



CORRUPTION AND CRIME COMMISSION

**REPORT ON THE INQUIRY INTO ALLEGED
MISCONDUCT BY PUBLIC OFFICERS IN
CONNECTION WITH THE INVESTIGATION OF
THE MURDER OF MRS PAMELA LAWRENCE,
THE PROSECUTION AND APPEALS OF
MR ANDREW MARK MALLARD,
AND OTHER RELATED MATTERS**

7 October 2008

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Dear Mr Peacock
Dear Mr McHugh

As neither House of Parliament is presently sitting, in accordance with section 93 of the *Corruption and Crime Commission Act 2003* ("the Act"), the Commission hereby transmits to you a copy of the *Corruption and Crime Commission Report on the Inquiry Into Alleged Misconduct by Public Officers in Connection with the Investigation of the Murder of Mrs Pamela Lawrence, the Prosecution and Appeals of Mr Andrew Mark Mallard, and Other Related Matters*.

The opinions, assessments and recommendations contained in this report are those of the Acting Commissioner on behalf of the Commission.

The Commission notes that under section 93(3) of the Act a copy of a report transmitted to a Clerk of a House is to be regarded as having been laid before that House.

Yours faithfully

A handwritten signature in cursive script, appearing to read 'J R Dunford'.

The Hon J R Dunford QC
ACTING COMMISSIONER

7 October 2008

ABBREVIATIONS AND ACRONYMS

A-CC	Anti-Corruption Commission
A Crim R	Australian Criminal Reports
AFIS	Automated Fingerprint Identification System
CCC Act	<i>Corruption and Crime Commission Act 2003</i>
Clemency Appeal	The referral to the Court of Criminal Appeal of Andrew Mallard's petition for clemency.
CLR	Commonwealth Law Reports
Comprehensive Summary	The Comprehensive Summary of Facts prepared by Det Sgt Shervill and attached to the letter to the DPP dated 17 June 1994.
Commission	Corruption and Crime Commission
Cons	Constable
Det	Detective
Det Sgt	Detective Sergeant
DPP	Director of Public Prosecutions
HCA	High Court of Australia
HOLMES	The HOLMES system is a computerised case management system that was used by the Major Crime Squad for the Lawrence Homicide in 1994.
MLA	Member of the Legislative Assembly
NAFIS	National Automated Fingerprint Identification System
Operation Huntsman	The code name given to the surveillance and undercover operation in respect of Andrew Mallard from 10 to 17 June 1994.
p	page
para	paragraph
Police Regulations	<i>Police Force Regulations 1979</i>
Pr T	Transcript page of the Private Hearings of the Commission.

Preliminary Hearing	The Committal Proceedings in the Local Court (16 to 18 January 1995).
PSM Act	<i>Public Sector Management Act 1994</i>
QC	Queen's Counsel
Running Sheet	Major Crime Running Sheet relevant to the investigation of the Pamela Lawrence homicide.
SC	Senior Counsel
Section 86 Submissions	Written Submissions lodged pursuant to section 86 of the <i>Corruption and Crime Commission Act 2003</i> .
Sen Cons	Senior Constable
Sgt	Sergeant
T	Transcript page of the Public Hearing of the Commission.
TT	Transcript page of the Trial of Andrew Mallard 1995.
UCO	Undercover Officer
VDT	Voir Dire Transcript (October 1995)
WAPOL	Western Australia Police
WASC	Western Australia Supreme Court
Written Submissions	Submissions in writing lodged following the conclusion of the public hearings and addresses.

Whilst the transcript of the Public Hearings runs in a continuous sequence, the transcripts of the Private Hearings are separately paginated for each witness and for each day of the same witness.

Police and other persons are referred to by their rank or occupation at the time of the events referred to.

DRAMATIS PERSONAE

- Katherine BARSDEN:** A 13 year old schoolgirl who observed a male person acting suspiciously within the Flora Metallica premises about the time of the murder in 1994. She gave evidence at the trial of Andrew Mallard.
- Kenneth Paul BATES:** The Prosecutor at the trial of Andrew Mallard in 1995. He is currently a Senior Prosecutor at the DPP.
- Francis John BRANDHAM:** A Detective Sergeant, acting Officer-in-Charge of the Major Crime Squad and worked on the Pamela Lawrence Homicide Investigation. He is currently a Superintendent of Police.
- David John CAPORN:** A Detective Sergeant and a member of the Major Crime Squad who worked on the Pamela Lawrence Homicide Investigation in May 1994. He is currently an Assistant Commissioner of Police.
- Alan CARTER:** A Detective Constable and a member of the Major Crime Squad who worked on the Pamela Lawrence Homicide Investigation. He is currently an Inspector of Police.
- Robert Enos COCK SC:** The current Director of Public Prosecutions.
- Dr Clive Trevor COOKE:** The Forensic Pathologist who performed the post mortem examination of Pamela Lawrence. He is currently the Chief Forensic Pathologist for Western Australia.
- Mark Andrew EMMETT:** A probationary Detective attached to the Claremont Criminal Investigation Branch who assisted the Major Crime Squad in the Pamela Lawrence Homicide Investigation. He is currently a Sergeant of Police.
- Michelle Isolde ENGELHARDT:** Permitted Andrew Mallard to stay at her Mosman Park Flat from 12 May 1994

until his arrest on 24 May. She was a significant witness in the trial of Andrew Mallard.

- Gary:** The pseudonym used by and in reference to the undercover police officer who spent time with Andrew Mallard between 14 and 16 June 1994. He is no longer a member of WAPOL.
- Patrick HOGAN:** The defence counsel for Andrew Mallard at his trial.
- Pamela LAWRENCE:** The proprietor of Flora Metallica, a jewellery shop in Mosman Park who was murdered in her shop premises on 23 May 1994.
- Peter Charles LAWRENCE:** The widower of Pamela Lawrence.
- Bernard Frank LYNCH:** The principal chemist at the Chemistry Centre of Western Australia in 1994. He is now retired.
- Andrew Mark MALLARD:** Convicted in 1995 of the wilful murder of Pamela Lawrence and sentenced to life imprisonment. He was released in 2006 when his conviction was overturned.
- John Roderick MCKECHNIE QC:** The Director of Public Prosecutions in 1994-95. He is currently the Honourable Justice McKechnie of the Supreme Court of Western Australia.
- M1:** The code reference to the Police Officer who was the controller for the undercover police officer from 14 to 16 June 1994 (see Gary).
- Dr Jeremy Francis O'DEA:** The principal forensic psychiatrist for the Health Department of Western Australia based at Frankland Centre, Graylands Hospital.
- John Robert QUIGLEY:** A member of the Australian Labor Party and sitting member for Mindarie in the Legislative Assembly. He was formerly, for many years, the Solicitor the West Australian Police Union of Workers.

Simon ROCHFORD:

Charged with the murder of his girlfriend Brigitta Dickens some seven weeks after the murder of Pamela Lawrence and in 1995 he was convicted of her murder and sentenced to life imprisonment. He is now deceased. Subsequent investigations have indicated that he is the prime suspect for the murder of Pamela Lawrence.

Malcolm William SHERVILL:

A Detective Sergeant, a member of the Major Crime Squad and the Case Officer for the Pamela LAWRENCE Homicide Investigation. He is currently an Assistant Commissioner of Police.

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EXECUTIVE SUMMARY

- [1] The Corruption and Crime Commission (the Commission) has conducted an inquiry into "whether any public officer engaged in misconduct in connection with the investigation of the murder of Pamela Lawrence, the prosecution of Andrew Mallard and other matters relating to and touching upon these events".
- [2] Pamela Lawrence was brutally murdered in her shop premises, Flora Metallica, at Mosman Park on 23 May 1994. Following a police investigation, Andrew Mark Mallard was charged with her murder on 17 July that year. He was subsequently convicted and sentenced to life imprisonment. Ultimately, in 2006, an appeal to the High Court of Australia on the grounds of non-disclosure to the defence of relevant material was successful and a new trial was ordered, but because of changes to the law relating to the admissibility of interviews which had not been video-recorded, the Director of Public Prosecutions decided not to proceed with the new trial and Mr Mallard was released from prison, after serving almost 12 years.
- [3] Further investigations then undertaken showed that Mr Mallard had not killed Mrs Lawrence, but that her likely killer was one Simon Rochford, then serving a sentence for the murder of his girlfriend, Brigitta Dickens. The morning after he was named in the media as a new suspect in the Pamela Lawrence homicide, Simon Rochford was found dead in his cell from wounds apparently self inflicted. His death is currently being investigated by the Coroner.
- [4] Mrs Lawrence was attacked and killed in her shop sometime after 5 pm on 23 May 1994 and was discovered by her husband shortly after 6.30 pm near the rear of the shop. She had suffered extensive head wounds and died while being transported to hospital.
- [5] The autopsy was performed by the Chief Forensic Pathologist, Dr Clive Cooke, who reported severe injuries to Mrs Lawrence's head with at least 12 cuts to the scalp. Under a dissecting microscope he was also able to detect some bluey-green material in some of the lacerations, which were later identified by the forensic chemist, Mr Bernard Lynch, as an oil-based orthophthalmic alkyd enamel paint containing "Prussian Blue" pigment. Some of her injuries also had a peculiar pattern and the problem became to identify a weapon or instrument which could cause injuries of such pattern.
- [6] The blood pattern analysis at the premises indicated that Mrs Lawrence had first been struck near the front of the shop premises, then dragged to the rear and there struck again, where she was left. Some fingerprints and a palm print were found, but analysis of the fingerprints produced no match other than with persons entitled to be present in the shop, such as employees, police and emergency services personnel. The partial palm print found on the top of one of the glass counters could not be matched, as there was no system then available for identifying palm prints.

- [7] The forensic examination of the premises failed to uncover any forensic link between the scene and Andrew Mallard, or any other person, and no blood of the deceased was ever found on any of Andrew Mallard's clothes or possessions. Apart from the nature of the weapon being unknown, the motive for the murder was unclear. Mrs Lawrence's handbag was not taken, although her purse, containing a small amount of money, had been removed, but a container of cash, visible on a shelf behind the counter, was untouched; no jewellery appeared to have been taken.
- [8] The first potential witness to come forward was Miss Katherine Barsden, a school-girl, then aged 13 years, whose mother, Mrs Jacqueline Barsden, worked in Flora Metallica and had left work the previous day at about 3 pm. Miss Barsden said that when being driven home from school by her grandmother shortly after 5pm on 23 May 1994, and whilst their car was stopped by traffic lights in Glyde Street, she had seen a man in the deceased's shop in an area not usually accessible to members of the public. She said that when the man saw her, he bobbed down, then the traffic lights changed and her vehicle moved on. She gave a description of the head of the person she had seen, including a description of what he was wearing on his head.
- [9] In response to an appeal to the public, the police received a number of calls and reports from members of the public nominating a large number of persons who might be of interest to the investigating police. Generally these persons were interviewed, and most were able to provide evidence as to where they were during the relevant period. When this happened, such persons were written off as persons of interest.
- [10] The Commission has, however, expressed concern over the failure to follow up information supplied by one Lloyd Harvey Peirce, who informed police that about 6.00pm on 23 May 1994 he had seen a Caucasian male run from the alley behind the jewellery store and cross the road towards the railway station, where he appeared to have an argument with a taxi-driver before running off and subsequently boarding a train for Fremantle. Mr Peirce gave a description of the man he had seen and of his clothing. Mr Peirce was interviewed and a statement obtained, but not signed, and the information he provided was not followed up.
- [11] Early in the investigation Andrew Mallard was nominated to the investigating police as a possible person of interest. He was at the time 31 years old. After leaving school he had spent about eight months in the army before a medical discharge, after which he had a number of short-term jobs, had moved interstate, overseas and back again, and was generally unsettled. During the period of the investigation he was twice remanded to the closed ward at Graylands Hospital for assessment under the Mental Health Act 1962 where the Principal Forensic Psychiatrist, Dr Jeremy O'Dea, diagnosed him as suffering from a hypo-manic phase of a Bipolar Mood Disorder, and considered that his cognition appeared intact but his overall social judgment impaired.

- [12] In the period leading up to 23 May 1994, Andrew Mallard appears to have been leading a marginal life. He had no fixed place of abode, but would persuade people to let him stay with them in return for such cannabis as he could obtain. He was receiving social security payments, but was also operating as a “con man”, engaging in petty stealing and substantially living on his wits. He claimed he could speak a number of languages, often declared an interest in Celtic design, spiritualism and related matters, and at other times claimed to be a Highlander, a Viking or a warrior. He had a number of minor convictions, all for traffic matters, apart from two for stealing and one for escape lawful custody.
- [13] On the evening of Sunday, 22 May, he committed a burglary in Mosman Park stealing a bicycle and a leather jacket. The burglary was reported to the police and the following day (23 May 1994) Mr Mallard was arrested, charged with the burglary, granted bail and released from the East Perth Lock up at about 3.47pm.
- [14] After some delay he caught a taxi to the Mosman Park area. He did not pay the taxi driver, but claimed, falsely, that he would return shortly with some further passengers to go to Fremantle. The taxi driver waited about 20 minutes and then went to the taxi rank near the Railway Station where he took another fare at (according to company records) 5.22pm; Andrew Mallard’s arrival at Mosman Park can be fixed at or around 5pm.
- [15] When interviewed, Ms Michelle Engelhardt, at whose unit Andrew Mallard had been staying, said that he did not arrive at her unit until after 6.30pm and Michael Buhagiar, who was at the flat at the time, said much the same thing, although both were not necessarily reliable witnesses. Both witnesses agreed that Mr Mallard and Mr Buhagiar left the flat shortly before 7 pm and took a train to Fremantle. This was confirmed by a Westrail video which shows them on the train at 6.57pm.
- [16] A telephone call by Mrs Lawrence to some customers between about 5.10 and 5.20pm established that she was still alive at that time. These times naturally made the police interested in where Mr Mallard had been between about 5pm and 6.40pm.
- [17] On the day following Mrs Lawrence’s death, Andrew Mallard was arrested and charged with impersonating a police officer, and was remanded for psychiatric assessment to the closed ward at Graylands Hospital, where he remained until 10 June 1994.
- [18] Whilst there Mr Mallard was interviewed by Det Sgt Caporn and Det Emmett in the presence of a nurse on four separate occasions, namely 26, 27, 30 May and 2 June 1994. He gave a number of accounts of his movements during the period from 5pm until 6.30pm, but each alibi given by him when checked by police was unsupported by the witnesses he nominated. Throughout these interviews he consistently denied having any involvement in the murder of Mrs Lawrence, and when a sample of his blood was taken on 2 June 1994 he

said, "This will clear me". Meanwhile analysis of his clothing and possessions produced no evidence of any kind linking him to the crime.

- [19] On 10 June 1994, Mr Mallard was taken to the Central Law Courts to answer the charges of larceny and impersonate police officer; he was released on bail. He was then invited by Det Sgt Caporn to come back to Police Headquarters at Curtin House where he was again interviewed over a period of more than nine hours, including breaks, with Det Sgt Caporn asking the questions and the questions and answers being recorded by Det Emmett.
- [20] According to Det Emmett's notes of the interview, Mr Mallard was asked over 15 times what occurred between leaving the taxi and arriving at Ms Engelhardt's flat. He gave a variety of explanations and at times said that he was confused or simply did not know. After lengthy questioning, none of which elicited any admissions, Det Sgt Caporn put it to him that he may be responsible for the murder, but he emphatically and repeatedly denied this and professed his innocence. Ultimately, under sustained questioning, Mr Mallard said that he went into the shop that night to case it for a burglary, but soon retracted that and again denied murdering Mrs Lawrence.
- [21] Some time later he started crying, and then started talking in the third person, saying that the person who murdered Mrs Lawrence was very scared and did not want to get caught. He said this "evil person" hit Mrs Lawrence with a wrench, saw a girl in a car who saw him, ran out the back and threw the wrench into the ocean at North Fremantle. Asked if this "evil person" was him, Andrew Mallard said he was not.
- [22] Ultimately, Andrew Mallard became hysterical, there was some physical contact, Det Sgt Caporn was bitten on the inner thigh and the interview was terminated. Mr Mallard was taken to hospital and examined, returned to Curtin House, charged with assaulting Det Sgt Caporn, bailed to appear on 15 June 1994, driven to Fremantle by police and released.
- [23] Following his release, Mr Mallard was placed under police surveillance and from 14 to 16 June 1994 inclusive, he was befriended by an undercover police officer (UCO) using the code name "Gary". The police operation produced no evidence of Mr Mallard's guilt; he made no admissions to the UCO, and did not lead police to the murder weapon, Mrs Lawrence's purse, nor any other evidence which could link him to the crime or the crime scene.
- [24] Andrew Mallard had been remanded on bail to reappear in court on Wednesday 15 June 1994, but had failed to do so and a bench warrant had been issued for his arrest. Late on Thursday 16 June the undercover operation was terminated and on the morning of Friday 17 June 1994 he was arrested pursuant to the bench warrant and taken to the Major Crime Squad offices at Police Headquarters where he was interviewed by Det Sgt Brandham and Det Carter over a period which, including breaks, extended from 10.30am until nearly 2pm.

- [25] During the interview he made a number of inconsistent and contradictory statements and admissions, many of which he retracted in the same interview. Asked directly if he killed Mrs Lawrence, he said he did not mean it, and he only wanted to make her quiet. He said he hit her a number of times with a wrench he had taken from the back shed of her premises, that he had been seen by a young girl in a green sedan or station wagon, that after leaving the store he virtually ran to Stirling Bridge where he threw the wrench into the middle of the river and washed his clothes in salt water to confuse forensic testing.
- [26] When asked about the wrench, he said it was a pipe wrench as used for gas bottles from the shed, and he drew a picture of the wrench which he said was rusty, had a ratchet system, and was a Sidchrome. He also drew a sketch of the Flora Metallica premises, but got some of the details wrong. When it was pointed out that there were no gas bottles in the shed, and after inaccurately describing how Mrs Lawrence made her jewellery, he conceded that he had never been in the shed.
- [27] He then said that he did not go into the shed, did not murder Mrs Lawrence and had made it all up. He said that he had second-guessed the detail from what he had seen in the media and from what he had heard from people. Asked how he could guess all that detail, he replied:
- “Maybe I’m psychic....All the things I told you is what I imagine the killer would have done, I got inside the culprit’s head. I got inside the killer’s head”.
- [28] His answers were clearly confusing containing, as they did, admissions, retractions, denials, facts which it appeared at the time that only the killer could know and other assertions which were clearly and demonstratively wrong. After a discussion with other officers, it was decided to conduct a video recorded interview to confirm the admissions which he had made.
- [29] When asked by the police whether he was prepared to undergo a video-recorded interview, Mr Mallard replied:
- “I want to be video recorded so that I can be cleared”.
- [30] After some preliminary matters, Det Sgt Brandham put a series of leading questions to Mr Mallard about what he had previously said and with which Mr Mallard agreed. Part way through the interview, Mr Mallard again lapsed into the third person format, purporting to describe what he imagined the actual killer would have done or said.
- [31] At the end of the interview, Det Sgt Brandham put to Mr Mallard that what he was saying was all made up. Mr Mallard agreed and said it was
- “....my version, my conjecture of the scene of the crime”.

- [32] Following the interview on 17 June 1994, Mr Mallard was detained pursuant to the bench warrant until he was brought before the court on Monday 20 June 1994, and, in the meantime, arrangements were made for him to be readmitted to Graylands Hospital for psychiatric assessment if the court acceded to an application to that effect. For the purposes of that application, Det Sgt Caporn wrote a letter to the Police Prosecutor setting out grounds for the application. The application may well have been justified, but some of the information provided was incorrect or misleading as set out in the body of the report and the Commission has formed the opinion that the preparation of the letter containing such incorrect and misleading information amounted to “misconduct” within the meaning of the CCC Act on the part of Det Sgt Caporn.
- [33] When he was brought before the court on 20 June 1994, the court acceded to the police application and Andrew Mallard was remanded to Graylands Hospital for psychiatric assessment. He was effectively out of circulation whilst the police built up their case against him.
- [34] At this stage the police had no murder weapon and no description of such a weapon apart from the description and sketch provided by Mr Mallard in his interview of 17 June 1994. On the other hand, some of the wounds sustained by Mrs Lawrence had a particular pattern with some containing a bluey substance identified as paint pigment. Dr Cooke thought that a copper anode, of the type he had been shown as being used in the manufacturing process at Flora Metallica, may have been a possible weapon, and the police went to a number of tool shops, and Dr Cooke himself went through a friend’s tool shed, seeking an instrument capable of causing injuries coinciding with those of the deceased. All these efforts were unsuccessful.
- [35] Accordingly on 24 June 1994, a series of tests were conducted striking a pig’s head with an anode, a wrench and an iron bar. None of these proved capable of producing injuries with a similar pattern to some of those sustained by the deceased. Not only were the anodes unwieldy, but large amounts of copper residue was left in the injuries, unlike in Mrs Lawrence’s wounds, and the traces of blue left in the pig’s head were the result of a chemical reaction, not traces of blue pigment such as is present in blue paint.
- [36] Because Andrew Mallard had said in an interview with police that the third person responsible for the murder would have washed his clothes in the salt water of the Swan River to remove all traces of blood, the police arranged for the Forensic Chemist, Mr Lynch, to carry out tests to determine whether his clothes had, in fact, been immersed in salt water. Mr Lynch carried out such tests in conjunction with other tests, determined that they had not, and reported accordingly; but at Det Sgt’s Shervill’s request, Mr Lynch prepared a fresh report, omitting all reference to such salt water testing. It is the Commission’s opinion that Det Sgt Shervill’s request to Mr Lynch to amend his report in this way amounted to “misconduct” within the terms of the CCC Act.

- [37] In 1994, the practice was for witness statements to originally be taken in writing by one of the police officers, checked by the witness and, if correct, signed by the witnesses and witnessed by one of the police. Then when the Brief of Evidence was being prepared, the statement would be checked with the witness in the light of subsequent investigations, and any appropriate alterations made with the approval of the witness. The statement was then typed, checked by the witness and, if correct, signed and witnessed as before.
- [38] This procedure was not inappropriate provided that any relevant changes were notified to the defence so that, at the trial, the recollection of the witness could be tested by cross-examination. However, in this case material changes were made to the statements of important witnesses, yet only the final statements were included in the Brief of Evidence and served on the defence.
- [39] Katherine Barsden was the 13 year old school girl who described seeing a man in the Flora Metallica shop at what must have been shortly before the time of the murder. Her original description of his headwear was “a gypsy type scarf...an orangy type border around the edge. The rest of the scarf was mixed coloured with blue, green and a cream colour”, and the sketch of the scarf she had drawn on the morning following the murder indicated a solid orangy-red border surrounding colours of “blue, green and blue/silver/white”, but in her final statement, the headwear only “looked like a gypsy type scarf”, and the rest of the scarf (apart from the border) became “mixed coloured and patterned”. In the meantime she had been shown Mr Mallard’s cap, which it was said he at times wore back to front, and her later statement stated that the cap was the same colours as what she saw the man in the shop wearing. That cap was red, yellow and black with a gold braid around the edge. The alterations to Miss Barsden’s statement were written on her original statement by Det Sgt Shervill, and the final statement made no reference to the sketches she had drawn on 23 and 24 May 1994, her visit to the police artist and the identikit picture drawn by him from her description, and the fact that on 3 June 1994 she had failed to identify the person she had seen from a photo display which included Andrew Mallard.
- [40] Michelle Engelhardt, in whose flat Mr Mallard was staying at the time, said in her original statement made on 29 May 1994, that when she returned to her flat (with Michael Buhagiar) at about 3pm on 23 May Mr Mallard’s cap was hanging on a hook behind the door, and that when he arrived home shortly before 7pm, he was not wearing any kind of headwear, but in her final statement, all reference to the cap being on the hook behind the door was omitted, the description of the cap was changed from gold coloured to “orange, gold, some sort of intricate design and looked dirty”, and she was not sure whether he was wearing his cap when he came in.
- [41] Three other witnesses who had seen someone in the area before or at about the time of the murder also had their statements altered in respect of what the persons they saw were wearing, and the persons described in the altered statements better corresponded with Andrew Mallard or the person seen in the shop by Miss Barsden.

- [42] Each of these witnesses were interviewed a number of times by Det Sgts Caporn and Shervill between the making of their original statements and the dates of their final statements. The final statements were the only ones which were included in the Brief of Evidence or were supplied to the defence. Each of these alterations strengthened the case against Andrew Mallard because although the persons as described in their original statements could not have been Andrew Mallard, the persons as described in the final statements could have been him, and this is how the evidence of these witnesses was presented at the trial.
- [43] The Commission is satisfied that the changes were brought about either by persistent and repeated questioning and/or by deliberately raising doubts in the witnesses' minds until they became confused, uncertain or possibly open to suggestion, and demonstrates a pattern which cannot have been an accident or coincidence.
- [44] The Commission's opinion is that this process constituted "misconduct" within the terms of the CCC Act on the part of Det Sgt Shervill and Det Sgt Caporn.
- [45] In the Major Crime Running Sheets, Det Sgt Shervill generally recorded that these various statements had been amended to exclude hearsay and irrelevant material or similar, but the material altered or omitted was not hearsay or irrelevant, and so the entries were false and in the opinion of the Commission, the making of such false entries amounted to "misconduct" within the terms of the CCC Act.
- [46] On 19 July the police met with the Director of Public Prosecutions (Mr John McKechnie QC, now the Honourable Justice McKechnie of the Supreme Court) to seek his advice as to whether there was sufficient evidence to charge Mr Mallard with wilful murder. No notes were taken of the meeting but one of the officers outlined the evidence, and the video of 17 June 1994 was shown. Mr McKechnie believes he was not told of the pig's head testing of the wrench.
- [47] His opinion was that there was sufficient evidence to charge Mr Mallard, but that it would be a difficult case, and would depend on whether the confessional material was admitted, and whether the jury accepted it.
- [48] After the meeting, the police went to Graylands Hospital, arrested Andrew Mallard and charged him with the wilful murder of Pamela Lawrence.
- [49] Following the arrest of Andrew Mallard, Det Sgt Shervill prepared a Comprehensive Summary of Facts, which he forwarded to the DPP under cover of a letter dated 21 October 1994. The Comprehensive Summary was a 30-page document outlining Det Sgt Shervill's assessment of the evidence, the strengths and some of the weaknesses of the prosecution case.
- [50] It quoted from statements and from the accused's interviews, including that the accused had claimed that the weapon used was a wrench. It included

references to his nomadic life-style, his psychiatric treatment, bizarre behaviour, and the undercover operation, but made no reference to the salt water testing or the material alterations to the statements of a number of witnesses.

[51] It stated that the murder weapon had not been identified, that the pig's head testing had excluded the anode as the weapon, and continued:

“During the experiment, a crescent wrench was also tested, which inflicted dissimilar wounds to those sustained by Mrs Lawrence”.

[52] In support of the reliability of the confessional material, it contained a list of “twelve things which only the killer would know”, but made no reference to the numerous errors of Mr Mallard. The final (but not the original) statements of the witnesses and expert reports were attached, but there were no statements or reports relating to the pig's head test.

[53] Further to the duties of disclosure at common law, and Guidelines issued by the DPP in 1992, further Guidelines directed to the duties of police as well as prosecutors were published on 14 December 1993 and reproduced in the Police Gazette of 9 March 1994. Those Guidelines required the delivery to the DPP as soon as possible after Committal of:

“all documentation, material and other information held by any police officer concerning any proposed prosecution witness which may be of assistance or interest to either the prosecution or the defence”,

and required certification by a police officer that such had been done.

[54] The Commission's opinion is that the failure to provide the prior statements of the witnesses, Mr Lynch's original report, and details of the unsuccessful attempts to locate a weapon capable of inflicting wounds similar to those found on Mrs Lawrence amounted to a failure to comply with the requirements of the Guidelines and constituted “misconduct” on the part of Det Sgt Shervill.

[55] The prosecution of Andrew Mallard was allocated by the DPP's office to Mr Kenneth Bates, a senior prosecutor, and Mr Patrick Hogan was briefed as defence counsel by the Legal Aid Commission.

[56] The preliminary hearing was held in November 1994 and Mr Bates referred throughout to the murder weapon as a “metal object”. Although Mr Mallard's sketch was tendered as an exhibit, it was not shown to Dr Cooke when he was in the witness box and he was asked no questions about whether such, or any other, wrench could have caused Mrs Lawrence's injuries.

[57] At a voir dire¹ hearing prior to the trial, Mr Hogan sought to have the evidence of the interviews excluded, but was unsuccessful. Subsequently, an

¹ A hearing to decide preliminary issue so the court can determine the question of whether evidence should be admitted.

application was made to adjourn the trial so that senior counsel could be engaged to appear for the accused, but this application was refused.

- [58] The trial commenced on 5 November 1995. Mr Kenneth Bates (Mr Bates) opened, and conducted the case, on the basis that the murder weapon was a wrench as drawn by the accused. He relied on the so-called confessions of 10 and 17 June 1994, which he claimed were corroborated and supported by independent witnesses, the examination of the crime scene, the post-mortem examination by Dr Cooke, that the confessions detailed many things which he claimed only the killer would know of, that witnesses had seen a person fitting Mr Mallard's description in the vicinity shortly before the time of the killing (these were the witnesses whose descriptions in their statements of the person seen had been altered, although that was not known to Mr Bates) and the observations of Miss Barsden.
- [59] When Dr Cooke gave evidence, Mr Bates asked him about the pig's head testing of the anode, and Dr Cooke explained why that could not be the murder weapon, but he failed to ask Dr Cooke any questions about a wrench, and in particular, the wrench sketched by the accused in his interview – the item he was relying on as the weapon.
- [60] In these circumstances, to run the case on the basis that a wrench as drawn was the murder weapon, but at the same time, to fail to put the drawing to Dr Cooke when he was giving evidence and to ask him whether the deceased's injuries were consistent with the use of such an instrument, is such a fundamental omission that the Commission has difficulty in accepting that it was an accident or due to an oversight. If Mr Mallard could not identify the murder weapon, it constituted a fundamental flaw in the reliability of his so-called confessions.
- [61] Moreover, having been informed of the pig's head testing of a wrench by the Comprehensive Summary of Facts authorised by Det Sgt Shervill, it was Mr Bates' duty to disclose this fact to the defence or to ensure that it had been disclosed by the police. He said he read about it in the Comprehensive Summary when he first received the papers, but subsequently overlooked it.
- [62] The Commission has formed the opinion that in conducting the trial as he did, and in failing to disclose to the defence the result of the pig's head testing of the wrench, there was "misconduct" on the part of Mr Bates.
- [63] In due course, the jury found Andrew Mallard guilty and on 21 December 1994, he was sentenced to life imprisonment with a minimum term of 20 years. An appeal to the Court of Criminal Appeal and an application for special leave to the High Court were both unsuccessful.
- [64] Notwithstanding his conviction, Andrew Mallard continued to maintain his innocence and, ultimately, one of his supporters, Ms Colleen Egan, a prominent Perth journalist, enlisted the aid of Mr John Quigley, a member of Parliament and a solicitor. On reading the transcript of the trial, Mr Quigley became convinced that something was wrong, that there had been an

undercover operation which had not been disclosed, and that Andrew Mallard had not had a fair trial.

- [65] In due course Mr Quigley prepared a clemency petition which he delivered to the Attorney General on 23 June 2002, following which the latter arranged for Mr Quigley to have access to the DPP's files. Mr Bates was asked to prepare the files for inspection and, on doing so, re-read the Comprehensive Summary of Facts, including the reference to the pig's head testing of the wrench, which he immediately drew to the attention of the DPP (Mr Robert Cock QC) with the explanation that it had previously been inadvertently overlooked.
- [66] Mr Quigley was then able to re-draft the petition which, in accordance with the relevant legislation, was referred to the Court of Criminal Appeal for the whole case to be heard as if it were an appeal.
- [67] This "Clemency Appeal" to the Court of Criminal Appeal was dismissed; however an appeal to the High Court was successful (15 November 2005) on account of the material non-disclosure. The verdict was set aside and a new trial ordered, the Court leaving it to the DPP to determine whether the appellant should in fact be re-tried.
- [68] Because of changes to the law since 1995, interviews with suspects which had not been video recorded were no longer admissible in evidence, so it was decided to discontinue the prosecution, and this was formally done on 20 February 2006 when a Notice of Discontinuance was filed in the Court. Mr Mallard was thereupon released from prison.
- [69] Following the discontinuance, the Commissioner of Police instigated a review of the original investigation by the Special Crime Squad, which was later extended into a full Cold Case Review to review all evidence relevant to the death of Mrs Lawrence. That review concluded on the evidence that the person most likely to have killed Mrs Lawrence was one Simon Rochford, then serving a sentence for the murder of his girlfriend, Brigitta Dickens, who had been killed by being struck on the head with a weight collar attached to a wooden handle on 15 July 1994, seven weeks after the death of Mrs Lawrence.
- [70] On the morning of 19 May 2006, after being named the previous evening in the television news as the new suspect for the murder of Mrs Lawrence, Simon Rochford was found deceased in his cell at Albany Prison, as the result of wounds, apparently self-inflicted. His death is currently the subject of an Inquest by the Coroner.
- [71] There were a number of factors which contributed to Andrew Mallard being convicted of a crime which he did not commit. These included:
1. the admissions and confessional statements which he made in his various interviews with police, both directly and in the third person;

2. these false confessions can in the opinion of the Commission only be explained by the mental illness which he was suffering at the time;
3. his failure to provide a verifiable alibi;
4. the failure of the police to properly assess the reliability of the confessional material due it would seem, to too much attention being paid to the so-called “twelve things only the killer could know” and insufficient attention to the number of matters which he got wrong;
5. the altered statements and the failure of police to disclose the earlier versions of such statements, especially those of Miss Barsden and Ms Engelhardt, to the defence;
6. the non-disclosure of the salt water testing of Mr Mallard’s clothes and the pig’s head test of the wrench;
7. the conduct of the prosecution; and
8. the failure of anyone to recognise the similarities between the injuries to Mrs Lawrence and those to Ms Dickens.

[72] A further matter investigated by the Commission as a “matter arising out of or in connection with” the conviction and appeals of Andrew Mallard was a complaint by police that Mr John Quigley MLA had threatened the UCO that he would expose his identity unless he cooperated with those agitating for a review of Andrew Mallard’s conviction by providing a statement about his part in the undercover operation. At the time Mr Quigley believed that the UCO had supplied cannabis to Andrew Mallard.

[73] It was alleged that the threats were made in a series of messages left on the UCO’s mobile telephone between 18 and 23 June 2002, when he was requesting the UCO to call him back, but the UCO was failing to do so. Those messages were lawfully recorded and the Commission has had the opportunity to listen to the tapes which were played during the Commission’s hearings in the presence of Mr Quigley.

[74] Section 338A of the *Criminal Code* requires that for an offence against that section there must be, inter alia, an “intent to compel” a person to do something that person is not legally required to do (in this case make a statement). The courts have held that the word “compel” is a very strong term involving an overbearing or constraining of the will, as opposed to mere persuasion; and although Mr Quigley’s calls were frequent and persistent, and cannot be condoned, the Commission is not satisfied that they displayed any more than an intent to persuade. Accordingly the Commission is not satisfied that Mr Quigley engaged in serious misconduct within the terms of the CCC Act in leaving the telephone messages.

[75] The Commission has formed a number of opinions as to misconduct and made a number of recommendations which are set out in Chapter 14 of the Report.

[76] The opinions as to misconduct may be summarised as follows.

1. That Det Sgt Caporn engaged in misconduct in writing the letter to the Police Prosecutor dated 17 June 1994 containing incorrect and misleading information.
2. That Det Sgt Shervill engaged in misconduct in requesting Mr Lynch to amend his reports by deleting all reference to the salt water testing.
3. That Det Sgt Shervill engaged in misconduct in bringing about the alterations to the statements of various witnesses without any reference to their earlier recollections.
4. That Det Sgt Caporn engaged in misconduct in bringing about the alterations to the statements of various witnesses without any reference to their earlier recollections.
5. That Det Sgt Shervill engaged in misconduct in making false entries in the Running Sheets relating to the amendments to the witnesses' statements.
6. That Det Sgt Shervill engaged in misconduct in failing to disclose to the defence the original statements of the witnesses including Mr Lynch's original report and details of the unsuccessful attempts to locate a weapon capable of inflicting wounds similar to those found on Mrs Lawrence.
7. That Mr Kenneth Bates engaged in misconduct in running the trial on the basis that a wrench as drawn by Andrew Mallard was the murder weapon, but, at the same time, failing to put Andrew Mallard's drawing to Dr Cooke and asking whether the deceased's injuries were consistent with the use of such an instrument.
8. That Mr Kenneth Bates engaged in misconduct in failing to disclose to the defence the pig's head testing of the wrench or ensuring that it had been disclosed by the police.

[77] The recommendations are detailed below.

1. That the Commissioner of Police give consideration to the taking of disciplinary action against Assistant Commissioner Malcolm William Shervill and Assistant Commissioner David John Caporn.
2. That the Director of Public Prosecutions gives consideration to the taking of disciplinary action against Mr Kenneth Paul Bates.

3. That consideration is given by the Commissioner of Police to making special provision for the interviewing by investigating police of mentally ill suspects.
4. That whenever there is legislation, fresh authoritative case law, or DPP guidelines which relate to the conduct of criminal investigation or the admissibility of evidence in such cases, senior police officers affected by such matters be required to attend formal seminars or meetings at which they can be made familiar with such matters.
5. That whenever the police obtain advice from the Office of the Director of Public Prosecution such advice be furnished in writing setting out, at least, the material considered, the opinion and the grounds upon which such opinion is based; or in cases of urgency, a detailed contemporary note should be made, preferably by the DPP officer or his secretary, and also by the police, setting out the matters specified.
6. That Mr Andrew Mallard gives consideration to raising a complaint with the Legal Practitioners Complaints Committee (LPCC) regarding the conduct of the trial by Mr Bates.

[Division 3 of the *Legal Practice Act 2003* deals with complaints made about legal practitioners. Section 175(2) specifies who can make a complaint to the LPCC including the Attorney General, the Legal Practice Board, the Executive Director of the Law Society, any legal practitioner or any other person who has had a direct personal interest in the matter].

[78] Finally the Commission acknowledges the efforts and expertise of those persons who were instrumental in securing justice and vindication for Andrew Mallard, especially Ms Colleen Egan, journalist, Mr Quigley MLA, Mr Malcolm McCusker QC, and Clayton Utz, solicitors, who acted pro bono.

CHAPTER ONE

INTRODUCTION

- [1] Following a notification pursuant to section 28 of the *Corruption and Crime Commission Act 2003* ('CCC Act') from the Commissioner of Police, a complaint pursuant to section 25 from Mr John Quigley MLA, Member for Mindarie,¹ a degree of public disquiet expressed in the media and elsewhere, and a preliminary investigation by its own officers, the Commission determined pursuant to section 33 to conduct an inquiry into:

whether any public officer engaged in misconduct in connection with the investigation of the murder of Pamela Lawrence, the prosecution of Andrew Mallard and other matters related to and touching upon these events.

- [2] Mrs Pamela Lawrence was brutally murdered in her shop premises, Flora Metallica in Glyde Street, Mosman Park on 23 May 1994. Following a police investigation, Andrew Mallard was charged with her murder on 17 July that year. He was subsequently convicted and sentenced to life imprisonment and he served approximately twelve years of that sentence.
- [3] Ultimately on 15 November 2005, the High Court of Australia held that Andrew Mallard had not received a fair trial because of the non-disclosure of certain material known to the police at the time of the trial, which was capable of giving rise to doubts as to his guilt, and ordered a new trial.
- [4] For reasons detailed in Chapter 10 of this report, the DPP determined not to proceed with the new trial and Mr Mallard was released from prison. Subsequent investigations established that Mrs Lawrence had not been killed by Mr Mallard, but that the likely offender was one Simon Rochford, since deceased, see Chapter 11.
- [5] The Commission has therefore directed its inquiries to a number of issues including the conduct of the police investigation, what material relevant to the issues was known to the investigating police, the DPP's office, the prosecutor or any other public officer at the relevant time, the duty of disclosure and the responsibility of police and other officers to make such disclosure, the procedures in place in 1994 in this regard, whether there have been any changes since or whether any further changes are still desirable and whether in relation to these matters the Commission is of the opinion that any public officer engaged in "misconduct" as defined by the CCC Act.
- [6] Because persons the subject of investigation included a currently serving Supreme Court Judge, a member of Parliament, senior public prosecutors and senior police, the Government appointed a person from outside the State, namely the Honourable John Dunford QC, a retired Judge of the Supreme Court of New South Wales as Acting Commissioner to conduct the inquiry. The Commission appointed Mr Jeremy Gormly SC of the New South Wales

Bar and Mr Peter Quinlan of the Western Australian Bar as Counsel Assisting the Inquiry.

CHAPTER 2 JURISDICTION AND PROCEDURE

Introduction

[7] One of the Commission's functions is to consider "misconduct" by "public officers". The term "public officer" is defined in section 3 of the CCC Act by reference to section 1 of the *Criminal Code* which defines "public officer" as including police officers, members of either House of Parliament, public service officers or employees within the meaning of the *Public Service Management Act 1994* ('PSM Act') and any person holding office under, or employed by the State of Western Australia whether for remuneration or not.

2.1 Misconduct

[8] Section 4 of the CCC Act states that:

Misconduct occurs if —

- (a) *a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer's office or employment;*
- (b) *a public officer corruptly takes advantage of the public officer's office or employment as a public officer to obtain a benefit for himself or herself or for another person or to cause a detriment to any person;*
- (c) *a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years' imprisonment; or*
- (d) *a public officer engages in conduct that —*
 - (i) *adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct;*
 - (ii) *constitutes or involves the performance of his or her functions in a manner that is not honest or impartial;*
 - (iii) *constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer; or*

(iv) *involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or the benefit or detriment of another person,*

and constitutes or could constitute —

(v) *an offence against the “Statutory Corporations (Liability of Directors) Act 1996” or any other written law; or*

(vi) *a disciplinary offence providing reasonable grounds for the termination of a person’s office or employment as a public service officer under the “Public Sector Management Act 1994” (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct).*

[9] Section 80 of the PSM Act provides that an employee subject to that Act who, inter alia, contravenes any provision of that Act, public sector standard or code of ethics, commits an act of misconduct or is negligent or careless in the performance of his or her functions, is guilty of a breach of discipline (“misconduct” is not defined in the PSM Act); and section 83 provides that a breach of discipline may be “minor” or “serious”.

[10] Where a “serious” breach is established, a range of available penalties are provided by section 86(3)(b), including dismissal. The PSM Act provides no definition or guidance as to what constitutes a “serious” breach of discipline. It is the Commission’s opinion that the breaches identified in this report were “serious” because, particularly in combination, they had the effect of depriving an accused person of a fair trial on a charge carrying a mandatory sentence of life imprisonment.

[11] Thus, before the Commission forms an opinion about misconduct involving section 4(d)(vi) of the CCC Act there must be an identifiable breach of discipline under the PSM Act, or its equivalent in the case of persons whose employment is not governed by that Act, it must be a “serious” breach within section 83 of the PSM Act and it must be such that it could provide reasonable grounds for dismissal under section 86(3)(b) of that Act. The Commission does not need to show that it would result in dismissal.

[12] In relation to police officers, section 9 the *Police Act 1892* authorises the Commissioner of Police to make rules, orders and regulations for the general government and discipline of members of the Police Force. This has been done by the *Police Force Regulations 1979* (‘Police Regulations’) which have been amended from time to time. As at 1994-5 such regulations included the following:

402 *Every member or cadet shall –*

- (a) ...
- (b) *promptly and correctly carry out all duties appertaining to his office, or any other duty he is lawfully directed to perform; and*
- (c) *in due course and at proper times comply with, and give effect to, all enactments, regulations, rules, orders and administrative instructions made or issued for his guidance in the performance of his duties ...*

605 (1) *A member or cadet shall –*

- (a) *except for good or sufficient cause, promptly and diligently attend to and carry out anything which is his duty as a member or cadet;*
- (b) *perform and carry out any duty in a proper manner ...*

606 *A member or cadet shall not –*

- (a) *knowingly make or sign any false statement in any official document or book;*
- (b) *wilfully or negligently make any false misleading or inaccurate statement ...*

- [13] A breach of any of these provisions constitutes a disciplinary offence under section 21 of the Police Act which also provides for a range of penalties including discharge or dismissal from the Force; but section 4(d)(vi) of the CCC Act requires any such conduct to be assessed by reference to the criterion laid down in the PSM Act.
- [14] Section 9 of the PSM Act requires all employees subject to that Act to comply with any Act governing their conduct and so it follows that a failure to comply with any provisions of the Police Regulations constitutes a breach of discipline within section 80 of the PSM Act.
- [15] Similarly the *Director of Public Prosecutions Act 1991*, section 24 authorises the DPP to issue Guidelines to be followed in the performance of the Director's Functions, and a breach of such Guidelines by a prosecutor would constitute "misconduct" within the terms of section 80(c) of the PSM Act.
- [16] Section 3(1) of the CCC Act defines "serious misconduct" as misconduct of a kind described in section 4(a)(b) or (c). Section 27A contains particular provisions relating to allegations of misconduct other than serious misconduct relating to members of Parliament. These provisions are further considered in Chapter 13.
- [17] It would appear to be beyond question that breaches of section 4(a) or (b) necessarily involve a mental element or *mens rea* by reason of the inclusion of the word "corruptly" and the reference in paragraph (c) to an offence implies that the ordinary principles of criminal responsibility would apply in cases coming within that paragraph.

[18] The position under paragraph (d) is not so clear. It has been suggested² by analogy to the common law criminal offence variously known as misconduct in public office, misbehaviour in public office or breach of public trust, that the act or omission must be wilful and intentional: but paragraph (d) is not specifically directed to criminal conduct and it has been said in New South Wales in relation to a similar provision³ that “breach of public trust” is not to be confined to conduct which could constitute the common law offence of misconduct in public office.⁴ Accordingly the Commission is of the opinion that although generally the element of “misconduct” under section 4(d)(iii) will require that the conduct or omission be wilful and intentional, that will not necessarily always be the case, such as where a public officer with a serious responsibility to fulfil fails to do so due to lack of attention or lack of diligence, akin to gross negligence. As McHugh JA said in G J Coles and Co Limited v Retail Trade Industrial Tribunal:⁵

A public office holder assumes the burdens and obligations of the office as well as its benefits. By accepting appointment to the office, he undertakes to perform all the duties associated with that office and, as long as he remains in office, he must perform all its duties.

Persons with serious responsibilities on account of their office cannot disregard their responsibilities by inattention or lack of diligence and the careless oversight of relevant important material cannot be relied on as an excuse. Such an omission will in an appropriate case constitute or involve a “breach of the trust placed in the public officer by reason of his or her office or employment as a public officer” within section 8(d)(iii).

[19] In respect of those instances when the conduct must be wilful and intentional it was submitted that this means that the person concerned must direct his or her mind to whether the act or omission in question does as a matter of law constitute an offence or a disciplinary offence.

[20] The Commission rejects such submissions. What must be wilful and intentional is the physical act in question or the failure to do a physical act in the sense that it is not accidental or the result of compulsion. Just as the criminal law requires that the criminal act or omission be deliberate and voluntary, so must “misconduct” under the Act; and just as ignorance of the law is no excuse for a criminal act, so ignorance of one’s obligations is no answer to an assessment of misconduct. Public officers who have duties and responsibilities have a duty to ascertain and learn what those duties and responsibilities are, and carry them out.

2.2 Reporting by the Commission

[21] Section 23 of the CCC Act provides that the Commission must not publish or report a finding that a person has committed a criminal or disciplinary offence; and a finding of misconduct is not to be taken as a finding or opinion of the Commission that a criminal or disciplinary offence has been committed.

- [22] By section 84(1) the Commission may prepare a report on any matter that has been the subject of an investigation or other action in respect of misconduct, and by section 84(3) it may include in such a report statements as to any of its assessments, opinions and recommendation and the reasons for them.
- [23] The words “assessments” and “opinions” are a reference back to section 22 of the CCC Act, which states that the Commission may make assessments and form opinions as to misconduct including whether misconduct has or may have occurred. The “recommendations” which may be made by the Commission are recommendations as to whether consideration should or should not be given to the prosecution or taking of disciplinary action against persons, or for the taking of other action the Commission considers should be taken in relation to the subject matter of its assessments or opinions or the results of its investigations (section 43(1)).

2.3 Reaching an Opinion: Standard of Proof

- [24] An opinion formed by the Commission under the CCC Act that misconduct has occurred is a serious matter. It may affect individuals personally and professionally. It has the capacity to affect relations between those whom the Commission has adversely mentioned, and their families, friends and acquaintances. Accordingly, there is a need to exercise care in forming opinions as to the occurrence of misconduct, or other adverse findings.
- [25] Although it is not a judicial tribunal and its opinions therefore do not have any direct legal effect so that standard of proof is not strictly relevant in reaching any opinion as to “misconduct” as defined in the CCC Act, the Commission has applied the test laid down for civil cases of a serious nature in Briginshaw v Briginshaw (1938) 60 CLR 336, namely proof on the balance of probabilities to the “reasonable satisfaction” of the Commission.
- [26] Another issue raised in submissions is whether the Commission can or should express opinions on conduct falling short of misconduct. In particular it was submitted that any findings (or presumably, opinions) in the Report which do not amount to findings (or opinions) of misconduct are impermissible, and reference was made to the *Joint Standing Committee on the Corruption and Crime Commission: Parliamentary Inspector’s Investigation and Review of the Acts and Proceedings of the Corruption and Crime Commission concerning Mr John D’Orazio*.⁶ In that Report, and also in a subsequent Report,⁷ the Parliamentary Inspector has expressed the opinion that the CCC has no power to form or report an opinion of “inappropriate conduct” falling short of “misconduct” by a “public officer”.
- [27] This opinion appears to be somewhat different to that of Ms Gail Archer SC in her *Review of the Corruption and Crime Commission Act 2003* (February 2008) who considered⁸ that the CCC has at the very least the power to report such conduct (i.e. inappropriate or undesirable conduct not amounting to

“misconduct”), but considered it unnecessary to determine whether that power extends to expressing an adverse opinion about such conduct.

- [28] This is a broad ranging inquiry relating to the conviction and lengthy imprisonment for wilful murder of an innocent person, and it is therefore essential to refer to and discuss the whole process of the investigation and trial of that person, including matters which may or should have been handled or dealt with differently, and whether or not they amounted to “misconduct” by “public officers”. A failure to do so would render the Report incomplete and the Inquiry unsatisfactory.
- [29] Accordingly, conduct by “public officers” not amounting to “misconduct” is referred to and discussed where appropriate, including discussion as to how such conduct did, or may have, impacted on the investigation and trial and, where applicable, why such conduct did not in the opinion of the Commission amount to “misconduct”.
- [30] As might reasonably be expected in the case of an inquiry into events which occurred up to 14 years ago, there were occasions when witnesses professed that they could not remember the event, or details about which they were being questioned. In many cases their memories were prompted by being shown contemporaneous documents; but in other cases the Commission had to make an assessment of whether the loss of memory was genuine. In making such an assessment the Commission took into account the natural tendency for memory to fade over a lengthy period of time, the apparent importance to the witness, at the time, of the event or detail, and a comparison with the events or details which the witness was able to remember; although the Commission cannot but observe that a number of witnesses professed lack of memory for what they might have done, but claimed an almost infallible memory of what they did NOT do. This lapse of time and possible loss of memory are of particular significance in considering circumstantial evidence where there may have been an explanation, since forgotten, for events which on their face appear to be incriminating.
- [31] In fairness to the police investigation team, and Det Sgt Shervill in particular, it should be placed on record that the investigation and unravelling of facts which occurred so long ago were only possible to the extent which in fact occurred on account of the detailed recording of the investigation in the Major Crime Running Sheet⁹ and the Comprehensive Summary of Facts¹⁰ both prepared by Det Sgt Shervill, and the fact that the earlier statements of the various witnesses had been kept and not destroyed, although, having regard to the practices at the time, he would never have expected them to be disclosed to the defence or to a body such as the present Commission. Without these sources the Commission’s task after such a lapse of time would have been virtually impossible.

2.4 Procedure

- [32] Section 135 of the CCC Act provides that the Commission is not bound by the rules of evidence and may inform itself by such means as it sees fit. In this

case the Commission's investigation has been substantial and it has informed itself by a number of different methods. Those methods have included obtaining and reviewing numerous files and other documents from the Western Australia Police (WAPOL), the Legal Aid Commission and the DPP's Office.

[33] In addition, the Commission has had access to, and taken into account, the evidence, judgements and reports relating to this matter of a number of courts and other bodies including:

1. the Preliminary Hearing in January 1995;
2. the Voir Dire before Murray J in October 1995;
3. the trial before Murray J and a jury in November 1995;
4. the appeal before the Court of Criminal Appeal in June 1996;
5. investigations by the Ombudsman into complaints made by Mr Mallard;
6. a preliminary investigation by the Police (Kennedy) Royal Commission in 2002;
7. the appeal to the Court of Criminal Appeal in 2003;
8. the appeal to the High Court in 2005;
9. the analysis and review of the case by the Special Crime Squad, being the Lawrence Homicide Review and the Cold Case Review; and
10. the investigation into the death of Brigitta Dickens and the transcript of the trial of Simon Rochford.

[34] The Commission has also examined a number of witnesses on oath or affirmation at both private and public hearings and those public officers whose activities may have amounted to misconduct have had the opportunity, through their counsel, to cross-examine the witnesses whose evidence related to them. Andrew Mallard himself was interviewed by officers of the Commission on three separate occasions and examined on oath at a private hearing. He was not called as a witness for examination in public because it was not considered desirable to subject him to lengthy cross-examination by a number of separate counsel; and having allegedly confessed to a murder he did not commit at a time when he was mentally ill and using cannabis and possibly other drugs, he could hardly be regarded as a reliable witness. Moreover, through his solicitors, he expressed a reluctance to give evidence in public and be subject to the further media scrutiny which that would necessarily involve.

- [35] At the conclusion of the public examinations, Counsel Assisting made oral submissions as to what adverse findings should be made in respect of particular persons, after which Counsel for those persons affected addressed in reply. They were invited to supplement their public addresses by Written Submissions, which they did. This first series of Written Submissions is hereinafter referred to as "Written Submissions".
- [36] Following the receipt and consideration of the Written Submissions the Commission prepared a draft report, and in accordance with section 86 of the CCC Act notified the persons against whom it was contemplating reporting matters adverse to them of such matters, and gave them the opportunity to respond, which most of them have done. Such responses, hereinafter referred to as the "Section 86 Submissions" have been taken into account in preparing this report.
- [37] Although the Commission has had the assistance of Counsel Assisting since the conclusion of the public hearings in responding to the written submissions, researching the relevant law and, along with other staff of the Commission, in checking transcript and other documents, proof reading and other administrative tasks, the opinions and recommendations contained herein are solely those of the Acting Commissioner, who accepts full and sole responsibility for them.

2.5 Miscellaneous

- [38] The Commission in its investigations, and public and private hearings, examined a number of issues relating to the investigation and trial of Andrew Mallard which are not the subject of discussion in this report. That is because, having regard to the lapse of time and the lack of documentation, the evidence was inconclusive; or upon such examination as was possible, the issue appeared minor, was not significant in the conviction of Andrew Mallard, or failed to yield any significant evidence of misconduct.
- [39] It is not the function of the Commission to assess or consider the judgements or findings of any court or judicial officer, and it has not attempted to do so. That is the proper function of the court appeal processes and, in any event, section 27(3) of the CCC Act prohibits such examination, except in the very limited circumstances therein specified, which have no application to the circumstances of this matter.

CHAPTER THREE BACKGROUND

3.1 The Murder

- [40] The attack which led to the death of Pamela Lawrence on 23 May 1994 was a brutal one. She was struck on the head a number of times with a blunt object in her premises known as Flora Metallica, a jewellery shop owned by her in Glyde Street, Mosman Park. Later investigations revealed that she had been struck in two separate locations in the shop, firstly towards the public area of the shop, after which she was dragged to the rear of the shop where she was struck again. Her attacker left her unconscious and barely alive in a pool of blood.
- [41] Mrs Lawrence's husband, Peter Lawrence, unable to raise her by phone and concerned by her late arrival home during the huge storm that day¹¹, drove the few minutes to the shop. He arrived just after 6.30pm and found her unconscious and grievously injured. He called 000 at 6.37pm. The police and ambulance arrived shortly after. By the time the ambulance arrived at Sir Charles Gardiner Hospital Mrs Lawrence had ceased breathing and had no cardiac output. She was pronounced life extinct at 7.15pm on 23 May 1994.
- [42] A major police investigation led by members of the Major Crime Squad was commenced. The crime scene seemed not to point to the identity of the offender.

3.2 Andrew Mallard

- [43] In due course Andrew Mark Mallard was investigated. When first located by police, Mr Mallard was already in Graylands Hospital for a psychiatric assessment on remand by a court, following a relatively minor offence. He had a history of petty offences, was a drug user, particularly of cannabis, and appeared to be mentally disturbed. When initially questioned he gave inconsistent accounts as to his whereabouts during what was thought to be the critical hour and a half during which Mrs Lawrence was attacked.
- [44] There was no forensic evidence linking Mr Mallard to the crime. The small number of fingerprints found at the scene did not match Mr Mallard's and no evidence of Mrs Lawrence's blood could be found in any of his clothing or possessions, which were extensively tested.
- [45] He was interviewed a number of times in circumstances detailed later in this report, particularly on 10 and 17 June 1994, in which interviews he appeared to make and retract what could be construed as confessions, and between which dates he was the subject of surveillance and an undercover operation. On 18 June 1994, he was remanded for psychiatric assessment to the secure ward at Graylands Hospital on another unrelated minor charge.

- [46] On 18 July 1994 the police learned that Mr Mallard was to be released to an open ward at Graylands Hospital from which he would be free to leave, whereupon they sought urgent advice from the Director of Public Prosecutions (Mr John McKechnie QC, now the Honourable Justice McKechnie of the Supreme Court), about the sufficiency of the case against Mr Mallard. After a conference with Mr McKechnie the following morning (19 July 1994)¹², Mr Mallard was arrested that afternoon and charged with the wilful murder of Mrs Lawrence.
- [47] He was tried before Justice Murray and a jury¹³, convicted, and on 21 December 1995 was sentenced to life imprisonment with a twenty year minimum term. He had been in custody since his arrest and remained so until released early in 2006.
- [48] An appeal to the Court of Criminal Appeal¹⁴ essentially on the admissibility of the interviews, was unsuccessful, as was an application for special leave to appeal to the High Court of Australia¹⁵.

3.3 The Clemency Petition

- [49] Following the unsuccessful appeals, various people, in particular members of Mr Mallard's family, continued to advocate on Mr Mallard's behalf, and as a result of extensive work which will be referred to later, in 2002 Mr Mallard petitioned the Governor for the exercise of the Royal Prerogative of Mercy pursuant to Section 140 of the *Sentencing Act 1995*. In accordance with the Act, the petition was referred by the Attorney General to the Court of Criminal Appeal ("the Clemency Appeal").
- [50] That appeal was unsuccessful¹⁶ but a further appeal to the High Court of Australia¹⁷ succeeded because of the non-disclosure at the time of the original trial of certain material known to the police and/or the prosecutor which could raise doubts about Mr Mallard's guilt. The Court ordered that his conviction be set aside and there be a new trial, but indicated it was for the DPP to determine whether or not to proceed with such further trial.
- [51] For reasons detailed in Chapter 10, the DPP decided not to proceed with the new trial. Mr Mallard was released from Casuarina Prison in February 2006 but remained liable to be retried if fresh evidence became available against him.
- [52] Meanwhile, the Commissioner of Police ordered a review of the original investigation and ultimately a full Cold Case Review by the Special Crime Squad. After reviewing all the evidence, the Special Crime Squad concluded that Andrew Mallard had not killed Mrs Lawrence but that the likely offender was one Simon Rochford who was serving a sentence for the murder of his girlfriend, Brigitta Dickens, on 15 July 1994, seven weeks after the murder of Mrs Lawrence, and who was found dead in his prison cell on 19 May 2006,

apparently as the result of self-inflicted wounds the day after he was named in the media as a new suspect¹⁸.

CHAPTER FOUR

THE CRIME SCENE AND FORENSIC PROCEDURES

4.1 The Shop and Business

- [53] Flora Metallica was in a cluster of shops close to the Stirling Highway end of Glyde Street, and close to Mosman Park railway station. There was a taxi rank adjacent to the railway station. Flora Metallica was within walking distance of the flat in which Mr Mallard had been staying over the previous weeks.
- [54] By May 1994, Mrs Lawrence had been the proprietor of Flora Metallica for some four years. The business specialised in encasing nuts, leaves and other organic material in metal and manufacturing them into jewellery.
- [55] The manufacturing process used by the business involved electrolytic and chemical processes of plating or coating the natural organic material with valuable and decorative metals, principally gold. The process involved the plating of the material either at the site (in the case, for example, of gold or copper plating) or offsite (in the case of silver plating). An array of bush items, particularly those of an iconic nature such as gum nuts and wattle, were plated and made into broaches and ornaments.
- [56] The premises in which the business was conducted consisted of four parts. The first was a very large, long but substantially empty backyard extending from the rear of the premises to a back lane.
- [57] The second part of the premises was a lockable shed which was in the backyard within metres of the rear of the shop. It was in that shed that Mrs Lawrence carried out the manufacturing process. It contained an electrolytic bath and racks from which items would be hung or suspended in the bath during the electrolysis process, workbenches, shelving with items on it used in the manufacture of jewellery and various other items that had plainly accumulated over the years.
- [58] The third and fourth parts of the premises were the areas inside the shop itself which was divided into two by shop furniture such as display boards. At the rear of the shop was a general storage and workshop area from which the public were excluded. No sign prohibited entry to it, but by the furnishings and the area of display, it was obviously a private rather than a public area. It constituted a little less than half of the shop area.
- [59] The final part was the retail display or public area of the shop in which there were glass cabinets for displaying the jewellery and a display board which also acted as a divider between the front and rear of the shop.
- [60] There was a front door to the shop from Glyde Street. The only windows into the premises were the two front display windows. There was a rear door at the

back of the shop onto a tiny landing with five steps down to the backyard and a few paces from the lockable outward opening door of the shed.

[61] Mrs Lawrence was, at the time of the assault, aged 45. She was in a happy, stable, long term marriage to Mr Peter Lawrence. They had two teenage daughters and lived in a house only minutes from Flora Metallica. By every account Mrs Lawrence was a popular, well liked person and there were no persons known who might wish to harm her.

4.2 23 May 1994

[62] On 23 May 1994, Perth was lashed by a huge storm with torrential rains. Winds uprooted trees and the storm interfered with power lines and traffic. Areas of Perth were blacked out including, later in the evening, the premises of Flora Metallica. The storm became an important memory peg in the minds of witnesses later interviewed by police.

[63] The only other person working in the shop on 23 May 1994 was Mrs Jacqueline Barsden. She left work at approximately 3pm, leaving Mrs Lawrence working in the shed. The system at the shop was that, on such occasions, when the shop was unattended, the front door would be locked and Mrs Lawrence could be contacted via intercom¹⁹.

[64] Mrs Lawrence usually came home between about 5 and 6pm. She would be sometimes detained by her work either in the shed or making telephone calls from the shop to customers. Indeed she made such a call that afternoon, said to be between 5.05 and 5.20pm, to a Mr and Mrs Whitford²⁰.

[65] Some time after 6pm, probably closer to 6.30pm, Mr Lawrence telephoned the shop to see what time his wife was coming home. When he rang, there was no answer and the phone had not been switched to the answering machine. He felt some concern and decided to drive down to the shop.

[66] When he arrived, it was apparent that the business had not been closed for the night. The light was on inside the shop, a mat, a pot plant and an A-frame sign were all still outside the front of the shop, as was a hanging sign over the door. Mr Lawrence had to use a key to enter the front door. He did so and took in with him the pot plant and the A-frame sign.

[67] At some point shortly after entering the shop he heard a sound, moved to the rear of the shop and found his wife on the floor close to the back door in a substantial pool of blood with obvious severe injuries to her head. He moved to attend to her, placed a cloth over the wounds and altered her position into one of recovery. He then made a 000 call at 6.37pm calling for an ambulance and police²¹.

[68] Two uniformed police officers, Cons Susan Debnam and Cons Shaun Staples arrived at Flora Metallica at 6.42pm, or five minutes after the conclusion of the

000 call. The officers were shown to the rear of the shop where they attempted to assist with containing Mrs Lawrence's bleeding²².

[69] Two ambulance officers arrived at 6.47pm or just nine minutes after the end of the 000 call²³. At this stage it would appear that there was still electric light in the premises, although it was soon to fail as part of the blackout.

[70] The ambulance officers, the police officers and Mr Lawrence altered Mrs Lawrence's position by moving her body through an angle of 90 degrees so that she could be more easily assessed and assisted. This inevitably contaminated the site from a forensic point of view, but this is a well known and accepted problem created by giving priority to the medical welfare of the victim. It was as true in 1994 as it is now²⁴.

[71] Within a short time Mrs Lawrence was placed in an ambulance and taken to Sir Charles Gardiner Hospital by Cons Debnam, but as previously noted life was pronounced extinct at 7.15pm that evening²⁵.

4.3 Arrival of Other Officers

[72] From 7.20pm, other officers commenced to arrive, including Sgt Ian Trinder. It was he who had the task of informing Mr Lawrence that his wife had died. Shortly afterwards, Mr Lawrence returned home with the consent of officers at the scene²⁶.

[73] The three officers who were to form the forensic team also arrived shortly afterwards namely Sgt Hofstee, Sen Cons Greg Walker (fingerprint expert) and Cons Ward (photographer). However, by that stage the scene was in total darkness following a blackout. The Tactical Response Group arrived with temporary lighting, but a decision was made (of which no criticism can be made) to close and secure the scene until proper light was available the following day. It had been raining on and off during the evening and night. Any footprints in the piles of sand in the backyard would have been washed away in any event.

[74] During that evening officers from the Major Crime Squad arrived at the scene. Det Sgt John Brandham was at the time the acting Officer in Charge of the Major Crime Squad. As a result of a conversation on the footpath outside Flora Metallica, he allocated the matter to Det Sgt Malcolm Shervill as Case Officer²⁷.

[75] Meanwhile, Det Sgt Shervill and another officer went to Mr Lawrence's house where they endeavoured to interview him, but were unsuccessful due to the distress in the household at the time. They abandoned the attempt²⁸.

4.4 Mr Lawrence

[76] One aspect of the initial examination of the crime scene and early investigation which has been questioned from time to time, particularly by Mr

Mallard's representatives at the time of the 2003 Clemency Appeal, has been that Mr Lawrence was not properly investigated as a potential person of interest for the murder of his wife.

- [77] The spouse of a murder victim where the offender is unknown would naturally be a potential person of interest for the offence. Mr Lawrence appears to have been a person of interest, so far as the police investigation was concerned, at a technical level only. His clothing was not sought until two days after the event. When he was asked to produce the clothing he did so by extracting it from a rubbish bin where he had thrown it on the night of the offence. His clothing was piled into one bag thereby interfering with any reasonable blood pattern analysis. It should have been collected on the night of the offence and each item treated separately.
- [78] The police may initially have formed the view that Mr Lawrence was not the offender and only followed him up later when no one else was emerging as a possible suspect. His car was not searched or analysed until some time after the event. When a weapon could not be found his house was not searched. No statements were taken from members of the family until very late and one daughter was never approached for a statement.
- [79] The police were undoubtedly right if they did form a view that Mr Lawrence was not the offender, but the late investigation of him was unfortunate.
- [80] The hypothesis that he might have been the offender has now been conclusively and comprehensively rejected by the findings of the Cold Case Review. It is manifestly a correct finding. Whatever criticism might have been made in the past of the manner in which Mr Lawrence was treated in the immediate aftermath of the offence, it could not, on any view, amount to "misconduct" within the meaning of the CCC Act.

4.5 Autopsy

- [81] That night Mrs Lawrence's body was transferred to the mortuary and the senior forensic pathologist, Dr Cooke attended at 10pm to carry out a preliminary examination of her wounds²⁹. The post-mortem examination was completed the following day.
- [82] In his autopsy report, dated 24 May 1994³⁰, Dr Cooke reported severe injuries to the head with at least twelve cuts to the scalp. He also reported finding turquoise blue/green material in seven of the twelve lacerations and a blue/grey material in one of the other injuries. That material could not be seen with the naked eye but only under a dissecting microscope.
- [83] Samples were sent to the forensic chemist, Mr Lynch who later described the fragments as an oil based orthophthalmic alkyd enamel paint, containing Prussian blue pigment³¹.

[84] After the autopsy on 24 May but still on the same day, Dr Cooke was shown by a police officer what was later called an anode. He reported:

I am subsequently shown a metal bar weighing 2.7 kilograms. The surface of the bar is partly covered with grey coloured material as well as blue-coloured crystals (copper sulphate). The bar is partly flattened in profile, broadening to shoulders at one end. A comparison is made between some of the injuries to the scalp and this end of the bar.

An anode is a lump of pure metal used in the electrolytic process in the shed behind Flora Metallica. The precise anode shown to Dr Cooke cannot now be established, but a number of anodes were present in the Flora Metallica shed and were photographed. The particular anode shown to Dr Cooke was not suggested to be the weapon, but was one of many found in the shed.

[85] For some time Dr Cooke considered that an anode was possibly the weapon³², in part because he considered its shape matched part of the injuries on Mrs Lawrence's head. He continued in that view until testing on a pig's head occurred on 24 June 1994. That testing, which will be considered in some detail later, demonstrated that an anode could not have been the weapon³³.

4.6 Forensic Work

[86] Over the next two days the crime scene was under the control of the forensic team led by Sgt Hofstee³⁴. The fingerprint expert, Sen Cons Walker, was also appointed exhibits officer. As the fingerprint expert he made up and maintained the forensic file. There was a standard one page Crime Scene Report³⁵ which appears to have been completed by him. The form is notable for the absence of detail it requires and is apparently quite different from any form serving the same purpose used at the present time.

[87] It is apparent from the form that fingerprints of some type were taken from three sites, but the form does not disclose whether what was lifted was finger or palm prints, where the prints were lifted from (other than the door, counter, sign), whether they were partial or whole, or indeed any detail concerning them.

[88] The box indicating that the form had been given to the officer in charge is not ticked but Det Sgt Shervill is of the view that he probably received the form, although he has no recollection of doing so³⁶.

[89] Sen Cons Walker identified the prints which he lifted by marking and dating them on the plaques which he then kept in his file. One of the prints he lifted was a partial palm print left on the glass counter of the shop which in 2006 was identified as belonging to Simon Rochford³⁷.

- [90] The murder of Mrs Lawrence, occurred seven weeks before Simon Rochford's assault on Brigitta Dickens. His prints were not at that stage on the Australian Fingerprint Identification System (AFIS). If the palm print had been submitted for identification at that time it would not have produced a match. In fact, there was no facility for matching palm prints prior to April 2001 other than by manual comparison to those of a particular suspect whose prints were already recorded.
- [91] It apparently did not occur to anyone to check the palm print against those of Simon Rochford after the latter was arrested on 18 July 1994; but at that time the investigating police were contemplating charging Andrew Mallard (he was arrested the following day) and there were no apparent links between the murders of Pamela Lawrence and Brigitta Dickens. No criticism can be levelled at any police officer for failure to identify the palm print prior to 2002.
- [92] The plaques of those fingerprints and the palm print, in accordance with the system then in existence, were retained in the forensic file created by Sen Cons Walker. At that time liaison between the crime scene forensic officers and the investigating officers was informal and a forensic file was not regarded as a police file for retention in a central system. Fingerprint files remained with the individual officer. This system has since been changed and all forensic files are now retained in a centralised forensic system³⁸.

4.7 Conclusion of Forensic Work

- [93] Although no formal system of reporting or handover seems to have existed between forensic officers who controlled the crime scene until their work was complete and the detectives who thereafter investigated, the forensic team seems to have finished their work by 25 May 1994, or two days after the murder.
- [94] The result of the forensic work was that the scene produced a body of information about the offence, but no information whatever about the identity of the offender. There were no identifiable footprints inside or outside of the premises. The offender had not left anything that amounted to an identifiable weapon either in the premises or in the suburban area around it. No blood was found, other than that of Mrs Lawrence.
- [95] The useful facts which emerged were that Mrs Lawrence had been hit firstly in the public area of the shop, probably while standing, she had then fallen and been struck again, then dragged to the back of the shop and struck further blows. The precise time of the assault could not be determined by the forensic pathologist, other than that the assault had probably occurred more than half an hour before Mr Lawrence arrived³⁹. That conclusion was drawn by an analysis of the amount of blood lost and by the presence of blood in Mrs Lawrence's lungs⁴⁰.
- [96] It was not known whether the offender had arrived or left by the front or rear door. The nature of the weapon was unknown. The motive was not obvious

because only her brown purse had been removed from her bag, whilst a container with cash in it was visible on a shelf behind one of the counters and was untouched. No jewellery appeared to have been stolen, although there was jewellery on a shelf available to be removed with ease.

[97] It was not known at the time whether the offender was wearing gloves, was left or right handed, nor what he or she was wearing. Nothing at the crime scene linked Andrew Mallard to the offence.

CHAPTER FIVE

THE EARLY POLICE INVESTIGATION

Introduction

[98] As already noted, members of the Major Crime Squad were called in to take charge of the investigation and it was assisted by detectives from Claremont CIB. Apart from Det Sgt Brandham (acting officer in charge of the Major Crime Squad) and Det Sgt Shervill (case officer), other officers who worked virtually full time on the investigation were Det Sgt Caporn, Dets Emmett, Carter, Ripp, Dorosz, Gooden, Potts, Young, Howard and Miller. Those more directly involved with the investigation of Mr Mallard were the two teams of Det Sgt Caporn with Det Emmett and Det Sgt Brandham with Det Carter⁴¹.

5.1 Katherine Barsden

[99] The first witness to come forward was Miss Katherine Barsden, then aged thirteen, who is the daughter of Jacqueline Barsden, the employee of Flora Metallica who had been working in the shop until 3pm on the day of the murder.

[100] At approximately 5pm on the evening of the murder, Miss Barsden had been collected from her school in Mosman Park by her grandmother (Mrs Wood) in the latter's light green Corolla Seca sedan and driven home via Glyde Street. As the car stopped in traffic opposite Flora Metallica, Miss Barsden looked in the shop window. When she did so she saw a man standing in an area of the shop not normally accessible to the public. He appeared to be alone, and when he seemed to see her, he bobbed down. He did not stand up again whilst the vehicle remained stopped.

[101] When she returned home, Miss Barsden spoke to her mother about what she had seen and drew a number of sketches of the man that she had seen.

[102] The following morning the Barsden family learnt of Pamela Lawrence's death and contacted the police. Det Sgt Greenshaw and Det Miller thereupon attended the Barsden residence and Det Miller took a statement from Miss Barsden⁴². The drawings she had done the evening before were retrieved from the family garbage bin and she also drew some fresh sketches in Det Miller's presence.

[103] In her statement (which she read and signed as correct) she described the person she saw as:

... about 30-35 years, medium build, fair complexion....He had a longish type face with a beard. The beard was a short one, not a long type. It was orangy-red or strawberry in colour.

He was wearing a gypsy type scarf over his hair. The scarf looked of a light material and had an orangy type border around the edge. The rest of the scarf was mixed coloured with blue, green and a cream colour. The scarf was tied tight over his hair.

- [104] The sketches she had drawn the night before and the fresh sketches which she had drawn in the presence of Det Miller were attached to her statement. Those sketches showed a man with a beard but no moustache and the scarf fitting tightly around his forehead. On one of the sketches drawn that morning she wrote:

Solid border – scarf orangy colour, some green and blue in the pattern. Scarf on his head tied like a gypsy. Could not see hair. Fair complexion, medium build, 30-35 years.

A sketch she did of the scarf indicated the “solid border” was “orangy/red” and the pattern inside the border was “blue, green, blue/silver/white”.

- [105] Later that day, Miss Barsden was taken to a police artist where a representation (identikit) was prepared after several hours of consultation between them⁴³. This identikit representation also showed a man with a beard but no moustache and with a scarf fitting tightly over his forehead, looking like a bandana, although Miss Barsden never used the term ‘bandana’.
- [106] Following attendance at the police artist, Miss Barsden returned to the office with Detective Miller and signed a typed written version of her statement which was in identical terms to the handwritten version⁴⁴.
- [107] On Friday, 3 June 1994 Miss Barsden was shown a photograph display of a number of persons including Andrew Mallard. She did not identify him as the person she had seen in Flora Metallica on 23 May. No statement relating to this was taken from Miss Barsden, nor made by the police officer (Det Sgt Greenshaw) who observed the process, and no evidence of this photograph display being shown was given in the trial.

5.2 General Enquiries

- [108] Commencing with this investigation, the Major Crime Squad operated a case management system, known as HOLMES, to maintain records of complex inquiries such as that involving the murder of Mrs Lawrence. Although it had not been used previously in Western Australia, it was used in this investigation at the instigation of Det Sgt Shervill as he knew of its use in England⁴⁵. No deficiencies in the investigation can be attributed to the use of HOLMES. The system, in broad terms, collected information obtained as part of the investigation and generated sequentially numbered actions to be carried out by investigation teams.
- [109] On the morning following the murder, the police made a public appeal for help, and consequently they received a number of calls from members of the

public which were duly entered into HOLMES and the follow ups allocated to particular officers⁴⁶. In this way a number of persons, having been nominated by members of the public were interviewed, and most were able to account for their movements on 23 May. After their alibis were checked out by police, they were written off as persons of interest and such fact noted in HOLMES. Simon Rochford was not nominated in any such process.

- [110] A lot of the information received by police related to persons whom witnesses reported seeing in the area on the afternoon and evening of the murder. In most cases, the witness was interviewed and a statement taken, including a description of the person observed.
- [111] Andrew Mallard was one of the persons nominated as the possible offender, but before dealing with him it is desirable to consider the police action in respect of Lloyd Harvey Peirce.

5.3 Lloyd Harvey Peirce

- [112] On the night following the murder (24 May 1994) Cons Martin, one of the police guarding the scene to protect it from interference during the course of the forensic investigation, was approached by a resident of the block of flats on the corner of Stirling Highway and Glyde Street who said that he had some information about a man he had seen on the afternoon of the murder. His details were taken in the normal way. He gave his name as Lloyd Harvey Peirce and his address.
- [113] The report was recorded in HOLMES⁴⁷ and included the following:

He said that at about 18:00 on 23 May 1994 he watched a Caucasian male run from the alley way behind the jewellery store across the road to the way that leads up the train station. There he appeared to have an argument with a Taxi Driver (he was waving his arms about). He then ran off and waited for a train and boarded the one heading for Fremantle. He is described as reasonably young (less than 30) collar length blonde wavy hair that appeared natural in colour wearing board shorts of a dull colour and a windcheater that was either grey or purple. He was wearing brown ankle high hiking boots black socks and was carrying a canvas backpack type bag that appeared to be full. Complexion was medium, height was approximately six foot and medium to light in build.

The information was allocated to Det Sgt Caporn and Det Emmett to investigate.

- [114] Det Sgt Caporn thereupon sought and obtained a warrant to search Mr Peirce's residence for a "weapon and blood stained clothing"; claiming there were reasonable grounds for believing such items would afford evidence of wilful murder. In support of the complaint⁴⁸, he swore that he had "received

information from a reliable source, that the said property is contained at the address shown on the face of this warrant”.

[115] The warrant was executed, but no items were seized apart from some blood stained jeans which, when examined, did not advance the investigation. Mr Peirce gave a statement, written out by Det Emmett in the usual way, which he signed⁴⁹. The return of the warrant signed by Det Sgt Caporn recorded that nothing was seized.

[116] That statement provided information consistent with the information given to Cons Martin the night before, but in more precise detail. It was as follows:

Around 5:15pm I was playing my guitar and standing looking out of my sliding door to the flat. It overlooks Stirling Highway next to the Mosman Park train station. I saw a bloke, run from our flats car park area across Stirling Highway to the train station. He nearly got hit by a car. It was raining. He went to a taxi before going to the train station. He was waving his arms about as if he was agitated.

He was described as about 20-25 years old about 6 foot maybe a bit shorter medium build, collar length hair, he was wearing I think brown boots, black socks, board short (sic), I don't know what colour they weren't bright, either grey or purple, sloppy joe top. He was carrying a backpack over his shoulder. He then left the taxi and ran to the train station. The train took off a short time later. The blonde bloke got on a train straight away it was heading to Fremantle.

A typed version⁵⁰ was apparently never signed.

[117] That same day (25 May) a statement was taken by Det Sgt Caporn from Mr Peirce's girlfriend whose name has been suppressed. It is not clear from the statement whether it was taken before or after the execution of the warrant on Mr Peirce although there is an entry in the Major Crime Running Sheet showing contact between Det Sgt Caporn and the girlfriend earlier in the day. This statement states:

He (Mr Peirce) told me (the girlfriend'd) that the police had been looking to interview him about the murder at the jewellery shop. He said that he saw the bloke who did it running across to the train station. I asked him how he would know that it was this person who did it. He didn't answer me and put someone else on the phone.

[118] The next day Mr Peirce's girlfriend rang the police with further information including that Mr Peirce:

... had been very paranoid since the murder and keeps saying 'I'm innocent, it wasn't me.

[119] About the same time, another piece of information was received by Cons Peter Trivett from one Scott Gozenton, a former flatmate of Mr Peirce, which gave rise to a further entry in HOLMES⁵¹. According to the entry, Mr Gozenton, who described himself as a “*satanic warrior*”, said Mr Peirce was “*very anti police, psychotic, violent and has committed stick ups*”. This entry was also allocated to Det Sgt Caporn and Det Emmett for investigation.

[120] There is nothing in the papers available to the Commission to indicate that Mr Gozenton was interviewed, but in respect of the serial emanating from him⁵² Det Sgt Caporn’s assessment of the matter was written on a Result of Action form dated 25 May 1994 in the following terms⁵³.

Attended at Peirce’s address, ... executed search warrant. Nil found. Interviewed Peirce at length and obtained statement. At this point no further action generated as a result of this serial investigation.

[121] In respect of Mr Peirce’s information⁵⁴ Det Sgt Caporn wrote as “Result of Action”

Attended and interviewed PEIRCE who in fact is the subject (nominal) of another serial (A61) Statement obtained. No further enquiry generated from this information.

It was signed and dated 26/05/94.

[122] Given the time that Mr Peirce saw a man running out of the laneway behind Flora Metallica, it is possible that the taxi driver with whom there was some argument may have been Graham Peverall, the driver who had driven Andrew Mallard to Mosman Park. (See section 6.4 below). Mr Peverall does not seem to have been asked any questions about this man alleged to have been seen by Mr Peirce⁵⁵.

[123] No copy of Mr Peirce’s statement was supplied to the defence as part of the Brief. Prior to the trial, Mr Les Robertson, an investigator acting on behalf of the defence, interviewed Mr Peirce and obtained a further statement from him⁵⁶, but in a letter to Mr Hogan, defence counsel, dated 6 June⁵⁷, Mr Robertson expressed some misgivings about Mr Peirce, stating it appeared possible that he knew a lot more than he had stated, and he believed he may be involved a little deeper than stated. Mr Peirce was subpoenaed for the defence to attend the trial and did so, but was not called as Mr Hogan felt there seemed to be some unreliability about his statement and he was concerned about a reference elsewhere in his statement to a “*very tall person*” a description which fitted Andrew Mallard⁵⁸.

[124] Westrail videos of trains passing through Mosman Park during the relevant period were seized, but the only relevant video that seems to have attracted any interest in the investigation at the time was the one that contained Andrew Mallard travelling to Fremantle at 7:00pm. Whether the person seen by Mr Peirce was visible on any of the videos, and in particular whether that person was Simon Rochford, cannot now be known because all videos other than the

one with Andrew Mallard on it are lost, notwithstanding an extensive search for them,⁵⁹ or are no longer in existence.

- [125] When the Cold Case Review team came across the HOLMES entries and the statement of Mr Peirce, he was re-interviewed and he gave a more detailed version of what he had seen that afternoon. He said that the man he had seen running across the road was a man he had also seen a little earlier that afternoon and had even said something to him. He said that the man had “*un-nerved*” him, and that about two days after he was spoken to by Det Sgt Caporn and Det Emmett, he drew a picture of him⁶⁰.
- [126] Mr Peirce had broken up with his girlfriend shortly after the murder of Mrs Lawrence, and as a part of the separation she had retained some of his documents, including an elaborate drawing unrelated to this matter, together with, on the same sheet of paper, a very small drawing of the face of the man he reported seeing on the afternoon of the murder. The Special Crime Squad returned to Mr Peirce’s former girlfriend. She had been out of touch with him for a very long time but confirmed that she had his papers and the drawing Mr Peirce referred to was identified.
- [127] That drawing⁶¹ shows a picture of a male face with a beard, but little in the way of a moustache. Whilst one could not reasonably say that it was a drawing of Simon Rochford, it is certainly not a drawing of Andrew Mallard who had a noticeable moustache but no beard. It is, at least, consistent with the sketch by Miss Barsden of a male with a beard. The person in the sketch is not wearing any headgear.
- [128] Mr Peirce’s explanation to the Special Crime Squad for his failure to provide the additional information about seeing the man in the street earlier, and about the diagram was that he was angry at the way the police had treated him on 25 May 1994.
- [129] In summary, Mr Peirce’s evidence may, after investigation, have proved irrelevant, or it may have led to an identification of Simon Rochford through a Westrail video. Whatever it may have led to, it was a sighting of a man carrying a bag, with facial hair consistent with Miss Barsden’s description, and running from the lane behind Flora Metallica at a time consistent with the time of the murder.
- [130] In evidence before the Commission both Det Sgt Caporn⁶² and Det Emmett⁶³ said they had no recollection of the matter until the search warrant was drawn to their attention, and they had no recollection of what other information they had available apart from that shown in the documents; but Det Sgt Caporn believed that Mr Peirce was a violent person and drug user. In Written Submissions this lack of recollection was repeated and the Commission accepts that, as the Peirce incident had not been brought to the attention of the officers concerned prior to the Commission’s Public Hearings, it should accept the lack of recollection as genuine.

- [131] Since the Hearings, Det Sgt Caporn has located further relevant information not previously provided, including a police report by one Sgt Hyde concerning an assault committed by Mr Peirce on a female person in February 1993 and seeking that he be remanded to Graylands Hospital for psychiatric assessment. The report stated that on arrival by police at his unit, he was holding an iron bar about a metre long with which he threatened the police, he claimed he had killed a man and been sentenced to twelve months probation (although it was pointed out that he had no record), and that whilst at the unit he went to the bathroom where police found him attempting to dismantle a razor and saying that if his girlfriend did not want him it was not worth living⁶⁴.
- [132] Written Submissions also referred to the fact⁶⁵ that Mr Peirce had been nominated as Pamela Lawrence's killer by Scott Gozenton⁶⁶ who had described him as violent and very anti-police and that the woman with whom he was cohabitating at the time referred to "*unusual behaviour by him*". It is also noted that at the time he had a criminal record for violence including assault on a female (although this appears to be the only listing) but was accompanied with a warning that he "*may suffer or display mental aberration*". It was also submitted that there may have been additional information in the possession of Det Sgt Caporn at the time justifying the search warrant.
- [133] However, regardless of any prior record Mr Peirce had (and it does not appear to have been extensive) and although he may have been a drug user and prone to violence, or had a reputation for violence, no one had informed the police that Mr Peirce was the killer. Mr Gozenton had merely nominated him as a violent person whom the police may wish to investigate as possibly the killer. As he had no information that Mr Peirce was in fact the killer or any information that he had hidden the murder weapon and blood stained clothing in his unit, he had no grounds for his suspicion set out in the complaint, and accordingly the Commission believes that the warrant was obtained on a complaint containing false information. However in view of the lapse of time and the possibility that there may have been more information available to Sgt Caporn than presently appears, the Commission feels that he should be given the benefit of the doubt in this regard and no adverse assessment made against him in respect of the obtaining of the warrant.
- [134] That however does not explain the approach taken in regard to Mr Peirce when the warrant was executed. Det Sgt Caporn would know as well as anyone else that the police cannot choose their witnesses or informants, and they often have to rely on persons who do not have unblemished records but are criminals, drug users or otherwise on the fringes of society. As Mr Peirce had volunteered information to the police about a person he had seen in the area, one would have thought that the appropriate course was to approach him, question him, and obtain as much information as possible from him in a friendly manner, without antagonising him by approaching him with a search warrant and in effect accusing him of being the murderer.
- [135] Furthermore, the information he gave in his statement, on its face, appeared reasonable and credible. The fact that Mr Gozenton, who himself may not have been a pillar of society, had nominated him as a person the police might

possibly investigate in regard to the murder was no justification for not following up the information which Mr Peirce gave. Although it is accepted that the police must make value judgements in the field, and some of those judgements may turn out to be wrong, the failure to follow up the information given by Mr Peirce at the time, and writing him off as a potential witness within 24 hours appears to have been most unfortunate; but does not amount to misconduct⁶⁷.

- [136] It cannot now, and never will, be known whether the person seen by Mr Peirce running away from the scene was Simon Rochford or not, but with the benefit of hindsight it can be asserted that it may have been. The decision to disregard, and not follow up, Mr Peirce's information may have skewed the whole investigation at that early stage, although whether this is so cannot now be resolved.
- [137] The fact that Det Emmett has now produced a video which it is claimed tends to show that Mr Peirce would not have had the view from his flat which he purports to have had, is irrelevant, as that is not a matter which was known at the time and is not recorded in HOLMES as a ground for writing-off the information supplied by him.

CHAPTER 6

THE INVESTIGATION OF ANDREW MALLARD

6.1 Nomination

[138] Andrew Mallard was nominated as a person of interest to the investigation by two separate sources. Indeed he was the subject of Actions as early as 21 and 23 on the HOLMES system.

- On 24 May 1994, Michelle Engelhardt, in response to an appeal to the public, nominated Mr Mallard as a person who had been staying with her in Mosman Park and had been charged by Cottesloe Police with burglary and impersonating police⁶⁸.
- On 25 May 1994, Sgt Ross Canning of the East Perth Lock Up advised the Major Crime Squad that Mr Mallard was “a bloke you need to be interested in” who was in Graylands Hospital and that he “seemed spaced out”. He described him as “approximately six foot, thirty years of age, red moustache, red hair approximately shoulder length in a ponytail” and referred to him having been arrested on 24 May by Cottesloe Police for stealing and impersonating police⁶⁹.

[139] Both actions were allocated to Det Sgt Caporn.

6.2 Andrew Mallard

[140] At the time of these events, Andrew Mark Mallard was 31 years of age. He was born in the United Kingdom and migrated to Australia with his parents when young. His father, since deceased, had an army background. He left school a year early and worked for a period before joining the army as his father had done. He developed difficulties in the army which appeared to have been in part caused by a natural unsuitability, but also in part by social issues. He was given a medical discharge from the army eight months after entry on 31 May 1983 at the age of 20. The discharge was based on a diagnosis of narcolepsy for which there was no subsequent support from a treating neurologist⁷⁰.

[141] In August 1993, about eight months before the murder of Mrs Lawrence, Mr Mallard’s general practitioner described him to his treating psychologist as somebody with a long history of psychological difficulties mainly in the area of personal relations and a general feeling of personal inadequacy and anxiety⁷¹. He was described as moving from place to place in the hope of resolving his difficulties. He had moved between the Eastern States and Mandurah, where his parents lived, and also to the United Kingdom, all of which he found stressful. A month later, his general practitioner prescribed some anti depressants for him, but they produced side effects and he ceased using them.

[142] The psychologist to whom Mr Mallard had been referred by his general practitioner, treated him from 10 November 1993 for ten sessions, the last being on 9 February 1994.

[143] Between 25 May and 16 June 1994, he was twice remanded by the Court of Petty Sessions (in circumstances detailed hereunder) to the closed ward at Graylands Hospital for assessment pursuant to the *Mental Health Act 1963*. He was assessed by the Principal Forensic Psychiatrist, Dr Jeremy O'Dea, who furnished two reports to the Court dated 8 June 1994 and 19 July 1994 respectively.

[144] In his first report⁷², he diagnosed Mr Mallard as suffering from:

A Hypomanic Phase of a Bipolar Mood Disorder which is a recurrent disturbance in mood characterised by a period of elevated mood alternating with other periods of depressed mood with longer periods of normal functioning in between times.

and thought that at the time of the alleged minor offences for which he had then been arrested, that Mr Mallard:

Was hypermanic with mild to moderate mood elevation, grandiose ideas and impaired judgement ability.

[145] Dr O'Dea considered that:

His cognition is intact but his overall social judgement appears impaired.

He was of the view that:

Andrew Mallard has a mental illness, most likely a Bipolar Mood Disorder which would benefit from treatment including treatment with medication. However, he is unwilling to accept such medication at the moment and his illness is of an insufficient severity for this to be justified against his will.

[146] In his second report, (19 July 1994), he confirmed the diagnosis of Bipolar Affective Disorder which he said was then, (after almost four weeks in hospital):⁷³

under adequate control with the instigation of his medication and rehabilitation program.

[147] When giving evidence at the Voir Dire examination on 4 November 1995, Dr O'Dea said⁷⁴ that when Mr Mallard was in the hospital the symptoms that he exhibited:

that drew us to his diagnosis were essentially that he was overactive, he was very irritable in the medical sense in so far as he may become uptight and upset and verbally threatening in situations of stress. He appeared to be somewhat grandiose.

Dr O'Dea described "grandiose" as meaning that Mr Mallard would claim capacities that were "if not possible certainly unlikely" and that he was "showing an impaired judgement in so far as he was making claims ... that seemed far fetched". He described Mr Mallard as having a "rich fantasy life".

- [148] In the months leading up to 23 May 1994, Mr Mallard appears to have been leading a marginal life, not on the streets but not substantially far from it. He later described himself as a "con man" or "flim-flam man",⁷⁵ able to manipulate people; he was receiving Social Security payments, but was also engaging in stealing and selling items that came his way; substantially living on his wits.
- [149] He had a habit of latching on to people with various stories and securing a place to sleep at night until he had worn out his welcome. He would trade contact with people and a bed for such cannabis as he could acquire.
- [150] His behaviour was distinctly odd in that he would wear layers of clothing; he claimed he could speak multiple languages; he often declared his interest in Celtic design, spiritualism and related matters and at other times claimed to be a Highlander, a Viking or a Warrior⁷⁶. He would do detailed designs in Celtic art and carried a stick from which was hung rags and items consistent with his Celtic interests.
- [151] He had a number of minor convictions, all for traffic offences apart from convictions in Eucla in December 1992 for stealing (2) and escape lawful custody.
- [152] On about 12 May 1994 using the first name "André" he was introduced to Michelle Engelhardt who at the time was living at Unit 3/10 Murray Avenue, Mosman Park.

6.3 Michelle Engelhardt

- [153] Michelle Isolde Engelhardt was 23 years old at the time. She had no job and was a drug user. She had a boyfriend, Damien Kotesky who stayed occasionally, but otherwise she lived alone. Ms Engelhardt and Mr Mallard struck some form of rapport and the latter was able to persuade her to let him sleep in her lounge room from about 15 May 1994.
- [154] According to Ms Engelhardt, she did not like Mr Mallard staying with her and asked him to leave on a number of occasions. He persuaded her to allow him to remain by supplying her such small amounts of cannabis he was able to obtain and by telling her untrue stories of a grandiose nature such as that he was in an undercover police officer and that he worked for Interpol. Ms Engelhardt accepted those stories and also the drugs, reluctantly allowing him

to remain. She noticed that he often wore layers of clothing and at times a velvet cap.

- [155] On the evening of Saturday 21 May 1994, Andrew Mallard went to the premises of Brettingham Dell at 22/650 Stirling Highway, Mosman Park claiming to be a police officer and showing a police cloth badge which he had stolen a few days earlier from police headquarters. Mr Dell told him to leave and Andrew threatened to return with a search warrant, but then left⁷⁷.
- [156] He returned to Mr Dell's unit the following evening, whilst Mr Dell was out, and asked the caretaker to let him into the unit, claiming to be an undercover officer with the CIB Drug Squad. When told by the caretaker that she did not have a key, he broke in and stole a bicycle and black leather jacket. He told Michelle Engelhardt that he had 'busted' Mr Dell for selling drugs and that the items had been seized because they were the proceeds of selling drugs. Mr Dell reported the break-in to the police.

6.4 23 May 1994

- [157] On the morning of Monday 23 May, Cottesloe police investigating the break-in and impersonation of a police officer at Brett Dell's flat the previous evening, attended Michelle Engelhardt's flat with a search warrant, and arrested Andrew Mallard. He was taken to the East Perth Lock Up where he remained until 3.47pm, when he was released on bail⁷⁸.
- [158] On leaving the lockup, Mr Mallard set off for Mosman Park. After some delay he took a taxi driven by Mr Graham Peverall, now deceased, from the city to the Bel Air Flats off Murray Street, which was the same street in which Miss Engelhardt lived, but a short distance away. He did not pay the fare but asked Mr Peverall to wait whilst he changed his clothes and collected two or three other persons so they could then all continue in the taxi to the Norfolk Hotel.
- [159] After waiting about twenty minutes, Mr Peverall realised that Mr Mallard was not going to return and pay the fare. He left, and drove the very short distance (one or two minutes) to the taxi rank at Mosman Park railway station. He waited for about ten minutes and at 5.22pm, a time which is fixed with certainty from the taxi company computer records, he was allocated a job⁷⁹.
- [160] It would seem, using Mr Peverall's times, that Mr Mallard got out of the taxi at Bel Air flats on Murray Street shortly before 5pm. It is also clear that he later went to Michelle Engelhardt's flat and that about 2 hours later he left to catch a train to Fremantle. The time at which Mr Mallard boarded the train at the Mosman Park station can be timed with a high degree of accuracy as Westrail videotapes show Mr Mallard boarding the train at 6:57pm.
- [161] Michelle Engelhardt said that he arrived at her unit about 10 to 20 minutes after she heard on the radio that it was 6.30pm, and that a few minutes later her former boyfriend, Damien Kostas, arrived, and that was still a few minutes before 7pm because she intended to watch "Home and Away" on

television at 7pm. She said that Mr Mallard and Michael Buhagiar who was also in the flat at the time, left together “only a few minutes after the start of ‘Home and Away’; it started just on seven o’clock”.⁸⁰ (This must be incorrect as they were on the train by 6:57pm).

- [162] Michael Buhagiar who had been at the unit that afternoon also said that Andrew Mallard arrived about 6.30pm⁸¹, although in evidence at the trial he said that “in retrospect I think it would have been closer to 5.30 because of what happened subsequently”.⁸² There were some difficulties with the evidence of Michelle Engelhardt which are discussed in Chapter 7, but based on the evidence of Mr Peverall, Ms Engelhardt and Mr Buhagiar, it was not unreasonable for the police, when they subsequently questioned Mr Mallard, to ask him to explain his movements between approximately 5pm and 6.40pm.
- [163] On 25 May, a Mr and Mrs Whitford were interviewed concerning the timing of a telephone call which Mrs Lawrence had made to their home on the evening of 23 May, and it appeared the call had been between 10 and 20 past five which, if correct, indicated that Mrs Lawrence was attacked and killed some time after that⁸³.
- [164] On the morning following Mrs Lawrence’s death (Tuesday 24 May 1994), Andrew Mallard, using the bicycle he had stolen from Mr Dell’s apartment, went to Iona Presentation College, from where he had stolen a chalice the week before, and represented himself to a nun as a detective investigating the theft of the chalice. He used as identification, a police badge and pin which he had stolen the previous day from Cottesloe Police Station when being interviewed over the break in at Mr Dell’s residence. When told that the police had been contacted and were on their way, he decamped to Saint Hilda’s Anglican Girl’s School where he attempted to steal a school bag but was disturbed. He subsequently returned to Ms Engelhardt’s flat where he was later arrested, taken to Cottesloe Police Station, charged with impersonating a police officer and remanded to the closed ward of Grayland’s Hospital for psychiatric assessment.
- [165] One consequence of these arrests on successive days, was that the police had photographs of Mr Mallard on both the day of the murder and the day after. These photos did not resemble the identikit picture drawn by the police artist on the instructions of Miss Barsden nor the sketches she had made herself on the evening of the murder or the following morning in the presence of Detective Miller; in particular, whereas Mr Mallard had a moustache and no beard (except what appears to be a day’s growth), the person allegedly seen by Miss Barsden is shown as having a beard and no moustache.

6.5 Interviews at Graylands Hospital

- [166] On 26 May 1994 Andrew Mallard was interviewed for the first time at Graylands Hospital by Det Sgt Caporn and Det Emmett in the presence of a nurse, Mr Ian Sharp. The interview extended from 1.25pm until 1.55pm⁸⁴.

[167] According to the police officers, the interview commenced with Mr Mallard being cautioned and informed that they were investigating the murder of Pamela Lawrence. He was asked about his movements after leaving the East Perth Lock Up, and he told the Police he got a taxi and then “went to Michelle’s flat”.⁸⁵

[168] When asked what time he arrived back at Ms Englehardt’s flat, he replied:

About 5.00pm and I went to Michelle’s flat.

He was immediately contradicted by Det Sgt Caporn, who asked:

Michelle told us you didn’t get back until after 6.30pm, could that be right?

He replied by giving essentially the same account of catching a taxi to Ms Engelhardt’s flat. He was then asked again:

What time did you get home?

to which he replied:

It was 6.30, just before or just after.

Mr Mallard therefore, when confronted with the suggestion that Ms Engelhardt contradicted his estimate of time, simply adopted as accurate the time that she had apparently suggested.

[169] Ms Engelhardt’s statement that Mr Mallard arrived at her flat about 6:30pm or shortly afterwards became of critical importance, notwithstanding that Ms Engelhardt does not appear to have been a particularly reliable witness as to detail. Mr Buhagiar was even worse in estimating times, and also initially said that he arrived just after 6.30pm⁸⁶, although at the trial he said he thought it would have been closer to 5.30pm.

[170] No one seems to have considered whether perhaps Mr Mallard was right after all, and Ms Engelhardt and Mr Buhagiar were wrong. Everyone seems to have assumed that Ms Engelhardt’s and Mr Buhagiar’s estimates of the time of Mr Mallard’s arrival were accurate.

[171] Following Sgt Caporn’s assertion at the first interview with Mr Mallard, that Ms Engelhardt had contradicted Mr Mallard’s 5pm return with a time of 6.30pm, Mr Mallard (in succeeding interviews), gave a number of accounts of what he claimed were his movements during the so called “missing 90 minutes”. This so called “missing 90 minutes” requiring explanation by Mr Mallard appears to have been accepted by all parties, including Mr Mallard, as a fact early on in the investigation.

- [172] Each alibi given by Mr Mallard was checked by the police and found to be unsupported by the witnesses he nominated, although a number agreed he had visited them the previous evening (Sunday).
- [173] Mr Mallard was interviewed on four separate occasions whilst in Graylands Hospital: the 26 May, 27 May, 30 May and 2 June 1994⁸⁷. Without going through the details of each interview, it may be summarised that there were three features of the interviews:
- a) Mr Mallard consistently denied having any involvement in the murder of Pamela Lawrence.
 - b) He told the officers that he had been into the shop on a previous occasion, approximately a week before the murder, in an unsuccessful attempt to sell jewellery.
 - c) He gave a variety of confused and inconsistent accounts, albeit variations on a theme, of his movements and activities during the “missing 90 minutes”. None of them could be verified by other witnesses.
- [174] In the interview of 2 June, he said that he had not been wearing any head gear on the night of the murder, and when asked whether he owned any bandanas, said that he owned two which were tied around a stick decorated as a Nordic/Viking “rune”, and with respect to them said, “I wasn’t wearing them the night she was murdered, I wasn’t even wearing my cap”. No bandana or scarf of the colours described by Miss Barsden or otherwise was ever found amongst his possessions. During the interview he also said that he had studied metaphysics, including “esiatrics” which is spiritualism, philosophy and science, and that he spoke six languages (French, German, Japanese, Swedish, Italian and Spanish), and when a sample of his blood was taken he said, “This will clear me”.
- [175] During this period search warrants were issued for Mr Mallard’s possessions both at Grayland’s Hospital and at Ms Engelhardt’s flat⁸⁸. Analysis of Mr Mallard’s clothing and possessions produced no evidence whatsoever of any link with the crime scene.

6.6 House to House Survey

- [176] In the last days of May, a house to house survey of the Glyde Street locality was organised, with a door knock taking place on 1 and 2 June 1994. Each officer involved was provided with a questionnaire, the identikit sketch which had come from the police artist’s work with Miss Barsden, and a set of instructions drafted by Det Sgt Brandham or under his direction.
- [177] The Briefing Notes⁸⁹ included a specific reference to Mr Mallard and directed teams around Flora Metallica to pay attention to any sightings of him. No other person was named, and a large number of the questionnaire response forms

completed by officers carrying out the survey, particularly those completed by Det Carter⁹⁰, in answer to the question “Any suggested inquiry arising from this interview” have written “No sightings of Mallard”, or “Not Mallard”.

6.7 Andrew Mallard as a Suspect

[178] By the beginning of June 1994, Andrew Mallard was under active investigation. All the available material points to him being, at that time, the only person actively being considered responsible for the homicide. The investigation files do not reveal any other person who had been interviewed in a formal manner and under criminal caution. The various detectives in their evidence before the Commission, said that there were other “*persons of interest*”, but they appear to have all been written off or discounted by about 1 or 2 June.

[179] On the other hand:

- there was no forensic evidence linking Andrew Mallard to the crime;
- he had denied committing the offence, and had said nothing by way of admission;
- he had given a variety of different accounts for his movements upon the assumption that he had to account for a period of 90 minutes, in circumstances where he was being interviewed in a psychiatric hospital and was demonstrating quite fanciful behaviour; and
- the murder weapon had not been identified. Not only had no weapon been found, but some of the injuries to the deceased’s skull had a distinctive shape and contained traces of something blue.

[180] The various police witnesses⁹¹ denied Mr Mallard was already a suspect at that stage and sought to draw a distinction between the use by them of the terms “suspect” and “person of interest”, maintaining that in police jargon a “suspect” meant a person in respect of whom there was sufficient evidence to charge, and that other persons being investigated were merely “persons of interest”. The Commission rejects this supposed distinction. The Concise Oxford Dictionary⁹² defines “suspect” as a “suspected person” and the verb “suspect” as “believe without adequate proof” and “incline to mentally accuse”. The Macquarie Dictionary⁹³ defines “suspect” as “to imagine to be guilty ... with insufficient proof or no proof, to imagine”.

[181] The Commission is satisfied that in the ordinary proper sense of the word, Andrew Mallard was a “suspect” by the beginning of June. He was described as “suspect” in the Major Crime Running Sheet⁹⁴ at 1000 hours and 1140 hours on 26 May (only three days after the murder); and in the second interview at Grayland’s Hospital on 27 May, when Mr Mallard said “do you think I did this?”, Det Sgt Caporn replied “if you weren’t a suspect, I wouldn’t be here”⁹⁵. Andrew Mallard was the only suspect and the police ceased

looking to see if any other person might be the offender, apart from following up reports on the HOLMES system (serials). Thereafter they concentrated their efforts on establishing a case against Andrew Mallard.

6.8 10 June Interview of Andrew Mallard

- [182] Andrew Mallard was due to be released from Grayland's Hospital on 8 June 1994, but his erratic and conflictual behaviour at the time led to his retention for a further two days. He was released on 10 June 1994.
- [183] Between 2 June and 10 June, there were no new developments in the investigation, at least nothing which pointed to anyone being guilty of the crime, including Mr Mallard. No weapon had been found or identified, no explanation for the traces of blue in the wounds of the deceased had been found, and even the motive was questionable.
- [184] In the days prior to Mr Mallard's release from Graylands Hospital on 10 June 1994, the Major Crime Running Sheet⁹⁶ reveals intense preparations for Mr Mallard's expected release, including further interviews with Ms Englehardt, Mr Buhagiar and Ms Raine, another witness, making arrangements for physical and technical surveillance; contact with Dr Aaron Groves, a psychiatrist, to arrange meetings which subsequently took place on 13 and 15 June relating to the undercover operation; liaising with Graylands Hospital and Central Law Courts as to his expected release, and three hours of preparation by Det Sgt Caporn and Det Emmett for a major interview. In most of the entries on the running sheet he is referred to as "suspect Mallard".
- [185] Meanwhile on 8 June, Det Sgts Shervill and Brandham with Det Young attended Flora Metallica and spoke to Mr Lawrence about chemicals used in the plating process, and also as to the possibility of some weapon or instrument (other than the anodes) which may have been used to kill the deceased being either in, or missing from, the premises. Mr Lawrence was unable to indicate that any object or other possible weapon was missing from the premises⁹⁷. Later the same day Det Sgt Brandham and Det Young attended a number of tool retail outlets in an unsuccessful attempt to locate a tool which could cause similar injuries to those sustained by the deceased⁹⁸.
- [186] Andrew Mallard attended the Central Law Courts on 10 June 1994 to answer charges of larceny and impersonating a police officer. His father also seems to have attended although his precise movements that morning are unclear. Mr Hogan, the Legal Aid lawyer allocated to Mr Mallard, was also present. Andrew Mallard was remanded and released on bail.
- [187] Immediately following his release, Det Sgt Caporn approached Mr Mallard outside the Central Law Courts and told him that if he came back with him to Curtin House (Police Headquarters) he would get some of his property back and he would be asked "a few more questions".⁹⁹ At that time Mr Mallard did not have any of his own clothing or his shoes, as they had all been seized by police under warrant from Graylands Hospital. He was wearing 'op shop'

clothing provided as a replacement by the police, and he wanted his own clothing back.

- [188] Mr Hogan advised Andrew Mallard that he did not have to go if he did not want to. He did not advise him not to go, either without his lawyer or at all, and did not advise him that he did not have to answer any questions and / or that he should not do so. He said he did not expect there to be a formal interview but there was some confusion and contradiction in his answers given to the Commission¹⁰⁰. It is difficult to understand why Mr Hogan would not have advised him not to go, not to answer any questions, or have not gone with him. On the other hand there is no way of knowing whether Mr Mallard would at that time have taken his advice.
- [189] The outcome was that Mr Mallard left with Det Sgt Caporn but without Mr Hogan and went to the Major Crime Squad Headquarters at Curtin House. Upon arrival he was taken to one of the two interview rooms. It would appear that it was the room in which the video equipment was kept, although such equipment was not used during the course of the interviews which occurred that day. Those interviews started at 12:50pm, according to the notes of Det Emmett, and did not end until some time after 9pm. The first interview was commenced without the customary caution¹⁰¹.
- [190] Before starting this interview, Det Sgt Caporn was aware that Mr Mallard had been in Graylands Hospital for a psychiatric assessment, he knew that he had been making bizarre claims about his background and abilities, that he had grandiose ideas and had made numerous claims which clearly were untrue. He had spoken to Dr O'Dea; a psychiatrist from Graylands Hospital, but had not received a definite diagnosis.
- [191] Det Sgt Caporn did not want to interview Mr Mallard any further at Graylands Hospital but in what he described¹⁰² as "a formal environment" by which he meant a police station. He denied¹⁰³ that the location of the interview (police headquarters at Curtin House) was intended to intimidate Mr Mallard, but the Commission is satisfied that this was the intention, and also the effect. He did not think that he would have been permitted to interview him over an eight and a half hour period at Graylands Hospital¹⁰⁴; and the Commission believes that he would not have been permitted to continue the interview if it had been at the hospital when Mr Mallard started to cry and show signs of distress.
- [192] Early in the interview Mr Mallard conceded that he had never been in the police force, but claimed to have been an informant for the Drug Squad and Fremantle CIB. He agreed that he had never worked for Interpol or British Intelligence and described himself as a good "flim flam" man: "I can con anybody" as he put it. He made grandiose and inappropriate claims about his memory and his intelligence. He claimed that he did martial arts which stemmed from meditation and concentration on Kung Fu, and said "I am also an artist and I work well with intricate design. I do Celtic art so I have to memorise diagram and intricate designs to do that".¹⁰⁵

[193] According to the interview notes of 10 June 1994, Mr Mallard was asked over 15 times what occurred between leaving the taxi and arriving at Ms Engelhardt's flat. Again, he was confronted with the proposition stated as fact, that there was an hour and a half that he needed to account for. He gave a variety of explanations for what he might have done during the "missing ninety minutes". At times he said he was confused or simply did not know¹⁰⁶.

[194] After lengthy questioning, none of which elicited any admissions, Det Sgt Caporn eventually put it to him that he may be responsible for the murder¹⁰⁷. By this time Mr Mallard had been at the Major Crime Squad for over five hours. The notes read as follows (Commission underlining)

Caporn: *You know why you can't place it don't you?*

Mallard: *No.*

Caporn: *Because you are telling lies trying to cover yourself of what really happened.*

Mallard: *No, I didn't murder her. You have got the wrong bloke, pal.*

Caporn: *So where were you?*

Mallard: *I didn't murder her. I didn't do it. I swear to God I don't know nothing about – I didn't murder anyone. I had nothing to do with it. I swear to God I didn't murder her. I had nothing to do with it.*

Caporn: *What happened?*

Mallard: *I don't know.*

Caporn: *Why don't you know?*

Mallard: *I don't remember. I told you what I know.*

Caporn: *A witness saw someone in the store at the time around the murder, Andrew. Was it you?*

Mallard: *You can put me in the store when I asked that woman about jewellery but no way did I do the murder.*

Caporn: *I am not talking about the time you went there and spoke to an employee.*

Mallard: *I did not murder anybody. I'm innocent. I did not murder her.*

Caporn: *Did you go into the store that afternoon or evening?*

Mallard: *No, I told you. I have only been there once and that was about a week prior to the murder.*

Caporn: *Well, where were you?*

Mallard: *No, I am confused; that's it. I have been cooperative and you are trying to pin me for the murder. That's it. I didn't do it. I'm innocent. I swear I didn't do it.*

Caporn: *We need to know what happened.*

Mallard: *I have told you everything I know. I have tried to help you.*

Caporn: *Let's get one thing clear here, Andrew. No one is coming out and accusing you of murder. We know your game. You are a scam man but there is a lot of things I don't like about your account of the events that day.*

Mallard: *I wasn't in the store that night. I wasn't in the store that night, Sergeant.*

Caporn: *We are trying our best to help you, Andrew. We want to know what happened.*

Mallard: *I can't tell you any more.*

Caporn: *Andrew, we have various witnesses who saw a person of your distinct description outside the store that evening between 4.30 and 5.15.*

Mallard: *That's a case of mistaken identity pure and simple. It wasn't me. I was not in the store. It wasn't me. I didn't murder anybody and I wasn't in the store.*

[195] To suggest that no one was accusing him of the murder was hardly correct – that was exactly what Det Sgt Caporn was doing; nor was he trying to help him. The reference in the last question to “various witnesses” having seen a person of Mr Mallard’s “distinct description” outside the store between 4.30pm and 5.15pm was also a blatant misrepresentation. As at 10 June there were no witnesses who had seen a person of Mr Mallard’s “distinct description” outside the store that evening, although (as will be seen later) after a number of witness’ statements were altered it was put to the court at the trial that this was so.

[196] According to the interview notes, the first time that Mr Mallard made anything that could be construed as an admission concerning Flora Metallica on 23 May 1994 is after 7.36pm following a toilet break when he said¹⁰⁸:

Mallard: *Okay, if I tell you now about going into the shop that night, what happens then?*

Caporn: *What do you mean what happens then?*

Mallard: *What are you going to do with me?*

Caporn: *Andrew, I can only act on the information you give to me. It is obviously a very serious matter which has occurred but if you can explain what happened, I'll listen to you.*

Mallard: *If I was to tell you that I went into the store and I know nothing about the murder, would you believe me?*

Caporn: *Andrew, it's not a matter of what I believe. It's a matter of what evidence there is to prove something.*

Mallard: *Look, I went into the shop that night to case it for a burglary.*

[197] According to the interview notes, Mr Mallard then proceeded to tell an elaborate story involving going into Flora Metallica, hearing a noise and then leaving again. Significantly, for the purposes of the prosecution case at trial, it was suggested that in the course of that account Mr Mallard described being seen by a girl in a green Corolla while in the store and “locking eyes” with her. The account was later relied upon as one of the matters Mr Mallard had said that only the murderer could know. He also said that he was wearing his cap on backwards at the time. There had been earlier references to him wearing his cap on previous occasions, sometimes back to front.

[198] Shortly after, however, Mr Mallard retracted the suggestion he had been in the store¹⁰⁹:

Caporn: *So what are you saying now?*

Mallard: *I didn't go into the store and I didn't murder Pamela Lawrence.*

Caporn: *Well, what was all that about going into the store then?*

Mallard: *I just made that up, sergeant, to get you off my back.*

Caporn: *What about what you said in relation to the witness and locking eyes with her? What did you mean by that?*

Mallard: *I made it up. I made it up like all the rest of it. I made it all up.*

Caporn: *What were you to say if I said that was in fact the case that you did lock eyes with the witness?*

Mallard: *I am a very intelligent man. I worked it out from the things you said to me.*

[199] According to the notes, further into the interview Mr Mallard told a similar story and again retracted it. He continued to assert, in more and more trenchant terms, that he did not kill Mrs Lawrence.

[200] Later Mr Mallard, apparently upset and frustrated judging from Det Sgt Caporn's subsequent description said¹¹⁰:

Do what you want, you can't prove anything otherwise you wouldn't be talking to me for so long. You would've charged me and that would be it but no, all the time digging, digging, pushing, pushing. I can't remember where I was; maybe I was nowhere, just sitting on top of Dover Court, minding my own fucking business. That's it minding my own fucking business. Why don't you do the same.

Shortly afterwards the notes state that Mr Mallard started crying.

[201] Det Sgt Caporn then asked¹¹¹:

What do you know, Andrew?

In a series of answers, Mr Mallard said:

I know there is a lot of blanks - all blanks. He was very scared. He didn't want to get caught. He was evil ...

This person that did this thing ...

It was evil. He was scared. He just kept on hitting her. He couldn't stop ...

[202] It was at this point that Mr Mallard was finally cautioned. Mr Mallard had not been advised of his right to silence in the previous seven and a half hours. He continued:

He murdered her. He's very scared. He doesn't want to get caught ...

This person - the evil person ...

I don't know his name ...

Just looking to steal something; just something to get by ...

Back door; up the stairs to the back door ...

She was locking up. She saw him. He was very scared he was going to get caught ...

He hit her and kept on hitting her ...

She put her hands up like this ...

[203] Asked what he hit her with, he said:

A wrench. He couldn't let her tell anybody. He was very scared ...

He saw a girl in a car. She saw him. He had to get out. He was very scared, can't get caught ...

There's a lot of blanks, just blanks ...

He had to move her so no one could see ...

To the back door ...

He dragged her ...

There was blood everywhere. She was still making noises, gurgling. He hit her again ...

After he moved her ...

He wanted to get away ...

I ran out the back. He had to go. There's just blanks ...

There's blanks. He was very scared ...

[204] Asked where he got the wrench from, he said:

A shed. Out the back there's a shed ...

A wrench.

Asked where the wrench was now, he replied "North Fremantle, he threw it in the ocean".

[205] Eventually Det Sgt Caporn asked "Andrew, when you talk about this person, this evil person, are you talking about yourself?"

He replied "No, this evil person is not me." What he had said in reference to this other person was later referred to at the trial, and is here referred to, as the "third party admissions".

[206] At this point Mr Mallard had been at Curtin House for over seven hours and subjected to persistent questioning about a murder, all on the day that he had been discharged from a psychiatric hospital. The third person admissions continued for several pages more until there was a break at 8.50pm, so that Mr Mallard could go to the toilet.

[207] The break lasted ten minutes and the moment he returned Mr Mallard said¹¹²:

Yes, I'm ready, and I want to say that I wasn't in the shop that night and I didn't murder Pamela Lawrence.

I didn't do it. I didn't murder Pamela Lawrence. You hear me? I didn't murder Pamela Lawrence.

[208] Det Sgt Caporn began to ask him again about his movements after leaving the taxi. From that point in the interview Mr Mallard started becoming hysterical, and some physical conflict occurred about which there have been differing versions. Det Sgt Caporn was bitten on the inner thigh and the interview was terminated. Andrew Mallard was taken to the hospital and examined, returned to Curtin House, charged with assaulting Det Sgt Caporn, bailed to appear on 15 June, driven to Fremantle, and released.

[209] At the end of the interview, the material obtained from Andrew Mallard was a tangled mess of inconsistent stories, contradictions, third party admissions immediately retracted, and a large number of denials of responsibility of the murder. Mr Mallard demonstrated distress at various times, attempted to tell stories which would be accepted, but which were then retracted. At no point in the interview was there a direct admission that he had harmed Mrs Lawrence in any way. Det Sgt Caporn did not consider that there was enough evidence to charge Mr Mallard at the conclusion of the 17 June interview¹¹³.

[210] The evidence given by Mr Mallard at his trial concerning this interview was quite different. He said Det Sgt Caporn's evidence did not accurately recount all the questions and answers that were asked and given and that Det Emmett was writing some, but not all, of the time. He said he requested a lawyer and was refused. He denied making any confession and claimed he was assaulted by Det Sgt Caporn who accused him of killing Mrs Lawrence. He said that at one stage Det Sgt Caporn left the room and returned and showed him a photograph about four inches by four inches with a white border showing the deceased's injuries¹¹⁴, a claim he repeated when speaking to the undercover officer and also in his video recorded interview with Det Sgt Brandham a week later.

[211] As indicated at the beginning of its Public Hearings, there is no point in the Commission attempting 14 years after the event, to resolve the issue of whether Mr Mallard was assaulted during the interview, which must depend on word against word. Similarly as the police claim to have made notes word for word during the interview and Mr Mallard did not, and, as the police version was apparently accepted by the jury at the trial, there is little point in the Commission attempting to determine where the truth lies as to the

contents of the interview. For similar reasons, the Commission is unable to reach any conclusion on the alleged showing of the photograph of the deceased's injuries.

[212] Accordingly, for present purposes, the Commission accepts the police version of the interview; but even accepting as entirely accurate the version of the interview reflected in the notes, there are a number of matters which are of concern:

- (a) The fact that the investigators waited until Mr Mallard had been released from the psychiatric hospital before undertaking the interview when there had been no apparent difficulty interviewing him there in the past;
- (b) The circumstances in which he was requested to attend the offices of the Major Crime Squad;
- (c) That Mr Mallard was clearly suffering from some form of psychiatric condition, and Det Sgt Caporn knew that he was given to fantasy and/or imagination, was a known liar, and interviewed him over such a lengthy period without any support person although Dr Groves, a psychiatrist who was frequently consulted by the police, who at no stage interviewed or diagnosed Andrew Mallard, told the Commission that if he had been asked at the time (which he was not) he would have advised that Andrew Mallard was fit to be interviewed;
- (d) That the interview continued in circumstances in which Mr Mallard had manifested considerable distress during the interview;
- (e) The fact that Mr Mallard was not advised of his right to silence until seven and a half hours into the process, particularly given that the officers had considered such a warning was justified on previous occasions;
- (f) That the interview was not video recorded when facilities were readily available for that purpose, but as to this see section 6.14 below; and
- (g) The persistent nature of the interview and what amounted to a refusal to accept Mr Mallard's denials.

[213] The Commission's opinion is that, unsatisfactory as these matters are, they do not, either separately or in combination amount to "misconduct" as defined in the CCC Act.

[214] As to the failure to administer a caution until well into the interview, the evidence before the Commission was that the practice in Western Australia at the time was not to administer a caution until the person being interviewed had made admissions. The Commissioner's Guidelines contained in the Police Manual at the time,¹¹⁵ stated that a caution should be given when the interviewer obtains information which should cause him to make up his mind

to charge a suspect. Unless there was forensic or other independent evidence implicating the suspect, this would in practice generally be after the suspect had made the relevant admissions, which would defeat the whole purpose of the caution, which is to convey to the suspect that he or she is not required to make admissions.

- [215] Two other points should be noted concerning this interview. According to Det Sgt Shervill's police notebook,¹¹⁶ at about 5:30pm that evening he received a telephone call from Mr Lawrence who said that a large shifting spanner may have been missing from the toolshed, and another entry refers to a "Sidchrome crescent" (sic) which Peter Lawrence "thinks" may have been missing. Mr Lawrence is recorded as having said it was a Sidchrome spanner that may have been missing, and he gave evidence to that effect at trial¹¹⁷. Mr Mallard made no mention of the word "Sidchrome" on 10 June, although, as will be seen, he did draw a Sidchrome wrench on 17 June 1994 during the interview with Det Sgt Brandham. Det Sgt Shervill and Det Sgt Caporn both said that this information was not conveyed to Det Sgt Caporn during the interview¹¹⁸.
- [216] The other point to note is that Mr Mallard was incorrect when he said in the interview that Mrs Lawrence had not been struck any further blows after being dragged to the rear of the shop. According to Dr Cooke, the Forensic Pathologist, the blood pattern marks at the rear of the shop indicated she had been struck further blows in that location¹¹⁹.
- [217] In his evidence to the Commission Det Sgt Caporn agreed,¹²⁰ that after the interview of 10 June he had the so called "third party" admissions which included many facts consistent with the murder and many facts inconsistent with it, a number of facts which the police believed only the murderer could know, but still no forensic link whatsoever to the crime. He said he was never happy with the wrench as the murder weapon, and he was not sure they had the right person, but his suspicions were "more elevated" than before; he felt something else was needed.

6.9 The Undercover Operation

- [218] Following his release on 10 June 1994, Andrew Mallard was placed under covert surveillance by police in the hope or anticipation that he may have had a place where he kept stolen and other items, that he might lead them to the stash and/or to the murder weapon and Mrs Lawrence's purse¹²¹. The surveillance operation lasted until Mr Mallard's arrest on the morning of 17 June.
- [219] The first days of the surveillance operation were unproductive. Mr Mallard did not lead the police to any stash and he spent his time rather aimlessly around the Fremantle area, associating with unemployed youths and other persons¹²².
- [220] The investigation team, and in particular Det Sgts Caporn and Shervill sought the involvement of an undercover police officer, in an effort to obtain further

evidence. An application was approved, briefing notes were prepared by Det Sgts Shervill and Caporn¹²³, meetings were held with the controller of the undercover officer (referred to by the Commission as M1), and Dr Aaron Groves, a psychiatrist who frequently assisted the police. Dr Groves was consulted as to how Andrew Mallard might be approached as part of the undercover operation and what risks there might be for the undercover officer (the UCO).

[221] In any event the operation commenced on 14 June 1994, when the UCO, who had adopted the code name "Gary", sat at a known haunt of Mr Mallard, Gino's Restaurant, at Fremantle, reading tattoo magazines which were known to be of interest to him. Conversation commenced and over the 14, 15 and 16 June there was extensive contact between the UCO and Mr Mallard. From the afternoon of 15 June 1994, their conversations were for the most part recorded and have been listened to by the Commission¹²⁴.

[222] As would be expected, the UCO prompted Mr Mallard into conversation about matters relevant to the investigation. On 15 June when the UCO and Mr Mallard were discussing tools for the UCO's truck, the UCO referred to a Sidchrome or King Craft tool box, and when Andrew Mallard asked "Sidchrome?" the UCO replied, "Sidchrome all the way".¹²⁵ This would appear to be the first reference to Sidchrome in Mr Mallard's presence; and it came not from him but from the UCO.

[223] The UCO explicitly asked Mr Mallard about his theories concerning the crime. In relation to some of the more elaborate aspects of those theories, the UCO, in an effort to build trust with Mr Mallard, agreed with the likelihood of some of the theories. For example, on 15 June a conversation included the following¹²⁶ (Commission underlining):

Mallard: Yeah they showed me photographs.

UCO: Yeah, now what's your, what's your theory on it?

Mallard: A guy was doing a burglary and he got disturbed and fucking freaked out, fucking smashed her skull in man.

UCO: And you reckon it's as simple as that?

Mallard: That's it basic, flat tack. It's more complicated than that, because there may have been a second component but I personally don't think so.

UCO: You don't reckon?

Mallard: (Indistinct) the papers say (interference on tape).

UCO: And they maybe reckon it was a monkey wrench do they?

Mallard: *(Indistinct), no, no, I reckon it's a gas bottle a fucking ring spanner it's a fucking ring about that big with a (indistinct) in the middle ---*

UCO: *What would they use those for?*

Mallard: *Tightening the big fucking valve connections on top of the fucking big gas cylinders.*

UCO: *What those...jaws?*

Mallard: *Like welding and things and shit like that. She's a jeweller man, she's got all the fucking welding. Iron welding (indistinct) big tank.*

UCO: *Alright, so she's using acetylene bottles you say.*

Mallard: *They're not; they're not acetylene bottles, but just think of acetylene bottles.*

UCO: *Yeah and (indistinct) next to them.*

Mallard: *Yeah, like a big fucking train spanner.*

UCO: *Yeah.*

Mallard: *What do you call them...spike spanners.*

UCO: *Yeah and you reckon he might have got it from ---*

Mallard: *From the shop?*

UCO: *---from the shop.*

Mallard: *Just bashed her over the head with it (tape interference) Stirling Bridge (tape interference).*

UCO: *Tide.*

Mallard: *Tide, channel....yeah.*

UCO: *Well that would be the best place to throw it.*

Mallard: *I got, I guessed all this, and then they said "that's pretty well much close to it" now they said "you're the murderer" that's (indistinct) together from what you cunts told me "we didn't say nothing to you", "yes you did". "I think you told me that cause we only hold you on circumstantial evidence and that's fuck all, if you don't*

let me go I know that" so. "Oh yeah, but, but er but, but" (interference).

UCO: Adam, Adam didn't he say that there was a shit load of blood? Well what would he have done with the clothes?

Mallard: (Interference)

UCO: In the van (interference).

Mallard: No, he could have been wearing overalls, could have been wearing fucking second skins like I do.

UCO: Gunna say, yeah he could have done it.

Mallard: Take them off, throw the clothes with the spanner, waded with the fucking thing over there, clothes were washed clean in the fucking salt water anyway by the time it hit the (indistinct) fuck all forensics had to do with it.

UCO: Oh.

Mallard: If the fucking salt water don't fuck up the high alkaline content, fucks everything up (over talking).

UCO: Oh, it would, it'd be nothing there. And the fish, the fish would be there.

Mallard: They reckon they had my clothing by the door, I said "sure I was in there, talked to the girl um about three days before", (indistinct) got bashed (indistinct) the woman that was working there ---

UCO: Right.

Mallard: "Yeah sure I was in there (indistinct) got clothing fibres that's fair enough". "Oh we had an eye witness" "Yeah is that right? I don't fucking believe this".

UCO: Right and you reckon it was the night; it was night time wasn't it?

Mallard: (Indistinct).

UCO: How would they have an eye witness in the...well you can't even see.

Mallard: It's all like bullshit man they fucking made the whole fucking thing up and I guessed it and fucked them up

mate. They were hungry for a conviction and they wanted todidn't like me, "this guys got a record, we can put him away, get him for five years, we'll get a promotion out of it."

UCO: *Just cause you were in the area?*

Mallard: *Yep.*

UCO: *That's fucking wrong.*

[224] It is worth noting at this point, that much of the theorising, which is clearly wrong, including reference to welding equipment, gas cylinders, train spanners, and washing his clothes in salt water would appear in much the same form two days later in the final interview between Andrew Mallard and Det Sgt Brandham.

[225] Perhaps even more importantly, some of the specific detail which was to be referred to by Mr Mallard two days later, such as "acetylene bottles", was specifically introduced into the conversation by the UCO, and not by Andrew Mallard, who claims to have guessed a lot of the details, and boasted how he misled the investigation. It is to be noted also that here again is an unsolicited claim by Andrew Mallard that the investigators had shown him photos of the deceased. The UCO also rather encouraged Andrew not to answer his bail on Wednesday 15 June¹²⁷. This failure led to the issue of the bench warrant which justified his arrest on 17 June.

[226] By the afternoon of 16 June Mr Mallard had not said anything to the UCO which amounted to an admission about the murder. On them returning from a visit to his parents' place at Mandurah, the UCO put to him directly¹²⁸.

UCO: *I've got to get one thing clear if I'm going to be working with yer. You know how you've answered all the questions about Mossie Park, was it you?*

Mallard: *No mate.*

UCO: *Cause it's playing pretty heavy on my mind.*

Mallard: *Yeah I know. But don't take it any further than that because that's what the cops said to me when they wanted to be friends.*

[227] As part of the operation, the UCO provided Mr Mallard with accommodation on the nights of both 14 and 15 June at the Tradewinds Hotel in Fremantle. During the 14 June, Mr Mallard had with him two unemployed youths, Adam Cater and Shannon Rossett, who later joined him at the hotel. Adam Cater gave evidence to the Commission¹²⁹.

- [228] It has been alleged by Andrew Mallard that, while at the Tradewinds Hotel that evening, the UCO supplied him with cannabis and a large green bong. Although the UCO denied it to the Police Royal Commission, after hearing the relevant tape played in this Commission, he admitted in a public hearing¹³⁰ that he did supply the large green bong and he expected it to be used for the smoking of cannabis¹³¹; but he steadfastly continued to maintain that he did not supply any cannabis himself, although he did drive Mr Mallard and the youths around in his vehicle so Mr Mallard could purchase cannabis¹³². Mr Cater also gave evidence of being driven around in the UCO's vehicle and it stopping at various locations whilst Andrew went to obtain the cannabis. Consequently the only direct evidence of the UCO supplying Andrew Mallard with cannabis is that of Mr Mallard himself, who was not cross-examined before the Commission.
- [229] Although Mr Cater said that the UCO smoked cannabis with them at the Tradewinds Hotel, he later conceded¹³³ that this was an assumption. The UCO denied it, and Mr Mallard said that whenever cannabis was about to be smoked, the UCO found some excuse to leave the room.
- [230] In these circumstances, the Commission is not satisfied that the UCO himself smoked cannabis or that he supplied cannabis to Andrew Mallard and his companions. There is some evidence to suggest however that he did drive him around so that cannabis could be purchased. The Commission has considered that the supply of the bong in the circumstances in which it was supplied, together with driving Andrew Mallard around for the purpose of supplying cannabis, if proved, could render the UCO an accessory to the offence of using a prohibited drug contrary to section 6(2) of the *Misuse of Drugs Act 1981*¹³⁴. The maximum term of imprisonment for an offence under section 6(2) is 2 years.
- [231] There is no evidence that the bong supplied by the UCO had detectable traces of a prohibited drug in or on it, and accordingly there is no evidence of conduct contrary to section 5(1)(d)(i) of the *Misuse of Drugs Act 1981*. Further, there was evidence from both the UCO and his controller, particularly in relation to the bong, that the use of "props" is not uncommon in undercover operations.¹³⁵ Section 31 of the *Misuse of Drugs Act 1981* authorises undercover officers to be in possession of prohibited drugs for the purpose of detecting the commission of an offence.
- [232] In the Commission's opinion there is insufficient evidence to indicate "serious misconduct" within section 4(c) of the CCC Act in the UCO assisting Andrew Mallard to purchase the cannabis and supplying the bong to facilitate its use, and as the UCO is no longer a member of WAPOL and the events took place over 10 years ago the Commission is of the view that no further action should be taken in respect of this matter.

6.10 The Suspicious Jewellery

- [233] On 14 June Det Sgts Shervill and Caporn went to the premises of Flora Metallica where they spoke to Mr Peter Lawrence and Ms Rosemary Lansell, (now Mrs Car), an employee, and obtained from them some pieces of the unique gold dipped gum nut leaf jewellery which had been manufactured by Mrs Lawrence. The Major Crime Running Sheet records that at 1010 they did “liaise with (M1) & UCO” (MI says the UCO was not present at this meeting), at 1025 they were at Flora Metallica and interviewed Mr Lawrence and Mrs Car “re obtaining jewellery for UCO and other matters”, and at 1135 they went to Fremantle CIB to again liaise with M1. They said they wanted to show it around to see if anyone had seen someone in possession of such items¹³⁶. No receipt has even been found for such items and there is no evidence that they were ever returned to Flora Metallica. Det Sgts Shervill and Caporn could not remember taking the jewellery but, on being shown the Running Sheet, they agreed to it.
- [234] Det Sgt Shervill admitted showing the jewellery to M1, the UCO’s controller, but denied giving it to him and he also denied passing it on to the UCO directly, although if the intention was to show it around to enquire if anyone had seen anyone in possession of similar jewellery (as had been represented to Mrs Car), it would necessarily have been passed on. The Commission finds Det Sgt Shervill’s denial rather strange, and it is suggestive of him trying to hide something. It is appropriate to set out his relevant evidence verbatim¹³⁷.

So what was the purpose in doing that?---Well, I have no memory of it - - -

Yes?--- - - but I would think that the purpose would be – because it was unique jewellery we would show it to the UCO.

Right?---Not give it to him but show it to him and say, “This sort of thing that you should be on the lookout for.”

Why wouldn’t you just give it to him and then he could – he could show it if he needed to?---Sorry.

Why wouldn’t you – why would you not give it to him? Why would you only show it to him?---Well, it’s not proper that we’d give him that sort of thing.

Why not?---Well, he only needs to know what it looks like. It’s not – this is not – it’s not proper that we should give it to the UCO for – you know, he might lose it; he – well, I don’t want to talk about his – his integrity but it’s not proper that the UCO had that sort of item.

All right?---In my opinion.

Yes. Is that something you discussed with Mr Caporn?---I don’t remember, sir. I have no memory of this whatsoever.

Can you just - - -

THE ACTING COMMISSIONER: *Just a moment. Would there be any possibility of wanting the UCO to show it around the area in which he was moving to see if anyone else had seen anything like that?---In my opinion, sir, no. That would be improper. It would be sufficient for – in my opinion, and me as the case officer to show the UCO, “This is the sort of thing you should be on the lookout for,” and that’s it, not give it to them, not for them to take it away.*

He could – I see.

GORMLY, MR: *What about giving it to him, in effect, as a prop?---No.*

You wouldn’t do that?---No, I would not do that.

All right. On the same basis: improper?---Yes.

- [235] Apart from showing the jewellery around to enquire whether anyone had seen Andrew Mallard or anyone else in possession of similar jewellery, there would, in the Commission’s opinion, be nothing untoward (providing it was appropriately documented) in using jewellery from Flora Metallica as part of an undercover operation, either to prompt the suspect to discuss its identity or to lead the UCO to an appropriate hiding place of similar jewellery. As it happened, it is clear that the records maintained within the WAPOL *did* record items (such as Celtic jewellery and Tattoo magazines; though not the bong¹³⁸) which were used as props in the course of the undercover operation.
- [236] In the circumstances the Commission considers it likely that Det Sgt Shervill (possibly with the knowledge of Det Sgt Caporn) did pass the jewellery to the UCO, either directly or through MI. The purpose and intention in doing so may at that stage only have been as conveyed to Mrs Car, i.e. to show it around. In Section 86 Submissions, MI claims that this did not happen and would be contrary to operational procedures. He denies that he ever received the actual jewellery, but says he only saw photographs of it.
- [237] Late on 16 June 1994 it was decided to terminate the undercover operation as it was regarded as having been unproductive. The UCO was becoming concerned for his safety as Andrew Mallard’s behaviour was becoming more and more bizarre; he was continuing to use cannabis (and alcohol) and had taken possession of a large knife from his parent’s house that afternoon. The UCO asked Andrew Mallard quite bluntly whether he had committed the murder, and he denied it¹³⁹. During the course of the day Andrew Mallard was encouraged by the UCO to undergo a bizarre haircut and to buy a women’s tartan skirt for use as a kilt thereby making him look ridiculous and to stand out, all of which were paid for by the UCO.
- [238] That evening Andrew Mallard and the UCO returned to the Tradewinds Hotel and a recorded conversation¹⁴⁰ describes the UCO handing Mr Mallard what is

described as “cheap costume jewellery”. Earlier in the same recorded conversation the UCO had told his controller that they would find “that thing” on Mallard. A question arose as to whether “that thing” might refer to the knife¹⁴¹. This is possible but in the Commission’s view unlikely, as there seems no good reason, if the knife was being referred to, to disguise what it was. There is nothing to suggest that any other person was in the vicinity at the time (Mallard was at Captain Munchies food outlet talking to some American sailors, although he seems to have returned to the UCO’s company very shortly after the reference to “that thing”) and the UCO seemed to have no inhibitions in discussing other operational issues relating to his withdrawal.

- [239] The UCO in evidence claimed that he found the item of jewellery on the floor of the hotel room, picked it up, had no use for it and gave it to Andrew Mallard¹⁴². The Commission regards this as an unlikely story, and although the Commission does not rely on Andrew Mallard’s evidence, it is worth noting that his evidence in private hearing¹⁴³ was that the UCO simply pulled it out of his pocket and gave it to him. Whichever version is correct it would appear, even without reference to the earlier conversation about “that thing” that the UCO gave jewellery to Andrew Mallard that evening.
- [240] Andrew Mallard then went to Captain Munchies at Fremantle where he met some young people including Timothy Urquhart, Toby Whitworth and Jordan Van Soest. They went for a drive around the area before they dropped him off near the Fremantle Town Hall. Whilst in the car Mallard emptied the pockets of the jacket he was wearing, and those contents included the jewellery he had been given by the UCO.
- [241] The youths said that when Andrew Mallard was getting out of the car they gave these various items back to him by passing them through the opening at the top of the front passenger seat window, whereas he claims they kept the jewellery. Shortly after leaving the vehicle, Andrew Mallard was stopped and searched by two uniform police, and apparently the jewellery was not recovered. This tends to support Andrew Mallard’s evidence that the youths kept it, although the uniform police may not have known any details of the Lawrence Homicide Investigation and may only have been looking for drugs.
- [242] Messrs Van Soest, Whitworth and Urquhart all made statements about the jewellery and Mr Urquhart described it in detail to a police artist who drew an impression of it¹⁴⁴ which matched the jewellery described by Mrs Car as taken from Flora Metallica by Det Sgts Shervill and Caporn “to show around Fremantle”. A further document¹⁴⁵ signed by Mr Urquhart dated 3 August 1994 also contained a description “possibly three (or four) acacia (or similar) nuts – stem appears flattened, pointing to the bottom of the stem”.
- [243] Mr Urquhart was taken to Flora Metallica where he viewed items of jewellery produced by that business and selected a gold dipped Golden Wattle as resembling what he had seen in the possession of Mr Mallard. When shown the police artist’s impression from Mr Urquhart’s description¹⁴⁶ Mrs Car immediately identified the item as “three golden wattle balls on a stick” from

Flora Metallica¹⁴⁷. In her evidence at the public hearings she described it as “golden wattle on a stalk”.

[244] Det Sgt Shervill, in his Comprehensive Summary of Facts¹⁴⁸ referred to this jewellery and to it being seen by Messrs Urquart and Whitworth in the possession of Mr Mallard on the evening of 16 June. No reference was made to such jewellery being originally collected from Flora Metallica by himself and Det Sgt Caporn on 14 June nor to it being handed to Mr Mallard by the UCO on 16 June. The Comprehensive Summary further stated that statements had been obtained from Messrs Urquart, Whitworth, and Van Soest relating to this issue and were attached, but such statements were apparently not attached and certainly were not subsequently included in the Brief of Evidence. Those witnesses were not called at the trial, the prosecutor (Mr Bates) stating that he only called witnesses whose statements were in the Brief and did not follow up the omission, even though on reading the Comprehensive Summary he had made a mark in the margin relating to this issue. Det Sgt Shervill said their statements were not included because he did not intend them to be called as prosecution witness, but wanted to draw the prosecutor’s attention to what they had to say. The Commission finds this reasoning difficult to understand. Another possible explanation for their omission is that it was accidental.

[245] The Commission has given much consideration to the evidence on this issue and to the Written Submissions received on behalf of Det Sgts Shervill and Caporn, the UCO and M1 and also the Section 86 Submissions. There are a number of circumstances which suggest that Det Sgt Shervill arranged (possibly through MI) for the UCO to give to Mr Mallard some jewellery from Flora Metallica, with the intention that the latter would be found in possession of it, thus providing a link between Mr Mallard and the crime scene. These circumstances include:

- Upon his release from custody on 11 June, Mr Mallard did not have in his possession any item resembling jewellery from Flora Metallica.
- There is no evidence to suggest that Mr Mallard obtained any such jewellery from any other source during the surveillance or undercover operations.
- On 14 June Det Sgts Shervill and Caporn collected items of jewellery from Flora Metallica “for UCO”.
- Between 14 and 16 June Det Sgt Shervill was in contact with M1 and M1 was in contact with the UCO. Det Sgt Shervill denies any direct contact with the UCO.
- After the decision had been made on 16 June to terminate the undercover operation and arrangements were being made for the UCO to withdraw, the UCO told M1 “you might find that thing on him”.

- When they returned to the Tradewinds Hotel for the last time, the UCO handed Mr Mallard what is described as “cheap costume jewellery”.
- The UCO said in evidence he found it on the floor which seems an unlikely story. Andrew Mallard said the UCO got it out of his pocket.
- At the time there appears to have been no operational reason for the UCO to be giving Andrew Mallard jewellery. He was no longer seeking to gain his confidence as he was at the point of withdrawing from the operation.
- The so called “cheap costume jewellery” was seen later that evening (the 16 June) by the witnesses Urquhart, Van Soest and Whitworth, and their descriptions of it matched the jewellery manufactured by Flora Metallica.
- The episode is detailed in Det Sgt Shervill’s Comprehensive Summary of Facts under the heading “Suspicious Jewellery”, but without reference to collecting such jewellery from Flora Metallica on 14 June or the conversation between the UCO and M1 on 16 June.
- There was no point in including it in the Comprehensive Summary unless it was intended to convey that the jewellery provided a possible link between Andrew Mallard and the crime scene. Det Sgt Shervill apparently believed at the time he wrote the Comprehensive Summary that the jewellery came from Flora Metallica¹⁴⁹.

[246] On the other hand:

- Although there appears to have been no reason for the UCO to refer to the knife as “that thing” and the Commission regards it as unlikely, it is possible that he did so.
- In Written Submissions on behalf of Det Sgt Shervill, attention has been drawn to the fact that Toby Whitworth stated that, in addition to the gold dipped Golden Wattle, he was also shown by Mr Mallard a gold coloured broach, and it was submitted that this could have been the piece handed to Mr Mallard by the UCO and referred to as “cheap costume jewellery”.
- It was also submitted that if experienced police officers such as Det Sgt Shervill had wanted to “plant” jewellery from Flora Metallica on Mr Mallard they would have “made a better job of it”, and not waited until late July 1994 to obtain statements from the relevant witnesses.
- In a somewhat similar vein, it was submitted on behalf of the UCO that if he was intending to “plant” jewellery on Mr Mallard he would have ensured that his listening device was not operating at the time.

[247] Det Sgt Shervill having referred to the matter in some detail in his Comprehensive Summary, the Commission finds it incredible that neither he nor Mr Bates, can recall the matter ever being discussed in any of the numerous conferences they had before and during the trial.

[248] After reviewing all the evidence and submissions, the Commission is unable to form an opinion whether the jewellery handed to Mr Mallard by the UCO was the jewellery collected from Mrs Car on 14 June or whether, if it was the same jewellery, it was as the result of any improper conduct or the part of any, or if so which, person or persons.

6.11 The Red Castle Hotel

[249] On the 16 June 1994, the UCO withdrew from the Undercover Operation. Andrew Mallard, still under physical surveillance, found his way to DC's Nightclub in Northbridge. Whilst he was there he became involved in an altercation with some persons unknown. After it was over, he returned to the nightclub for some time before being lost by the surveillance team.

[250] According to him, he eventually left DC's Nightclub and went to the Red Castle Hotel in East Perth with an unknown female in anticipation of sexual activity with her. When they arrived there, having no money, he offered her drugs in return for sex, to which she was apparently agreeable. He then went downstairs to reception to try and obtain some drugs, but the best he could do was to obtain some aspirin powder. He returned to their room where he attempted to pass the powder off as drugs, but the woman was not fooled and promptly left, taking his jacket with her.

[251] An attempt by police some months later to identify and contact the female by reference to the hotel's guest register proved unsuccessful. It would seem that the purpose in attempting to locate the female was to ascertain if she had any knowledge of the jacket or the jewellery or, as Det Sgt Shervill claimed in his evidence to the Commission, to ascertain what, if anything, Mr Mallard had discussed with her.

[252] Andrew Mallard then made his way back to Fremantle where he went to the house where his friend Michael Buhagiar lived, and had a sleep in his room. Later in the morning of 17 June, he made his way down to Gino's Café in Fremantle, one of his regular haunts. This was to be his last taste of freedom until 2006.

6.12 Arrest on Bench Warrant

[253] Following the incident at the conclusion of his interview with Det Sgt Caporn and Det Emmett on 10 June, Andrew Mallard had been charged with assaulting a public officer (Caporn) then performing a function of his office, contrary to the *Criminal Code* section 318 (1)(d)¹⁵⁰. He had been remanded to

appear at the Central Law Courts on Wednesday 15 June and allowed bail, but he had failed to appear. At the time the undercover and surveillance operations were in place, the police knew where he was and would have known of the remand, but apparently did nothing to encourage his attendance. Indeed the UCO had rather encouraged him not to attend by telling him not to worry¹⁵¹. On his non-attendance a Bench Warrant¹⁵² was issued for his arrest.

- [254] The surveillance teams said they found him at Gino's Café on 17 June and notified the Major Crime Squad. At about 10.10am Det Sgt Brandham and Det's Carter and Ripp attended Gino's Café in an unmarked police car and arrested Mr Mallard pursuant to the warrant. He was put in the police car where he is said to have briefly struggled but was restrained. It is said by the officers that they travelled in silence to Curtin House, where he was strip searched and placed in an interview room.
- [255] The warrant purported to be issued pursuant to the *Justices Act 1902*, but that provision had been repealed some 12 years earlier and the relevant provision for apprehension of a person failing to answer bail was section 56 of the *Bail Act 1982*. The warrant required that the person concerned be apprehended and brought before the court "forthwith" to be dealt with according to law. The current provision under the *Criminal Procedure Act* section 177(4)(a) is "as soon as practical".
- [256] This was not done; he was arrested at about 10.10am on Friday 17 June and arrived at Major Crime Squad Headquarters at 10.30am, however he was not brought before a court until the following Monday 20 June.
- [257] Det Sgt Brandham said in evidence¹⁵³ that, as he was dealing with a very serious homicide, he believed the community would expect him to interview Mr Mallard when an opportunity arose, and he saw the arrest under the bench warrant as an opportunity to conduct such interview. He said he believed then, and still believes, that once he had been arrested he could interview him without bringing him before a Magistrate or Justice in accordance with the law.
- [258] In this he was, and is, mistaken. The object of the requirement for the person arrested to be brought before the court "forthwith" or "as soon as practical" is so that he or she can, if desired, challenge the warrant and the deprivation of liberty, and so that any continuing incarceration is authorised by a court and properly regulated and documented. It is not always possible to bring a person arrested before a court forthwith, for example, if a person is arrested during the night, there is nothing preventing that person being interviewed about either the matter the subject of the warrant or any other matter, provided that the person is willing to be interviewed and the court appearance is not delayed by the interview.
- [259] Therefore there was no impropriety in Det Sgt Brandham commencing the interview when he did, the last (video recorded) interview concluded at 2.04pm¹⁵⁴. The Police Prosecutor was contacted at 1.00pm¹⁵⁵ and the evidence was that contact was made with the court¹⁵⁶, but police were told that an appearance that afternoon could not be arranged, and that he should be

lodged in the lock up and brought before the court the following day¹⁵⁷. On the other hand the Running Sheet records that at 2.50pm that day Det Gooden contacted Graylands Hospital with a view to having Andrew Mallard re-admitted for a further assessment; it may be that his appearance before the court was delayed so that such arrangements could be put in place, but this is not established by the evidence.

- [260] As it happened, although Mr Mallard was arrested on the morning of Friday 17 June it was some days before he was taken before a court. Following the interviews, he was at 3.20pm placed in a cell. That night, after the discussion with the nurse on duty, he was conveyed to Royal Perth Hospital to investigate various alleged injuries and was retained there for a period such that the Saturday sitting of the court on 18 June was missed. The court did not sit on the Sunday, with the result that he did not appear in court until Monday 20 June when, as will be seen hereafter, he was again remanded to Graylands for observation.
- [261] The Commission is satisfied that Det Sgt Brandham intended to interview him for the Pamela Lawrence homicide whenever and wherever he could, preferably at the office of the Major Crime Squad; the bench warrant (assuming it was valid) was a convenient device for the purpose of arresting him and getting him to that office where he could be interviewed without any choice to leave and without any supervision or observation by the court or the medical authorities at Graylands Hospital.
- [262] In all the circumstances, the Commission is not satisfied that Det Sgt Brandham engaged in any misconduct within the terms of the CCC Act in interviewing Andrew Mallard prior to him being brought before the court to answer the bench warrant.

6.13 The Interview of 17 June 1994

- [263] Andrew Mallard was interviewed on 17 June 1994 in three separate interviews:
- between 10.30am and 12.55pm;
 - between 1.00pm and 1.30pm; and
 - between 1.35pm and 1.58pm.

The third interview was recorded on videotape; neither of the first two were video or audio recorded. Det Sgt Brandham and Det Carter were later to give evidence that the contents of those interviews were written down, word for word by Det Carter as the interviews progressed and later checked by Det Sgt Brandham.

- [264] Andrew Mallard in evidence at his trial, and in private hearing and interviews before the Commission, claimed that he did not say all the things in the interview which it is alleged he said, and that Det Carter was not writing down what was said contemporaneously as he claimed. He certainly said most of

the things attributed to him, because he re-affirmed them in the video recorded interview but these claims (which the Commission regards as allegations only and not evidence) have caused the Commission to examine closely the evidence surrounding the interview and the making of notes relating thereto.

[265] Accompanying Written Submissions on behalf of Det Sgt Brandham and Det Carter was a table co-relating what Mr Mallard allegedly said in the non-video recorded interview with what he confirmed on video and, although there is no exact concordance and none of the answers in the non video recorded interviews purport to describe the actions of a third person, as a number of the video recorded answers do, the Commission is satisfied that all relevant answers of a confessional nature were confirmed in the video interview.

[266] According to the evidence of Det Sgt Brandham and Det Carter, and as recorded in the notes Det Carter made, the interview commenced with a caution, following which Det Sgt Brandham said:

Andrew, you have been spoken to on several occasions now about this matter and both you and I know that there are certain things that you have told us that, only someone with an intimate knowledge of the offence could know.

Mallard replied:

Yes I know that.

[267] Det Sgt Brandham then told him that he wished to go over what he had told Det Sgt Caporn (Commission underlining).

You told Det Sgt Caporn that you were responsible for the death of Pamela Lawrence (he had not said that), now I'm asking you Andrew, did you kill Pamela Lawrence?

Whereupon Mallard closed his eyes very tightly for several seconds and visibly shook. Asked to tell them what happened Mallard said:

It's not easy, it hurts ... I didn't mean it, she started screaming. I only wanted to make her quiet.

[268] Mr Mallard then went on in a series of answers to describe in the first person how he went into the shop intending to rob it, that Mrs Lawrence saw him, told him to take what he wanted, became hysterical, that he only wanted to knock her out but could not stop, that he believed he hit her at least 6 times, possibly 12, over the left eye and on the back of the head, that after she went down he dragged her to the back of the shop, but did not hit her at the back of the shop, that when he left she was still making gurgling noises, but could not have survived. He said that she was wearing dark slacks and a jumper and that he had hit her with a wrench which he had got from the shed at the back. He said he took some money from her purse, but no jewellery.

[269] Asked to start again from the beginning, he described entering the shop. He continued:

... confront her, I'm going to rob you. I want jewellery and cash." She says, "take what you want. she's getting hysterical, on speed, on speed, panicked, shut her up, knock her out, hit her, can't stop, hit, hit, she goes down, drag her so no one can see her, out the back, gone.

(He used no personal pronouns in the last part of this passage, but the context clearly suggests that he was purporting to describe his own actions.)

[270] After some further questions and answers he was asked:

Andrew, did you kill her because she knew you?

to which he replied:

Yes,

and banged his head. Shortly afterwards he said:

Look, I killed her okay, bashed her skull in, took the money and took the purse,

and at that time he became a little aggressive.

[271] In answer to further questioning he said that at the time he was wearing his cap on backwards, that he was seen by a girl in her early teens who was in a small, pale green sedan or station wagon, with whom he "locked eyes", and that after leaving the store he virtually ran to Stirling Bridge where he threw the wrench into the middle of the river, washed the purse and his clothes in the salt water "because salt water fucks with forensics", pushed the credit cards into the sand and left them there, "but you won't find them" and dumped the purse over the side of the bridge, went back to Michelle Englehardt's, where he washed his clothes; he was soaked and it was raining.

[272] He was then asked about the wrench and he said it was a pipe wrench as used for gas bottles from the shed and, at the police's invitation he drew a picture of the wrench on two pieces of paper. He said it was rusty and had a ratchet system, that it was a big one, a Sidchrome, similar to the one he had just drawn.

[273] He was then asked to draw the layout of the inside of the shop which he did on two pieces of paper, or rather on one piece of paper and a piece of cardboard, the backing of a pad of paper. On that sketch he purported to mark where he had first hit the deceased, the position to where he had dragged her and where he had been when he was "seen by the person in the car". He was then asked to draw the steps area which he did, but got it

wrong, putting the shed on the right instead of the left when approaching from the back of the building.

[274] After a five minute break and another caution, Det Sgt Brandham told Mr Mallard there were no gas bottles in the shed and questioned him about what equipment was stored there. This led to Mr Mallard describing how he believed Mrs Lawrence made her jewellery; which he also got completely wrong. Det Sgt Brandham then confronted him and said,

You've never been in that back shed have you Andrew?

to which he replied:

No.

[275] The following exchange then took place:

Brandham: *What did you use to hit Pamela LAWRENCE with then?*

Mallard: *A wrench.*

Brandham: *Where did you get it from?*

Mallard: *From the shed.*

Brandham: *But you've never been in the shed?*

Mallard: *I must have got it from somewhere else.*

Brandham: *Did you take it with you to the shop?*

Mallard: *No.*

Brandham: *Andrew, did you go to that shop that night and murder Pamela LAWRENCE?*

Mallard: *No.*

Brandham: *So what are you saying?*

Mallard: *I made it all up.*

Brandham: *Why?*

Mallard: *Only because I've got a lawyer.*

Brandham: *What do you mean?*

Mallard: *I don't know.*

Brandham: So you're saying that everything you have told us here this morning was all made up?

Mallard: Yes.

Brandham: This is exactly the same thing that you did to Det Sgt Caporn, isn't it?

Mallard: Yes.

[276] When asked about the detail that he had described, he said he second-guessed it and that he only knew details from what he had learnt from media reports and what he heard from people. He went on,

I've seen the back of the shop from a distance. I guessed the bit about the backdoor and the shed and the steps. I know the front of the shop and I know the inside ... What was guessed was the position of the body, the weapon used, the equipment in the shed, the number of steps and which way the doors open. But I did see the fly screen on the back door from a distance.

When asked how he could guess all that detail he replied:

Maybe I'm psychic ... All the things I told you is what I imagine the killer would have done, I got inside the culprit's head, I got inside the killer's head.

[277] This is the first suggestion, as recorded in Det Carter's notes, where he says that when talking about the killer he is referring to another person (third party admissions). Up to this stage all his answers, as recorded, had related to his own actions, his own thoughts and his own reactions. Det Sgt Brandham and Det Carter then left the room and conferred with other members of the investigating team.

[278] Det Sgt Brandham said he did not know what to make of the answers that Mr Mallard had given, containing as it did admissions, retractions, denials, facts which it appeared at the time only the killer could know, and other relevant matters which were clearly and demonstrably wrong. One of the officers, Det Potts, suggested that they conduct a video recorded interview to confirm the admissions made by Mr Mallard, and this suggestion was adopted.

[279] Det Sgt Brandham and Det Carter returned to the interview room, turned the video equipment on, and Det Sgt Brandham told Mr Mallard that he did not have to undergo a video recorded interview, to which he replied:

I want to be video recorded so that I can be cleared.

He was again cautioned and then asked what happened to him the previous evening when he had been assaulted outside DC's Nightclub in Northbridge, which Mr Mallard described in some detail

[280] There followed a pattern of questioning following the pattern:

You told us that ...

and

You also told us ... is that correct?

[281] In response to leading questions of that nature, Andrew Mallard agreed that he had told them that he went in through the rear door of the Flora Metallica shop, that he thought the shop was closed and it was safe to break into the shed at the rear, and that he had described what was inside the shed. When Det Sgt Brandham asked him what he had described inside the shed, he replied;

Well, basing my knowledge on jewellery ... I figured it had to be a mixture of fine equipment for - - like little gas bottle, blowtorch - - tweezers, special optical - - I thought being jewellery ... she would have had to have an acetylene set ...

Mr Mallard agreed that he had also said that he thought there was a melting pot for use in gold dipping.

[282] At one stage he asked if he could say something and said;

If Pamela Lawrence was locking the store up, maybe she came in through the back way, the front door was already locked ... and she left the key in the back door and that's why he had easy access, and that that's why she didn't hear him until he was marching down the store.

This is the first reference in the video recorded interview to a third person, and Det Sgt Brandham then said:

We'll go on with what you told us earlier, okay, before we go into any thing else. Are you happy with that?

Mr Mallard replied that he was very happy with that. He agreed that he had told them that he went in through the back door and saw nothing, but once inside, he heard something. Asked what happened after that, he said;

Well, initially I entered into the room or this person entered the room ... thinking he was on his own.

(Commission underlining)

[283] There followed a number of questions where Det Sgt Brandham put to Mr Mallard a series of propositions of what he had previously said he had done in killing Mrs Lawrence. In response to some of them Mr Mallard agreed that

was what he had told them; in other answers he referred to a third person e.g. "This is what I imagine this person would say".

[284] There was no question directly put to Mr Mallard that he had previously told them that he had killed Mrs Lawrence, although the following passage does occur:

Brandham: *You told us she became hysterical and started screaming.*

Mallard: *That's right. That's what I said.*

Brandham: *Okay. And that's what you said that you didn't mean - - - this is again - - - it's difficult, because this is what you've said - - -*

Mallard: *I didn't mean to - - -*

Brandham: *- - - to us. You said you didn't mean to - - -*

Mallard: *- - - cause any further injury - - -*

Brandham: *Okay.*

Mallard: *... I panicked and at the time I thought I was on speed or drugs, but maybe not.*

Brandham: *... I think you said initially that you only meant to knock her out.*

Mallard: *That's right.*

and later, when asked to indicate where Mrs Lawrence was struck, he described hitting her on various parts of her head and said that he continued hitting her until she suffered injuries which he described in colourful and lurid terms.

[285] When asked about how many times he had hit her, he said:

Judging by the damage that was shown to me in photographs ...

When asked about her being dragged to the rear of the shop, he replied:

But I've got some more ideas on that,

but Det Sgt Brandham was not interested in Mr Mallard's ideas, and said:

We'll just go through what you've told us first, Andrew.

[286] Asked about her clothing Mr Mallard said she was wearing “a skirt of some sort. Again being a woman of taste she would have had to ... worn a nice skirt like this but one that joins up”.¹⁵⁸ Mr Mallard was at that time still wearing, as a kilt, the second hand tartan skirt that the UCO had helped him purchase the previous day at the Op Shop in Fremantle, and he had previously said in the non-video recorded interview that Mrs Lawrence was wearing dark slacks and a jumper. Mr Lawrence’s recollection at the trial was that she was wearing jeans and a blue jumper¹⁵⁹.

[287] He agreed that at the time he was wearing a peaked cap which, when turned around, could look like a bandana. He said he had done that, but not very often. He confirmed that he had previously told them that he had disposed of the purse, weapon and handbag off the Stirling Bridge because the salt would affect the forensic examination and that he had washed his hands in the salt water, “high alkaline”.

[288] Apart from some irrelevant formalities, the interview concluded with the following exchange (Commission underlining):

Brandham: *Right, no problems. Now, after telling us all this a couple of times, you then have said to us that that’s all lies, that you made that all up.*

Mallard: *That’s right.*

Brandham: *Is that correct?*

Mallard: *That’s correct?*

Brandham: *Okay. Now, the only one thing I want to ask you, Andrew, is, there are certain things about what you told us that only the offender would know.*

Mallard: *Yes.*

Brandham: *Okay. How do you explain that?*

Mallard: *Um, my association in Mosman Park, going to the deli on the corner, walking past the jewellery store, being inside at the front counter of the jewellery store, not knowing what is behind the back wall, but also seeing the jewellery store or the jewellery store and adjoining shops from the cycle centre in Stirling Highway, and then just coupling that with information on the television, um, identikit photograph, which is probably nothing like the person.*

Brandham: *Okay. But the fact is that - - the fact is that you told us all these things and you now say that that was a*

complete pack of lies – that all the things that you told us was - -

Mallard: *I say that was my - - my version, my conjecture, of the scene of the crime.*

- [289] It was a very strange interview. Andrew Mallard was hardly questioned about the facts, but only about what he had said to them in the earlier interviews. At no stage was he invited to give a narrative of his movements, but he was consistently brought back to what he had allegedly told them previously, with which he generally agreed, although a substantial part of his responses were couched in the third person, and Det Sgt Brandham had very fairly put to him at the end of the interview that what he had told them, he had made up.
- [290] Det Sgt Brandham agreed that, even in 1994, this was not his usual form of questioning in a video recorded interview. He said in the usual case where a person had confessed prior to the video interview, he would normally obtain the confession, and then ask the suspect to tell a detailed story in their own words; but in this case Andrew Mallard had confessed off video and then retracted his confession, and it was for that reason that the video interview took the form it did by asking leading questions to corroborate what he had previously said off video¹⁶⁰.

6.14 Failure to Video Record the Interviews

- [291] Another matter considered by the Commission was why the earlier interviews with Det Sgt Caporn on 10 June 1994 and with Det Sgt Brandham on 17 June 1994 had not been video recorded when video equipment was available, but the Commission is now satisfied that at that time (May-June 1994) the practice was that video recording of interviews was not undertaken unless a suspect or person of interest had made admissions, usually in a formal non-videoed interview.
- [292] The matter was discussed in Mr Mallard's first appeal¹⁶¹ where the then Chief Justice pointed out that, although the Commissioner of Police had issued *Guidelines for Video Recording of Interviews with Suspects* effective from 1 May 1993, which stated audio/visual recording was to be applicable with "all suspects where the offence is a major indictable crime, namely offences that carry a term of imprisonment which exceed 14 years..." it was not applied in practice.¹⁶²
- [293] The subject had previously been discussed in a number of cases including Sell v The Queen¹⁶³, and in Andrew Mallard's case¹⁶⁴ the Court said that interviews not video recorded and taking place after the decision in Sell (22 June 1995) would not be admitted.
- [294] The Chief Justice also pointed out¹⁶⁵, following what had been said in Sell that the whole interview should be video recorded, not just confirmation of

admissions alleged to have been made in an earlier non-video recorded interview.

- [295] Following the decision in Mallard and advice from the DPP, the Commissioner of Police issued a direction¹⁶⁶ as follows:

A caution will be administered at the commencement of any interview of a suspect in relation to an offence. That caution will be recorded either on videotape, or where video recording facilities are not available, in note form.

The practice of police officers conducting interviews with suspects in relation to an offence, without utilising available videotape equipment, is to stop. The whole interview of a suspect in relation to an offence, is to be recorded upon videotape where recording facilities are available.

- [296] Meanwhile Chapter LXA (ss 470D et seq) of the *Criminal Code*, which had been enacted on 9 December 1992, was proclaimed and came into operation on 4 November 1996. Those provisions, since re-enacted with some modifications as Part 11 (ss 115 to 124) of the *Criminal Investigation Act 2006*, made statutory provision for the video recording of interviews and provided that, except in limited specified circumstances, evidence of admissions was not admissible unless they had been video recorded.
- [297] As has been noted, the practice in 1994 was that suspects were not interviewed on video until they made admissions, at which stage they were re-interviewed on video. In the interview of 17 June, as recorded in Det Carter's notes, Mr Mallard, very early in the interview (see paras 267 to 270 above), made clear, unambiguous admissions of killing Pamela Lawrence, but the interview was not stopped at that stage and recommenced on video. Det Sgt Brandham was unable to say¹⁶⁷ why he had not done so, but he also said he wanted to get more detail¹⁶⁸.
- [298] At his trial, Andrew Mallard said that during his interview he was merely trying to assist the police solve the crime by discussing with them his theories on what the killer would have done, hence the references to a third person; but why the police would seek or utilise the theories of an unemployed drug user of no fixed place of abode who was at the time facing charges of impersonating police and stealing a police badge, to help them solve a major crime is beyond the Commission's comprehension, and the proposition must be regarded as a further manifestation of his mental illness at the time.
- [299] It is the Commission's opinion that there was no misconduct on the part of Det Sgts Caporn and Brandham in failing to video record all the interview of 10 and 17 June 1994, as they were merely following the procedures in place at that time.

6.15 A True Record?

- [300] The other issue examined in relation to the non-video recorded interviews of 17 June was whether the notes made by Det Carter are, as claimed by him and by Det Sgt Brandham, a true and complete, contemporaneous, verbatim record of the interview.
- [301] This investigation was prompted by three separate pieces of evidence namely, Det Sgt Shervill's notebook, the reports of the document examiners, Dr Steven Strach and Ms Carol Veitch, and the fact that during the video recorded interview Det Sgt Brandham does not appear to be referring to Det Carter's notes of the off camera interviews earlier that day.
- [302] Throughout the investigation Det Sgt Shervill kept a notebook¹⁶⁹ in which he noted observations, meetings, things to do and to get others to do, contact telephone numbers and thoughts on the investigation as it progressed. The notebook pages were ruled on both sides and opened long ways in a "landscape" format in the form commonly called a "reporter's notebook". The entries commenced at each end and the pages have been numbered by the Commission for the purposes of the investigation. One page sequence runs from 1 to 88 and the other sequence from 89 to 101.
- [303] Commencing at p 49 under the general heading "WHY", the pages are divided (except for pp 60 – 61) into two columns headed respectively "FACT" and "WITNESS/EVIDENCE". In the FACT column are a series of numbered points relating to facts concerning Andrew Mallard, whilst opposite such entries in the WITNESS/EVIDENCE column are noted the sources of the information in relation to that item appearing in the first column, and sometimes a relevant comment on such item.
- [304] Apart from p 60 – 61 (which seem to be entries made on or relating to 16 and the morning of 17 June), the sequence runs from point 1 on p 49 to point 51 on p 67. Then at the top of p 68 is a heading, "General I/V 17/6/1994", and there follow points 52 to 75 on p 78 where there is another heading "Video I/V 17/6/1994" and the sequence continues from points 76 to 108 on p 87.
- [305] It initially appeared to the Commission that the items on p 49 to 67 (points 1 to 51) related to information available to the police investigators prior to 17 June, either from the interview with Det Sgt Caporn on 10 June, or from other witnesses, and that the items from point 52 onwards related to the non video recorded interview with Det Sgt Brandham on 17 June and the video interview of the same day respectively.
- [306] Written Submissions on behalf of Det Sgt Brandham and Det Carter drew attention to the fact that a number of entries in the notebook, particularly from point 25 on p 62 (which follows the notes relating to 16 June) and prior to the heading on p 68 ("General 17/6/1994"), could only have come from the 17 June interview; namely points 25 to 48, except points 42 and 43. But they are

not in the same order as in Det Carter's notes of the interview, and some of them are quite different. For example, point 44 reads:

Claims that person responsible took weapon to Stirling Bridge and threw it in river.

Whereas the notes of the interview as recorded state:

Brandham: *Where did you dispose of the wrench?*

Mallard: *Off the Stirling Bridge, I virtually ran there.*

This entry, point 44, and also points 45 and 48, also raise a query as to whether Andrew Mallard at times spoke in the third person during the non video recorded interview on 17 June, contrary to what is recorded in Det Carter's notes.

[307] Det Sgt Shervill "cannot remember" how the headings came to be there, but denied that what was entered underneath each of the headings were notes he made from the interviews as they took place, although under those headings the notes generally record in summary form, what the officers claim was said by Mr Mallard in the off camera and video recorded interviews respectively. In relation to the off camera interview, there are some matters in the notebook under the heading "General I/V 17/6/1994" which do not appear in Det Carter's notes, and other matters which are recorded in a different sequence; including that the notebook records the drawing of the shop (point 62) ahead of the drawing of the wrench (point 63) whereas Det Carter's notes, indicate the wrench was drawn before the shop premises. On the other hand, all the entries under the heading "Video I/V 17/6/1994" (points 76 – 108) appear in the same sequence as in the tape.

[308] The matters in Det Sgt Shervill's notebook which do not appear in Detective Carter's notes are:

Point 53: *Card (Pamela Lawrence's) in wallet with leather jacket and cassette tape – Rm 41 Red Castle Hotel.*

Point 54: *Wacked her with wrench (no reference to "wacked" in Det Carter's notes)*

Point 61: *Her head - back, side, front, forehead, side, temples, top of the head, side nose, forehead. (No reference in Det Carter's notes to blows to the side, temple or nose).*

Point 65: *Agrees that there is a wheelbarrow in the shed.*

Point 71: *Purse not in river. I don't know where purse is, I didn't take anything from shop, I didn't do it.*

Point 72: *It was pissing down with rain at the time.*

- [309] Det Sgt Shervill was unable to give a satisfactory explanation as to where these matters came from, or how the headings on p 68 and 78 came to be where they are, but this could possibly be due to the lapse of time since the entries were made. At his private hearing on 10 September 2007 Andrew Mallard said he had not said the matters recorded in points 61 or 65 during his interviews on 17 June¹⁷⁰. As to point 53, Andrew Mallard said at his trial¹⁷¹ that he had given the wallet and cassette tape to the taxi driver who had driven him from the Red Castle Hotel to Fremantle early on the morning of 17 June. If this were true, it was not known to Det Sgt Shervill until much later.
- [310] The matters which appear in a different sequence, in addition to the order in which the drawings were done relate to point 54, "I killed her okay, ? skull in, took money, took her purse" which comes before point 61 (p 72) in Det Shervill's notebook, but in Det Carter's notes¹⁷² this passage occurs on p 20 whilst the reference to going to rob her and want her jewellery and cash appears at p 18. It also appears in the notebook before "Hit her with my right hand, I am very strong right handed" at point 61 (p 73) whereas in Det Carter's notes it appears (at p 20) immediately after, though in the same answer as, "My right hand, I am very strong right handed".
- [311] There was also the evidence of the highly qualified and experienced document examiner, Dr Steven Strach, who applied to the documents the Electrostatic Detection Apparatus (ESDA), a forensic process partly developed by him, but now well established internationally, which is used to analyse writing impressions and paper alignment or misalignment and determine the order in which writing impressions have been created. He concluded that¹⁷³, the sketch of the shop was made when it was located (directly or indirectly) over the papers on which the sketches of the wrench were made, and that it was highly probable that the sketches of the wrench were made after the sketches of the shop (even though the sketch of the shop was partly on the cardboard backing of a writing pad).
- [312] This confirmed the sequence in Det Sgt Shervill's notebook and contradicted that in Det Carter's notes. His opinion was supported, though not in the same detail, by the report of another document examiner, Ms Carol Veitch.¹⁷⁴
- [313] Copies of these expert's reports were provided to the police officers and their lawyers in August 2007 so as to give them the opportunity to obtain evidence or reports to the contrary. Dr Strach was the last witness called on 26 November 2007¹⁷⁵, and was cross-examined by Mr Davies QC on behalf of the officers. No other report or witness was produced; although Mr Trowell QC did in his closing address propound an alternative theory, but without any supporting evidence. On the other hand, Andrew Mallard at his trial said that he drew the sketches in the order recorded in Det Carter's notes¹⁷⁶.

- [314] These matters, together with the fact that in the video interview Det Sgt Brandham is seen to be referring to something other than Det Carter's notes, namely what appears to be a single piece of paper, raised the question whether Det Sgt Shervill may have listened to the off-camera interview from the adjacent annex and made his own notes of what was said commencing under the heading on p 68 of his notebook point 52, and that Det Carter's notes were only written up later, possibly relying on rough abbreviated notes made during the interview, used by Det Sgt Brandham in the video interview and subsequently destroyed; or alternatively, that Det Sgt Shervill had not listened in on the interview, but had made the notes in his notebook from such rough, abbreviated notes made by Det Carter in the circumstances referred to. In Written Submissions, Det Sgt Brandham claims that he was referring during the video recorded interview to brief notes or dot points (presumably made during the off-camera interviews) and that this was in accordance with his usual practice, which appears to be the case.
- [315] On the other hand, most, if not all, of the relevant material contained in Det Carter's notes was adopted by Andrew Mallard, albeit some of it in the third person, in the video interview. Bearing in mind that the notes contain exculpatory passages, inconsistencies, errors and retractions, the Commission can see no point or reason for the police re-writing the notes (and subsequently denying the re-writing). Even if some things were said in the off camera interview which are not recorded (and this is doubtful), the Commission is not satisfied that there is anything in the notes which was not in fact said, except possibly that there may have been some reference to a third person in the off-camera interview.
- [316] On the whole of the evidence the Commission is not satisfied that Det Carter's notes are not a true and complete, contemporaneous verbatim record of the interview, and accordingly is not satisfied that there was any misconduct on the part of Det Sgt Brandham and/or Det Carter in the recording of the content of the off-camera interviews of 17 June 1994.

CHAPTER SEVEN

BUILDING THE CASE AGAINST ANDREW MALLARD

7.1 The Interim Period

[317] Following the interviews of 17 June 1994, the police were uncertain what to do next. Because of the confused and contradictory answers which Andrew Mallard had given in the interviews, and the lack of any forensic evidence which might connect him with the murder scene or confirm the so-called admissions allegedly made by him, they did not feel that they were in a position to charge him with wilful murder. He had been arrested on a bench warrant for failure to appear on the charge of assaulting Det Sgt Caporn at the conclusion of the interview of 10 June and still had to be brought before a court in respect of that matter.

[318] The only evidence the police had against Mr Mallard was what, if anything, could be gleaned as admissions from his various interviews and his failure to provide a verifiable alibi for the period of approximately 5:10 to 6:40pm, assuming that Michelle Englehardt's times were accurate. Failure to provide an alibi can never of itself constitute evidence of guilt. The so called admissions had not only been retracted but had come from a man with clearly established mental problems and a history of drug use¹⁷⁷. In addition to the characteristics described at Chapter 6, Det Sgt Shervill in his Comprehensive Summary at pp 21-22, described Mr Mallard's mental condition as showing signs of deteriorating between 10 June and 17 June and his behaviour as "*abnormal, irrational and unpredictable*". He gave the following examples of his "*odd behaviour*" during this time:

- *befriending juvenile "street kids";*
- *directing that the "street kids" call him "Master", "Hawk" or "Lionheart" claiming that he had passed through several dimensions and his soul had gone into different bodies;*
- *not wanting to be left alone;*
- *"squatting" in a vacant flat and lighting fires within that flat;*
- *carrying out spiritual ranting;*
- *carving a sword from an old boat oar and carrying it around with him;*
- *begging for drinks and cigarettes at cafés in Fremantle;*
- *committing fraud offences on taxi drivers (non payment of fares);*
- *carrying a small bag containing hair which he claimed was his girlfriend's hair;*

- *threatening to kill and offering violence towards one of the “street kids” in his company;*
- *wearing boots and spurs with the kilt;*
- *shaving the sides of his head;*
- *becoming increasingly dependant on drugs of addiction, particularly cannabis; and*
- *becoming increasingly dependant on other people to provide for him.*

[319] It was claimed at the time and at trial that the interviews contained material facts which only the killer could know¹⁷⁸; but as it is now known that Andrew Mallard was not the killer, these facts are shown to be facts which could be known by persons other than the killer.

[320] In addition, in his subsequent Comprehensive Summary Det Sgt Shervill also stated (at p 30)

Furthermore the rambling admissions made by the accused during interview left doubt in the minds of some investigators as to whether the accused had in fact murdered Pamela Lawrence.

Before the Commission each of the investigating team has claimed that he was one of those with such doubts¹⁷⁹. Whether each of them really experienced such doubts at the time, or are relying on hindsight, must at this stage be a matter of conjecture, although it seems likely that at least some of them had such doubts.

[321] As Dr Barclay, a forensic expert, pointed out in his report to the Special Crime Squad for the purposes of the Cold Case Review¹⁸⁰, Andrew Mallard was on any fair assessment unlikely to be the murderer. Although he had a criminal record they were not for crimes of violence¹⁸¹, he was a confidence trickster (con-man) or “flim flam” man whose practice generally was to obtain property from others by convincingly telling them lies, or a similar approach. One of his practices was to claim to be a police officer.¹⁸²

[322] On the night before Mrs Lawrence’s homicide Andrew Mallard had used such a ruse to gain entry to Brett Dell’s flat where he had stolen a bicycle and a black leather jacket¹⁸³. On the morning after the murder he had ridden the stolen¹⁸⁴ bicycle to Iona Presentation Convent where he claimed to be a police officer investigating the theft of a chalice from the chapel the previous week, when he had in fact himself been the thief. He had then gone next door to steal a schoolgirl’s bag from the grounds of St Hilda’s Anglican School.¹⁸⁵

[323] If he had committed the brutal murder of Pamela Lawrence the evening before, he would be expected to lie low or leave the area, whereas his bizarre

conduct as described could only attract attention to himself; and it strongly suggested that he had nothing to do with Mrs Lawrence's death.

- [324] If, as they now claim, the police officers had doubts, the appropriate course was to review all the material and all the witness' statements to see if there could be anyone else who might be a possible suspect, and to re-examine the evidence they had to see if any possible leads had been overlooked. This is the very thing they did not do, but rather they focused their efforts on seeking to build a case against Andrew Mallard, and the manner in which they did it reflects no credit on the police involved.
- [325] In Section 86 Submissions on behalf of Det Sgt Brandham it is claimed that nowadays police operational procedures require regular reviews of the investigation as a whole to be conducted by senior police either within or outside the investigation team, including reviews of the direction and focus of the investigation, the available evidence and the resources required to efficiently conclude the investigation. It is conceded that no such review procedures existed in 1994, and that the first such review of an investigation was in 1996 which was instigated by Det Sgts Caporn, Greenshaw and Brandham.
- [326] In fairness to him it should be pointed out that Det Emmett was detached from the Major Crime Squad on the day following the interview of 17 June and returned to duties at the Detective Office at Claremont Police Station. He played no further part in the Lawrence investigation.

7.2 The Letter of 17 June 1994

- [327] Once Andrew Mallard's 17 June interview ended, and it was apparent that he would be taken back to court on the bench warrant, arrangements were made for him to be readmitted to Graylands Hospital in the event that the court were to accede to a police application to that effect. Det Sgt Caporn prepared a document directed to the police prosecutor containing information to support such application.¹⁸⁶
- [328] The application may well have been justified and been in accordance with the *Police Commissioner's Routine Orders 13 – 5.5*, but what is of concern to the Commission is the terms of the document prepared to support the application.
- [329] It was addressed to the Police Prosecutor and headed "*Re: Bail for Andrew Mark Mallard*". It referred to his previous remand to Graylands on 24 May, his release on 10 June, that he was interviewed by members of Major Crime Squad that day, that he had become distressed, attacked the interviewing officer and bitten him on the leg, that as a result he was charged with assaulting a public officer and again released on bail, that he failed to appear on 15 June and a bench warrant was issued for his arrest.

[330] The document said:

Since MALLARD's release to bail several members of the public have approached Police with information concerning his behaviour and statements made by him.

This information includes the following allegations:

- *That he claims to have committed the murder of Pamela LAWRENCE who was subject of a homicide on 23/05/94.*
- *That he believes he is a Viking and a Warrior. This includes assuming the role of each by dressing in that mode.*
- *That he intends to commit sexual assaults on young females.*
- *That because of his disorderly behaviour he was subject to an assault at a Northbridge nightclub.*
- *That he took possession of a large knife from his parent's residence and made claims that he intended to commit violent acts with it.*

On June 17, 1994 MALLARD was arrested by members of the Major Crime Squad pursuant to the bench warrant. He was interviewed concerning the above-mentioned allegations and has made some statements to support parts of them.

Further inquiries are to be conducted by Police to ascertain if in fact MALLARD has committed any further offences.

It is requested, however, that MALLARD be subject to a further remand for assessment at the Graylands Hospital in light of his behaviour since being released from there.

It has become apparent during the early stages of the investigation into MALLARD'S conduct that some of the claims are substantiated in connection with his verbal statements.

[331] Some of this information was incorrect or misleading:

- There is no evidence that Andrew Mallard had claimed to any member of the public that he had committed the murder of Pamela Lawrence. If he had and that matter had been reported to police, it would have been recorded and a statement obtained from the person concerned. No such report or statement exists or has been provided to the Commission. The only claims he had made to have committed the murder were in the police interviews made in the circumstances described above, some in the third person terminology, and all of them retracted.

In Section 86 Submissions, Det Sgt Caporn has drawn attention to an entry in some handwritten notes of the UCO¹⁸⁷ containing the passage “*when he said he had done the murder ...*”, but apparently that was never regarded seriously as an admission. It was not formally recorded anywhere and in his Comprehensive Summary Det Sgt Shervill stated that during the Undercover Operation, Andrew Mallard had made only “*various non incriminating statements*”¹⁸⁸ about the murder and the surveillance and undercover operation gleaned no further evidence which implicated him in the process. In any event, the UCO was not a member of the public but a police officer, and the undercover operation was at an end, so there was no reason not to disclose its existence.

- The Commission has been unable to find any evidence that Mr Mallard had intended to commit sexual assaults on young females, had done so previously, or that he had expressed such an intention to any member of the public. Once again, if he had done so it would have been recorded and presumably Mr Mallard would have been spoken to about it.

In Section 86 Submissions Det Sgt Caporn has drawn attention to handwritten notes apparently written by either the UCO or his controller (M1)¹⁸⁹ which refer to remarks (a few in colloquial language) and gestures apparently made by Andrew Mallard relating to sexual intercourse and submits that such material may have justified the claim that he intended to commit sexual assaults on young females. When the recorded remarks (and gestures) are taken in their context, they clearly refer to engaging in consensual sex with adult females, particularly prostitutes, and lend no support to any suggestion that he intended to sexually assault young females.

- The incident at the nightclub in Northbridge¹⁹⁰ had probably not been reported to police by members of the public but by the surveillance officers and/or by Andrew Mallard himself after his arrest the following morning, but it is not impossible that members of the public might also have reported the matter.
- Mr Mallard had taken possession of a large knife from his parents’ residence, and although there is no evidence that he intended to commit violent acts with it, the possibility cannot be excluded. He claims to have given it to the UCO on the afternoon of 16 June. He apparently did not have it on him when searched by uniform police officers near Captain Munchies later that evening, and certainly did not have it in his possession when arrested the following morning.
- It was misleading to write that he had been interviewed “*concerning the above allegations and has made some statements in support of parts of them*”. He had only been interviewed concerning one of the allegations referred to in the document, namely the homicide of Mrs

Lawrence, whereas the document clearly suggested he had been interviewed in respect of all of them.

- [332] The bare facts of the matter were that Mr Mallard was a suspect in relation to the Pamela Lawrence homicide and that he had made admissions in interviews with police, but had also expressly denied any involvement. The admissions he had made were confusing, contradictory, in part inconsistent with known facts, possibly untrue and, in any event, had all been retracted. The police did not believe they had sufficient evidence to charge him with wilful murder, and wished to make further enquiries, yet those were the very facts which were not advanced to the magistrate.
- [333] In the Section 86 Submissions on behalf of Det Sgt Caporn it is claimed that he ceased his primary role in regard to Andrew Mallard on 10 June 1994 and did not thereafter have an active role in the latter's arrest, interview or processing on 17 June. That may be so, but he was still closely involved in the investigation and continued to be so up until 19 July when he attended the meeting with the DPP.
- [334] It was further submitted that the information contained in the letter may have come either from or through Det Sgt Shervill, and that Det Sgt Caporn may have had an honest and reasonable belief in its accuracy. But Det Sgt Caporn was working closely with Det Sgt Shervill and was fully aware of the progress of the investigation and all facets of the information becoming available during its course.
- [335] In the circumstances the Commission does not accept that he was merely writing what someone else told him to write. In any event, he signed the document, which was an important document intended to influence the court, and he must therefore accept responsibility for it.

Commission Opinion

- [336] It is the Commission's opinion that Det Sgt Caporn engaged in misconduct within section 4(d)(ii) and (vi) of the CCC Act in that writing the letter to the Police Prosecutor dated 17 June 1994 containing errors and incorrect statements, constituted the performance by him of his functions in a manner which was not honest or impartial and could constitute a disciplinary offence contrary to regulation 606(b) of the *Police Force Regulations 1979*, providing reasonable grounds for the termination of his employment as a public service officer under the PSM Act.
- [337] The result of all this is that when brought before East Perth Magistrates Court on Monday 20 June 1994, Andrew Mallard was remanded to Graylands for further psychiatric assessment and Dr O'Dea admitted him as a compulsory patient. If the true state of affairs had been disclosed, it is possible that Andrew Mallard would have been released on bail and, whatever the intention, the effect of the remand was that Andrew Mallard was out of circulation whilst police built up their case against him. He had not been

charged with the murder of Mrs Lawrence and the only charges he was facing were assaulting Det Sgt Caporn on 10 June and the charges arising from his arrest on the morning of 23 May 1994.

7.3 Pig's Head Testing

[338] At this time (circa 20 June 1994), not only did the police have no forensic evidence linking Andrew Mallard to the crime scene, but they had no murder weapon, or clear evidence as to what the weapon was. Mr Mallard had drawn what was described as a Sidchrome wrench during his interview with Det Sgt Brandham and Det Carter on 17 June which he said was rusty and with a ratchet system, but Dr Cooke, the Pathologist, had not been able to match some of the injuries to the deceased's skull to any particular instrument because of their peculiar shape.

[339] The detectives went to a number of hardware stores looking for a tool with such a shape as could possibly inflict such injuries and Dr Cooke was shown copper anodes used in the making of Flora Metallica jewellery, which he thought may have been a possibility. On 16 June Det Sgt Brandham showed him a plumber's wrench which he had obtained from Jolly Roger Hardware, but he considered it could not have caused the injuries¹⁹¹ and on 17, 20 and 21 June, Det Sgt Brandham and Det Young or Det Sgt Shervill went to tool shops looking for a possible weapon and collecting a metal bar and paint samples for comparison with the head wounds to Pamela Lawrence¹⁹². Dr Cooke said he also went through a friend's tool shed looking for what might have been a possible weapon, but could not find anything which satisfied him¹⁹³.

[340] Accordingly, on 24 June 1994, tests were conducted in an attempt to replicate the injuries to Mrs Lawrence by striking a pig's head with various instruments. The event is recorded in the Major Crime Running Sheet:¹⁹⁴

Detective Sergeants SHERVILL, BRANDHAM and Det CARTER to State Mortuary where view experiment conducted with pigs head being struck by several objects by Doctor COOKE (Forensic Pathologist) and Bernie LYNCH (Chemist).

[341] Testing on a pig's head is a recognised method of replicating human head injuries. In evidence before the Commission, Det Sgt Brandham recalled it clearly, Det Sgt Shervill recalled it to some extent and Dr Cooke recalled some aspects of the testing, but not those which related to a wrench¹⁹⁵.

[342] It seems that the testing took about an hour¹⁹⁶. According to Det Sgt Brandham¹⁹⁷, it included the testing of some anodes taken from the shed of Flora Metallica, an adjustable wrench, a piece of metal pipe similar to the leg of a chair and possibly some other items. Mr Lynch (Chemist) recalls the tests with the anodes and a spanner¹⁹⁸, but he was primarily interested in the anodes and paid little attention to the testing involving the spanner.

- [343] Det Sgt Brandham said the wrench used was an adjustable spanner with a ratchet screw to make it slide backwards and forwards¹⁹⁹ and at the public hearings he described it as “*an adjustable wrench, not a plumber’s type wrench ... which opens cross-ways*”²⁰⁰ and said that it was nothing like Andrew Mallard’s drawing²⁰¹. Det Sgt Shervill on the other hand described it as a “*crescent wrench*” selected because of the statements made by Andrew Mallard²⁰². He said it was a shifting or crescent spanner, a good sized one, 10 or 11 inches but he could not remember if it was a Sidchrome²⁰³. At the public hearings, he said that no wrench could be found to fit the description given by Andrew Mallard²⁰⁴.
- [344] Neither Det Sgt Brandham or Det Sgt Shervill were satisfied that a wrench as drawn by Andrew Mallard was the murder weapon²⁰⁵.
- [345] Whatever description is given, the Commission is satisfied that the wrench as tested was the closest the police could find to the drawing done by Mr Mallard to test anything else would have been pointless and would have proved nothing.
- [346] In his Section 86 Submissions, Det Sgt Brandham sought to rely on the evidence before the Commission of Bruno Fiannaca,²⁰⁶ to support the proposition that the police chose for the testing a wrench similar to that described by Mr Lawrence as possibly missing from the shed at the rear of Flora Metallica after the murder. But Mr Fiannaca, who appeared for the DPP in the Clemency Appeal, was not present at the pig’s head testing; he only became involved in the case in 2002, and can only have been speculating as to why a particular wrench had been chosen for the testing.
- [347] According to Det Sgt Brandham, he recalled himself striking the pig’s head with the anode and the wrench, and that the wrench was used in a number of different ways and configurations during the testing. None produced injuries similar to those suffered by Mrs Lawrence²⁰⁷. It also became clear from the testing that the injuries suffered by Mrs Lawrence were not caused by the anodes. Not only were the anodes found to be unwieldy, but large amounts of copper residue were left in the injuries, which was not the case in Mrs Lawrence’s injuries. In addition, traces of blue left in the injuries to the pig’s head from the anodes were the result of a chemical reaction, whereas the traces of blue in Mrs Lawrence’s injuries were established by Mr Lynch to be traces of Prussian blue pigment, such as occurs in blue paint²⁰⁸.
- [348] Another point which was overlooked at the time but later established, was that Sidchrome spanners were NOT painted blue²⁰⁹.
- [349] Although the testing with the pig’s head was part of the police investigation, it was only noted briefly in the Major Crime Running Sheets (without any details) and subsequently in Det Sgt Shervill’s Comprehensive Summary of Facts. No report concerning it was obtained from Dr Cooke and he made no record of it in any laboratory report. None of the police officers present made a statement about who was present, what instruments were tested, how they were tested and what the results showed.

- [350] Dr Cooke said that he made no notes of the experiment, that nowadays he would but at that time *"things were a lot looser"*²¹⁰; and he did not provide the police with a report about the tests²¹¹, and was not asked to do so²¹².
- [351] The only weapon specified by Mr Mallard in his alleged confession was shown to have been incapable of inflicting the injuries to Mrs Lawrence. This alone therefore cast grave doubts on the reliability of his confession, yet its significance was either overlooked or ignored. This was not the only test where results which did not advance the case against Mr Mallard, or which tended to exonerate him, were cast aside (except in this instance for a passing reference in the Comprehensive Summary).
- [352] As the pig's head test was part of the police investigation, it should have been properly recorded by means of a supplementary report from Dr Cooke, possibly supplemented by statements from one or more of the police present describing what was tested and the results. Such report and any such statements should subsequently been included in the Brief of Evidence and disclosed to the defence. The obligation to do so was that of Det Sgt Shervill as case officer, as he prepared the Brief of Evidence.
- [353] It was not sufficient in the opinion of the Commission to include a reference to the pig's head testing of the wrench and its result in the Comprehensive Summary, whatever responsibility that may have placed on the Prosecutor. That Comprehensive Summary was intended for the DPP's Office and not for the defence and the reference therein to the pig's head testing did not relieve the police of their duty of disclosure discussed in Chapter 8.
- [354] However although, in the Commission's opinion, Det Sgt Shervill should have obtained a report on the pig's head testing from Dr Cooke for inclusion in the Brief of Evidence, the clear and specific reference to it in the Comprehensive Statement of Facts relieves him from any assessment that his failure to do so was dishonest or impartial. It follows that in the Commission's opinion his failure to obtain such a report did not amount to "misconduct" within the terms of the Act.

7.4 Mr Lynch and Salt Water Testing

- [355] One of the things that Mr Mallard had said during the course of the 17 June 1994 interview with Det Sgt Brandham, was that the person responsible for the crime would have run down to the Swan River at Stirling Bridge, thrown the weapon from the bridge, pushed the cards from Mrs Lawrence's purse into the sand and washed the blood from his clothing in the salt water because it would interfere with a forensic analysis and prevent the detection of blood. This proposition appears to have first arisen in conversation with the UCO when Mr Mallard was asked for his theory on the crime²¹³.

[356] In light of Mr Mallard's statement in relation to the salt water, it was decided to carry out some tests to determine whether Mr Mallard's clothing had in fact been submerged in salt water.

[357] Mr Lynch, a chemist employed by the Chemistry Centre of Western Australia, carried out those tests along with other tests. He concluded that there was no salt content in the clothes consistent with them having been immersed in salt water. The exact wording of that part of his report dated 30 August 1994 was as follows²¹⁴:

1. *The residual soluble salts detected in the clothing items are not consistent with immersion in river water as represented by the sample from adjacent to the Stirling Bridge, Fremantle, unless they were subsequently washed in fresh water.*
2. *A pair of shoes and a leather jacket ex suspect 24.6.94 were examined visually. No visual indications of immersion were evident.*

[358] No test appears to have been carried out at that time to determine what level of washing would be necessary to remove salt from clothing which had been saturated in salt water.

[359] Det Sgt Shervill asked Mr Lynch to delete from his report any reference to the salt water tests. A further report dated the same day was produced which contained no references to those tests²¹⁵.

[360] Det Sgt Shervill advanced various reasons²¹⁶ why the results of these tests were not disclosed including:

- they may have had the wrong clothes;
- the salt water may have been washed out of the clothing by the heavy rain during Mallard's return to Mosman Park; and
- Mr Mallard said he had washed them in a washing machine with detergent during his stay at Graylands Hospital.

[361] The Commission rejects all of these explanations. As to the third point, the police knew when they took his clothing, before passing it on to the chemical laboratory and Mr Lynch, that Mr Mallard had washed his clothing²¹⁷. The Commission can find no reference to detergent being used, but this may have been assumed. The test was part of the investigation and by any criterion its results should have been disclosed. The Commission is in no doubt that if the test had shown the clothes had been washed in salt water the results would have been disclosed to confirm what Mr Mallard had said in his interview. Obviously the reason why the results were withheld from the defence and the prosecution and hence from the jury, was that such results tended to contradict what Mr Mallard had said in his interview, and so did not advance the case against him.

- [362] Mr Lynch said that he removed the relevant passages from the report at Det Sgt Shervill's request. He could not recall any other occasion when having prepared a report, he had later been told by police that some items tested were irrelevant and to prepare a fresh report omitting such irrelevant items²¹⁸; but he did not question whether he should or should not do it²¹⁹. The alteration of Mr Lynch's statement to exclude reference to the salt water testing is another example of a non-disclosure of evidence which would otherwise weaken the case against Mr Mallard because it demonstrated that another part of the so called confession was not true.
- [363] It is worth noting in passing that further tests done in 2003 for the Clemency Appeal showed that if the clothing had been washed in salt water and then worn whilst the wearer returned from Stirling Bridge to Mosman Park in heavy rain, that rain would not have eliminated traces of salt water from the clothing.²²⁰

Commission Opinion

- [364] It is the Commission's opinion that Det Sgt Shervill engaged in misconduct within section 4(d)(ii) and (vi) in that requesting Mr Lynch to delete from his report all reference to the salt water testing constituted the performance by him of his functions in a manner which was not impartial, and could constitute a disciplinary offence, contrary to regulation 605(1)(b) of the *Police Force Regulations 1979*, providing reasonable grounds for termination of his employment as a public service officer under the PSM Act.

7.5 The Altered Statements

- [365] The next step in the police "investigation" was the revision of witness statements, which took place, particularly over the period 20 June until early July 1994.
- [366] At that time, the practice was for witness statements to be initially taken in long hand, generally written out by one of the interviewing police, and signed by the prospective witness as true and correct, with such signature witnessed by one of the police. Subsequently, when preparing the Brief of Evidence for the prosecuting authorities, the statements would be checked in the light of any investigations which had taken place since the original statement was taken, times, dates and other details checked by reference to surrounding events, and irrelevant material and hearsay eliminated. The statement was then corrected, typewritten, again checked by the witness, and if the witness was satisfied, it was signed and witnessed as before.
- [367] This process was fundamentally appropriate and, although one would expect details to be checked as indicated when the original statements were taken (and they presumably were), there was also the prospect of a witness remembering an additional fact, or not being so sure of something previously

said; no objection can be taken to the general practice as described, provided that any relevant changes were notified to the defence, either by the production of the original statement, by a reference in the later statement to what had been said in the earlier statement, or by the provision of a supplementary statement. This is because different or contradictory statements by a witness would provide significant material for defence counsel to test the witness' recollection at the trial.

[368] However what happened in the case of Andrew Mallard was not a mere revision or tidying up of statements, but in respect of some vital and material witnesses, significant alterations to their statements so that matters which apparently did not refer to him were made to appear to relate to him. This turned a very weak case against him, depending entirely on the so called admissions of a person who clearly had mental problems, with their proved inaccuracies and inconsistencies, into a much stronger case – and none of the earlier statements were ever disclosed to the defence or the prosecution prior to 2002. This process was fundamentally improper and was a major contributing factor to the wrongful conviction of Andrew Mallard.

[369] The Police and their Counsel placed considerable reliance on the fact that the relevant witnesses were satisfied with their final statements and prepared to sign them as true, and so they were; but the witnesses were not aware of the issues, nor of how the alterations to their statements affected the case. A detailed examination of the relevant statements will demonstrate what happened and its significance.

[370] The witnesses whose statements are relevant in this regard are:

- (a) Katherine Barsden
- (b) Michelle Englehardt
- (c) Meziak Mouchemore
- (d) Katherine Purves (now Murtagh)
- (e) Lilly Raine

The police principally involved in this part of the operation were Det Sgts Shervill and Caporn.

7.6 Katherine Barsden

[371] The first witness to come forward in the investigation was Katherine Jacqueline Barsden, a schoolgirl aged 13 at the time whose mother, Jacqueline Barsden, worked part-time at Flora Metallica, and who had ceased work on 23 May 1994 at about 3pm.

[372] About 5pm that day Miss Barsden's grandmother, Mrs Marion Wood, picked her up from St Hilda's School in Mosman Park to drive her to her home in Swanbourne, and they travelled along Glyde Street towards the Stirling Highway. Approaching the traffic lights at the intersection of Glyde Street and Stirling Highway, their vehicle was stopped by a red traffic light and was about

the third car back from the intersection. Whilst stopped, Miss Barsden looked over to the Flora Metallica shop and saw a man standing in an area not normally accessible to customers. She told her grandmother that she could see a man in there but could not see Mrs Lawrence; her grandmother told her to take note. She said the lights in the shop were on, but the front door was closed, and she did not see any “open” sign or anything else outside the front of the shop.

[373] She also said that the man saw her looking at him, and then ducked down out of her sight. Shortly afterwards the traffic lights changed and their vehicle proceeded on to her home. When she got home she told her mother, who told her to draw a picture of what she had seen whilst it was fresh in her mind, which she did.

[374] The following morning, having heard on the radio that a woman had been bashed in Glyde Street, the family contacted police. Det Miller visited the Barsden home and obtained from Miss Barsden a signed statement hand printed by him;²²¹ she produced to him the sketches she had drawn the previous evening²²² and also drew further sketches for him, including what purported to be a sketch of the man’s scarf worn as headwear, indicating the colours thereof²²³.

[375] In the statement she said:

I would describe the man in the shop as about 30-35 years medium build, fair complexion. I could not see much of his body it was mainly his head. He had a longish type face with a beard. The beard was a short one, not a long one. It was orangy – red or strawberry in colour. He was wearing a gypsy type scarf over his hair. The scarf looked of a light material and had an orangy type border around the edge. The rest of the scarf was mixed coloured with blue green and a cream colour. The scarf was tied tight over his hair.

[376] Both the sketches she drew on the evening of the 23 May, and those she drew for Detective Miller on the morning of the 24 May, depicted a man with a beard and no moustache with a scarf tied tightly around his head. The sketch she drew of the scarf indicated a solid orangy/red border with the rest of it “blue, green and blue/silver/white”. The sketches depicted a square shaped scarf, folded diagonally once to form a triangle, fitting around the front and top of the head with two ends tied at the back.

[377] Later that day, she was taken to the Police Artist at Police Headquarters where she explained to Sgt Dunnet, the police artist, her description of the person she had seen, and he drew an identikit picture of the person she described. This “artists impression”²²⁴ was circulated to the media and used in the door-to-door canvas conducted over the 1-2 June. Her previous statement was then retyped in the same form, except for the addition of a paragraph referring to the visit to the Police Artist and the drawing of the identikit picture.

[378] This signed statement, which is dated 24 May 1994, and witnessed by Detective Miller, no longer exists in its original form, but only with the alterations and additions made to it in Det Sgt Shervill's handwriting and later incorporated into a fresh typed statement signed by Miss Barsden on 1 July 1994 and witnessed by Det Sgt Shervill²²⁵. A number of the alterations were immaterial; for example to eliminate any reference to where Miss Barsden lived, but some of the others were of vital significance.

[379] The paragraph quoted above was re-drafted as follows (with the alterations underlined):

I would describe the man in the shop as about 30-35 years old, medium build, fair complexion. I did not pay attention to what he was wearing. I took notice of his face and head He had a longish type face with a light beard. The beard was a short one. It was orangish-red, or strawberry in colour. He was wearing what looked like a gypsy type scarf over his head. I say it was a scarf because it looked to be tight across his forehead, and tight across the sides of his head, above his ears. The scarf looked of a light material and had a distinctive orangy coloured border around the edge. The rest of the scarf was mixed coloured and patterned.

[380] In the meantime police had taken possession of a cap belonging to Andrew Mallard and Miss Barsden's statement of 1 July included an additional paragraph, also added in Det Sgt Shervill's writing, as follows:

I have been shown a cap by the police and I can not (sic) say if it was what I saw on the man in Flora Metallica on Monday 23 May 1994, I can say that it has the same colours of what I saw the man wearing in the shop that day.

[381] The changes from her original statement to her statement of 1 July 1994, were significant. Not only has the man's beard become a light one, but a gypsy type scarf coloured blue, green and cream with an orange border has become only what looked like a gypsy type scarf and changed colour to the same colours as Andrew Mallard's cap namely red, yellow and black with a gold braid band around the edge. The later description certainly contains no blue or creamy colour and it may possibly be Andrew Mallard's cap, although she cannot say that it is. Whereas previously it was right over his hair, it now looks to be right across his forehead and the sides of his head above his ears. Not only that, all references to her sketches, made whilst the image was fresh in her mind have been removed.

[382] The person seen by her at about 5:00 to 5:05pm and originally described by her could not have been Andrew Mallard. Her description did not fit him and he had no scarf matching her original description of his headgear. Moreover she later indicated how tall he was by reference to where he stood near a jewellery display board, and the height indicated was too low for Andrew Mallard who was 198 centimetres tall. In addition Andrew Mallard had a prominent moustache and no beard as such, although unshaven, whereas her

statement made no reference to a moustache and described a light beard. To put it bluntly, the person in the shop whose original description by Miss Barsden did not fit Andrew Mallard now becomes "*probably Mallard*".

- [383] On 3 June 1994, Miss Barsden was shown some photographs of different men by Det Sgt Greenshaw,²²⁶ which included one of Andrew Mallard and failed to identify any as being the person seen by her in the shop. This fact was not included in any statement by her, nor was there a statement by Det Sgt Greenshaw.
- [384] Neither her original hand printed statement of 24 May nor her typed statement of the same day in its unaltered form were disclosed to the defence (or the prosecution for that matter), nor her failure to identify Mr Mallard from the photo board inspection on 3 June 1994; and so defence counsel had no opportunity to effectively cross examine her on her evidence which tended to show that Andrew Mallard was in the shop shortly prior to the murder.
- [385] On 18 September 1995, prior to the trial, Ms Barsden made a further statement²²⁷, also witnessed by Det Sgt Shervill, to the effect that on 17 January that year she had given evidence in relation to the matter (i.e. the committal hearing) and looked at the accused man (Mallard) who was sitting in court and saw "*that the man's shoulders, neck and upper silhouette matched perfectly to the man I saw in Flora Metallica*". Evidence of this "dock identification" was not led at the trial²²⁸: but the process demonstrates a strong desire on the part of the police to identify Andrew Mallard as the person in the shop. Her reference to his shoulders, neck and upper silhouette hardly sits well with what she said in her original statement (omitted in her statement of 1 July).

I could not see much of his body, it was mainly his head.

- [386] The Commission is in no doubt that Miss Barsden was endeavouring to tell the truth when she made her original statement, and also her later statement of 1 July 1994, but she was at the time an impressionable 13 year old who probably felt she had an important part to play in the conviction of the brutal murderer of her mother's employer, and so was anxious to help the police in any way she felt she could.
- [387] She said in evidence to the Commission,²²⁹ that she always found Det Sgt Shervill "*professional, respectful and polite*" in all his dealings with her, and said it was "*absolutely absurd*" to say that he "*doctored*" her statement; although she did concede²³⁰ that her final description of the head gear was influenced by being shown the cap. She agreed she spoke with the police many times before her statement of 1 July was signed, and the Running Sheet records meetings with her on 24, 25 and 29 May, 3 June and 1 July. The Commission is also satisfied that by the end of the trial she firmly believed that the right man had been convicted, and so it is not surprising she became angry and upset when she and her family were approached by Andrew Mallard's supporters in about 2002.

[388] Miss Barsden's evidence to the Commission was not as satisfactory, particularly when she tried to dispute the colours of Andrew Mallard's cap²³¹ which was produced for her inspection. She ultimately agreed that the cap she was shown ("as it is now") did not fit the description of the man's head gear as it appeared in her original hand written statement²³². It appears that she told the police artist who drew the identikit picture that the person she saw was around 6 feet tall which he then described as "approx 183cms"²³³. Andrew Mallard was actually 6ft 6in (198 cms) tall.

[389] Det Sgt Shervill's entry in the Running Sheet for 1 July 1994 reads:

Katie Barsden conveyed to Major Crime Squad office where further interviewed. Statement amended to excluded (sic) inadmissible information.

This entry was false. There was nothing in her original statement, and particularly in her description, which was inadmissible, but the effect to her statement was to change her description of the headwear worn by the person she had seen in the shop, particularly its colour and from a gypsy type scarf (or bandana, although she did not use that word) to possibly a cap worn back to front.

[390] There is no evidence that Det Sgt Caporn played any part in the interviewing of Miss Barsden, the alterations to her statement, or the entry in the Running Sheet concerning the same.

7.7 Michelle Engelhardt

[391] Michelle Isolde Engelhardt resided at 3/10 Murray Avenue, Mosman Park. On 12 May 1994, she was introduced to Andrew Mallard, then using the first name André, who shortly afterwards moved into her flat where he slept on a mattress in the lounge room. She said that when she met him he was wearing a gold coloured velvet hat. Michelle Engelhardt by her own admission was a drug user and it appears that Andrew Mallard from time to time endeavoured to obtain drugs for her, generally unsuccessfully, and by Saturday 21 May, she wanted him to leave.

[392] When spoken to by police after the murder of Mrs Lawrence, she suggested that they might be interested in Andrew Mallard as a possible suspect. Det Sgt Caporn and Det Emmett therefore visited her at her unit on 26 May and obtained some details. They went back on 29 May and obtained a detailed statement. This statement was recorded by Det Emmett in his own hand writing constructed from answers given by her in response to questions asked by Det Sgt Caporn, signed by Ms Engelhardt and her signature witnessed by Det Sgt Caporn²³⁴.

[393] In that statement she detailed how she met Mr Mallard and how he came to be staying in her unit. She said that on the morning of 23 May they were both at home and the police from Cottesloe came with a search warrant, searched

the premises and took “André” away to the police station. They also told her to attend the police station to collect a summons (apparently for possession of an implement for smoking cannabis). She said she then went to Fremantle where she visited Michael Buhagiar in Collie Street and she and Buhagiar then returned to her unit in Mosman Park at about 3:00pm. The statement continued *“André’s hat was hanging above my door inside”*.

[394] According to the evidence of Det Emmett at his private hearing²³⁵, this passage was added due to a specific recollection of Ms Engelhardt after his writing of the statement had proceeded at least into the next paragraph. This is consistent with the form of the document because Det Emmett has left a space between each paragraph, but it can be seen that this passage has been squeezed in, and there is no space between it and the beginning of the next paragraph.

[395] Ms Engelhardt said that Michael Buhagiar stayed at her place and they talked until “André” arrived just before 7:00pm; she fixed the time by reference to the fact that “Home and Away” had not started on the television at that time. She went on:

When he arrived he was wearing a black leather jacket, a woolly red tartan shirt, I’m not sure what else he was wearing he didn’t have any sought (sic) of headwear on. He did have black leather gloves on.

and that when he got home he was wet. She said that shortly afterwards her ex-boyfriend, Damian Kostezky, arrived and that about 7:00pm “André” and Michael Buhagiar left her premises, saying they intended to go back to Mr Buhagiar’s. The statement contained a number of other details which are not relevant to the present issue, but it would seem that it was on Ms Engelhardt’s version of events, and the times she fixed, that the police subsequently questioned Andrew Mallard about his whereabouts between 5:10pm and approximately 6:40pm.

[396] Following the taking of this statement, Det Sgt Caporn and Det Emmett visited or spoke with Michelle Engelhardt on a number of occasions and in due course helped her to obtain other accommodation and some furniture. The Running Sheet record further meetings on 30 May, 7,8,9, and 13 June. On 27 June she was collected from her new address by Det Sgt Shervill and Det Caporn and taken to Fremantle CIB office where she was further interviewed concerning Andrew Mallard, and a fresh typed statement was obtained, which was signed by her and her signature witnessed by Det Sgt Caporn. There were a number of variations in that statement²³⁶ compared with her earlier statement but for present purposes the material ones are as follows:

- The former description of a *“gold coloured velvet hat”* was changed to *“I’m not sure of the exact pattern of this cap but it was orange, gold, some sort of intricate design and looked dirty”*.

- Reference in the earlier statement to the fact that sometimes he would wear his velvet hat, was changed to *“when wearing the cap he would place it on backwards, sideways or with the peak to the front depending on how he felt”*.
- The reference to his hat hanging above the door inside her unit when she and Buhagiar returned about 3:00pm on 23 May was completely deleted.
- As to his arrival at the flat sometime before 7:00pm that evening whereas the earlier statement said *“he didn’t have any sought (sic) of headwear on”*, that was changed to *“I’m not sure if he was wearing his cap”*.

[397] In her private hearing on 20 August 2007, Ms Engelhardt said in reference to the cap hanging on the back of the door, *“That is what I’ve said, so obviously that must have been what I thought was true at the time”*²³⁷. However she said when the police continued to question her over it on a number of separate occasions she became unsure and they asked her for more detail²³⁸. She said they did not tell her that they were leaving out her reference to the cap hanging behind the door²³⁹, and she did not know how she got to say that she was not sure if there was anything on his head, because when he came in towards 7:00pm his hair was wet, so he could not have had his cap on²⁴⁰. She said *“the more I was picked apart the more I just started to not know ... to not trust my own recollection because I was stoned half the time”*²⁴¹.

[398] In her evidence at her public hearing she told the Commission that between the making of her first and second statements the police appeared very interested in what clothing Andrew Mallard was or was not wearing, particularly the issue of the cap²⁴², that she does not know why the reference to the cap hanging on the hook on the door was left out of her later statement²⁴³. She *“never asked for anything”* in her statement to be changed²⁴⁴. She also conceded a tendency to *“change allegiances”*.

[399] Michelle Engelhardt was an unreliable witness in many respects. She was at the time a persistent drug user, she was pregnant at the time she gave evidence at the trial, which she claimed caused her to be confused, and her evidence before the Commission both in private and public hearings was at times confused, contradictory and difficult to follow. She claimed to have had a considerable loss of memory between 1994 and the present time, which may well have been genuine.

[400] Her evidence must be scrutinised carefully and although it appears the police spoke to her a number of times, it is difficult to assess what pressure, if any, they put upon her, or whether the passage about the cap hanging on the hook behind the door on the afternoon of the murder was omitted without her being informed of its omission. Constant questioning and re-questioning of a witness over matters of detail could cause a strong-willed person with a clear mind to have doubts, and Ms Englehardt was not such a person.

- [401] What is important however is that six days after the death of Mrs Lawrence she said that on that evening Andrew Mallard's hat was on the hook behind the door in her unit, and that when he came in he did not have any kind of headwear on. Whether those statements were correct or not, the important thing is that she had made them, and for the statements to be changed without the defence being informed of her original statements, meant that the defence was not able at the trial, to explore her recollection of these events or test her credit generally by reference to her original statement. Once again the case against Andrew Mallard was considerably strengthened by the alterations to her original statement.
- [402] In Section 86 Submissions on behalf of Det Sgt Caporn it was submitted that it was entirely proper for the police to re-interview Ms Engelhardt as other information became available during the investigation, including information obtained from interviews with Andrew Mallard, and if, when re-questioned, she changed her story, to make appropriate alterations to her statement; this is all clearly correct.
- [403] The problem was not that her statement was altered, but the manner in which it was altered without disclosing that the statement finally signed was not her original recollection some six days after the events in question and therefore, it is generally accepted, more likely to be accurate than her recollection some time later.
- [404] Her earlier statements, particularly the references to his cap hanging on the hook and him having nothing on his head when he came in, tended to exculpate Andrew Mallard and there should therefore have been a reference to them in her final statement even if the position some days later was that she doubted the accuracy of what she had previously said and wished to correct it.
- [405] Witness statements containing corrections to what the witness has previously said or recalled are not uncommon and her earlier recollections, together with her later corrections, could have all been accommodated in the one final statement. The failure to do so deprived the defence of the material which would have greatly assisted a challenge to her credibility. The mere possibility that his cap may have been on the hook behind the door and that he had nothing on his head when he returned home would have considerably weakened the prosecution case and may have caused the jury to at least have a reasonable doubt of Andrew Mallard's guilt. Although there were other alterations to her original statement, those relating to his cap and whether he had anything on his head were the significant ones which could go to the guilt or otherwise of Andrew Mallard.
- [406] Although her evidence about the cap hanging on the hook may have varied from time to time at the trial, on the clemency appeal and during this Inquiry; the Commission rejects the submission that it was only an assumption or supposition. In particular, the fact that she volunteered the information when the original statement was being written out by Det Emmett on 29 May (see

paragraph 394 above), strongly suggests that it was more than an assumption or supposition.

- [407] The fact that when cross-examined in the Court of Criminal Appeal some nine years later, she agreed at the end of a series of questions to the proposition that she was “*assuming that his hat was on the hook because he did not have it with him when the police took him away*”,²⁴⁵ does not persuade the Commission that she was making an assumption when she spoke to Det Sgt Caporn and Det Emmett on 29 May 1994.
- [408] In this case the Major Crime Running Sheet described the final statement of 27 June 1994, as “*Statement amended to exclude hearsay supposition and irrelevancies*” (Commission underlining). That could support the proposition that something (unidentified) in the earlier statement was later described as a “*supposition*” but, having regard to the overall position discussed hereunder at 7.11, the Commission attaches no significance to this consideration. That entry was apparently made by Det Sgt Shervill.

7.8 Katherine Purves

- [409] Ms Katherine Lawley Purves, now Mrs Murtagh, worked at the Op Shop on Stirling Highway Mosman Park, and made a report to the Police on 25 May 1994 that she had seen a man walking down Glyde Street at about 4.45pm on 23 May 1994. Her report became Action 38²⁴⁶ in the Holmes system.
- [410] The description she gave was:
- Australian 30s 185 cm slim build to medium shoulder length light brown hair wavy possibly unbrushed. Wearing two tone tracksuit pants soft blue and possibly pink. Pink windcheater top. Not carrying anything. Socks pulled up over tracksuit pants. Looked like a Fremantle Hippy. May have had something on his head – not sure.*
- [411] She gave a similar description when a statement was taken on 2 June 1994, stating²⁴⁷:
- He wore pants which were a soft blue mixed in with another colour. The colours were a soft pastel, I think a pink. He had a windcheater which seemed to be pink in colour. It may even have been a type of red or orange in colour ... I am not sure if he was wearing anything on his head. If he was it was more than likely a beanie or similar.*
- [412] Her initial interviews were with Det Lindley and when her initial statement was taken on 2 June 1994, it was by Dets Lindley and Godden, who saw her again the following day (3 June).
- [413] Like other witnesses Ms Purves was later reinterviewed (28 June) by Det Sgts Shervill and Caporn and a fresh statement was prepared which she signed the following day, witnessed by Det Sgt Caporn²⁴⁸. Her description now read:

He wore long trousers, not jeans and a windcheater. I can't recall colours. He had some sort of head wear because I recall his hair protruding from it, however I do not know what it was.

- [414] Ms Purves was in fact never asked to identify Andrew Mallard by a photo display or otherwise in 1994-5, and when finally asked to do so by the Special Crime Squad in 2006, she said that it was not him, and that she had never thought that it was²⁴⁹.
- [415] The evidence establishes that Andrew Mallard was not wearing a jacket when he left the East Perth Lock Up on the afternoon of 23 May and some time later he put on a black jacket. That afternoon and evening he was not wearing nor (so far as the evidence shows) ever in possession, of a pink, or otherwise brightly coloured, windcheater or jacket.
- [416] Thus a person who, according to the description originally given, could not have been Andrew Mallard was made to appear as possibly him, and the evidence of Ms Purves was adduced at the trial as some evidence that he was in the area at the relevant time. In Section 86 Submissions, it was said that her statement referred to a "light coloured" top, but this did not appear in her statement of 28 June 1994, but in a statement taken²⁵⁰ as part of the Cold Case Review by the Special Crime Squad.
- [417] In her evidence before the Commission, Ms Purves said the police came back and reinterviewed her a number of times (she thought three or four), and kept on asking her questions about the colours of the clothing and whether the man had anything on his head; and it was the police who suggested he may have been wearing a bandana. She said she felt badgered, became confused, and began to doubt her own earlier recollection, and signed the final statement as it was put in front of her²⁵¹.
- [418] The Running Sheet records that Ms Purves statement was amended to "*exclude hearsay and irrelevant information*", and once again the amendments were not for that purpose. Only the final statement was made available to the defence.

7.9 Lily Raine

- [419] Ms Lily Raine gave evidence at the trial of Mr Mallard, that she saw a man enter a lift at the Bel Air Apartments after 5:00pm on 23 May 1994, carrying an iron bar in one hand and a choc milk in the other. She gave evidence at the trial identifying the man as Mr Mallard²⁵².
- [420] Ms Raine provided two handwritten statements on 1 June 1994 and 2 June 1994, respectively. Both statements were witnessed by Det Sgt Caporn.
- [421] In the statement of 1 June 1994, she said:²⁵³

I describe this man as being early to mid 20s, six foot six to six foot seven, very scruffy looking with light brown collar length hair he was wearing navy blue track suit trousers the type that tie up in the front, no socks and brown sandal type shoes. I cannot recall if he wore anything on his head or what top he was wearing ... (Commission underlining)

The description in the statement taken on 2 June 1994 was relevantly the same, although the description of the person's footwear was changed to "interwoven type shoes".²⁵⁴

[422] Notwithstanding the differences between this description and Mr Mallard, Ms Raine identified Andrew Mallard on a photo board shown to her on 1 June 1994, but there was a problem with such identification in that she had seen him arrested up the road from her unit the day after the murder, and her identification of the man in the lift may have been influenced by her sighting of the man she saw being arrested the following morning.

[423] On the description by Ms Raine, only the height appears to have fitted Andrew Mallard. She described light brown shoulder length hair but made no reference to Mr Mallard's distinctive moustache, and there is no record of Mr Mallard ever wearing track suit pants or brown footwear of any kind during the relevant period.

[424] Ms Raine was re-interviewed by Det Sgts Caporn and Shervill on 29 June 1994, and provided another statement dated 1 July 1994. That statement had one significant change in her description of the person she saw. Whilst she could not recall if he wore anything on his head a month earlier, she now said²⁵⁵:

I cannot recall what top he had on, but he was wearing something on his head. I describe this as like a scarf but I'm not sure exactly. It was non distinctive colours and in dirty condition.

[425] How and why these changes were made, and how she was able to remember that he was wearing something on his head and was able to vaguely describe it, when she could not remember initially, has never been explained. Ms Raine did not give evidence before the Commission because of ill health.

[426] Ms Raine's earlier statement was not provided nor included in the Brief of Evidence, or provided to the defence.

7.10 Meizhak Mouchemore

[427] Mr Meizhak Mouchemore telephoned the police on 26 May 1994 in response to the public appeal for information, and according to the HOLMES entry he said:

*At about 16.10 to 1630 hrs Monday Informant shut shop early (PALAZZO furnishings) and was in vehicle in car park adjacent to Flora Metalica. He observed male person approx 186-187cm and lanky build wearing very pointy boots (black) skin tight blue jeans + red shirt. He had long shoulder length Brown hair standing between Flora Metalica and vacant shop. Informant was in vehicle for about five minutes and states that his person was there all the time.*²⁵⁶

[428] Det Sgt Caporn and Det Emmett took a statement from Mr Mouchemore four days later on 30 May 1994. In that statement the time, of 4:10pm to 4:30pm, which would have made it most unlikely that the man seen was Andrew Mallard, became, "4:30pm or just after".

[429] The description in that statement included a similar description, including "black pointy winkle picker boots", a description inconsistent with Mr Mallard's footwear, as other evidence clearly established that he was wearing black "Doc Martin" shoes at the relevant time and his shirt was described as "possibly a red flannelette shirt".

[430] There are also some handwritten notes by Det Sgt Caporn made prior to the first statement which include the following.²⁵⁷

Pointy boots

Tall

Long brown hair

Jeans denim

Red flannelette shirt ...

Nothing on his head

[431] Mr Mouchemore was again interviewed by Det Sgts Caporn and Shervill a month later on 29 June 1994, and his final statement was taken. In it,²⁵⁸

- the time became, about 4:40pm;
- The description removed reference to the "very pointy, winklepicker black boots" and became merely "black footwear"; and
- the shirt became "a red coloured top possibly a shirt".

[432] Written Submissions on behalf of Det Sgt Caporn draw attention to the fact that the change from "red flannelette shirt" to "red coloured top, possibly a shirt" is a change in Andrew Mallard's favour because he was apparently wearing a red tartan flannelette shirt when released from East Perth Lock Up on the afternoon of 23 May. This is unlikely to be correct because the photograph of him taken at the East Perth Lock Up prior to his release on 23

May does not show him wearing a red flannelette shirt²⁵⁹. The photograph of him taken following his arrest on 24 May does shows him wearing a red flannelette shirt²⁶⁰.

- [433] Nevertheless, the Commission regards the change in relation to the shirt of minimal significance, because, although not so specific, a “*red coloured top, possibly a shirt*” was still consistent with Andrew Mallard, whereas the change in the description of the footwear meant that a person seen in the area at about the relevant time (although in this case even the time was changed) who could not have been Andrew Mallard was made to appear as if it could have been. There was no reference in either statement to “*nothing on his head*” as appearing in the notes, and if the person observed had nothing on his head, he almost certainly was not the person seen in the shop by Miss Barsden. Once again the changes were not made “*to exclude hearsay and irrelevancies*”, as recorded in the Running Sheet²⁶¹. Moreover Det Sgt Caporn was unable to give any explanation why neither statement reproduced what was in the notes, namely “*nothing on his head*”.
- [434] In his evidence before the Commission,²⁶² Mr Mouchmore could not remember how the description in his statement came to be changed from “*black winkle picker boots*” to “*black footwear*”. He did not think it had been suggested to him by the Police that the reference to “*pointy winkle picker*” be removed, and had no recollection of it being specifically pointed out to him that the description had been changed to “*black footwear*”. He agreed with the suggestion that he just read the statement, saw that it said “*black footwear*”, which was correct, and so he signed the statement²⁶³.

7.11 Summary

- [435] These various alterations to the statements are of particular concern. Whilst, as has been previously noted, it would be appropriate to check the evidence of important, and indeed all, witnesses to ensure that their recollections were clear and firm, and that any doubts or reservations be exposed early in the investigation; nevertheless what happened here displays a deliberate pattern of strengthening the case against Andrew Mallard by producing witnesses who supported the proposition that he was the person seen by Katherine Barsden in Flora Metallica shortly after 5:00pm, at a place in the shop where he should not have been, and where he attempted to hide when it appeared she had seen him. These were not alterations which reflected doubts or uncertainty about the relevant details, but actually changed the colours and, to an extent, the nature of the head wear, if any, and other clothing. The changes to Ms Engelhard’s statement concerning Andrew Mallard’s cap on 23 May were also of major significance.
- [436] In his Comprehensive Summary of Facts,²⁶⁴ Det Sgt Shervill referred to the witnesses Mr Mouchmore and Ms Purves and quoted from physical descriptions given by them of the persons seen, but made no reference to their descriptions of the clothing; in his Opening Address at the trial, the prosecutor, Mr Bates²⁶⁵, described these two witnesses as people “*who saw a*

man fitting the accused's description in the vicinity of the shop Flora Metalica shortly before the time of the killing". Their later descriptions of the clothing and footwear of the persons they saw may have fitted Mr Mallard, and their references to headgear (including the later statement of Mrs Raine) may also have, at a stretch, fitted the description of the person described in her later statement by Katherine Barsden; however their original descriptions did not, particularly as the alterations to Miss Barsden's statement had actually changed the colours, shape and nature of the person's headwear.

- [437] As far as Mr Mouchmore and Ms Purves (Murtagh) are concerned, it is true that the trial judge in his summing up did say that his personal view was that it would be "*pretty difficult*" to conclude that the person they described and saw was the accused,²⁶⁶ but he also said (as he was bound to) that it was a matter entirely for them and that they were not bound by his view. In these circumstances it may be that some of the jurors considered their evidence significant and proceeded on that basis.
- [438] In his police notebook previously referred to, the references in the first column to these witnesses, Det Sgt Shervill has written in the second column "*polish statements*". Those words could mean a number of different things. In the context of these witnesses it appears to have meant "revise", and in relation to the witnesses referred to, the effect has been to "change".
- [439] There are, and will be cases where witnesses having made an initial statement, and on reflection or as the result of further questioning wish to change some detail. This can be appropriately done by a further statement setting out what the witness originally believed, but that on reflection, the witness now believes something else, or, if the original statement has already been typed and signed, by a supplementary statement setting out the witness' later recollection. Either of these processes may weaken the prosecution case, but are proper and essential so that the defence is aware that there has been a change from the original position.
- [440] The Commission is satisfied that, Det Sgts Caporn and Shervill, who were together involved in the process, either by persistent and repeated questioning, or by deliberately raising doubts in the witnesses' minds until they became confused, uncertain or possibly open to suggestion, were instrumental in causing the witnesses to change their statements generally by being less particular as to clothing and headwear colour (or in the case of Miss Barsden actually changing them), so that the later, more general descriptions could apply to Andrew Mallard.
- [441] The process demonstrates a pattern which the Commission is satisfied cannot have been accidental or a coincidence. It is true that the original statements were retained, but the Commission is satisfied that, having regard to the practice in this State at the time, it was unlikely that such original statements would be called for either by the DPP's office or by the defence.

Commission Opinion

[442] For these reasons it is the Commission's opinion that Det Sgt Shervill engaged in misconduct within section 4(d)(ii) and (vi) of the CCC Act in that causing the witnesses Katherine Barsden, Michelle Englehardt, Meziak Mouchmore, Katherine Purves and Lily Raine, to alter their statements as they did without any reference in their final statements to their earlier recollections, involved the performance of his functions in a manner which was not honest or impartial and could constitute a disciplinary offence contrary to regulation 605(1)(b) of the *Police Force Regulations 1979*, providing reasonable grounds for termination of his employment as a public service officer under the PSM Act.

For these reasons it is the Commission's opinion that Det Sgt Caporn engaged in misconduct within section 4(d)(ii) and (vi) of the CCC Act in that causing the witnesses Michelle Englehardt, Meziak Mouchmore, Katherine Purves and Lily Raine, to alter their statements as they did without any reference in their final statements to their earlier recollections, involved the performance of his functions in a manner which was not honest or impartial and could constitute a disciplinary offence contrary to regulation 605(1)(b) of the *Police Force Regulations 1979*, providing reasonable grounds for termination of his employment as a public service officer under the PSM Act.

[443] The Commission is further of opinion that Det Sgt Shervill engaged in misconduct within section 4(d)(ii) and (vi) of the CCC Act, in that making false entries in the Running Sheets relating to the amendments to the statements of the witnesses Katherine Barsden, Michelle Englehardt, Meziak Mouchmore, and Katherine Purves, involved the performance of his functions in a manner which was not honest and may constitute a disciplinary offence, contrary to regulation 606(a) of the *Police Force Regulations 1979*, providing reasonable grounds for termination of his employment as a public service officer under the PSM Act.

CHAPTER EIGHT THE CHARGING OF ANDREW MALLARD AND THE DUTY OF DISCLOSURE

8.1 The 19 July Meeting

- [444] On 19 July 1994 a meeting was held in the office of the Director of Public Prosecutions (DPP) to discuss charging Andrew Mallard²⁶⁷. It was attended by Det Sgt Shervill, Det Sgt Caporn, Inspector Lane (the officer in charge of the Major Crime Squad) and the DPP, Mr McKechnie, now the Honourable Justice McKechnie of the Supreme Court. Mr McKechnie did not recall if he had an assistant present.
- [445] At 1:20pm on 18 July, the day before the meeting with Mr McKechnie, there was a discussion among members of the Major Crime Squad. They had just heard from Dr O'Dea that Mr Mallard was to be released from the secure ward and would be free to leave Graylands Hospital the following day. The Major Crime Running Sheet entry reads:²⁶⁸

Discussions held within the Major Crime Squad and as a result Dr O'Dea contacted and arrangements made to attend at Graylands Hospital 1300 hours 19/7/1994 and take Mallard to the Perth Court of Petty Sessions for the purpose of charging him with 'wilful murder' relating to the death of Pamela Lawrence. Decision made in this regard as it is not acceptable and not in the public interest to have Mallard in a situation where he can walk from the hospital back into the general community and to commence the judicial process relating to this matter.

This note suggests that the police had determined on 18 July to charge Mr Mallard before they went to see the DPP the following day (19 July).

- [446] It seems to be common ground among the Police and the DPP that there was some form of procedure that gave the Police access to the DPP for advice, including advice as to whether or not to charge a particular suspect²⁶⁹. There are advantages in doing so in some form. It was, and is a common procedure in other jurisdictions and is still used in Western Australia²⁷⁰. There is little benefit, for example, in charging a suspect in a difficult case if the DPP is unlikely to proceed to a prosecution. Mr McKechnie said that the advice was always given on the understanding that it was provisional, based on the information given, subject to a brief and to later review. A brief was not necessarily required for obtaining advice, and it seems not usually to have been prepared.²⁷¹
- [447] Apparently no notes were taken of what occurred at the meeting. No one can recall taking notes and no notes have been located, although Mr McKechnie said he would have expected that one of the police officers was keeping notes. It appears that one of the police officers, either Det Sgt Caporn or Det

Sgt Shervill, outlined the evidence, including the confessional material, and all present recall the video of 17 June being shown. Det Sgt Shervill says it was he who outlined the strengths and the weaknesses of the case²⁷². Some weaknesses must have been outlined because Mr McKechnie appears to have accepted that the matter would be a difficult case for the prosecution. That is apparent from internal DPP documents which reflect the allocation of the brief to a very senior prosecutor, said to be because of its complexity²⁷³.

[448] Mr McKechnie recalled being shown the video and assumed, although he could not specifically remember, that there was no weapon produced and no forensic link shown between Mr Mallard and the crime scene. His evidence in relation to the pig's head testing was as follows:²⁷⁴

Were you informed that pig's head testing had occurred using various implements that were thought might be like the weapon? - - - No.

May we take it that you were not informed then that there was testing, the results of which were inconsistent with the weapon that the proposed accused was said to have used? - - - That is correct.

If you had been told that, is that something that you would have remembered? - - - The reason I am definite within – obviously within the span of any memory – the reason I am definite is the surprise that I felt when I read about it in the newspapers sometime early this century. It was such a shock that I am confident as one can be that I did not know of it earlier.

The errors and contradictions in the confessional material were discussed and also Mr Mallard's mental state, although Mr McKechnie could not recall whether he was shown Dr O'Dea's reports or any other psychiatric assessment of Mr Mallard.²⁷⁵

[449] Both Mr McKechnie and the police seem to agree that Mr McKechnie's opinion was that there was sufficient evidence to charge Mallard but that it would be a difficult case, which would depend on whether the confessional material was admitted and whether the jury accepted it. The DPP's office would therefore provide a senior prosecutor to conduct it.

[450] Mr McKechnie would not have been told of the earlier versions of the statements or the ways in which they had been altered. He said that, although his opinion was couched in terms of advice, he expected the police to follow his advice, and so the decision to charge Mr Mallard was effectively his.²⁷⁶

[451] Following the meeting, officers went out to Graylands Hospital that afternoon. Mr Mallard was summoned into Dr O'Dea's office at 1:00pm, an hour or two after the meeting with Mr McKechnie, and was there arrested for the wilful murder of Mrs Lawrence.²⁷⁷

[452] The fact that no notes were taken of the discussions at this meeting is a matter of real concern, as it makes it almost impossible (particularly some 14

years later) to determine what facts were disclosed to Mr McKechnie and the precise nature of any discussions which occurred.

- [453] For the future, it is desirable that, if possible, any such advice be furnished in writing, setting out, inter alia, the material considered, the opinion and the grounds upon which such opinion is based; or in cases of urgency, a detailed contemporaneous note should be made, preferably by both the DPP officer or his or her secretary, and also by the police. Such note should set out the matters referred to above. A recommendation to this effect is contained in Chapter 14.
- [454] Apart from the failure to disclose to the DPP at that meeting the prior inconsistent statements of some of the witnesses (particularly Miss Barsden and Ms Englehardt), and the results of the salt water and probably the pig's head test, the Commission's opinion is that there was no misconduct on the part of anyone in respect of the meeting on 19 July, or the arrest of Mr Mallard later that day.
- [455] It cannot be said that Mr McKechnie's advice that there was sufficient evidence to charge Andrew Mallard was wrong. In 2006 when upholding his appeal, the High Court refused an application to enter a verdict of acquittal for the reason that, notwithstanding all the non disclosure which had by then been exposed, it was still open to a jury properly instructed, to convict on the confessional evidence alone if they accepted that it was true. In any event, legal advice, honestly given, even if wrong, could never amount to "misconduct" within the terms of the CCC Act, or otherwise.

8.2 The Comprehensive Summary of Facts

- [456] The principal task carried out between the charging of Mr Mallard on 19 July and the delivery of the Brief of Evidence to the DPP on 21 October 1994, was the preparation of a Comprehensive Summary of Facts by Det Sgt Shervill. It took several weeks to prepare the document and to collect all of the materials that were to be included in the Brief, and it was delivered under cover of a letter dated 21 October 1994²⁷⁸. That letter was addressed to Mr McKechnie and headed:

Request for the allocation of a Prosecutor for a Preliminary hearing at the Perth Court of Petty Sessions.

- [457] It referred to the meeting of 19 July, and noted that an agreement had been reached that there was sufficient evidence to charge Mr Mallard with Wilful Murder although a prosecution would have inherent difficulties, and that if Mr Mallard elected a preliminary hearing, a senior prosecutor would be assigned to prosecute the charge. It went on to request the assignment of a prosecutor and concluded:

Attached hereto is a Comprehensive Summary of Material Facts to be relied upon together with the Prosecution Brief to allow an assessment to be made.

[458] The Comprehensive Summary was a 30 page document outlining Det Sgt Shervill's assessment of the evidence. It covered the strengths and some of the weaknesses of the prosecution case. It quoted from statements and interviews, including that the accused had claimed in an interview that the murder weapon was a wrench. It included references to Mr Mallard's nomadic lifestyle, his psychiatric treatment, bizarre behaviour, the "suspicious jewellery" and the undercover operation, but made no reference to the salt water testing of Mr Mallard's clothes nor the fact that a number of witnesses, for example, Miss Barsden, had changed their original descriptions of the persons they had seen and the clothing they wore.

[459] It stated that the type of weapon used had not been identified nor located and that the pig's head test excluded the anode as a weapon. It continued:²⁷⁹

During this experiment, a crescent wrench was also tested which inflicted dissimilar wounds to those sustained by LAWRENCE.

[460] In support of the reliability of the confessional material, it contained a list of what were said to be "*twelve things which only the killer could know*"; but made no reference to the numerous errors which Mr Mallard had made in his so called confessions. As one of the purposes of the Comprehensive Summary, according to the covering letter, was "*to allow an assessment to be made*", this was a glaring omission and is an example of an unbalanced, unfair and slanted approach. The DPP's office could not make a proper assessment about the reliability of the confessions, and therefore the prospect of success, unless presented with all of the evidence, both favourable and unfavourable to the prosecution.

[461] Such errors which, with the benefit of hindsight, could now be described as "*fifteen things which the non – killer did not know*" included the following.

- *He hit her with a wrench* – it has been established that a wrench as drawn could not have caused the injuries of peculiar shape.
- *All the 'hits' took place at the front of the shop* – Dr Cooke's evidence was that the blood pattern indicated Mrs Lawrence had been struck again after she was dragged to the rear of the premises.
- *The shed is on the right* – in fact it is on the left.
- *The back door is wooden* – in fact it is metal.
- *He killed her because she knew him* – in fact he had never seen her before.

- *He disposed of the weapon off Stirling Bridge – the weapon was not found in that location or anywhere else.*
- *He washed his clothes in salt water to eliminate blood stains – contradicted by the salt water testing.*
- *The Flora Metallica jewellery was made by sketching the gum leaf design and then making them out of gold – in fact actual leaves were taken and electroplated.*
- *That the shed contained gas bottles – there were no gas bottles in the shed.*
- *There is a tool box in the shed – not so.*
- *The number of steps at the rear is four (not five, six or eight).*
- *His sketches of the shop interior contain errors (for example, position of the sink and perpendicular counter).*
- *He describes Mrs Lawrence as wearing black slacks / shirt – In fact she was wearing light blue denim jeans.*
- *Her handbag was on the floor – in fact it was on a shelf.*
- *The handbag was stolen – only the purse was taken.*

[462] The final (but not the original) statements of the various witnesses and experts' reports were attached, but not those relating to the "suspicious jewellery" and there were no statements or reports in relation to the pig's head test.

8.3 The Duty of Disclosure

[463] The extent of the duty of the police and the prosecuting authorities to disclose to the defence matters gleaned during the investigation which do not advance the prosecution case, and in particular, matters which tend to, or might, weaken the prosecution case appears to have been subject to a degree of uncertainty and confusion in this State (and possibly elsewhere) prior to the passing of the *Director of Public Prosecutions Act 1991*, and the appointment of Mr McKechnie to that office soon afterwards.

[464] The attitude of the police generally appears to have been only to disclose those matters intended to be relied on by the prosecution at the trial. In particular, the initial handwritten statements from witnesses were never disclosed, only the subsequent typed statements, irrespective of how different or inconsistent the former were with the latter, notwithstanding authoritative statements from superior courts that all material which may be relevant to the

guilt or innocence of an accused should be disclosed; including information which may materially impact on the credibility of a prosecution witness.²⁸⁰

[465] Following his appointment as Western Australia's first DPP, this was an issue which concerned Mr McKechnie, and on 1 November 1992, he issued a *Statement of Prosecution Policy and Guidelines* which were published in the *Government Gazette* (No. 157) of 6 November 1992. Those Guidelines included the following provisions:²⁸¹

4. *This Statement of Prosecution Policy and Guidelines is based on, and developed from, the Crown's longstanding prosecution policy in Western Australia. It is now reduced to writing for the information of Crown Prosecutor's, prosecuting counsel, police, legal practitioner's and the community generally...*

Duty of Prosecuting Counsel

53. *Counsel for the Crown has a duty to ensure that the prosecution case is presented properly and with fairness to the accused...*

Disclosure of Information to the Defence

59. *When information which may be exculpatory comes to the attention of a prosecutor and the prosecutor does not intend adducing that evidence, the prosecutor will disclose to the defence*

- a) *the nature of the information;*
- b) *the identity of the person who possesses it; and*
- c) *when known, the whereabouts of the person.*

Disclosure of Inconsistent Statements of Witness

65. *Where a witness called by the prosecution gives evidence on a material issue and the prosecutor has an earlier statement which may be inconsistent with the present testimony, the prosecutor should inform the defence of that fact and make available the statement.*

[466] The extent to which these Guidelines came to the attention of serving police officers in the period following their publication can only be a matter of speculation, but it was probably minimal or non-existent. Obviously a prosecutor could only disclose a prior inconsistent statement to the defence if he or she had been made aware of it by police.

[467] Further *Guidelines for Disclosure of Material Additional to the Crown Case* were published by the DPP on 14 December 1993 and were reproduced in the *Police Gazette* (No. 9) of 9 March 1994, published by the authority of the Commissioner of Police. The front page heading of that issue contained the usual notation:²⁸²

Police throughout the State are instructed to make themselves thoroughly acquainted with the contents.

[468] Under the heading “**Director of Public Prosecutions Act 1991**” the following appeared:²⁸³

Guidelines for Disclosure of Material Additional to the Crown Case

1 *The duties of the Crown to disclose the case for the prosecution are set out in paragraphs 57-65 of the Statement of Prosecution Policy and Guidelines issued November 1, 1992. These guidelines deal with disclosure of material not directly relevant to the Crown case.*

Duties of Police

2. *In all matters following a committal for trial on indictment, police must deliver to the office of Director of Public Prosecutions, as soon as possible after committal, all other documentation, material, and any other information held by any police officer concerning any proposed prosecution witness, which might be of assistance or interest to either the prosecution or the defence.*

3 *A police officer shall certify that to the best of that officer’s knowledge or belief, all such documentation material or information has been disclosed.*

Obligations of the Prosecution

4. *The prosecution, upon request by the defence, shall, subject to any claim for immunity on the grounds of public interest, disclose all such documentation, material or information either by making copies available or allowing inspection.*

[469] At about the same time, in order to give effect to paragraph 3 above, a new cover sheet was introduced to accompany the Police Brief of Evidence to the DPP. This new cover sheet included a form of certification that all such documentation, material, or information had been disclosed.

[470] A number of police witnesses said it was not their practice to read the Police Gazette (except as to available promotions and appointments), but their obligation was clear, particularly in the light of the certification they were required to provide²⁸⁴.

[471] The Comprehensive Summary of Facts, with the various witnesses’ statements accompanying it, was in this case provided prior to the Committal because it was intended that a Senior Prosecutor from that office would conduct the Committal. It furnished to the DPP’s office, all relevant material in support of the prosecution case, but failed to disclose “*other material concerning any proposed prosecution witnesses which may be of interest to... the defence*”²⁸⁵, in particular, the prior statements containing the different descriptions of the persons seen by the witnesses, Katherine Barsden, Meziak Mouchemore, Katherine Purves and Lily Raine, Mr Lynch’s original report which included details of the salt water testing, and the prior statement of Michelle Englehardt.

- [472] The fact of the pig's head testing of the wrench was disclosed in the barest detail, but there was no report either from Dr Cooke concerning it, nor the enquiries by police at tool shops in unsuccessful efforts to find a tool capable of inflicting injuries consistent with those of the deceased.
- [473] It is no answer for Det Sgt Shervill to say, as he does, that it was not the practice of the police at that time to disclose exculpatory matters or prior inconsistent statements of witnesses, or that he did not know what his obligations were because he had not read the Police Gazette. As a Senior Detective, it was his responsibility to know what his obligations were and to carry them out.
- [474] Much was made during the public hearings of the fact that prior statements of witnesses are now disclosed to the defence, but it became apparent that this was due, not to any change in police attitudes or realisation of their duties and responsibilities under the Guidelines, but because defence lawyers began a practice of issuing subpoenas for any earlier statements and obtaining access to them in that way²⁸⁶.

Commission Opinion

- [475] The Commission is therefore of the opinion that Det Sgt Shervill engaged in misconduct within section 4(d)(ii) and/or (iii) and (vi) of the CCC Act in that his failure to disclose to the DPP's Office the prior statements of Katherine Barsden, Michelle Engelhardt, Meziak Mouchemore, Katherine Purves and Lily Raine, the original report of Bernard Lynch and details of the unsuccessful efforts by police to find a tool capable of inflicting the injuries suffered by Mrs Lawrence's involved the performance of his functions in a manner which was not honest or impartial and/or involved a breach of the trust placed in him by reason of his employment as a public officer and could constitute a disciplinary offence, contrary to regulation 603(1) of the *Police Force Regulations 1979* providing reasonable grounds for termination of his employment as a public service officer under the PSM Act.

8.4 A Continuing Problem

- [476] Disclosure has continued to be a problem notwithstanding the 1993 Guidelines. Section 42(1) of the *Criminal Procedure Act 2004* which commenced on 2 May 2005, set out in statutory form, those items which the Prosecution must disclose to the defence prior to the trial. It includes:
- a) *a copy of every statement ... by any person who may be able to give evidence that its relevant to the charge, irrespective of whether or not it assists the prosecutor's case or the accused's defence ...*
 - e) *a copy of every other document or exhibit which may assist the accused's defence.*

[477] The same year the DPP issued a fresh *Statement of Prosecution Policy and Guidelines 2005*, to give effect to the statutory requirements, Paragraphs 111 and 112 expressly required the police to furnish to the Office of the DPP:

... all other documentation, material and other information held by any police officer concerning any proposed prosecution witness which might be of assistance or interest to either the prosecution or the defence.

and to certify that such had been done.

[478] Notwithstanding this, problems continued, and by letter dated 7 December 2006, the current DPP, Robert Cock QC, wrote to the Commissioner of Police advising that in a number of recent prosecutions relevant material had not been disclosed to the defence, let alone to the prosecutor, prior to trial. He went on to explain in some detail the nature and extent of the obligations of the Police in respect of disclosure. He also attached a list of *"Items not Commonly Disclosed"* which included, *"all typed or handwritten statements of witnesses both signed and unsigned, including draft statements and statements of witnesses not included in the brief, any and all negative enquiries from potential witnesses, any and all negative results of any forensic testing, running sheets (including those of surveillance and undercover operations) and any photo boards shown to witnesses including negative and incorrect identifications"*.

[479] By a *General Broadcast* to all police on 17 January 2007, authorised by the Deputy Commissioner Specialist Services, police were reminded of their obligations in this regard and the DPP's list of *"Items not Commonly Disclosed"* was set out in full²⁸⁷.

[480] There can no longer be any excuse for police to claim they are unaware of their obligations relating to disclosure. Whether police are currently fulfilling their obligations in this regard, the Commission is unable to say; but if they understand and comply with their obligations as described, there should be no further problems in this regard.

CHAPTER NINE

THE TRIAL OF ANDREW MALLARD

9.1 Allocation of Prosecutor

- [481] Following the receipt by the DPP's office of the letter of 21 October 1994 with the Comprehensive Summary of Facts and the statements of the witnesses, the prosecution was allocated to Mr Kenneth Bates²⁸⁸.
- [482] Mr Bates was a senior and experienced prosecutor, although this was, at the time of trial, only his third murder trial. At the time of allocation, he had not done any.²⁸⁹ In accordance with the system and practice at the time, Det Sgt Shervill assisted Mr Bates in a role which might, in other situations, have been described as that of an instructing solicitor. He had a detailed knowledge of the matter, he was familiar with the persons involved, he was knowledgeable about the issues and he had been involved in the drafting of many of the documents.
- [483] There were numerous conferences between Det Sgt Shervill and Mr Bates and later with Mr Anthony Elliott, who was another DPP barrister, appointed as junior counsel to Mr Bates for the purposes for the trial²⁹⁰.
- [484] Meanwhile, Mr Patrick Hogan, who up until that stage had not acted in any murder trials, was briefed by the Legal Aid Commission to appear for Mr Mallard. By the time of the trial he had acted in one previous murder trial, ironically that of Simon Rochford.

9.2 Receipt of Brief

- [485] Mr Bates was briefed on 28 October 1994 and received the letter of 21 October with the Comprehensive Summary of Facts shortly after that date. It was understood when he received the brief that he was expected to appear not only at the trial but also at the committal or preliminary hearing already fixed for five days starting 16 January 1995. It ultimately ran for three days (16 - 18 January).
- [486] In Section 86 Submissions on behalf of Mr Bates, attention was drawn to his evidence as to the circumstances in which he read the Comprehensive Summary, namely whilst on holidays and for the purpose of obtaining an overview of the case²⁹¹; and it was suggested that he should have been able to assume that everything contained in the Comprehensive Summary would also be contained in the Brief of Evidence. Even if that were so as a general rule, one would expect it to occur to him on reading the Brief, that there was no evidence, apart from the inconsistent, and at times retracted, confessional material as to what was the murder weapon, and the obvious thing to do in those circumstances was to have another look at the Comprehensive Summary to see what it had to say on the subject. In any event, it was

obvious that the purpose of the Comprehensive Summary was to assist him and, as per the covering letter, “to enable an assessment to be made”.

- [487] Whether he read it on holidays or elsewhere, it was his responsibility to read it carefully and pay attention to what it said. The Commission also finds it surprising that when preparing for the trial, he did not re-read the Comprehensive Summary to refresh his recollection for an overview of the case and as a “check list” to see if there was anything he was overlooking. It cannot be said that he was under any obligation to do so, but the Commission believes that it is what careful counsel would commonly do.
- [488] At a private hearing (30 July 2007), Mr Bates said that on reading the papers he formed the view that it was a complex and difficult matter²⁹² due to the large number of witnesses and the nature of the confessional material including that some of it was in the third person, it was later retracted, and the alibis had turned out to be fake. Before the Preliminary Hearing, he identified the reliability of the confessions as being a central issue in the trial²⁹³.
- [489] Mr Bates said that prior to the Preliminary Hearing, he became aware that there were also psychiatric issues concerning the reliability of the confessions²⁹⁴ and it has been submitted that his awareness of these issues only arose over time, initially from the fact that there was material in the brief that Mr Mallard had been interviewed by police at Graylands Hospital. But in fact, the psychiatric issues were first raised in the Comprehensive Summary of Facts²⁹⁵ and if he had read that document with any care or attention at all, he must have been aware of those issues from the beginning.
- [490] He agreed that there had been no disclosure of the pig’s head testing of the wrench²⁹⁶ and said that when he first received the papers he read the Comprehensive Summary and the covering letter, but then worked from the witness statements and reports in the Brief. He overlooked the reference on page 29 of the Comprehensive Summary to the pig’s head testing of the wrench, pointing out that there was no expert report or police statement about it in the Brief²⁹⁷.

9.3 Preliminary Hearing

- [491] When Mr Bates opened at the Preliminary Hearing he made no reference to a wrench, but followed the wording of the Statement of Material Facts provided by the police. He said²⁹⁸:

Defendant walked to the backyard via the rear laneway. There he ascended the stairs to the back door. When he went to jemmy the back door open with a metal object that he had brought with him he found that the door was locked.

After referring to him being confronted by Mrs Lawrence and she becoming hysterical, he continued:

The Defendant then panicked and struck her several times on the head within the hair line with the metal object that he had been carrying.

And he later said:²⁹⁹

The Defendant then left the premises, by taking the purse and the metal object with him.

[492] The first witness was Dr Cooke. He was asked what might have caused Mrs Lawrence's injuries and replied³⁰⁰:

Some of these injuries have a non-specific look about them, they could be caused by almost any blunt object, but some of them also have a chop-like appearance to them. I was subsequently ... shown a metal bar, which I understood was a copper anode or cathode used as apart of electrolysis and I thought that showed – that type of weapon bar may have fitted some of those injuries quite well ...some of the scalp lacerations were non-specific, but for some of them this bar fitted very well ...

[493] The Commission considers Dr Cooke's answer was misleading, but does not believe that it was intentionally so. He had been present during the pig's head test on 24 June 1994, where he knew, and recalled (as his evidence at the trial made clear), that a copper anode such as found in the rear shed could not have been the murder weapon because it was unwieldy, because of the excessive copper oxide deposit it left in some of the wounds and because of the absence of blue paint particles which he had found in some of the wounds of Mrs Lawrence.

[494] He was not asked any follow up question by Mr Bates, who moved on to another topic. He was not asked if a wrench could have caused the injury. The drawing of the wrench done by Mr Mallard on 17 June was tendered,³⁰¹ but it was not shown to Dr Cooke whilst he was in the witness box.

[495] A number of other witnesses were called, including Det Sgt Caporn who read out the notes of the interviews he had conducted with Mr Mallard, as did Det Sgt Brandham. In addition to the witnesses who were called, a number of witness statements were tendered by consent.

[496] No psychiatric evidence was called, nor were the reports of Dr O'Dea tendered. It would seem these only became available to Mr Bates after the Preliminary Hearing, and they were not relevant to the issue in the Preliminary hearing, namely whether the prosecution could establish a prima facie case. No evidence was led concerning the pig's head test, the salt water testing, the suspicious jewellery, or the undercover operation. Mr Bates was not aware of the salt water testing, there were no statements, but only a reference in the Comprehensive Summary of Facts, to the suspicious jewellery, and the undercover operation was not relevant.

[497] Mr Bates, as prosecutor, made no attempt to identify a wrench as drawn by Andrew Mallard as the murder weapon. He said in evidence to the Commission³⁰² that at the Preliminary Hearing he relied on the Police Statement of Facts for his opening, and then ran through the various witnesses whose statements had been supplied. The Commission accepts his evidence in this regard.

[498] The magistrate found there was a prima facie case and Mr Mallard was committed for trial to the Supreme Court. On 20 January 1995, Det Sgt Shervill completed the "Committal Cover Sheet"³⁰³ which included the following statement as required by paragraph 3 of the 1993 *Guidelines*:

I certify having forwarded to the Director of Public Prosecutions all documentation material and other information concerning all proposed prosecution witnesses that I know or believe may be of assistance or interest to either the prosecution or defence.

Attached to the cover sheet were the statements of the prosecution witnesses. However, the original statements and reports referred to above were not included. It follows that the certification was false and the chain of non-disclosure continued. Det Sgt Shervill said that he did not appreciate that the form of cover sheet had been changed and that it now included the certification referred to.

9.4 Pre Trial Matters

[499] In due course the trial date was set for Thursday, 2 November 1995, with a Voir Dire hearing to deal with admissibility of the interviews and other preliminary matters set for Tuesday 3 October 1995.

[500] At the Voir Dire hearing, Mr Hogan applied to have the evidence of the interviews excluded on two grounds. The first was that any admissions made during such interviews were not voluntary because the accused had been assaulted by police during the interviews, that he was cajoled and threatened, detained against his will and the length of the interrogation was too long with insufficient breaks. On the basis of the video recorded interview and the presentation of Andrew Mallard during that interview, the trial judge found that the concessions he made and agreements to statements made earlier were not consistent with someone under pressure from being assaulted.³⁰⁴

[501] The second basis on which Mr Hogan sought to have the interview material excluded was that the accused was suffering from a psychiatric disorder, namely Bi-Polar Affective Disorder, but not specifically on the basis that his condition might render any admissions unreliable. Mr Hogan called Dr O'Dea and led from him evidence of the diagnosis and of its symptoms. He did not specifically ask Dr O'Dea whether Mr Mallard's psychiatric condition would or could interfere with the reliability of the statements he made. He did not ask him whether Mr Mallard's bipolar condition, or indeed anything else concerning Mr Mallard, might lead to a false confession.³⁰⁵

[502] In ruling to admit the evidence of the interviews, the Judge said:³⁰⁶

There was nothing which I thought` emerged from Dr O’Dea’s evidence which would have any particular impact, let alone any substantial impact upon the reliability of the confessional material.

[503] Years later Dr O’Dea was to agree with the evidence of Dr Stephen Patchett, which was obtained for the Clemency Petition in the Court of Criminal Appeal. That evidence did raise doubts about the reliability of Mr Mallard’s confessions by reason of his psychiatric condition.

[504] Mr Hogan did not call Dr O’Dea in the trial before the jury. He cannot now recall the reason, but he expects that it was because he thought that evidence about Andrew Mallard’s mental illness might be prejudicial in front of the jury which was considering a brutal murder, and jurors may take the view that a mentally ill person was such a person who might commit such an offence³⁰⁷.

[505] As the trial date drew near, Mr Mallard (and his family) decided that they wished him to be defended by senior counsel rather than by Mr Hogan, and limited enquiries were made to ascertain who might be available. When enquiries proved unsuccessful, an application was made for an adjournment of the trial. This application was heard by the trial Judge on 6 October 1995 and was refused.

9.5 Private Investigator

[506] In the meantime the Legal Aid Commission engaged a private investigator, Mr Leslie William Robertson, to make further enquiries on behalf of Mr Mallard. Mr Robertson attempted to interview a number of witnesses about other persons who had been seen in the area within the relevant time. He obtained statements from Ms Annabella de Florenca³⁰⁸, who was subsequently called by the defence in the trial, and Mr Lloyd Harvey Peirce,³⁰⁹ who was not.

[507] Mr Robertson also had a meeting with Det Sgt Shervill at Police Headquarters, Curtin House. Mr Robertson said³¹⁰ that he was seeking information in regard to locations and names of witnesses, but Det Sgt Shervill “*was not very helpful. I certainly wasn’t given any information that I requested and went out virtually empty handed ...*” He also said that he was given no access to the case file held by police, but he could not recall precisely what he asked for.

[508] Det Sgt Shervill, on the other hand said:³¹¹

I don’t have a memory of him telling me what he was enquiring into and I offered any assistance I could ... I have a memory of offering him access to the case file if he had specific areas he wanted to look at.

[509] Mr Robertson's recollection of what he specifically asked for is not sufficiently specific or reliable at this point in time; but in any event, there would be no point in offering him access to the case file, *"if he had specific areas he wanted to look at"*, because Mr Robertson could not have known that the statements of a number of material witnesses, for example: Miss Barsden, had been materially altered, nor that the police had information that the weapon drawn by Mr Mallard could not have been the murder weapon, and so could not have known what *"specific areas"* he would want to look at.

9.6 The Trial

[510] At the trial, which commenced on 2 November 1995,³¹² Mr Bates opened differently from the Preliminary Hearing. In unequivocal terms he said that a wrench was the weapon used by the accused to kill Mrs Lawrence, and in his opening he used the word *"wrench"* twelve times. In his closing address he referred to a *"wrench"* three times, to the *"weapon"* five times and, almost as an afterthought, suggested at the end that it may have been the *"iron bar"* referred to by Ms Lily Raine.

[511] He referred to the accused entering the rear shed, and said that the accused *"obtained a wrench from the rear shed"*³¹³, and that *"the accused man then entered the shop carrying the wrench in his hand."* In these remarks he was relying on what Andrew Mallard had said in his interviews with police, and ignoring his concession to Det Sgt Brandham that he had never been in the shed.

[512] He said that after discussion between Mrs Lawrence and the accused man, Mrs Lawrence became hysterical and the accused man *"who didn't want to be identified, then brutally and savagely hit her over the head with the wrench that he was carrying. He struck her twelve times in three distinct areas on her head within her hair line and he did not strike any other part of her body"*.³¹⁴

[513] He also claimed³¹⁵ that the accused's two confessions on separate occasions were corroborated or supported by accounts of independent witnesses, by the examination of the crime scene itself and by the post-mortem examination conducted by Dr Cooke, and that the confessions correctly detailed many things which only the killer could know. He referred³¹⁶ to Mr Mouchmore and Mrs Purves as persons who saw *"a man fitting the accused's description in the vicinity of ... Flora Metallica shortly before the time of the killing"* and also referred to the observations of Miss Barsden³¹⁷.

[514] Dr Cooke was called as a witness in the Crown case. After leading his qualifications, Mr Bates took him through his post mortem report, including his opinion, that the cause of death was head injuries including twelve cuts to the skin of the skull, with extensive fracturing of the skull bone with bleeding around the brain and extensive bruising and tearing of the brain substance. Mr Bates then asked him, by reference to the post mortem report, to describe each of the injuries in detail, which he did including that some of the wounds

contained a bluey-green material visible under a dissecting microscope, though not to the naked eye.³¹⁸

- [515] Dr Cooke gave evidence of visiting the premises of Flora Metallica on 26 May 1994, and the observations he made, and that on 24 May (the same day as the post mortem), he was shown a copper anode such as was used in the shop's electrolysis processing, weighing 2.7kgs and a couple of feet long. He observed a bluey coloured material which he believed to be copper sulphate.³¹⁹
- [516] He was then asked some questions about the pig's head test. He said he conducted an experiment in the presence of Mr Lynch from the Chemistry Centre and others, which involved striking a pig's head with one of the anodes. He gave evidence that the shape of the injuries to the skin of the pig's head were close to the injuries to Mrs Lawrence's skull, but that there were some "*disappointing aspects*" to the experiment. These were firstly, that the anode was very unwieldy and heavy, and it was very difficult to accurately strike the pig's head, and secondly, that the copper sulphate on the bars was deposited very heavily within the wounds so that it was clearly visible, whereas in Mrs Lawrence's case, the bluey-green material was not visible to the naked eye.³²⁰
- [517] He said he later received the results of Mr Lynch's chemical analysis of the blue material from the anode testing and from Mrs Lawrence's wounds. As a result of those findings, and his own observations, he concluded that the injuries to the deceased were not sustained from a copper anode although there was some similarities in the shape of the wounds³²¹. No evidence was led concerning the pig's head testing involving the wrench. Dr Cooke had no recollection of it and Mr Bates had forgotten or overlooked what he had read about it in the Comprehensive Summary of Facts.
- [518] After playing a selected section of the video interview to the jury and being asked whether the areas of injury described were consistent with his findings on post mortem³²² he was asked about blood splattering:³²³

The injuries that they (sic) found, are they consistent ... with the head being struck with a blunt object of some description?
(Commissions Underlining)

to which he replied:

Yes.

Mr Bates then moved on to another topic. As he had opened the trial on the basis that the weapon was a wrench, even though his case was based on the confessional material, one would have expected the next question to be the obvious one:

Such as a wrench?

but it was not.

[519] As Mr Bates knew prior to the trial that some of the deceased's wounds had a peculiar pattern and that they could not be caused, by any blunt instrument, but only by one with a leading edge or pointy end³²⁴, it is difficult to understand why he did not at this stage ask Dr Cooke further questions on the nature of the weapon, so as to make this clear. This would have been an appropriate time to show Dr Cooke the sketch drawn by Andrew Mallard and ask if the injuries were consistent with such a weapon. At this stage the Commission is not concerned with what answer Dr Cooke may have given, but with the fact that the question was not asked.

[520] Mr Lynch gave evidence and expressed the opinion³²⁵ that the weapon was probably steel or iron, painted blue, or with blue paint on it. He described the pig's head testing of the copper anodes³²⁶ and excluded them as the murder weapon, but made no reference to the testing of the wrench. He was not asked about the salt water testing, but Mr Bates did not know of it because only Mr Lynch's shorter report was included in the Brief, and there was no reference to it in the Comprehensive Summary of Facts prepared by Det Sgt Shervill. Mr Lynch said that he did not tell Mr Bates of the pig's head testing of the wrench in their pre-trial conference³²⁷.

[521] In his Closing Address, Mr Bates, apart from his references to the "wrench", said that it was a tragic case of a robbery gone wrong, and that Mr Mallard had disposed of the weapon and then soaked his clothes before returning to Ms Engelhart's flat shortly after 6pm³²⁸. He then went through the 15 matters contained in the confessional material which he claimed only the killer could have known³²⁹. He referred to the fact that the police divers had been unable to find the weapon near Stirling Bridge and in answer to a point made by Mr Hogan that there was no blood on any of Mr Mallard's clothing, he said:³³⁰

He told the police that he went down to the river near North Fremantle and washed his clothing and that explains the lack of blood on his clothing.

[522] Mr Bates ran the whole case on the basis that a wrench was the murder weapon because of what Andrew Mallard had said in his interviews. He called Dr Cooke as a witness but did not ask him if a wrench could have caused the injuries suffered by Mrs Lawrence. The drawing by Mr Mallard of the alleged murder weapon was not shown to Dr Cooke. The anode was eliminated as a possible weapon, a wrench was not explored and Dr Cooke concluded his examination in chief with a reference to a "blunt object of some description". Mr Bates questioned Dr Cooke extensively about what was known not to be the murder weapon (the anode), but not at all on what he was alleging the weapon was (the wrench).

[523] Not only is it a fundamental imperative in any homicide, wounding or civil personal injury case to relate the injuries suffered to the weapon or nature of the accident, it was of particular significance in this case, because Andrew Mallard had nominated the wrench as the murder weapon, and so evidence

that a wrench was consistent with the wounds suffered by the deceased went to the reliability of the confession.

- [524] In Section 86 Submissions, reliance was placed on the remarks of the Court of Criminal Appeal in its judgement on the Clemency Petition³³¹ to the effect that, a confession to the use of the weapon which may not have been that actually used may have been but one more inconsistency, and did not affect the reliability of other parts of the confession; however the High Court held that this was not the correct approach.³³² The majority said:

It was not for the Court of Criminal Appeal to seek out possibilities, obvious or otherwise, to explain away troublesome inconsistencies which an accused has been denied an opportunity to explore and exploit forensically. The body of unrepresented evidence so far mentioned (relating to a wrench and the deceased's wounds including the pig's head testing) was potentially highly significant in two respects. The first lay in it's capacity to refute a central plank of the prosecution case with respect of the wrench. The second was it's capacity to discredit, perhaps explosively so, the credibility of the prosecution case, for the strength of that case was heavily dependent on the reliability of the confessional evidence ...

- [525] Defence counsel, Mr Hogan, knew nothing of the pig's head test and therefore could not, on ordinary principles of advocacy, risk asking Dr Cooke whether a wrench of the type Mr Mallard had drawn could have been the murder weapon, although he could have explored the issue at the Preliminary Hearing. It is surprising, that at the close of the Prosecution case, he did not take the point that there was no evidence that a wrench as drawn by his client and as opened by the Prosecution could have caused the injuries. Alternatively, he could have taken the point in his Closing Address.
- [526] The Section 86 Submissions claim that the Commission is applying different standards in criticising Mr Bates for not asking questions about the wrench, but not criticising Mr Hogan for the same failure. But Mr Hogan had not been informed of the pig's head testing of the wrench and did not have a duty of disclosure. Mr Bates had and did.
- [527] Mr Hogan did get Dr Cooke to agree, that as a result of the attack and the dragging of the body there would be extensive blood staining on the clothing, including the shoes, of the assailant³³³. He asked him about the anode testing and Dr Cooke expressed the view that some of the injuries showed a sharpness consistent with the shape of the anode or the bow, rather than the stern, of a ship³³⁴.
- [528] Dr Cooke told the Commission,³³⁵ that he does not recall the pig's head testing of a wrench, although he did recall testing an anode. In 2002, at Mr Quigley's instigation³³⁶, he was shown, for the first time, the sketch of the wrench drawn by Mr Mallard. His preliminary view then, was that because wrenches of such nature had rounded edges on both the head and handle, they would produce

more of a crushing type of injury rather than the chopping and penetrating type of injuries suffered by the deceased.³³⁷

[529] On 20 June 2002 he conducted testing on a pig's head using a wrench (Sidchrome), approx 30cms long, and was unable to reproduce the appearance of many of the injuries seen on the deceased's head³³⁸, although, he did not exclude the possibility that some form of wrench, not yet identified, might have been able to cause such injuries.

[530] The evidence establishes that Mr Bates and Dr Cooke had a pre-trial conference on 27 October 1995. It would appear that at this conference Mr Bates was made aware of the pig's head testing of the anode³³⁹, and exclusion of such an instrument as the murder weapon. Even if Mr Bates had overlooked the passage in the Comprehensive Summary about the pig's head testing of the wrench, the Commission finds it surprising that, once the anode was excluded, they would not have discussed the question of what could have been the murder weapon; one would expect that such discussion would have led to a consideration of whether the weapon nominated and drawn by Mr Mallard (the wrench) could have caused the injuries.

[531] Dr Cooke recalls the conference with Mr Bates prior to the trial, but has no specific recollection of a wrench being discussed. However he assumes that there would have been some discussion about the weapon,

*I think it would be silly of us, sir, to have a pre-trial conference and not talk about the weapon.*³⁴⁰

Asked whether he recalled a pre-trial discussion concerning a wrench as a weapon he replied³⁴¹:

Again, not specifically, no, but I do know that it has been put to me about that time about a wrench in general terms. My recollection is that not at any time was a specific type of wrench discussed with me.

[532] Mr Bates said that in the conference he did not discuss with Dr Cooke whether a wrench could have caused the injuries, but agreed, "*with the benefit of hindsight*" it would have been a logical thing to do,³⁴² and he accepted that he should have put the wrench to Dr Cooke and asked whether or not it was capable of causing the deceased's injuries³⁴³.

[533] Mr Bates also had a number of meetings with Det Sgt Shervill, but the latter also did not recall any discussions between them about the murder weapon or more specifically about a wrench as such weapon or the pig's head testing of the wrench,³⁴⁴ but agreed that the issue of the weapon/wrench would no doubt have been discussed although he had no memory of it.

[534] At some time, apparently shortly before the Voir Dire, Mr Bates had a conference with Det Sgt Brandham relating primarily to the interviews the latter had with Mr Mallard on 17 June 1994. In his notes of that interview³⁴⁵ (voluntarily produced by Mr Bates through his counsel) appears the passage:

1.37

- *gas bottles – that’s not right*

spanner drawn – doesn’t match injuries

blue copper – in the wounds

go back in there clarify – couple of little things

- [535] In his evidence before the Commission, Mr Bates suggested that these notes record Det Sgt Brandham relating to Mr Bates, a conversation he (Brandham) had with Det Sgt Shervill on 17 June 1994 during a break in the interviews, and indicates that Det Sgt Shervill was then telling Det Sgt Brandham that the spanner which had just been drawn by Mr Mallard did not match the injuries; and not that Det Sgt Brandham was making such a statement to Mr Bates. Other entries on the page tend to support this interpretation except that, as the pig’s head testing with the wrench did not take place until a week later (24 June 1994), it is difficult to see how or why Det Sgt Shervill would have made such a statement on 17 June, unless Dr Cooke had expressed to him some preliminary view on wrenches in general during informal discussion prior to that time, or alternatively it was a private opinion of Det Sgt Shervill.
- [536] But whatever the context, Mr Bates was clearly on notice from Det Sgt Brandham prior to the Voir Dire that there was a problem with the spanner (or wrench) as drawn by Mr Mallard being the murder weapon. He agreed that this information was of “*enormous significance*” but cannot recall any further questions about it and did not cause any further inquiries to be made in relation to the issue³⁴⁶. This information from Det Sgt Brandham makes his reliance at the trial on the wrench as the murder weapon all the more questionable.
- [537] Mr Bates said that, owing to the procedure adopted at the Voir Dire, and in particular, as there was no issue as to Det Sgt Brandham’s evidence in chief, his statement was tendered³⁴⁷, and this evidence, which Mr Bates intended to lead at the Voir Dire and should have, became irrelevant to the issues then being considered, and he overlooked it³⁴⁸, and then forgot what he had been told with regard to it by the time the trial came around³⁴⁹. (The trial commenced 4 weeks after the Voir Dire).
- [538] Mr Bates agreed that “*with the benefit of hindsight*” there were a number of matters inconsistent with the wrench as drawn, being the murder weapon³⁵⁰ but said he wanted to run the case on the wrench being the weapon because that was what Andrew Mallard had said in his interview. He denied that he refrained from asking Dr Cooke whether the injuries were consistent with the wrench as the murder weapon because he knew that he would not get a positive answer.³⁵¹
- [539] The Commission has difficulty accepting, that notwithstanding the peculiar nature and shape of some of the injuries which had been the subject of the

pig's head testing of the anode by Dr Cooke, and examination by Mr Lynch as to the chemical deposits in the wounds, and the information gleaned from the conference with Sgt Brandham, there was no discussion between Mr Bates and either Dr Cooke or Det Sgt Shervill in their conferences as to whether such peculiar injuries were consistent with the use of a wrench as drawn by Mr Mallard.

- [540] Det Sgt Shervill,³⁵² Det Sgt Caporn³⁵³ and Det Sgt Brandham³⁵⁴ all told the Commission that they doubted or had reservations about a wrench as drawn by Andrew Mallard being the murder weapon, but apart from what appears at paragraph 534, there is no evidence that any of them ever conveyed their doubts or reservations to Mr Bates.
- [541] Mr Bates ran the trial on the basis that a wrench as drawn by Mr Mallard was the murder weapon, but made no attempt to prove that the use of such an instrument was consistent with the injuries suffered by the deceased. Although he asked questions about a possible murder weapon (the anode) he did not show Dr Cooke the sketch of what he was claiming was the weapon. This is such a fundamental omission that the Commission has difficulty accepting that it was accidental or due to an oversight. In these circumstances the Commission considers the most likely explanation to be that, even though he had overlooked or forgotten what was in the Comprehensive Summary, Mr Bates knew or realised that there were difficulties with identifying the murder weapon and decided to avoid the issue as much as possible.
- [542] In Written Submissions on his behalf it was submitted (paragraph 43) that *"it is wrongly assumed now that the identity of the murder weapon was a pre-occupying question at the trial"*. If it was not, it should have been, because if the accused could not correctly identify the weapon he allegedly used, it constituted a fundamental flaw in the reliability of his "confessions". In the Section 86 Submissions it was submitted that the failure by Andrew Mallard to correctly identify the murder weapon would constitute a fundamental flaw in the reliability of the confessions as *"simply wrong"*³⁵⁵, and the findings of the Court of Criminal Appeal are relied on in this regard. As pointed out in paragraph 524 above, the High Court regarded the evidence concerning the wrench as *"a central plank of the prosecution case"*.
- [543] There was also the failure to disclose the result of the pig's head testing of the wrench to the defence. Mr Bates had been informed of it in the Comprehensive Summary and consequently had a duty to disclose it to the defence, or to ensure that it had been disclosed by the Police. It is not acceptable to say that he read it once when he first received the papers and subsequently overlooked it. He had a responsibility to make himself familiar with the case and he failed to live up to that responsibility.
- [544] The Commission has read and taken into account a large number of references from leading members of the Criminal Bars, both local and interstate, all of whom speak in glowing terms of the high ethical and professional standards of Mr Bates, and in particular his fairness in the conduct of criminal trials. They reject any suggestion that he deliberately

sought to pervert the course of justice, and the Commission does not find that he did.

- [545] However, as the prosecutor he had specific duties under the DPP's Prosecution Guidelines, including to ensure the prosecution case was presented properly and with fairness to the accused (cl. 53) and to disclose information which comes to the attention of a prosecutor which may be exculpatory of an accused (cl 59).

Commission Opinion

- [546] In relation to the breach of clause 59, it has been submitted that a failure to disclose information could never result in what is described as a serious breach of discipline within section 83 of the PSM Act unless there be a deliberate act, and that a breach due to inadvertence or lack of diligence could never justify termination.
- [547] Section 80 of the PSM Act provides that breaches of discipline include "*misconduct*" (which is not defined for the purposes of that Act) and "*negligent or careless performance*" of functions, and the Commission is satisfied that the breaches of the Guidelines identified, even if due to inadvertence or lack of diligence, amounted to breaches of discipline.
- [548] Whether such breaches are "*serious*" does not, in the Commission's assessment, depend on whether they are deliberate or not, but on the seriousness of the context in which the conduct or omission occurs, the degree of responsibility of the person committing the breach and the possible consequences for others affected by the conduct or omission; in this case contributing to an accused being deprived of a fair trial on a charge carrying a mandatory penalty of life imprisonment. Having regard to these factors the Commission is satisfied that Mr Bates' breaches were serious within the terms of section 83 of the PSM Act and consequently could provide reasonable grounds for the termination of his employment as a public service officer.
- [549] For these reasons, the Commission's opinion is that Mr Kenneth Bates engaged in misconduct within section 4(d)(iii) and (vi) of the CCC Act in that conducting the trial on the basis that the murder weapon was a wrench as drawn by the accused, but making no attempt to prove that such weapon could have caused the deceased's injuries, particularly in circumstances where it was known that there was a problem about the pattern of some of the injuries, involved a breach of the trust placed in him by reason of his employment as a public officer and could constitute a disciplinary offence providing reasonable grounds for the termination of his employment as a public service officer under the PSM Act. The breach of clause 53 of the Guidelines would also appear to constitute a breach of clause 16.1 of the Professional Conduct of Rules of the Law Society of Western Australia which requires prosecuting counsel to present the case for the prosecution "*fairly, impartially and in a competent manner*".

[550] The Commission is further of the opinion that Mr Kenneth Bates engaged in misconduct within section 4(d)(iii) and (vi) of the CCC Act in that failing to disclose to the defence the result of the pig's head testing of the wrench constituted or involved a breach of the trust placed in him by reason of his employment as a public officer and could constitute a disciplinary offence providing reasonable grounds for the termination of his employment as a public service officer under the PSM Act.

9.7 “Twelve/Fifteen Things Only the Killer Would Know”

[551] One point relied on strongly by Mr Bates in his opening and closing addresses was that the admissions made by Andrew Mallard on 10 and 17 June contained a number of facts which only the killer would know, and which therefore supported the reliability of the confessions.

*The confessions you will see are of such a detailed and intricate nature and correctly detail so many things that only the killer could know ...*³⁵⁶

Twelve of these matters “*which only the killer would know*” were first formulated by Det Sgt Shervill in his Comprehensive Summary³⁵⁷, and a further three were added by Mr Bates at the trial.

[552] As it has now been established that Andrew Mallard did not kill Mrs Lawrence, none of these matters were “*things which only the killer would know*”; however it is appropriate to look at these matters in light of the information which was in the public domain at the time.

[553] At the conclusion of the video recorded interview with Mr Mallard, Det Sgt Brandham said:

Now the only one thing I want to ask you, Andrew, is, there are certain things about what you told us that only the offender would know ... How do you explain that?

To which Mr Mallard replied:

Um, my association in Mosman Park, going to the deli on the corner, walking past the jewellery store, not knowing what is behind the back wall, but also seeing the jewellery store or the jewellery store and the adjoining shops from the cycle centre in Stirling Highway, and then just coupling that with information on the television, um, identikit photograph, which is probably nothing like the person.

[554] The matters listed by Det Sgt Shervill in the Comprehensive Summary³⁵⁸ were as follows (they have been numbered by the Commission for ease of reference).

1. *Knowing the three areas of injuries sustained to Pamela LAWRENCE'S head and accurately showing them on his own head during the video recorded interview. (Corroborated by the post mortem examination).*
2. *Saying that he struck Pamela LAWRENCE at least six times possibly twelve. (Post mortem examination determined that LAWRENCE sustained twelve wounds to the head).*
3. *Saying that he did not hit Pamela LAWRENCE anywhere else. (Corroborated by the post mortem examination).*
4. *Saying that he dragged Pamela LAWRENCE from the front of the shop to the rear. (Corroborated by the drag marks in the blood on the floor as interpreted by Doctor COOKE and Aleksander BAGDONAVICIOUS).*
5. *Saying that Pamela LAWRENCE was wearing dark slacks and a jumper. (LAWRENCE was wearing blue jeans and a jumper).*
6. *Accurately describing the configuration of the shed in relation to the rear of the shop, the steps to the back landing, the flyscreen security door, the main rear door, and the small sign on the main rear door. (All are not visible from the rear laneway or backyard).*
7. *Saying that while he was in Flora Metallica he was seen by a girl in her early teens who was sitting in the front seat of a car parked back from the traffic lights in Glyde Street. (Corroborated by the witness Katherine BARSDEN).*
8. *Saying that he had realised he had been seen by the girl he "ducked" down behind the counter. (Corroborated by BARSDEN).*
9. *Saying that Pamela LAWRENCE's purse came from her handbag. (This is the place she kept her purse).*
10. *Saying that the handbag was black. (Her handbag is a dark blue).*
11. *Claiming that when he left Pamela Lawrence she was making "gurgling noises". (Corroborated by Peter LAWRENCE who states that on finding his wife she was "moaning and making gurgling sounds. I saw that she had a mouthful of blood").*
12. *Saying that he saw Pamela LAWRENCE's car parked at Flora Metallica when he was loitering in Glyde Street prior to entering the premises. (Corroborated by the fact that LAWRENCE's car was still parked in its usual position when the crime was discovered).*

[555] The additional matters added by Mr Bates at the trial were:

13. *Saying that Mrs Lawrence said, "Take what you want and go".*
14. *Saying that money was taken and that no jewellery was taken.*
15. *Saying that he took the wrench from the back shed to use as a jemmy on the back door but when he got to the back door it just pushed open.*

[556] The Commission's research has uncovered the following in relation to these matters:

1. The West Australian, Channel 7 and Channel 9 all reported on 24 May 1994 that Mrs Lawrence had received a number of injuries to her head and there were also subsequent reports. In his interview with Det Sgt Caporn on 10 June, when asked where he hit her, Mr Mallard indicated with his hand and Det Emmett wrote "Top head" (no reference to 3 areas). In the interview of 17 June with Det Sgt Brandham he said that he hit her "*right on top of the cranium*", and in the video interview he said the initial blow would have been around the forehead, and as she went down, he hit her on the cranium and on the temple. At the trial, Det Sgt Caporn said that the reference in the media was to the head area in general without any specific areas of the head being identified, and in his Closing Address Mr Bates (at p.20) said, "*There was certainly information in the media that she had been struck on the head with a blunt instrument, but that was as far as it went*".

Dr Cooke had in fact identified injuries to the right frontal region, the left temporal region and the back of the head, but Mr Mallard made no reference to the right frontal region or the back of the head as such. The proposition that Mr Mallard knew the three areas of injury and had accurately shown them on his own head during the video recorded interview was therefore misleading.

2. The media reports of 24 May 1994 suggested there had been a frenzied assault and there were a number of injuries about the head. The West Australian of 25 May reported that Mrs Lawrence had been hit "*more than ten times*" and this was repeated in the same newspaper on 26 May; again in the Sunday Times on 29 May and in the Subiaco Post on 31 May. Acting Inspector Darryl Lockhardt was reported as saying that Mrs Lawrence had been hit at least ten times. Mr Mallard had made statements such as "*about twelve, six to twelve and at least ten times*". In the Commission's view it was really splitting hairs to say that he said twelve times, rather than ten, or at least ten, as reported in the media. In any event having regard to the nature of the instrument which it was subsequently determined was likely to have caused her death, and Dr Cooke's evidence that in some cases a single blow could have caused two or even more lacerations, the evidence does not establish, and never did, that Mrs

Lawrence had in fact been hit ten, or any other particular number of, times.

3. All the references in the media were to head injuries. There was no reference to any injuries to any other part of her body and Mr Mallard did not say that he had struck her anywhere else. Mr Bates told the Commission³⁵⁹ that he was not told that Mr Mallard had also referred to injuries to Mrs Lawrence's nose.
4. There were references in the media to the deceased being found at the rear of her shop on the Channel 2 news of 24 May and in *The West Australian* of 27 May.
5. In fact Mrs Lawrence was not wearing dark slacks and a jumper, but blue jeans and a jumper. In any event in his video recorded interview with Det Sgt Brandham on 17 June, Andrew Mallard said she was wearing:

a skirt of some sort. Again being a woman of taste and sophistication she would have had to have been wearing a nice skirt like this, but one that joins up.

6. Mr Mallard did not accurately describe the configuration of the shed in relation to the rear of the shop, or the steps to the back landing. When asked the number of steps leading up to the back in the video recorded interview Mr Mallard said, *"five but no more than eight"*, and later *"six to eight"*. The images shown on the television news were a potential source of Mr Mallard's information.
7. Mr Mallard on one occasion described the vehicle as being pale green, and at another stage he said it was white and also that it was a Corolla; on 17 June he had described it as a Cortina. He also said *"it was a small green, pale green sedan or station wagon, it may have been white I'm not certain"*. It was in fact a pale or apple green Toyota Corolla Seca sedan³⁶⁰.
8. There were a number of references in the media to a person being seen behind the counter, and this person was the subject of the identikit photo which was circulated. The Channel 7 News of 26 May said, *"This is the man that was seen bobbing down behind the counter"*, and in the interview of 10 June Andrew Mallard said, *"we locked eyes and I bobbed down like this and ran out"*. He later said *"I quickly ducked down behind the counter"*. On 17 June he said, *"he bobbed down, I ducked down"*.
9. It would not be difficult to guess that a woman kept her purse in her handbag.
10. Although there was no reference in any public media to Mrs Lawrence making *"gurgling noises"*, there was reference to the fact that she had

been bashed and left for dead, and died on the way to hospital, having been alive when found by her husband. That she was making “gurgling noises” could have been a guess.

11. There was nothing in the media about her car being parked nearby, but if he was anywhere in the area he could have easily seen it parked where it was, or it could have been a reasonable assumption.
12. It had previously been reported in the media, for example, the Sunday Times 29 May, that Mrs Lawrence had given strict instructions to her staff to always hand over whatever was demanded in a robbery, and once again it would not be difficult to assume that a person confronted with a robber armed with some sort of weapon would say, “take what you want and go”
13. On 24 May, Channel 2 reported, “nothing appears to have been stolen”; Channel 7 reported “nothing was taken”; Channel 10 reported “there was nothing stolen at all” as did the *Western Australian* on 25 May; and on 29 May the Sunday Times disclosed, for the first time, that Mrs Lawrence wallet, with only a few dollars in it, had been stolen.
14. It was reported in the media that there was no sign of forced entry to the shop and there are a number of references in the media to the type of weapon that could have been used including a star picket with a jagged edge; perhaps a wheel brace, like a tyre lever, like the one pictured (anode); a blunt weapon like a hammer, spanner or star picket, or club like weapon. Although raising them as matters only the killer would know, Mr Bates in his closing address at³⁶¹ conceded that:

The last two were in the media.

[557] In summary, even at the time when it was thought Mr Mallard MAY have been the offender, there was sufficient information disclosed in the media which, together with a few calculated guesses, could explain the answers which he gave. They were not matters “which only the killer would know”, and the jury were misled by being asked to believe they were.

[558] The evidence at trial concerning what was in the media was given by Det Sgt Caporn³⁶² whose evidence was unchallenged in this regard.

[559] It appears that Mr Bates accepted what he was told by the police as to what had been in the media, as he should have been able to do; but he should have realised that some of the points, particularly points 5 and 9, lacked validity. It would further appear that Det Sgt Caporn’s examination of the media was not sufficiently thorough and that the defence team, led by Mr Hogan, did not conduct adequate, if any, research of its own to determine what matters had been reported in the media. The result was that the prosecution was able to put to the jury a strong argument in support of the

reliability of the confessions when that material should have been challenged, and either destroyed or its value and reliability significantly diminished.

[560] It is unfortunate that no countervailing list of *“Things which Andrew Mallard Got Wrong”* such as that referred to in Chapter 8 was not also put before the jury. Such a list could only have come from the Police, as it was only the investigating police who had access to information showing what Andrew Mallard had said that was incorrect.

9.8 Defence

[561] As pointed out by the trial judge in his summing up,³⁶³ the only direct evidence of the guilt of the accused was the confessional material in the police interviews of 10 and 17 June, and in support of the reliability of such confessions the prosecution relied on the 12 or 15 matters which *“only the killer could know”*.

[562] In responding to these matters Mr Hogan relied on such things as the lack of blood on the clothing or shoes of the deceased; the failure of the police divers to find the weapon in the area of Stirling Bridge; and that on the evening of the murder Mr Mallard claimed, at an adult bookshop in Fremantle, to have no money (this was inconsistent with him having taken Mrs Lawrence’s purse from Flora Metallica).

[563] As to the weapon, Mr Hogan argued that clearly it was not one of the copper anodes and Dr Cooke had said that the wounds were consistent with an object which was robust and fairly heavy, whereas the only item which Mr Lawrence had said may have been missing was a much smaller shifting spanner, which in any event did not match the item drawn by the accused in his interview with police. In the absence of information about the pig’s head test with the wrench, Mr Hogan was not in a position to press this point to his client’s advantage.

9.9 Verdict, Sentence and Appeal

[564] The jury returned its verdict of guilty on 15 November 1995, and on 21 December Mr Mallard was convicted of the wilful murder of Pamela Lawrence and sentenced to imprisonment for life with a minimum term of 20 years. He had been in custody since 17 June 1994 and remained so until released on 20 February 2006, having served a period just in excess of 11 years and 8 months.

[565] He appealed to the Court of Criminal Appeal on the grounds that the interviews and videos should not have been admitted, but such appeal was dismissed on 11 September 1996.³⁶⁴ An application to the High Court for special leave to appeal was dismissed on 24 October 1997.

CHAPTER TEN THE PETITION (CLEMENCY APPEAL)

10.1 Mr John Quigley MLA

- [566] Notwithstanding his conviction, Andrew Mallard continued to maintain his innocence and by the first half of 2002 a number of persons were actively investigating and advocating on his behalf; including his sister, Ms Jacqueline Mallard; Ms Colleen Egan, a prominent Perth journalist, and Mr Quigley. Mr Quigley had become involved in the case at the invitation of Ms Egan who asked him to read the Transcript and relevant papers with a view to obtaining a reference for a second appeal.³⁶⁵ Mr Quigley began that work during Lent in 2002.
- [567] John Robert Quigley had been admitted as a barrister and solicitor in 1975, and practised as such, principally in the criminal law field, until his election to the Western Australian Parliament in 2001, although he retained his practising certificate until it expired in 2006. For many years he was the Principal Solicitor for the Police Union in this State³⁶⁶.
- [568] Upon reading the transcript, Mr Quigley became satisfied that something was wrong with the Prosecution, that there had been an undercover operation which had not been disclosed, and that Mr Mallard had not had a fair trial. He began seeking additional information which could justify a petition to the Governor for clemency, pursuant to section 140 of the *Sentencing Act 1995*.
- [569] In due course, Mr Quigley prepared a petition which he delivered to the Attorney General on 23 June 2002. At about the same time he indicated that he intended to speak about the Mallard matter in Parliament during the debate on the Appropriation Bill on Friday 28 June 2002. Mr Quigley said that when he handed the petition to the Attorney General he regarded it as doomed to fail³⁶⁷.
- [570] Before his intended speech to Parliament on Friday 28 June 2002, the Attorney General arranged for Mr Quigley to have access to the DPP's file, and the DPP (Mr Cock) asked Mr Bates to prepare the file for inspection. On doing so Mr Bates re-read the Comprehensive Summary of Facts, including the paragraph relating to the pig's head test of the wrench.
- [571] Mr Bates immediately drew it to Mr Cock's attention with the explanation that it "*had previously been inadvertently overlooked*"³⁶⁸.
- [572] Mr Quigley attended the offices of the DPP on Saturday 29 June 2002, where he was handed a copy of the Comprehensive Summary by Mr Cock, and his attention was drawn to the passage concerning the pig's head testing of the wrench. As arranged, he was given access to the relevant DPP's files.

[573] Following his access to the DPP's files, including the Comprehensive Summary, Mr Quigley was able to redraft the petition which, in accordance with the relevant legislation³⁶⁹, was referred to the Court of Criminal Appeal for the "whole case" to be heard as if it were an appeal (the Clemency Appeal).

10.2 The Court of Criminal Appeal

[574] One of the central focuses of the petition was that there had been material non-disclosure by the prosecution of significant material relevant to the defence which, *inter alia*, cast doubt on the reliability of the so-called confessions allegedly made by Mr Mallard.

[575] A number of the matters related to non-disclosure were admitted, but the Crown contended that, notwithstanding these matters, Mr Mallard had not been deprived of a chance reasonably open to him of being acquitted. On 3 December 2003, the Court dismissed the appeal³⁷⁰. It did so for two main reasons:

1. It held that the law required a limited view of the evidence to be considered on that type of appeal; and
2. It held that even where there had been failures in the duty of disclosure, those failures would not have altered the outcome of the trial.

[576] Mr Mallard appealed to the High Court, which on 15 November 2005 unanimously³⁷¹ upheld the appeal, quashed the conviction and ordered a new trial³⁷².

[577] The Court held that, on an application for clemency pursuant to section 140 of the *Sentencing Act 1995*, the Court should not limit the evidence considered as the Court of Criminal Appeal had done, but should consider the "whole case", and further, that because of the material non-disclosure, Mr Mallard had not received a fair trial. An application on behalf of Mr Mallard for a verdict of acquittal was refused but the majority said:³⁷³

Having regard however to what has in total passed and emerged it would remain well open to the Respondent to elect not to have the Appellant re-tried if it were so minded.

[578] The Court expressed particular concern about the material non-disclosure. For example Kirby J said:³⁷⁴

Of particular concern are the items in which evidentiary material, consistent with innocence and presenting difficulties for the prosecutor's hypothesis of guilt, were actually suppressed or removed from the material supplied to the Defence.

10.3 Discontinuance

- [579] Following the decision of the High Court, the Director of Public Prosecutions, Mr Robert Cock QC, instructed one of his senior prosecutors, Ms Troy Sweeney SC (now Her Honour Judge Sweeney), to examine the matter and advise what course should be taken. Mr Cock selected Ms Sweeney because of her seniority and lack of prior involvement in the matter.
- [580] Since the first trial, section 570D of the *Criminal Code* had been enacted. This rendered inadmissible any evidence of an admission by an accused person unless there was a videotaped recording of the admission, except in certain exceptional circumstances. Those provisions were retrospective in that they applied to all trials, irrespective of when the interview had taken place³⁷⁵. This meant that any new trial of Andrew Mallard for the murder of Mrs Lawrence could not include any evidence of the interviews with him which had not been videotaped. Without those interviews, Ms Sweeney concluded that there was no reasonable prospect of a conviction.
- [581] On 20 February 2006, a notice of discontinuance was presented and a statement was read in court by the DPP, Mr Cock. In the statement, Mr Cock explained the reasons for the discontinuance, particularly the impact of s570D of the *Criminal Code* on the admissibility of the confessional material. He concluded:³⁷⁶

I do note for the record and for the future that this decision is made on the evidence presently available to the prosecution. Mr Mallard's discharge on this charge doesn't alter the fact that he remains a prime suspect for this murder. Should any credible evidence present in the future that would ever give the state a reasonable prospect of obtaining a conviction, the state would seek the prosecution but, of course, that is not the present position and many years have passed since this homicide occurred.

- [582] Mr Mallard was released forthwith from Casuarina Prison, but remained liable to be retried if fresh evidence became available against him.
- [583] The statement read to the Court had been prepared by Ms Sweeney³⁷⁷ and was only read by Mr Cock because the matter was listed by the court at short notice and Ms Sweeney was unavailable at the time.
- [584] The terms of the statement, particularly the reference to Mr Mallard still being a "*prime suspect*", were inappropriate. The material disclosed in the appeals, which further contradicted the matters contained in the so-called confessional material, must have caused any reasonably fair minded person to have had doubts as to whether Mr Mallard was in fact the murderer. It was tantamount to the DPP and police saying, and was likely to be understood by the general public as meaning:

We know he did it although we cannot prove it.

- [585] After the exposure in the High Court of the weaknesses in the prosecution case, such description was certainly inappropriate in the case of Mr Mallard. The DPP acknowledged as much in a letter of apology which he wrote to Mr Mallard dated 11 October 2006.
- [586] The passage quoted above, at paragraph 581 was included at the request of Mr Cock³⁷⁸ who considered it should be said in case, if fresh evidence came to light, it became necessary to resist an application for a permanent stay of proceedings. He now accepts that a more appropriate procedure is to write a letter to the suspect's solicitors reserving the prosecution's position.
- [587] Meanwhile, the Commissioner of Police did two things: firstly, in light of the statements made by the High Court concerning the conduct of some of the police officers, he gave appropriate statutory notice to the Commission in his role as a "notifying authority" pursuant to section 28 of the CCC Act, and secondly, he instigated a review of the original investigation, the Lawrence Homicide Review 2006, discussed in the next chapter.

CHAPTER ELEVEN

THE COLD CASE REVIEW AND SIMON ROCHFORD

11.1 Cold Case Review

- [588] Following Mr Mallard's successful appeal to the High Court the Commissioner of Police instigated a review of the original investigation, known as the Lawrence Homicide Review 2006. The review was not to deal with issues of potential misconduct by any police officer, but was rather a review of the original investigation into the murder of Mrs Lawrence. The task of carrying out the Lawrence Homicide Review was allocated to the Special Crime Squad under the leadership of Det Sen Sgt Anthony Lee.
- [589] When reviewing the forensic material from the 1994 crime scene, Special Crime Squad officers saw that the investigation files, which had undergone reorganisation since 2002, contained the plaques and photographs of fingerprints found at the crime scene. Among the plaques was the perfectly preserved plaque of an unidentified partial palm print, and another containing unidentified finger prints.
- [590] There had been few fingerprints lifted from the scene at Flora Metallica but in 1994 it was considered that they were of little use. Those which were identified were shown to belong to persons known to be at the scene, such as Peter Lawrence and police officers. At that time only fingerprints, and not palm prints, could be checked against the Australian Fingerprint Identification System (AFIS).
- [591] Since 1994, the national fingerprint database, now known as the National Automated Fingerprint Identification System (NAFIS), has undergone substantial improvement. In particular, since April 2001 it has been possible to conduct an open search of palm prints on the database. Following the upgrade to NAFIS, unidentified prints from past "unsolved" offences have been gradually entered into the system and this has resulted in previously unsolved crimes being resolved.³⁷⁹
- [592] In 2001, however, the murder of Mrs Lawrence was a "solved" crime. Accordingly, the fingerprints, including the palm print, from Flora Metallica had not been entered into the new database.
- [593] In 2006, after the plaques were found in the case files, they were checked against the NAFIS database where they produced an immediate match. The palm print was identified to be that of Simon Rochford³⁸⁰
- [594] At that time, Simon Rochford was an inmate of Albany Regional Prison, in the eleventh year of a fifteen year sentence for the wilful murder of his girlfriend, Ms Brigitta Dickens. Her murder had occurred as a result of being struck on the head with a particular instrument on 15 July 1994, seven weeks after the

murder of Mrs Lawrence. The weapon used was a weight collar attached to a sawn-off hoe handle.

- [595] Simon Rochford had been arrested on 18 July 1994, three days after the murder of Ms Dickens, and he confessed to killing her. He was charged with her wilful murder the day before Mr Mallard was charged with the wilful murder of Mrs Lawrence. Simon Rochford later went to trial, claiming that he did not intend to kill Ms Dickens, but his defence failed, the jury found him guilty, and he was convicted and sentenced on 11 November 1995.
- [596] The identification of the palm print as that of Simon Rochford caused the Special Crime Squad conducting the Lawrence Homicide Review to recommend that their work be extended to conduct a full Cold Case Review, in order to reassess the identity of the person responsible for the death of Mrs Lawrence. The recommendation was accepted and the Cold Case Review undertaken.
- [597] The Police had not intended to release information to the public concerning the identification of the palm print until they had had the opportunity to make further enquiries. However, two separate pieces of information relating to the palm print were released by the media over a period of time, both of which had a profound affect on the conduct of the review.
- [598] On 12 May 2006, Mr Gary Adshead published in *The West Australian* newspaper³⁸¹ that a palm print had been identified, but not whose palm print it was, only that it belonged to a person currently in prison for a violent crime. The name was released by journalist Ms Suzanne Short on the ABC television news on 18 May 2006.
- [599] Anticipation of the premature release of the information that a palm print had been identified caused officers of the Special Crime Squad to execute a search warrant at Albany Prison and interview Simon Rochford before they were really in a position to do so. He was interviewed by Det Sgt Saunders on 11 May 2006, and denied involvement in the murder of Pamela Lawrence³⁸².
- [600] Following the interview with Det Sgt Saunders, Simon Rochford was placed on suicide watch for a period of time and underwent a series of counselling sessions. On the morning of 19 May 2006, being the morning following being named on ABC television news as a prime suspect for the murder of Mrs Lawrence, he was found dead in his cell in circumstances which are ultimately matters for the State Coroner, but which appeared to be the result of self-inflicted wounds.
- [601] After Simon Rochford's death, the Special Crime Squad continued its work. It closely examined the Brigitta Dickens case, including the precise circumstances of her death and those exhibits tendered in the 1995 trial of Mr Rochford which could still be found.

- [602] One of the puzzling features of Andrew Mallard's trial was that the murder weapon was never identified. In his so called "confessions" in the interviews of 10 and 17 June 1994, he had nominated as the murder weapon a Sidchrome wrench as drawn by him. However, tests conducted on a pig's head in the presence of the Chief Pathologist, Dr Cooke and police on 24 June 1994, one of the material matters not disclosed to the defence prior to the trial, and further tests by Dr Cooke in 2002, had proved that such an implement could not have caused some of the distinctive and unusually patterned injuries suffered by Mrs Lawrence. Moreover, traces of blue paint and rust had been found in Mrs Lawrence's injuries and Sidchrome spanners were not painted blue³⁸³, or at all and do not rust.
- [603] On the other hand, the injuries to Ms Dickens had the same distinctive and unusual features as some of those sustained by Mrs Lawrence and traces of blue paint were found in Simon Rochford's back pack (obtained by the Special Crime Squad) consistent with the traces found in Mrs Lawrence's injuries. This suggested that the injuries to the two victims had been inflicted by the same weapon, namely, a weight collar attached to a hoe handle. This fact, together with his palm print on the counter of the Flora Metallica shop, and other evidence which emerged from the Cold Case Review, caused the Special Crime Squad to conclude in October 2006, that in regard to the murder of Mrs Lawrence:
1. Andrew Mallard was not the offender;
 2. Mr Peter Lawrence was not a suspect; and
 3. That if Simon Rochford were alive, the DPP would be consulted with a view to him being charged with the wilful murder of Mrs Lawrence.

11.2 Sandford Inquiry

- [604] On 5 July 2006, the Commission received a notification pursuant to section 28 of the CCC Act from Assistant Commissioner Stephen Brown of the Western Australia Police alleging that Senior Constable Kirsten Sandford, employed in the Fingerprint Bureau, had released unauthorised information to an external source relating to Simon Rochford's palm print.
- [605] Sen Const Sandford was interviewed by the Police Internal Affairs Unit, and admitted to advising her psychiatrist about the palm print identification, but denied telling her husband, Christopher Sandford, or anyone else. Christopher Sandford was a former police officer, who had ceased service in 2005.
- [606] The Commission conducted an investigation which included examining on oath in private hearings³⁸⁴ both Sen Cons Sandford and her husband .
- [607] During evidence on oath, Sen Cons Sandford acknowledged that she had told her husband about the identification of the palm print on the day of the discovery. Her explanation for telling him was that she was on..."such a

*high*³⁸⁵ and was excited about the Fingerprint Branch's achievement, but she did not tell her husband whose palm print it was³⁸⁶.

- [608] Sen Cons Sandford denied making any telephone calls personally to the media, stated she did not encourage, ask or expect her husband to make any telephone calls to the media or to pass the information on to anyone else, and, although having suspicions that he may have made calls, did not know for certain that he had done so.
- [609] Christopher Sandford, during his evidence on oath, acknowledged receiving the information from his wife and, in response to a direct question as to whether he had told Mr Gary Adshead from *The West Australian Newspaper* about the palm print identification, made the comment... *"I told him one month after coming – one month after coming into contact with that information"*³⁸⁷.
- [610] As a result, the Commission concluded that the information that a palm print had been identified had been passed by Sen Cons Sandford to her husband, who in turn passed the information to Mr Adshead, who subsequently caused it to be published in *The West Australian Newspaper* on 12 May 2006.
- [611] The Commission formed the opinion that Det Con Sandford had engaged in misconduct pursuant to section 4(d)(v) and (vi) of the CCC Act and released the transcripts of the relevant hearings to the police for the purposes of considering if disciplinary action was necessary. Ms Sandford has since resigned from Western Australia Police.

11.3 Release of Simon Rochford's name

- [612] Following publication on 12 May 2006 that a palm print had been identified, there was speculation and interest in the identity of the person leaving the print, until Ms Suzanne Short disclosed on the ABC television news on 18 May 2006, that the palm print was that of Simon Rochford.
- [613] The Commission examined a number of witnesses, including Ms Short, in private hearings to determine how she was able to identify Mr Rochford, and is satisfied that she did so as a result of investigative research carried out by her and others working with her in the ABC organisation. Ms Short attended the Commission in answer to a summons served on her. Upon her appearance she sought, through her counsel, a short adjournment to speak with the persons who might be regarded as her informants.³⁸⁸ After speaking with them, she returned and informed the Commission that those persons had no objection to her disclosing their names,³⁸⁹ after which she gave her evidence.
- [614] Her research encompassed an examination of other violent murders around the time of that of Mrs Lawrence, which produced Mr Rochford's name. Ms Short then confronted the Police media officer, Mr Neil Poh, and other police officers, and her information was neither confirmed nor denied by them. Correctly, Ms Short formed the opinion that the identified palm print belonged

to Simon Rochford and, after further discussion with police media officers, she named him in the TV News that evening as being a new suspect for the murder of Mrs Lawrence. The Commission has examined the research material on which Ms Short based her opinion and accepts that, using both the original information leaked to the media on 12 May 2006 and her investigative material, she was able to establish Simon Rochford's name. There is no evidence of any further misconduct by any public officer other than that which related to the release of the earlier information on 12 May 2006.

CHAPTER TWELVE OVERVIEW

12.1 The Interviews

- [615] There were a number of factors which contributed to Andrew Mallard being convicted of a murder which he did not commit. The most significant of these factors was that, on at least three occasions, including once in the video-recorded interview, he confessed that he had killed Mrs Lawrence. In addition, he made a number of statements in the third person purporting to describe what the actual killer (being someone other than himself) would have done, which the jury could, and apparently did, construe as admissions of what he himself had done (the so-called “*third party admissions*”).
- [616] In addition to this, and related to it, is the fact that at no stage over a number of interviews did he provide a verifiable alibi for what came to be regarded as the relevant time, namely from approximately 5.00 pm to 6.40 pm on the evening of the murder.
- [617] So why did he confess to a murder he did not commit, and what steps if any, were taken to check the validity of his apparent confessions? The answer to the first question is that he was mentally ill. He was remanded to Graylands Hospital on minor charges for assessment on the day following the death of Mrs Lawrence, and Dr O’Dea diagnosed that he was suffering a bi-polar condition, but was fit to be at large in the community.
- [618] Both before his first arrest on 23 May and subsequently, but particularly during the period of the undercover operation (13 - 16 June) he was living a bizarre life in a fantasy world. Examples have been cited previously in this report, and do not need to be repeated in detail, but include such things as claiming to be an undercover police officer, and being able to speak six languages, proclaiming himself to be a Viking and dressing as a Highlander, squatting in premises and being a regular user of cannabis.
- [619] Of course, some of his claims could be seen as, and probably were, part of his stock-in-trade as a con-man living on his wits, but some of them more likely demonstrated a loss of touch with reality; for example, claiming that in his interviews he believed the police were seeking his theories on what the real killer would have done, and that he was simply assisting them.
- [620] Dr O’Dea gave evidence at the Voir Dire³⁹⁰ to the effect that Andrew Mallard was just as capable as a person not suffering from mental illness of telling the difference between fact and non-fact. However in the opinion of the Commission, this was not the right question, which should have been:

In the light of his mental condition, is it possible that his confession may not be true?

- [621] The police were conscious of the possibility of a false confession, and for this reason drew up a list of *“twelve things only the killer would know”*. This was later expanded to fifteen by the prosecutor at the trial, and the fact that Andrew Mallard had stated these matters in his interviews was relied on as, in effect, verifying the confessions. As it has now been established that Andrew Mallard was not the killer, these were not facts *“which only the killer would know”*, and this aspect of the matter has been discussed in Chapter 9.
- [622] What the police, the prosecutor, and also defence counsel, failed to do was to consider the number of errors which there were in the confessional material, the number of things which Andrew Mallard simply got wrong. These have also been previously discussed in Chapter 8, the most obvious of which was his inability to identify the murder weapon. A number of police³⁹¹, for example, Det Sgt Shervill and Det Sgt Brandham, said they never believed that the wrench was the weapon, and the pig’s head testing tended to confirm this, yet no one seems to have questioned whether that fundamental mistake on Andrew Mallard’s part, especially when combined with his other mistakes, did not throw doubt on the reliability of the whole confession. It appears to have been passed off as possibly a deliberate inaccuracy by an offender who was trying to mislead police when appearing to make admissions.
- [623] Although the *“twelve things only the killer would know”* were tabulated in the Comprehensive Summary, there was no corresponding table of the mistakes. The attitude of the police appears to have been, having obtained the confessions, to advance their reliability by every means possible, rather than to look at both sides of the equation and to consider just how reliable the so-called confessional material really was. It is not sufficient to say that to do that was a job for the defence at trial; many of the mistakes were known only to the police.
- [624] There is one worrying aspect of the interviews which has not previously been referred to. As Andrew Mallard was not the offender, it is difficult to see how some of the information stated by him in his interviews could have been known to him at all, and the question arises whether such information was fed to him in casual conversation either by investigating police or by the UCO, and then reproduced by him in the interviews. This applies for example to what he said about being seen by the *“young girl”* in the car. As he was not there, and only the barest details of the encounter were published in the media, the question arises, as to where he got the balance of the information such as the make and colour of the vehicle. He gave different versions of the make and colour, but one of his versions was correct.
- [625] As to the position of the wounds to Mrs Lawrence’s head, Mr Mallard has claimed on a number of occasions that he was shown a Polaroid photograph, a claim which is denied by investigating police³⁹². What is known is that in conversations with the undercover officer there was reference to a Sidchrome spanner³⁹³ and that washing clothing in salt water would remove traces of blood. Both these matters were reproduced in the interviews with Det Sgt Brandham on 17 June.

- [626] There is no evidence that factual material was improperly fed to Andrew Mallard before or during the interviews, and the Commission has formed no opinion that it was; but it would help to explain how a mentally ill person came to confess to a murder he did not commit and was able to support such confession with verifiable facts. That some matters were discussed with the UCO was not known to the defence because the undercover operation was not disclosed. Under the latest guidelines such an operation would now be disclosed.³⁹⁴
- [627] The case of Andrew Mallard demonstrates the problems which can arise when mentally ill persons are interviewed for lengthy periods by experienced police investigators without any support person present.
- [628] The Commission therefore believes that special provision should be made for the interviewing of mentally ill persons, as is the case with indigenous persons, intellectually disabled persons and children. Such provisions could include that they only be interviewed in the presence of a psychiatric doctor or nurse, a lawyer or a family member of their choice. A psychiatrist should be required to certify that such person is fit to be interviewed, can distinguish between fact and fiction, and is likely to give truthful answers. A person should be regarded as mentally ill if he or she has been diagnosed with a mental illness within the previous three years, has been receiving psychiatric treatment within that period, or has been in a mental hospital, either as a compulsory or voluntary patient, within that time.
- [629] The Commission acknowledges that an effort has already been made in this regard by the revised WAPOL Code of Conduct which was gazetted on 16 April this year³⁹⁵. That revised code expressly sets out principles for “Dealing with People with Disabilities”; but in the Commission’s view, more specific directions are desirable.

12.2 The Altered Statements

- [630] The next factor which contributed to the wrongful conviction of Andrew Mallard was the alteration of the statements of a number of witnesses, but particularly those of Miss Barsden and Ms Englehardt. The changes to the statements of these witnesses changed the case against Mr Mallard by strengthening it considerably.
- [631] In the case of Miss Barsden, who saw a man in the deceased’s shop at a time shortly before she was killed, by changing the colour and possibly the nature of the headgear the man was wearing, a person who could not have been Andrew Mallard became a person who probably was. This was how her observations were represented in Det Sgt Shervill’s Comprehensive Summary of Facts, how the case was opened by the prosecutor at the trial, and on which he relied on it in his closing address.

[632] Of almost as much significance were the major changes to the statement of Ms Enghardt. If she was correct in her original statement that on the afternoon of 23 May Andrew Mallard's cap was hanging on the hook behind the door in her unit and that when he came in later that evening he had nothing on his head and his hair was wet, it meant that he was not the person seen by Miss Barsden through the shop window. Even if she was wrong on any or all of these matters, the fact that she had said them opened up a fruitful field for cross-examination to the defence and Ms Engelhardt, who had a habit of changing her story in any event, and could have been thoroughly discredited. If her timing of Andrew Mallard's arrival at her flat was in doubt, his failure to provide a verifiable alibi for the period from 5.00pm until approximately 6.40pm would have become of much less significance.

[633] The alterations to the statements of Katherine Purves and Meziak Mouchmore also had the effect of providing evidence that a person resembling Andrew Mallard had been present in the area shortly before the murder, and was presented to the jury as having that effect, whereas based on their original statements those persons could not have been him. Finally in this regard was the alteration of Mr Lynch's report by deletion of the results of the salt water testing, which would have raised further questions as to the reliability of the confessional material.

12.3 Non-Disclosure

[634] Closely related to the matter of the altered statements is the issue of non-disclosure, particularly of the prior statements, the salt water testing of the clothing and the pig's head testing of the wrench; the fault of which, except for the pig's head testing, was that of Det Sgt Shervill, whilst the non-disclosure of the pig's head testing was primarily the fault of the prosecutor, and to a lesser degree, that of Det Sgt Shervill.

[635] If it had been disclosed, and the jury made aware that

- the colours and possible nature of the headwear of the man seen by Miss Barsden had been changed,
- the description of the clothing worn by the persons seen by Ms Purves and Mr Mouchmore had been changed,
- the changes to Ms Englehardt's statement remarked on above,
- a wrench similar to that drawn by the accused could not have caused the deceased's injuries, and
- Andrew Mallard was wrong when he spoke of the person responsible washing clothing in salt water,

the whole of the prosecution case would have been considerably weakened, if not totally discredited.

12.4 The Conduct of the Prosecution

[636] The conduct of the trial by the Prosecutor in opening with the proposition that the murder weapon was a wrench when he had been informed that a wrench was not the weapon, or at least there were doubts about it, and failing to support that proposition by evidence from the pathologist that the wounds were consistent with a wrench as drawn by the accused in the interview of 17 June has already been discussed in Chapter 9 and does not need to be repeated here, beyond recording it as a possible factor which contributed to the conviction. A further possible contributing factor was the emphasis placed on the 12 or 15 things which it was claimed only the killer would know, without any similar attention being paid to the demonstrable errors contained in Andrew Mallard's account.

12.5 The Conduct of the Defence

[637] The defence of Mr Mallard was in the hands of Mr Hogan, a lawyer employed by the Legal Aid Commission, conducting only his second murder trial (by coincidence his first was that of Simon Rochford). As is normally the case, he lacked the resources available to the prosecution to carry out investigations, and probably saw little point in doing so, as many of the errors contained in Mr Mallard's admissions were only known to be errors by the police.

[638] He no doubt had a difficult client and his instructions were presumably inadequate, and apparently, in part, misleading³⁹⁶. It would seem he was instructed that his client's admissions were the result of him being assaulted by the police, but the failure of the hospital on two occasions to detect any injuries, together with his calm and upfront appearance on the video recorded interview, meant that such a claim was bound to fail.

[639] The Commission is reluctant to criticise Mr Hogan on account of any failure to ask particular questions or for any tactical decisions he made during the course of the trial, particularly when, as a result of the non-disclosure, he was at a distinct disadvantage. An application to adjourn the trial to obtain the services of a more experienced defence lawyer was unsuccessful³⁹⁷.

12.6 Similarities Overlooked

[640] One thing which has intrigued the Commission is that no one saw a link at the time between the murders of Pamela Lawrence and Brigitta Dickens, notwithstanding that they occurred within about seven weeks of each other, both victims sustained similar but distinctive injuries, both homicides were investigated by the Major Crime Squad, both suspects were interviewed by Det Sgt Brandham and both post mortem examinations were carried out by the same forensic pathologist, Dr Cooke. The murder weapon was known in

the case of Brigitta Dickens, but was not identified in the case of Pamela Lawrence.

- [641] Pamela Lawrence was killed on 23 May 1994; the post-mortem carried out the following day; Mr Mallard was interviewed by Det Sgt Brandham on 17 June and arrested at Graylands Hospital on 19 July. Brigitta Dickens' body was found on 17 July and Mr Rochford was charged by Det Sgt Brandham on 18 July after being interviewed by him the same day. Dr Cooke carried out the post-mortem examination on Ms Dickens also on that day.
- [642] Det Sgt Brandham's evidence to the Commission, was that he saw the murder of Mrs Lawrence as a burglary gone wrong and that of Ms Dickens as a domestic dispute and, whereas Andrew Mallard denied involvement or admitted it and subsequently retracted such admissions, Simon Rochford readily admitted he had killed Ms Dickens, but claimed he had no intention to kill her. Sgt Brandham was an investigator, not a pathologist, and he was concerned with identifying the offender and the circumstances of the offence, rather than the cause of death. The Commission regards his explanation as reasonable.
- [643] Dr Cooke, on the other hand, was the pathologist who conducted both post mortems. He observed the wounds to both skulls and saw that the wounds to Ms Dickens were of a distinctive shape, and knew what weapon had been used to kill her. Seven weeks previously he had examined the skull of Mrs Lawrence and observed similarly shaped injuries, but he knew that neither he nor the police had been able to identify the weapon, and that it was still a mystery at the time he did the post-mortem on Ms Dickens. He did not see a connection, which the Commission accepts, but which it does find surprising. It would appear that he must have kept each post mortem in a separate compartment in his mind, and not done any lateral or cross-case thinking.

12.7 WAPOL in 1994-95

- [644] As will appear from what has gone before, there appears to have been an attitude in the police in 1994-95 that in preparing a case investigators only looked to those matters which tended to inculpate the person to be charged and that any matters which might exculpate or cast doubt on that person's guilt were ignored. How far this extended to other investigations is beyond the scope of this inquiry, but on a number of occasions police officers said that they would do things differently today, and there was direct evidence that some practices have changed in the meantime. For example, all previous statements of witnesses are now furnished to the defence as a matter of course and the forensics file for each investigation is now retained in a central area at the Forensics Branch.
- [645] In these circumstances, and as the Commission has been looking at an historical rather than a contemporary situation, it is not in a position to assess current investigative procedures or make recommendations in respect of them. The Commission has spoken with representatives from the Western

Australia Police, who in 2006 were tasked with conducting a review of the Forensic Standard Operating Procedures relating to the investigation of homicides. As a result, the police have implemented a set of new standardised procedures which appear to have addressed many of the issues arising from this inquiry with regard to forensic analysis, forensic procedures and management and review of forensic information.

- [646] The Commission has also received a copy of the Western Australia Police revised Code of Conduct as published in the Police Gazette on 16 April 2008. It is acknowledged that several issues highlighted during this inquiry have been considered when preparing the document. However the document only addresses the relevant issues in very general terms, for example: dealing with persons with a disability (p 9) and the need to treat individuals fairly, noble cause corruption, biased investigations and non disclosure of critical evidence (p 11). It is in very general terms and in the opinion of the Commission something much more specific and detailed is required.
- [647] One particular matter of concern which did emerge however was the problem of communicating fresh information or directives to police officers, an issue which arose in relation to the DPP's Guidelines and the requirement for certification in November 1993. These were published in the Police Gazette for the information of all police, but there was evidence before the Commission that generally police do not read the Police Gazette, except as to available appointments and promotions³⁹⁸.
- [648] In relation to the latest letter from the DPP with the list of "Items not Commonly Disclosed" (2007), the Commission notes that the Commissioner of Police has issued a *General Broadcast*, but whether that will be more widely read or acted upon than the Police Gazette would seem to be a matter of conjecture. It would appear that what is needed is a system whereby whenever there is legislation, fresh authoritative case law, or DPP Guidelines which relate to the conduct of criminal investigations or the admissibility of evidence in such cases, police officers affected by such matters be required to attend formal seminars or meetings at which they can be made familiar with such matters.

CHAPTER THIRTEEN

MR JOHN QUIGLEY MLA

13.1 Introduction

- [649] Within the general Scope and Purpose of the Commission's investigation are matters relating to the conduct of Mr John Quigley, Member for Mindarie in the Legislative Assembly. These matters, which occurred in June 2002, relate to allegations that he made threats to the UCO, referred to in this inquiry as "Gary".
- [650] These events occurred in the context of Mr Quigley's efforts to obtain information to include in the petition for clemency which he was at that time preparing.
- [651] The Western Australian Police Service made a complaint in relation to these matters to the Anti-Corruption Commission and such complaint has been taken over by this Commission pursuant to section 20 of the CCC Act and its general powers under section 18 as a "*matter arising out of or in connection with*" the conviction and appeals of Andrew Mallard.

13.2 Law

- [652] The CCC Act contains particular provisions in relation to allegations of misconduct other than serious misconduct made against members of Parliament "*in the performance by him or her of the functions of that office*"³⁹⁹. Such allegations must be referred by the Commission to the presiding officer⁴⁰⁰, in the case of Mr Quigley, the Speaker of the Legislative Assembly⁴⁰¹.
- [653] Upon receipt of the referral, the presiding officer must require the Privileges Committee of the House to inquire into the matter⁴⁰², but if the Privileges Committee resolves to carry out its own inquiry, it must do so by directing the Commission to act on its behalf⁴⁰³.
- [654] For the purposes of an inquiry referred to the Commission under section 27B (2), the Commission is given additional powers⁴⁰⁴ and is required to act in conformity with the *Parliamentary Privileges Act 1891*⁴⁰⁵, and there are specific provisions about reporting in such cases.
- [655] Notwithstanding the references in section 27B (6),(7) and (8) of the CCC Act to the *Parliamentary Privileges Act*, and the heading to section 27A, it would appear that the provisions of section 27A and 27B apply not only to cases involving parliamentary privilege, but to all allegations of misconduct by a member in the performance by him or her of the functions of that office; and the two concepts do not necessarily correspond, although there is considerable overlap.

- [656] Another matter in relation to the text of the CCC Act is that section 27A(3) provides that in relation to allegations of misconduct other than serious misconduct within that section, section 22(3) and Division 4 of Part 2 are excluded – but the CCC Act contains no Division 4 of Part 2. It may be that Division 4 of Part 3 was intended, but that is not what Parliament has enacted. It is understood that this anomaly has already been referred to in the Review of the CCC Act by Ms Gail Archer SC (February 2008) Chapter 21.13.
- [657] The overall effect of these provisions is that if the allegation is one of serious misconduct, the Commission is to conduct its inquiry in the ordinary way, but if it is an allegation of misconduct other than serious misconduct, and relates to the performance by the member of Parliament of his or her functions as such a member, the allegation must be referred to the relevant presiding officer and section 27B applies.
- [658] The Commission is satisfied that, in the course of these events, Mr Quigley was acting in his capacity as a member of Parliament, as well as solicitor, and that the allegation is an allegation of a criminal offence punishable by two or more years imprisonment, namely making threats contrary to section 388A of the *Criminal Code* and is therefore an allegation of “*serious misconduct*” as defined by section three of the CCC Act. It is therefore appropriate that it be investigated by this Commission.

13.3 Meeting at Plantation Restaurant

- [659] At the same time that Mr Quigley was examining the transcripts of Andrew Mallard’s trial, other persons assisting Andrew became aware that an undercover officer had been involved in the police investigation. Those persons included Ms Egan and Mr Ian Trinder, a retired member of WAPOL, who had also joined those assisting Mr Mallard. Ms Egan and Mr Trinder also became aware of the identity of the undercover officer.
- [660] In May 2002, Mr Trinder made contact with the UCO and arranged a meeting with him. That meeting eventually occurred on 29 May 2002 at Plantation Restaurant in South Perth. At the time, Mr Quigley had not been told that the undercover officer had been identified, and did not find out about the Plantation Restaurant meeting until some time after it had occurred.
- [661] Prior to agreeing to meet with Mr Trinder, the UCO made contact with WAPOL’s Internal Investigation Unit. He made that contact because of his concerns at having been identified. Arrangements were made between the UCO and the Internal Investigation Unit to record the meeting at the restaurant. Both the recording and a transcript of that meeting were available to the Commission.
- [662] Of some significance to the events that followed was a portion of the meeting concerned with references to “*grass*”. That part of the conversation was as follows (“G” refers to the UCO and “IT” to Ian Trinder):

IT: *But I suppose you've got the alternate, probably a fortunate moment now with this Royal Commission coming up if, if I don't know your in, your involvement, I honestly don't know, if you have got something to worry about.*

G: *Well no I don't because I can say to you my job was given to me on a piece of paper, this is the target, this is where he'll be and that's it and I mean the, the - - -*

IT: *Well there's a few peripheral things but ah they're small things about the cannabis and that but that's fuck all within - - -*

G: *I've been there - - -*

IT: *- - - the scope of this sort of shit.*

G: *- - - that year, that's wrong, a bit of grass.*

IT: *Yeah yeah.*

[663] The UCO gave evidence to the Commission⁴⁰⁶ that the statement “*that's wrong, a bit of grass*” was a statement by him that he did not supply Mr Mallard with any “*grass*” or cannabis at all.

[664] Following the meeting at Plantation Restaurant, Mr Quigley was made aware of both the existence, and the identity, of the UCO. He had, by that time, independently come to the view that there must have been an undercover operation involved in the investigation of Andrew Mallard in 1994.

[665] After being apprised of the UCO's identity, and the meeting at Plantation Restaurant, Mr Quigley resolved to contact him to seek a statement from him. He specifically wished to obtain a statement as to the supply of cannabis to Andrew Mallard during the course of the undercover operation. In his evidence before the Commission⁴⁰⁷ he stated that the information which he had that the UCO had supplied cannabis to Mr Mallard came from two sources:

- (a) from Mr Trinder, who advised Mr Quigley and others that at the Plantation meeting the UCO had admitted doing so (this information was, in fact, not correct); and
- (b) from Mr Mallard, who had given instructions to Mr Quigley that Gary had supplied him with cannabis and a bong during the course of the undercover operation.

13.4 Telephone Messages to the Undercover Officer

- [666] Mr Quigley's first contact with the UCO was by telephone on 15 June 2002 (a Saturday). There is no recording of that conversation, although a running sheet maintained by WAPOL⁴⁰⁸ records the substance of the conversation being "*John Quigley had contacted him requesting he supply a statement over the Mallard issue. Quigley was querying with [Gary] if Mallard had smoked cannabis in his presence in the week leading up to his arrest*". Mr Quigley agreed in evidence that, while the telephone conversation was longer than suggested by this summary, the summary appeared to be generally correct.
- [667] There was a second conversation on 16 June 2002 (Sunday) in which Mr Quigley again indicated that he wished to obtain a statement from the UCO. On 16 June 2002 the Running Sheet records further contact from Mr Quigley. In this conversation Mr Quigley is recorded as making specific reference to the allegation that the UCO had informed Mr Trinder during the Plantation Restaurant meeting that he had supplied cannabis to Mr Mallard.
- [668] In evidence⁴⁰⁹ Mr Quigley agreed that the alleged admission at the Plantation Restaurant was discussed. He went on to say that in that conversation he was also "*begging him to come forward and tell the truth to the Royal Commission or the – to the Royal Commission or to the DPP. So I'd be continually begging him to tell the truth*". The reference to the Royal Commission is a reference to the Police Royal Commission which commenced in 2002.
- [669] Mr Quigley also gave evidence, which was corroborated by the DPP, Mr Cock, that about that time he had made contact with Mr Cock to seek an indication as to whether a certificate of immunity might be provided in the event that an officer came forward with information in relation to the Mallard investigation. In that context Mr Quigley advised Mr Cock as to the allegations concerning cannabis and, according to Mr Quigley, the response he received from Mr Cock was that a certificate of immunity was within the range of things available if the allegations were correct, although it would be necessary for a statement to be provided.
- [670] Mr Quigley also stated that he was in contact with Mr Michael Dean from the Police Union in an effort to arrange for a lawyer, if necessary, to take a statement from the UCO for the purposes of obtaining the certificate of immunity.
- [671] There was at least one other unrecorded conversation between Mr Quigley and the UCO, on 18 June 2002. The Running Sheet from WAPOL indicates that in that conversation Mr Quigley stated that he would be "*going to the press*". Mr Quigley's evidence was that he could not recall that phone conversation.
- [672] After that phone conversation Mr Quigley and the UCO did not speak to each other again. Mr Quigley, however, left a series of messages on the UCO's mobile phone voicemail on the ensuing days. Those messages were lawfully

recorded and both the recordings of them and transcripts were available to the Commission. Edited versions of the recordings were played during the course of Mr Quigley's examinations before the Commission on 4 September and 30 October 2007.

[673] It is not necessary to detail the content of all of those telephone messages. It suffices to note that Mr Quigley left a series of messages for the UCO in the ensuing days which clearly demonstrate an increasing level of agitation (or in his own words, desperation) on Mr Quigley's part. By way of example, the first recorded message at 11:57am on 18 June was relatively innocuous. Mr Quigley stated⁴¹⁰:

It's midday, it's John Quigley. I rang back on the 3 hours as suggested by you, but they have told me you have left via your own vehicle. I have just spoken at length to the Director of Public Prosecutions and to Michael Deane. You are being provided with an independent lawyer. I need to contact you urgently because I have got to keep these other people at bay. Please trust me, I haven't done a thing wrong.

[674] By Thursday, 20 June 2002, Mr Quigley had not heard back from the UCO, despite a number of messages being left. A message left at 8.25 am on that day was as follows⁴¹¹:

Good morning (name). John Quigley. Right, as far as I'm concerned now, you have deceived me. I can understand that because you're under pressure, but that won't go well in the long haul. I've discussed with Peter Coombs, this whole situation, on a confidential basis last night. He agrees I now have enough evidence to name you in the Parliament, which will happen next week unless you change, unless you have a change of heart and wish to cooperate. The Director of Public Prosecutions has asked that I take a statement from you, but I'm prepared to take it through an independent lawyer. I'm not prepared to let this person rot for 30 years any longer. I can understand your concern. Now, you've gone to Darwin, you've told me, to tell your father, so I will be naming him as well as a person who knows about this, knows about it from his son (name), who drove from (place) to Darwin to tell him on Wednesday, arriving there on Thursday. I don't want to do any of this, (name). Please believe me. You're not - - -

[675] The message continued:⁴¹²

This message carries on from the previous that ran out. So, Peter Coombs understands it all, he will be contacting you as a friend on my behalf today to let you know what a corner you are now in. I don't believe the case officers, for one moment, will back you up. They will leave you out on their own – on your own, and say that what you did, had nothing to do with them, which will leave the conspiracy, but they'll try and contain the conspiracy to the UCO's.

So, sorry it's come to this mate. Apologise to (name), will you, but I've done my best, there's been no cooperation from you, therefore, as far as I'm concerned, in my sights are both you and (name), unless you have a change of heart. Unless I hear from Coombs you've had a serious change of heart, that's the way the cards are going to fall. See you in the witness box mate.

Consistent with the reference to the UCO's father in the first of the above messages, the reference to "apologise to (name)" was a reference to the UCO's father.

[676] A message was left later that afternoon, specifically referring to members of the media who would "be in town next week for my speech in the Parliament".⁴¹³

[677] At 3.51 pm on 20 June 2002 Mr Quigley left the following message, now making reference to the UCO's former controller:

Oh, hi (name), Quigley again. More info for you – located your controller, bingo. You're putting yourself further and further out by yourself. Please, I beg you, contact Michael Dean urgent, or Peter Coombs urgent. You know who he is, he's in the job it is in Kal, I don't want to say it on the phone. So if you're protecting him you are the only person who will be without protection. You may ring him and find out whether he's been contacted, re the Mallard matter. Oh yes he has, so not only will you be named, but your controller will be named if you do not cooperate. It's not a threat, I can't get the Certificate of Immunity or recommend a Certificate of Immunity for someone who won't talk to us. You might already be at the Royal Commission, that's okay, but I know who your controller is and I need the truth for Mallard. So don't think you're protecting him. Pretty soon his name will be on Four Corners too and I don't think he will thank you. He is in the job.

[678] That message was continued on the following tape⁴¹⁴ and ended with the statement:

Please contact Michael Dean, Peter Coombs, as a matter of urgency, but, or you're going to destroy, not only your family, but a lot of other families as well.

[679] The following weekend (22 - 23 June 2002) coincided with the State Conference of the Australian Labor Party. It was Mr Quigley's intention to deliver his petition to the Attorney General, Mr Jim McGinty MLA, on the Sunday evening, 23 June 2002.

[680] During that day, Mr Quigley left a further message on the UCO's mobile phone at 11:55am.⁴¹⁵

(name), it is 11.55 Sunday, Quigley. You still haven't contacted me. I'm now preparing Trinder's affidavit, which has got your name in it, that you're a UCO, that all that conversation you had – the bikies, the druggies, the lot, and Plantations of course. By not contacting me, the only way I can go forward is through Trinder and I would say that by tomorrow, your name, your place of employment and telephone numbers are going to be the biggest news in Western Australia. No doubt. It's front page on the Aus tomorrow. You should contact me as a matter of urgency if you wish to change the course of events. There is still an immunity I could obtain for you today and no publication of your name. Now, I've got (suppressed) name, your controller. He is down from Kalgoorlie now. He might be protected, he might point the finger at you. If you don't contact me quickly well, it's out there – (suppressed) sites in the, in the affidavit, your father, the whole trip. I told you this earlier in the week. I beg you to come forward today and tell me the truth so you can get the Certificate of Immunity. This is John Quigley. I'll be at this electorate office for just a few hours – 9341 2995, or you might choose to ring the union president again, Michael Dean – your call. You know his number. I'll give you his mobile number. His mobile number is – where is it? You can track his mobile number down, you were a UCO, that's easy, through the union – 9321 2155. You ought act within minutes. The Australian have sent their article for the front page tomorrow to the lawyers in Melbourne. This is now urgent. People are going to drop. Bye.

[681] The reference to “Trinder’s affidavit” is a reference to a statutory declaration made by Mr Trinder on 23 June 2002. Among things recorded in that statutory declaration is the following relating to his meeting with the UCO at the Plantation Restaurant:

42. *I said, “Your incident with Andrew at the Tradewinds, is probably not a huge worry, you giving him something.” (The UCO) said “Look I gave him a bit of “green” I’m not worried about that, that’s nothing in this business.”*

43. *I said “No I suppose it just fades into insignificance when compared to this thing.” I put to (the UCO) that he met Andrew at Gino’s in Fremantle and (the UCO) replied “Yes, I was get to know him, get his confidence and be-friend him.*

13.5 Identifying the Undercover Officer

[682] The petition, including the statutory declaration of Mr Trinder, was handed to the Attorney General later on 23 June 2002. Two days later (25 June 2002) Mr Quigley held a press conference in the Fern Garden at Parliament House. At that conference Mr Quigley, in some form, provided the details of the UCO to the assembled media. He was examined in the Commission as follows⁴¹⁶:

I know you didn't call them together but you appeared among them. Is that so? - - - I did.

Did you in fact provide them with the contact details of Gary"? - - - I wouldn't deny that.

All right? - - -

If someone said I did, I wouldn't deny that. Well, I think at the private hearing someone said that I'd held – someone had held up a – I'd held up a bit of paper with his phone number on it. I don't deny if that's the - - -

I'm not interested in the means by which you did it, Mr Quigley, but I think at the private hearing you agreed that you had provided those contact details. Correct? - - - Yeah.

- [683] Following the press conference in the Fern Garden, and before Mr Quigley made any address in Parliament in relation to the matter, which he intended to do on Friday 28 June 2002, the Attorney General arranged for Mr Quigley to have access to the files of the DPP and so he attended his offices on Saturday 29 June 2002 at which time he was handed a copy of the Comprehensive Summary of Facts and Mr Cock pointed out the passage concerning the inconsistency between a wrench and Mrs Lawrence's injuries. That led to an Amended Petition, which was ultimately the Petition referred to the Court of Criminal Appeal.
- [684] On the following working day, Monday 1 July 2002, Mr Quigley appeared on a radio interview on 6PR. The Commission did not have access to a recording of that radio interview although a transcript of it is available⁴¹⁷. That transcript reveals that Mr Quigley used a variant of the UCO's proper name on a number of occasions. It is not possible now to say whether the variant of the name in the transcript was an error made by Mr Quigley at the time, or a transcription error from the recording. When asked about this issue at his private hearing, Mr Quigley stated that his "*best estimation [is] that that would be mistake by the typist would be my honest answer*"⁴¹⁸.

13.6 Discussion

- [685] These allegations were initially investigated by the Anti-Corruption Commission who sought an advice from the DPP which was furnished under the heading "Investigation Report" dated 6 January 2003⁴¹⁹.
- [686] Subsequently the A-CC referred the matter back to the DPP for action to be taken, but the latter took the view that no further action should be taken until Andrew Mallard's appeal processes were complete. By that time the functions of the A-CC had been taken over by this Commission.

[687] The matter was referred to Mr James MacTaggart, a Senior State Prosecutor in the office of the DPP who, after conferring with the DPP, Mr Cock, by letter dated 29 May 2006⁴²⁰, advised the Commission:

The Director agreed with my advice that the statements uttered by Mr Quigley to the former undercover operative are capable of amounting to a prima facie case of making a threat with intent to compel a person to do an act which the person is lawfully entitled to abstain from doing, contrary to section 338A of the Criminal Code but that, rather than prosecute Mr Quigley on indictment for the criminal offence, his conduct should be referred to the Legal Practice Board, the disciplinary body which regulates the conduct of legal practitioners.

However nothing was done to pursue either course pending the outcome of this Commission's examination of Mr Quigley's conduct.

[688] Submissions on behalf of Mr Quigley which included written opinions of two Queen's Counsel may be summarised under four headings:

- (1) That the CCC is not permitted to publish an opinion that Mr Quigley has committed an offence;
- (2) That the facts relating to the matter do not constitute a prima facie case of an offence under section 338A;
- (3) That in any event, the telephone messages left by Mr Quigley are protected by parliamentary privilege because they related to what Mr Quigley intended to say in Parliament; and
- (4) Even if the Commission is of opinion that Mr Quigley has engaged in misconduct it should in all the circumstances exercise its power under section 18(3) of the CCC Act to determine that no further action against him is warranted.

[689] Section 4(c) of the CCC Act provides that "misconduct" occurs if a public officer, whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years imprisonment, section 22(1) authorises the Commission to make assessments and form opinions inter alia as to whether "*misconduct*" has or may have occurred, and section 84 authorises the Commission to include in its report statements as to any of its assessments, opinions and recommendations. It follows that the CCC Act therefore authorises the reporting of opinions that "*misconduct*" within section 4(c) has occurred. That necessarily involves an opinion that a public officer has committed an offence punishable by 2 or more years imprisonment, and to justify the opinion the report must set out its reasons for such opinion, including identifying the offence involved.

[690] It is in that context that section 23 must be examined. Subsection (1) of that section provides that the Commission must not publish a report finding that a particular person has committed a "*criminal offence*" or a "*disciplinary*

offence”, but subsection (2) (not referred in the opinion submitted to the Commission) also provides that an opinion that “*misconduct*” has occurred is not to be taken as a finding or opinion that a particular person has committed a “*criminal offence*” or a “*disciplinary offence*”. In construing subsection (1), one cannot ignore subsection (2). It is to be observed that the two subsections refer to different concepts: subsection (1) refers to a “*criminal offence*” or a “*disciplinary offence*” whilst subsection (2) refers to “*misconduct*”.

[691] It follows that in forming an opinion that “*misconduct*” within section 4(c) has occurred, the Commission must form an opinion that a particular person has committed the requisite offence, but the publication or report that “*misconduct*” has occurred within section 4(c) is not, and is not to be taken as a finding or opinion that a particular person has committed a “*criminal offence*” or “*disciplinary offence*”.

[692] To construe the relevant provisions in any other manner would have the effect of preventing the Commission from ever forming or reporting an opinion that misconduct within section 4(c) had occurred, and would render that paragraph otiose. Similar problems would arise in relation to paragraph (d) because (d)(v) and (vi) respectively refer to “*an offence*” and a “*disciplinary offence*”.

[693] So far as is relevant, sections 338 and 338A of the *Criminal Code* provide:

338. ...

In this Chapter a reference to a threat is a reference to a statement or behaviour that expressly constitutes, or may reasonably be regarded as constituting, a threat to –

(a) ...

(d) *cause detriment of any kind to a person ...*

338A. ...

Any person who makes a threat with intent to –

(a) ...

(d) *compel the doing of an act by a person who is lawfully entitled to abstain from doing that act,*

is guilty of a crime ...

This section was considered by the Court of Criminal Appeal in *Tracey v The Queen*⁴²¹, a case against a trade union official who was alleged to have threatened two business proprietors (husband and wife) that he would organise a picket unless they withdrew an application which they had made to cancel or suspend their apprentice’s apprenticeship.

[694] Kennedy J, with whom White J generally agreed, held that to constitute the offence

- (a) whether the words used constituted a threat must be looked at objectively;
- (b) the belief of the persons to whom the alleged threat was directed is not relevant;
- (c) the intent must be to “*compel*” rather than to merely “*persuade*”;
- (d) the threat must relate to something the person allegedly threatened is not legally obliged to do

Kennedy J also held that

- (e) the detriment to be caused need not be an unlawful detriment,

while Wallworth J held that the threat must be made without lawful excuse, and White J held that the “*detriment*” in section 338A(d) means “*loss, damage or injury*”.

[695] The Commission is satisfied that, looked at objectively, the messages left for the UCO on his mobile telephone answering service constituted a “*threat*” within the ordinary meaning of the word.

[696] They also related to something which the UCO was not obliged to do. What Mr Quigley was seeking at the time of the alleged threats was that the UCO would go to the Royal Commission and tell the truth about the undercover operation. Although he believed at the time (on reasonable grounds) that the UCO had supplied Andrew Mallard with cannabis, he did not tell him what he was to say, but only to tell the truth.

[697] If he received a summons from the Royal Commission, the UCO was bound to attend and if he attended and gave evidence, either voluntarily or under compulsion, he was bound to tell the truth; but he had not received any summons, and so was not bound to attend.

[698] Alternatively Mr Quigley wanted the UCO to make a statement for the DPP or to himself so that it could be used in support of Andrew Mallard’s clemency petition. Once again, although if he made a statement, the UCO was bound to tell the truth, he was at the time under no legal compulsion to make a statement. The Commission is therefore satisfied that the alleged threats were directed to having the UCO do something which he was not at the time legally bound to do.

[699] However the alleged threats must also be intended to “*compel*” the doing of the act in question. As Kennedy J said in *Tracey v The Queen*.⁴²²

Dictionary definitions of “compel” commonly take the form of ‘to urge irresistibly, to constrain, to force’. The meaning of ‘compel’ contrasts with the meaning of “persuade”...

His Honour had previously⁴²³ quoted from the dictum of Lush J in *Wood v Bowron*:⁴²⁴

But I apprehend that it is the very essence of a threat that it should be made for the purpose of intimidating or overcoming the will of the person to whom it is addressed.

- [700] In the Commission’s assessment, Mr Quigley’s messages were not intended to force, constrain, intimidate or overcome the will of, the UCO, but rather to persuade or encourage him, to go to the Royal Commission or make a statement, and so the Commission is not satisfied that his messages left on the UCO’s voice mail could constitute an offence under section 338A and consequently is not satisfied that he engaged in serious misconduct within the terms of the CCC Act.
- [701] On the other hand, as a solicitor of, at the time, almost 30 years standing, and particularly in the light of his experience as solicitor for the Police Union, Mr Quigley must have known that the disclosure of the identity of undercover police officers is undesirable and improper, and he agreed that this was generally so.⁴²⁵ It was therefore undesirable that he resorted to the threats he did, even though his motives were to secure a desirable objective, namely the reversal of what he believed was (and was ultimately proved to be) the wrongful conviction of an innocent man.
- [702] His conduct in making the threats cannot be condoned, but for the reasons given, the Commission is not satisfied that he engaged in serious misconduct within the terms of the CCC Act.
- [703] Although not relevant to the issue of whether an offence has been committed, it is worth noting that the alleged “threats” achieved nothing – the UCO did not make a statement and did not tell the truth about the bong until confronted with the relevant recorded telephone messages before this Commission, after previously denying it, and has consistently denied, and still denies, supplying cannabis. In fact Mr Quigley achieved his object of obtaining access to the police files and presenting a Petition which ultimately led to Mr Mallard’s vindication without any co-operation from the UCO.
- [704] The third submission on behalf of Mr Quigley was that the telephone messages left by Mr Quigley were protected by parliamentary privilege because they related to what he intended to say in Parliament, but the Commission rejects such submission. Things said outside Parliament about what a member intends to say in Parliament are no more protected by parliamentary privilege than is the repeating outside Parliament what has already been said in Parliament (other than fair reporting by the media of the proceedings of Parliament).

- [705] The case to which the Commission was referred in this regard, namely *Gangemi & Anor v The Western Australia Farmers Federation (Inc)*⁴²⁶ dealt with an entirely different issue, namely whether the courts could examine the reasons why members voted in Parliament as they did.
- [706] As the Commission has not formed an opinion that Mr Quigley has engaged in serious misconduct within the terms of the CCC Act, it becomes unnecessary to consider section 18(3).

CHAPTER FOURTEEN OPINIONS, RECOMMENDATIONS AND ACKNOWLEDGEMENTS

14.1 Commission Opinions

[707] For the reasons stated previously in this Report, the Commission has formed the following opinions as to misconduct:

1. That Det Sgt Caporn engaged in misconduct within section 4(d)(ii) and (vi) of the CCC Act in that writing the letter to the Police Prosecutor dated 17 June 1994 containing errors and incorrect statements constituted the performance by him of his functions in a manner which was not honest or impartial and could constitute a disciplinary offence contrary to regulation 606(b) of the *Police Force Regulations 1979*, providing reasonable grounds for the termination of his employment as a public service officer under the PSM Act.

[Refer paragraphs 327-337].

2. That Det Sgt Shervill engaged in misconduct within section 4(d) (ii) and (vi) of the CCC Act in that requesting Mr Lynch to delete from his report all reference to the salt water testing constituted the performance by him of his functions in a manner which was not impartial and could constitute a disciplinary offence contrary to regulation 605(1)(b) of the *Police Force Regulations 1979*, providing reasonable grounds for termination of his employment as a public service officer under the PSM Act.

[Refer paragraphs 355-364].

3. That Det Sgt Shervill engaged in misconduct within section 4(d)(ii) and (vi) of the CCC Act in that causing the witnesses Katherine Barsden, Michelle Englehardt, Meziak Mouchmore, Katherine Purves and Lily Raine to alter their statements as they did without any reference in their final statements to their earlier recollections, involved the performance of his functions in a manner which was not honest or impartial and could constitute a disciplinary offence contrary to regulation 605(1)(b) of the *Police Force Regulations 1979*, providing reasonable grounds for termination of his employment as a public service officer under the PSM Act.

[Refer paragraphs 365-442].

4. That Det Sgt Caporn engaged in misconduct within section 4(d)(ii) and (vi) of the CCC Act in that causing the witnesses Michelle Englehardt, Meziak Mouchmore, Katherine Purves and Lily Raine to alter their statements as they did without any reference in their final

statements to their earlier recollections, involved the performance of his functions in a manner which was not honest or impartial and could constitute a disciplinary offence contrary to regulation 605(1)(b) of the *Police Force Regulations 1979*, providing reasonable grounds for termination of his employment as a public service officer under the PSM Act.

[Refer paragraphs 365-442].

5. That Det Sgt Shervill engaged in misconduct within section 4(d)(ii) and (vi) of the CCC Act in making false entries in the Running Sheets relating to the amendments to the statements of witnesses Katherine Barsden, Michelle Engelhardt, Meziak Mouchemore, and Katherine Purves involved the performance of his functions in a manner which was not honest and could constitute a disciplinary offence contrary to regulation 606(a) of the *Police Force Regulations 1979*, providing reasonable grounds for termination of his employment as a public service officer under the PSM Act.

[Refer paragraphs 365-443].

6. That Det Sgt Shervill engaged in misconduct within section 4(d)(ii) and/or (iii) and (vi) of the CCC Act in that his failure to disclose to the DPP's Office the prior statements of Katherine Barsden, Michelle Engelhardt, Meziak Mouchemore, Katherine Purves and Lily Raine, the original report of Bernard Lynch and details of the unsuccessful efforts by police to find a tool capable of inflicting the injuries suffered by Mrs Lawrence's, involved the performance of his functions in a manner which was not honest or impartial and/or involved a breach of the trust placed in him by reason of his employment as a public officer and could constitute a disciplinary offence, contrary to regulation 603(1) of the *Police Force Regulations 1979*, providing reasonable grounds for termination of his employment as a public service officer under the PSM Act.

[Refer paragraphs 463-480].

7. That Mr Kenneth Bates engaged in misconduct within section 4(d)(iii) and (vi) of the CCC Act in conducting the trial on the basis that the murder weapon was a wrench as drawn by the accused, but making no attempt to prove that such weapon could have caused the deceased's injuries, particularly in circumstances where it was known that there was a problem about the pattern of some of the injuries, and involved a breach of the trust placed in him by reason of his employment as a public officer and could constitute a disciplinary

offence providing reasonable grounds for the termination of a person's employment as a public service officer under the PSM Act.

[Refer paragraphs 510-550].

8. That Mr Kenneth Bates engaged in misconduct within section 4(d)(iii) and (vi) of the CCC Act in that failing to disclose to the defence the results of the pig's head testing of the wrench constituted or involved a breach of the trust placed in him by reason of his employment as a public officer and could constitute a disciplinary offence providing reasonable grounds for the termination of his employment as a public service officer under the PSM Act.

[Refer paragraphs 485-490 and 543-550].

14.2 Recommendations

[708] The Commission makes the following recommendations:

1. That the Commissioner of Police give consideration to the taking of disciplinary action against Assistant Commissioner Malcolm William Shervill and Assistant Commissioner David John Caporn.
2. That the Director of Public Prosecutions gives consideration to the taking of disciplinary action against Mr Kenneth Paul Bates.
3. That consideration is given by the Commissioner of Police to making special provision for the interviewing by investigating police of mentally ill suspects.
4. That whenever there is legislation, fresh authoritative case law, or DPP guidelines which relate to the conduct of criminal investigation or the admissibility of evidence in such cases, senior police officers affected by such matters be required to attend formal seminars or meetings at which they can be made familiar with such matters.
5. That whenever the police obtain advice from the Office of the Director of Public Prosecution such advice be furnished in writing setting out, at least, the material considered, the opinion and the grounds upon which such opinion is based; or in cases of urgency, a detailed contemporary note should be made, preferably by the DPP officer or his secretary, and also by the police, setting out the matters specified.
6. That Mr Andrew Mallard gives consideration to raising a complaint with the Legal Practitioners Complaints Committee (LPCC) regarding the conduct of the trial by Mr Kenneth Bates.

(Division 3 of the *Legal Practice Act 2003* deals with complaints made about legal practitioners. Section 175(2) specifies who can make a complaint to the LPCC including the Attorney General, the Legal Practice Board, the Executive Director of the Law Society, any legal practitioner or any other person who has had a direct personal interest in the matter.)

14.3 Acknowledgements

[709] Before concluding the Report it is desirable and proper for the Commission to acknowledge and pay tribute to the efforts of those who believed in the innocence of Andrew Mallard and who by their time and efforts secured his freedom and ultimate vindication. Those persons whose efforts were particularly significant were Ms Colleen Egan, journalist, Mr John Quigley MLA, Mr Malcolm McCusker QC, and Clayton Utz solicitors, who all acted without remuneration. Without their respective efforts and expertise, Andrew Mallard would still be in prison, convicted of a wilful murder he did not commit.

ENDNOTES

- ¹ E25349 and E24761 Notification from John Quigley.
- ² P M Hall: Investigating Corruption and Misconduct in Public Office (2004), p 366
- ³ Independent Commission against Corruption Act 1988 (NSW), section 8(1)(c)
- ⁴ Report on Investigation into Conduct of the Hon J Richard Face, p 39
- ⁵ (1986) 7 NSWLR 503 at 524
- ⁶ Parliamentary Inspector's Investigation and review of the Acts and Proceedings of the Corruption and Crime Commission concerning Mr John D'Orazio
- ⁷ Report no 28, 37th Parliament, 2007, Appendix 3 paragraph 18
- ⁸ Review of the Corruption and Crime Commission Act 2003 by Ms Gail Archer SC, February 2008, paragraph 603
- ⁹ Major Crime Running Sheet
- ¹⁰ Comprehensive Summary of Facts
- ¹¹ Statements of Peter Lawrence, dated 21 July 1994, 27 March 2003, 7 August 2003
- ¹² T2414-2434
- ¹³ R v Mallard (no 90 of 1995)
- ¹⁴ Mallard v The Queen (CCA 204 of 1995) Lib no: 960505A
- ¹⁵ Mallard v The Queen (24 October 1997) P 52/1996
- ¹⁶ Mallard v The Queen [2003] WASCA 296, 28 WAR I
- ¹⁷ Mallard v The Queen [2005] HCA 682, 224 CLR 125
- ¹⁸ WAPS Cold Case Review Report Dated December 2006
- ¹⁹ Statement of Jacqueline Barsden, dated 1 July 1994
- ²⁰ Statements: Mr and Mrs Whitford, dated 13 July 1994
- ²¹ Statements of Peter Lawrence, 000 call
- ²² Statements Cons Susan Debnam, dated 13 July 1994 and Cons Shaun Staples, dated 13 July 1994, Affidavit of Cons Shaun Staples
- ²³ Statements: John Rigby, John Pampano, dated 17 June 1994
- ²⁴ Affidavit of Shaun Staples
- ²⁵ Major Crime Running Sheet p 1
- ²⁶ Major Crime Running Sheet p 2
- ²⁷ Det Sgt Brandham, 20 June 2007, Pr. T16-17. Det Sgt Shervill, 3 July 2007, Pr. T26
- ²⁸ Major Crime Running Sheet p 2
- ²⁹ Major Crime Running Sheet p 3
- ³⁰ Confidential Report to the Coroner, dated 24 May 1994, authorised by Dr Cooke
- ³¹ Report of Bernard Lynch on 38 items, 30 August 1994, PrT 11
- ³² T585
- ³³ Report by Bernard Lynch, dated 26 August 1994
- ³⁴ Sgt Hofstee, 2 August 2007, Pr.T 237-241
- ³⁵ Police Crime Scene Report
- ³⁶ T 1911

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- ³⁷ T 2528, Fingerprint Records
- ³⁸ T 2526
- ³⁹ Post Mortem Report Pathologist Dr Clive Cooke, dated 24 May 1994 and appendums
- ⁴⁰ Post Mortem Report, Pathologist Dr Clive Cooke, dated 24 may 1996 and appendums
- ⁴¹ Major Crime Running Sheet
- ⁴² Handwritten Statement of K. Barsden with sketches, dated 24 May 1994
- ⁴³ Police Artist Drawing - Identikit
- ⁴⁴ Signed and Typed Statement of K. Barsden
- ⁴⁵ T1903
- ⁴⁶ Records contained in HOLMES Case Management System
- ⁴⁷ HOLMES Serial Message M22, 24 May 1994
- ⁴⁸ Complaint to Ground Search Warrant for residence of Lloyd Peirce 21/630 Stirling Highway Mosman Park (E13716)
- ⁴⁹ Handwritten Statement of Lloyd Peirce, dated 25 May 1994
- ⁵⁰ Typed Unsigned Statement of Lloyd Peirce
- ⁵¹ Holmes Serial Message 57, Action 61
- ⁵² Holmes Serial Message 57, Action 51
- ⁵³ Action Write Off by Det Sgt Caporn, Holmes Message 57, Action 51
- ⁵⁴ Holmes Serial Message 57, Action 51
- ⁵⁵ Statement of Mr Graham Peverall, dated 26 June 1994
- ⁵⁶ Statement of Lloyd Peirce – undated, obtained by Mr L. Robertson, Private Investigator
- ⁵⁷ Letter to P. Hogan from PI Consultants, dated 6 June 1994
- ⁵⁸ T2969
- ⁵⁹ Cold Case Review Report, dated December 2006
- ⁶⁰ Statement of Lloyd Peirce taken by Major Crime Squad
- ⁶¹ Drawing by Lloyd Peirce
- ⁶² T537
- ⁶³ T554-558
- ⁶⁴ Report of Sgt Hyde, 3 February 1993 (Part 111), Det Sgt Caporn Written Submission to CCC January 2007
- ⁶⁵ Written Submission by Det Sgt Caporn Para 143
- ⁶⁶ HOLMES Serial Message 57, Action 61
- ⁶⁷ In Section 86 Submissions, Det Sgt Caporn referred the fact that the relevant entries were endorsed “checked and completed” and initialled by the office based investigation manager, but this appears to be a reference to Cons Ripp who was operating the HOLMES system, one of whose functions was to write off an entry on the computer when it was completed (T1334).
- It was also claimed that there was a system in place for reviewing those actions which had been written off (see E15761), but there was no evidence as to how it operated in practice during this investigation.

⁶⁸ E14401 HOLMES Action No. 21

⁶⁹ E14400 HOLMES Action No.23, Message 30

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- ⁷⁰ Department of Defence Medical Records of Andrew Mallard E38755, E12733
- ⁷¹ E9698, E12903 Medical Records Andrew Mallard
- ⁷² Psychiatric Report to Court, by Dr Jeremy O’Dea, dated 8 June 1994
- ⁷³ Psychiatric Report Andrew Mallard, Dr O’Dea, dated 19 July 1994
- ⁷⁴ Voire Dire Transcript, Dr O’Dea, 4 November 1995
- ⁷⁵ Police Interviews with Andrew Mallard
- ⁷⁶ Police Lockup Records
- ⁷⁷ Statement of Brettingham Dell, date unclear on statement
- ⁷⁸ Police Lockup Records
- ⁷⁹ E13300 Statement of Mr Graham Peverall, dated 29 June 1994
- ⁸⁰ E13639 Handwritten Statement, Michelle Engelhardt, dated 29 May 1994
- ⁸¹ Statement of Michael Buhagiar, dated 25 June 1994
- ⁸² TT801
- ⁸³ Statements of Mr and Mrs Whitford, dated 25 May 1994
- ⁸⁴ Statement of Mr Ian Sharp, dated 21 December 1994
- ⁸⁵ Police Notes of Interview with Andrew Mallard 26 May 1994
- ⁸⁶ Statement of M. Buhagiar, dated 25 June 1994
- ⁸⁷ Police Notes of Interview with Andrew Mallard 26 May 1994, 27 May 1994, 30 May 1994, 2 June 1994
- ⁸⁸ Search Warrant Executed at Graylands Hospital, 30 May 1994, Search Warrant Executed at Michelle Englehardt’s flat 1 June 1994
- ⁸⁹ E13289 Briefing Notes prepared by Det Sgt Brandham
- ⁹⁰ E13195 Surveys completed by Det Carter
- ⁹¹ Evidence of Sgt Caporn, T364-370 Det Sgt Shervill 3 July 2007 Pr T 124-132
- ⁹² Concise Oxford Dictionary, Sixth Edition (1976), p 1164
- ⁹³ Macquarie Dictionary, Fourth Edition, p 1233
- ⁹⁴ Major Crime Running Sheet, p 19-20
- ⁹⁵ Notes of Police interview with Andrew Mallard, 27 May 1994
- ⁹⁶ Major Crime Running Sheet p 50-52, p 54, p 56, p 62
- ⁹⁷ Major Crime Running Sheet, p 55
- ⁹⁸ Major Crime Running Sheet, p 55 - 56
- ⁹⁹ T396-404
- ¹⁰⁰ T2938-2944, T2982-2983
- ¹⁰¹ Police Notes of Interview with Andrew Mallard, 10 June 1994
- ¹⁰² T378-380
- ¹⁰³ T378-380
- ¹⁰⁴ T378-380
- ¹⁰⁵ Interview of Andrew Mallard. 10 June 1994 (E13489)
- ¹⁰⁶ E13489 p 58
- ¹⁰⁷ E13489 p 78

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- ¹⁰⁸ E13489 p 84
- ¹⁰⁹ E13489 p 89
- ¹¹⁰ E13489 p 102
- ¹¹¹ E13489 p 103
- ¹¹² E13489 p 12
- ¹¹³ T443-445
- ¹¹⁴ TT947
- ¹¹⁵ Commissioner's Guidelines, Police Manual
- ¹¹⁶ Det Sgt Shervill's Police Notebook, p 97
- ¹¹⁷ TT102-103
- ¹¹⁸ T414-415
- ¹¹⁹ TT126-154
- ¹²⁰ Evidence of Det Sgt Caporn, 27 June 2007, PrT123-126, 28 June 2007 Pr T 36
- ¹²¹ CCC24155, Comprehensive Summary Of Facts
- ¹²² Police Records of Surveillance Operation Huntsman
- ¹²³ E14357 Application for Surveillance Operation Huntsman
- ¹²⁴ Police Records of Surveillance Operation Huntsman
- ¹²⁵ Police Records of Surveillance Operation, Tape 2, 15 June 1994 (E12358)
- ¹²⁶ E12360 Police Records of Surveillance Operation Huntsman
- ¹²⁷ E12359 Police Records of Surveillance Operation, Tape 2, 15 June 1994
- ¹²⁸ E12370 Police Records of Surveillance Operation, Tape 3B, 16 June 1994,T901
- ¹²⁹ T1004-1016
- ¹³⁰ T890
- ¹³¹ T891-892
- ¹³² T886
- ¹³³ T1011-1012
- ¹³⁴ Misuse of Drugs Act 1981 section 6(2)
- ¹³⁵ T891, T892, T778-782
- ¹³⁶ T969
- ¹³⁷ Evidence of Det Sgt Shervill, 4 July 2007, PrT31-36
- ¹³⁸ Police Record of Surveillance Operation
- ¹³⁹ Police Records of Surveillance Operation, Tape 3B, 16 June 1994, (E12370)
- ¹⁴⁰ Police Records of Surveillance Operation, Tape 3B, 16 June 1994, (E12372)
- ¹⁴¹ Police Records of Surveillance Operation, Tape 3B, 16 June 1994, (E12372)
- ¹⁴² T817-819, T907-917
- ¹⁴³ Evidence of Andrew Mallard, 10 September 2007, PrT52-53
- ¹⁴⁴ Police Artist's Drawing of jewellery described by P. Urquhart (E12377)
- ¹⁴⁵ Statement of Timothy Urquhart, 24 August 1994
- ¹⁴⁶ Police Artist's Drawing of jewellery described by P. Urquhart (E12377)

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- ¹⁴⁷ Evidence of Rosemary Car, 3 July 2007, PrT16, T973
- ¹⁴⁸ Comprehensive Summary of Facts (E24155)
- ¹⁴⁹ Comprehensive Summary of Facts
- ¹⁵⁰ Complaint (Ch No 31274) Assault a public officer (part of E13297)
- ¹⁵¹ Police Records of Surveillance Operation Huntsman
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- ¹⁹⁰ Notes of Surveillance Operation Huntsman 16-17 June 1994
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- ²²⁷ Statement of K. Barsden, dated 18 September 1995
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