

# The wrongful convictions and exoneration of Kathleen Folbigg



Lessons from the course of the *Folbigg* case





**Dr Emma Cunliffe, Professor, Allard School of Law**

# An introduction to the *Folbigg* case



**THE Daily Telegraph**  
Thursday, May 22, 2003 \$1\* Including GST 3M

This woman is the mother of these four babies



**SHE KILLED THEM ALL**

KATHLEEN Folbigg was yesterday found guilty of smothering her four babies to death. The emotional ruling in Sydney's Supreme Court ended a case that has gripped the nation — and ranked Folbigg 55 as Australia's worst female serial killer.

**INSIDE:** Murder ran in her family: P2 Detective who collared a killer: P5 Diaries of a monster: P31

**LETTER FROM THE BABY KILLER**

**I'm the most HATED woman alive**



**EXCLUSIVE**  
By LORNA KNOWLES

AUSTRALIA'S worst female serial killer cries herself to sleep every night, knowing, in her own words, she is "the most HATED woman alive".

But in an extraordinary letter, obtained exclusively by *The Daily Telegraph*, Kathleen Folbigg maintains her innocence, declaring: "Vindication will one day be mine."

Folbigg wrote the revealing four-page letter to her foster sister, Lea Brown, two weeks ago from the isolation wing of Mulawa women's jail at Silverwater. The 36-year-old has been in custody since a Supreme Court jury found her guilty of smothering her four children to death.

For the first time, Folbigg speaks out about her harrowing seven-week trial.

**Continued Page 4**

**INSIDE | TWINS DIE AFTER BRAVE ATTEMPT TO BE SEPARATED: P3**

# An introduction to the Folbigg case

- Suspicious pattern of deaths



ABOVE: The house of Craig and Kathy Folbigg at Singleton. Picture: ROB McKELL

BELOW: The Folbigg's birth and death notices for Caleb and Laura respectively

**BIRTHS**

**It's a BOY!**

**FOLBIGG** (nee Mariborough). — Kathy and Craig are proud to announce the arrival of their first child Caleb Gibson, born 1/2/89, 11.15 p.m., 7lb 3 3/4 ozs, 19 1/2" long. Thanks to doctors and staff WSMH.

**FOLBIGG:** Laura Elizabeth at the Singleton District Hospital on the 1st March 1999 aged 20 months. Dearly loved and treasured daughter of Craig & Kathy Folbigg of Millard Close Singleton and of R.E. Teasdale's of Singleton. The funeral was held on Friday 5th March 1999.

## Four dead babies in 10 years Parents investigated

By FRANCES O'SHEA

A HUNTER Valley mother who has had four infant children die during the past 10 years is under investigation by police.

The *Daily Telegraph* has learned that Singleton detectives have been investigating the circumstances surrounding the deaths of the four Folbigg children, aged between 19 days and 18 months.

Kathy Folbigg, 32 and her husband Craig have been interviewed by police about the events leading up to the deaths of their children.

A number of the couple's relatives and friends are also understood to have been interviewed by police.

Singleton detective, Senior Constable Bernie Ryan confirmed yesterday that a coronial investigation was being carried out in relation to the deaths of the babies.

He emphasised that at this stage there was no evidence of any criminal offence by any party.

The four Folbigg children — two boys and two girls — died between February 1989 and March 1999.

Each of the deaths occurred at the house where the couple lived at the time.

Caleb Folbigg was born in Newcastle on February 2, 1989 and died on February 20, 1989.

Patrick Folbigg was born on June 3, 1990, also in Newcastle and died on February 13, 1991.

Sarah Folbigg was born on October 14, 1992 in Newcastle and died on August 30, 1993.

The death of 18-month-old Laura Folbigg was reported to Singleton police as a matter of course in March this year.

She had been born at the Singleton Hospital on August 7, 1997 and died on March 1 this year.

When police were told it was the fourth child the couple had lost in recent years they began an immediate investigation.

Mrs Folbigg is a part-time shop assistant in Singleton while her husband is a salesman in a local car yard. They have no remaining children.

Detectives have recently conducted separate records of interview with both Mr and Mrs Folbigg.

It is believed that a search warrant was executed at the couple's Singleton home and certain property was removed for examination.

The *Daily Telegraph* understands each of the babies underwent a post-mortem at the time of death and were later cremated.

Two of the deaths were attributed to SIDS, one was caused by an obstruction of the airways due to an epileptic fit and the fourth was undetermined.

Neighbours of the Folbiggs described them as an "outgoing" couple.

A neighbour, who asked not to be named, described Laura's death earlier this year as a "complete shock."

"She seemed such a bright, happy and healthy baby," the neighbour said.

"We couldn't believe it when we heard she died."

When approached by The *Daily Telegraph* last Friday Mrs Folbigg declined to comment on the deaths.

Yesterday a solicitor for the couple contacted The *Daily Telegraph* reiterating their decision not to speak publicly about the death of their four children.

# An introduction to the Folbigg case

- Forensic medical evidence regarding rarity of family pattern of infant deaths



## Sudden deaths of four siblings one-in-a-trillion chance, court told

Ellen Connolly

Kathleen Folbigg's solicitor called the deaths a "coincidence", but the prosecution told Maitland Local Court it was murder.

Dressed in oversized prison greens, Kathleen Folbigg, 31, was led into court yesterday afternoon, four days after being charged with murdering her children: sons Caleb, 20 months, and Patrick, eight months, and daughters Sarah, 11 months, and Laura, 18 months, between February 1989 and March 1999.

At the back of the courtroom sat her boyfriend of eight months who, the court heard, had asked Folbigg to marry him.

In opposing the bail application, police prosecutor Sergeant Daniel Maher said that while each child's individual death had not raised much concern, their collective deaths could only be attributed to suffocation.

Sergeant Maher said medical evidence from a United States forensic pathologist, Dr Janice Ophoven, showed that the chances of cot death being responsible were "a trillion to one".

"What that means is this is the only case that has occurred in the world. It's just not likely."

He said the circumstances surrounding the deaths were not consistent with sudden infant death syndrome, or cot death.

This included the fact each child was found face up, they were still warm when found

infants showed signs of life.

Extensive tests had ruled out the possibility the children suffered fatal genetic or viral disorders, he said.

Although they were admittedly circumstantial, police alleged that entries in a diary owned by Kathleen Folbigg also went to her partial admission of guilt, Sergeant Maher said.

In one diary entry, she had written: "I am my father's daughter." He had taken this as

**I am my father's daughter.**

Diary entry from Kathleen Folbigg, whose father was convicted of murdering her mother in 1969.

a reference to Folbigg's father, Thomas, who was convicted of murdering her mother, Kathleen, in January 1969.

But her solicitor, Mr Brian Doyle, said the deaths were a coincidence. He said the Crown case was weak and there was no direct evidence.

"Every one of the children was in fact ill in their lifetime before their death," Mr Doyle said.

He said the medical experts had come to their conclusions after being supplied with Folbigg's diaries and other statements.

"So, what we have got at the end, wholly and solely, is coincidences," Mr Doyle said.

The magistrate, Mr Richard Wakely, refused bail due to the seriousness of the charges. Folbigg will reappear in







# An introduction to the Folbigg case

## Diaries

6 News

Weekend Edition, October 25-26, 2003 smh.com.au



## The diaries of a mother incapable of love

From Page 1

the fish swimming in the tank. She tries to feel calm, and this works, for a while. She knows she is capable of killing. She can't stop it. That feeling, and the growling, is coming back again.

It's had in bed at night, too. Things keep coming into her mind as she tries to sleep, haunted by guilt and a constant fear. Craig, a heavy sleeper, snores away next to her.

She turns on the bedlamp and tries to write, remembering how scared she is when she is alone with the baby. Sometimes she puts the baby on the floor and walks away. Back to the fish tank. To watch, to try and relax. The anger can cool, sometimes as quickly as it came. "I don't know," she writes, propped up in bed. "How do I conquer this? Help is what I want."

But there is no help. The court would later hear that her condition made her unable to ask for help, unable to confide in anyone.

So, beginning in her early 20s, Kathy cries out where no one will hear. In her book with the golden clasp, covered in teddy bears and cherubs, her childlike handwriting begs for things to be OK. She fills the pages with secret thoughts, the most damning of which will be used by the prosecution to convict her.

For nine years she sporadically documents her worries, with the same two recurring.

"First, that Craig will leave her. She feels threatened because of his constant torments about her weight. She can't deal with his 'perpetual fluctuations'."

Second, that there is no real feeling of family roots. Nothing to ground her, no support.

Even when she keeps having her own children, the feeling doesn't ease. It seems as though it has always been that way. Her natural mother, Kathleen Donavan, neglected her for hours and days on end. Her father, Thomas Britton, a violent man involved in organised crime, stabbed her mother to death in 1968, when Kathleen was 18 months old.

A Department of Community Services officer's report records that she had been "misused by her father during infancy" causing a preoccupation with her sexual organs.

When sent to live with her aunt and uncle, Mr and Mrs Platt, she was "virtually uncontrollable." A month shy of her first birthday, she was described as being in the "border-



Kathleen Folbigg. "How do I conquer this? Help is what I want."

line retarded range". She had no grasp of manners, basic hygiene or dealing with other children. As an adult she has been categorised as having above-average intelligence. As a young girl, she rarely smiled.

"Could it be," she would write years later, "because I personally feel, that no one is for me?"

Although everyone else has an idea of where and what time they were born, it is something she has never been told.

"Depresses me that everyone else has a fair idea where and what time they were born. I don't. I have never been told. Unless I look on my birth certificate, and even then it doesn't really mean anything to me, like everyone else."

"The only thing left undone in my life is my real father. Unless someone decides to be compassionate and tell me about him one day, it will remain unknown."

Kathleen's DOCS file constantly

refers to her happy time with a foster family, when she grew to be a sweet and affectionate child. But when reference is made to this in court, she looks to the ceiling or rolls her eyes.

She feels the onset of depression stemming from the isolation of her family coming again, after the death of three babies, on November 13, 1996. It is annoying and confusing whenever she thinks about it.

"Why is family so important to me? I now have the start of my very own, but it doesn't seem good enough. I know Craig doesn't understand. He has the knowledge and stability and love from siblings and parents, even if he chooses to ignore them."

"Me - I have no one but him. It seems to affect me so. Why should it matter? It shouldn't."

But how much of a support was Craig? He was a loving father, yes. A man who adored playing with his children. A breadwinner.



Her babies... Caleb (died February 20, 1989), Patrick (died February 13, 1991), Sarah (died August 30, 1993) and Laura (died March 1, 1999). Artist's sketch: Folbigg in court yesterday.

## Killer will be left alone with her crimes

For her own protection Kathleen Folbigg is likely to be locked up for 22 hours in every 24 - the way she has lived since being found guilty in May.

She looked drawn and detached as Justice Graham Barr sentenced her to 40 years' prison, with a 30-year non-parole period, for the manslaughter of Caleb Gibson, 19 days, the grievous bodily harm of Patrick Allan, left blind and brain-damaged, and the later murder of Patrick, eight months, Sarah Kathleen, 10 months, and Laura Elizabeth, 19 months.

Her lawyer, Peter Krisenthal, said she would appeal against the conviction and the sentence.

Justice Barr told the court that Folbigg's tormented childhood provided significant mitigation. She had a profound and irreversible capacity

to develop any emotional bond.

She was not a cruel mother, and did not systematically abuse her children, he said, but would always be a danger if given the responsibility of caring for a child, and that must never happen.

Folbigg had cut off the victims' air supply using her hand or some soft material. Each child would lie warm in the bed while she screamed. Three of the four she couldn't pick up, but she tried to give cardiopulmonary massage to 19-month-old Laura, with whom she had bonded the most.

Almost all mothers who kill their babies are psychotic, the court heard, but it is unanimous that Folbigg is not. Instead she suffers from a severe, yet uncharacterised, personality disorder.



to show, she talks of her whole world crashing down.

"Craig's roving eye will always be of concern to me."

At night she tries to go to bed before Craig, so she can have time to mellow, to sort out her thoughts. Summing up the pain, she sits in bed one night in the middle of winter, pregnant with Laura.

It's 9.34pm, she notes in the right-hand corner of the page. She doesn't want to die, she writes, with no one knowing she was here.

"Thirty years. The first five I don't really remember, the rest, I choose not to remember. The last 10-11 have been filled with trauma, tragedy, happiness and mixed emotions of all designs."

"If it wasn't for my baby coming soon, I'd sit and wonder again what I was put on this earth for."

"What contribution have I made to anyone's life?"

Full judgement at smh.com.au/national

# An introduction to the Folbigg case

- The defence case



## **Folbigg defence near end**

The defence case for Kathleen Folbigg, accused of murdering her four babies, is expected to finish this morning, after 1½ days of evidence, after the defence announced it would call five witnesses. The trial, originally set down for 10 weeks, may finish in under half that time.

# Judicial commentary post-conviction





## Sentencing judgment [2003] NSWSC 895 (Austlii)

The arguments in favour of natural explanations for the deaths and Patrick's ALTE were unimpressive in the light of the whole of the evidence. ...



The evidence showed that natural but unexplained death was rare in the community and that there was no demonstrated genetic link to explain multiple deaths in a single family.

The advantage the jury had over the medical expert witnesses was that in addition to the matters the witnesses were permitted to take into account the jury could take into account the fact of the other deaths and Patrick's ALTE, with the presence at the relevant time of the offender and the improbability that all five events occurred naturally and spontaneously, and any meaning the jury gave to the offender's diary entries. ...

## Sentencing judgment [2003] NSWSC 895 (Austlii)

[When evaluating video of Folbigg's police interview]: I thought the offender expansive, voluble, chatty, almost detached for the most part. Her appearance was quite out of keeping with the gravity of the occasion. When asked about the meaning of the entry of [certain diary entries] she gave ... unconvincing answers[.]

...

The stresses on the offender of looking after a young child were greater than those which would operate on an ordinary person because she was psychologically damaged and barely coping. Her condition, which I think she did not fully understand, left her unable to ask for any systematic help or remove the danger she recognised by walking away from her child. She could confide in nobody. She told only her diary.



## Court of appeal [2005] NSWCCA 23 (Austlii)

In the present case there was, in my opinion, ample evidence at trial to justify these findings, reached beyond a reasonable doubt:



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

## Court of appeal [2005] NSWCCA 23 (Austlii)

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





# High Court of Australia (special leave refused) [2005]

## HCATrans 657 (Austlii)



McHugh J: is not the difficulty facing you, Mr Jackson, that the diary entries lend very cogent weight to what inferences can be drawn from the unexplained deaths?

Kirby J: ... it is the combination of the coincidences which are collected by the prosecution submissions and the diary entries which seem to me to be very powerful in combination,

# Evaluating the *Folbigg* trial



# Indicia of a wrongful conviction, as at 2011

1. Positive indicia of factual innocence.
2. Key expert testimony was misleading at time of trial, and has been cast into further doubt.
3. Coincidence evidence was either generic or based on contested evidence.
4. Probative value of Craig Folbigg's evidence was questionable.
5. Diaries do not contain a confession, do not compensate for other inadequacies in the evidence.
6. Folbigg has always maintained her innocence.



# Key themes

- Denying uncertainty
- The influence of adversarialism
- The interplay of expert and behavioural evidence
- Discrediting women's knowledge
- Behavioural evidence as makeweight





## Residual uncertainty

In this book, I suggest that Folbigg has been wrongly convicted of killing her children. However, I cannot say how the Folbigg children died. Given the passage of time and uncertainties within the evidence, I do not venture that I have uncovered the truth that Folbigg waits for.



# What happened next ...





## New South Wales

🕒 This article is more than 7 years old

### Kathleen Folbigg: NSW announces inquiry into serial killer's convictions

Folbigg was convicted of killing four of her children, aged between 19 days and 19 months



📷 Kathleen Folbigg, who was convicted of killing four of her children. The NSW government has announced an inquiry into the convictions. Photograph: Mick Tsikas/EPA

Michael McGowan

Wed 22 Aug 2018 15.31 AEST

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# Inquiry 'reinforces guilt' of convicted child killer Kathleen Folbigg, former chief judge concludes

Lucy Cormack, Angus Thompson and Latika Bourke

Updated July 22, 2019 — 9.30pm, first published at 8.10pm

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An inquiry into the 2003 conviction of Kathleen Megan Folbigg, dubbed by the media as "Australia's worst female killer", has produced evidence that "reinforces her guilt", a former chief judge of the District Court has concluded.

Folbigg was jailed for at least 25 years in 2003 after she was found guilty of killing her four babies – Caleb, Patrick, Sarah and Laura – in the decade from 1989.





## Blanch inquiry



The evidence at the Inquiry does not cause me to have any reasonable doubt as to the guilt of Kathleen Megan Folbigg for the offences of which she was convicted. Indeed, as indicated, the evidence which has emerged at the Inquiry, particularly her own explanations and behaviour in respect of her diaries, **makes her guilt of these offences even more certain.**

Blanch, *Final Report* (2019)

# Blanch inquiry addendum



I agree that as a result of the June 2019 paper, it is now plausible that Sarah and Laura may have had a cardiac condition and that raises a possibility it caused their deaths. That, of course, is on the basis of considering the genetic evidence in isolation. However, in determining cause of death the Inquiry must consider that evidence in the context of the whole of the evidence before the Inquiry ...

... taking into account additionally the diary entries made by Ms Folbigg and her lies and obfuscation, the evidence of Mr Folbigg indicating Ms Folbigg's fraught relationship with Sarah [and Laura], and the tendency and coincidence evidence, **I remain of the view that the only conclusion reasonably open is that Ms Folbigg smothered Sarah [and Laura].**

Blanch, *Final Report* (2019)



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## Nobel Laureates and leading scientists call for Kathleen Folbigg pardon

March 04, 2021



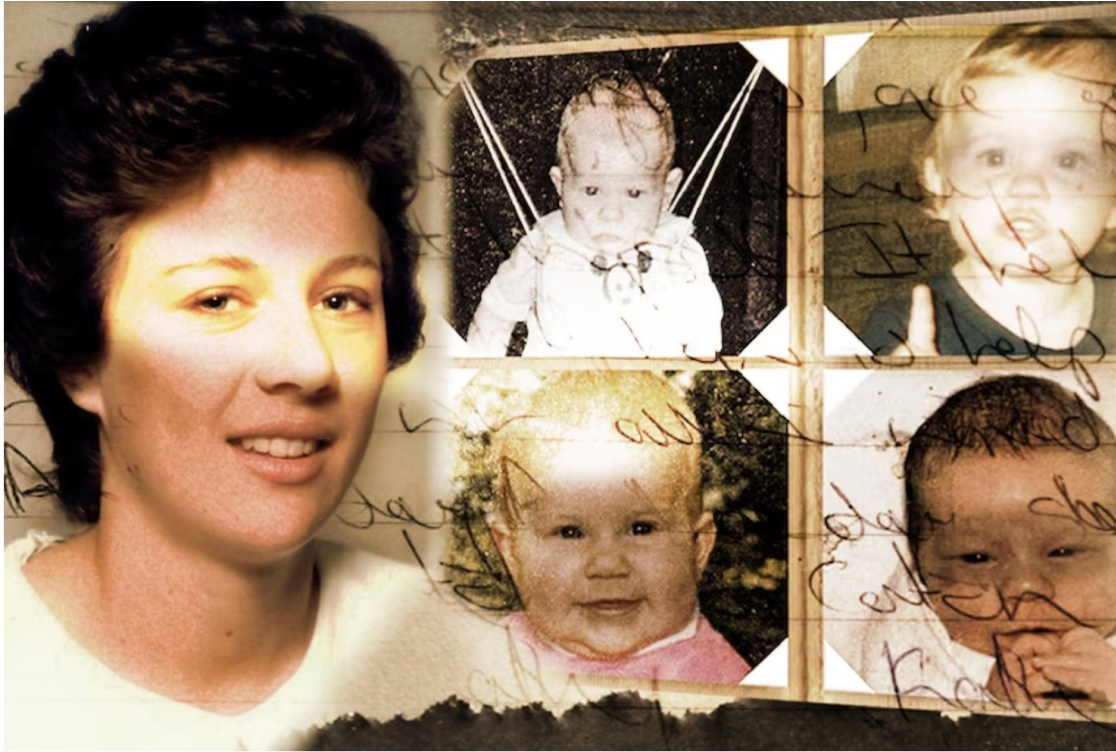
*From left: Academy President Professor John Shine, Professors Carola Vinuesa, Fiona Stanley and Jozef Gecz and Former Chief Scientist Professor Ian Chubb.*

## Second Kathleen Folbigg inquiry could be a test case for law reform in Australia

By court reporter Jamelle Wells

Courts

Sat 11 Feb 2023



Kathleen Folbigg was found guilty by a jury in 2003 for the murder of three of her children, and the manslaughter of another. *(Supplied)*

World

## Australian mother freed from prison after 20 years due to doubt she killed her 4 children

Kathleen Folbigg convicted in 2003 for the murder of her 3 children, manslaughter of her 4th

The Associated Press · Posted: Jun 05, 2023 3:41 AM PDT | Last Updated: June 5, 2023



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# Bathurst inquiry



I am of the opinion that there is **a reasonable possibility that three of the children died of [identified] natural causes[.]**

I am unable to accept the proposition that the evidence establishes that Ms Folbigg was anything but a caring mother for her children.

In my view, informed by the expert evidence before the Inquiry, **the diaries reflect Ms Folbigg blaming herself for the death of each child, as distinct from admissions** that she murdered or otherwise harmed them.

Bathurst, *Memorandum to AG Daley* (2023)



# Bathurst inquiry



Regrettably, ... **the jury were invited, at least implicitly, to accept the assumption that the four then unexplained deaths could only be due to unnatural causes,** namely smothering. Meadow's "law" also ignores the fact that **it would similarly be a remarkable coincidence if over the period of ten years the mother of four children smothered them without leaving any trace** on each occasion, and in circumstances in which two of them carried an extremely rare, potentially life-threatening genetic variant, of whom one also had myocarditis, and a third presented, at the least, atypically for a case of suffocation.

Bathurst, *Memorandum to AG Daley* (2023)

# Bathurst commentary on prosecutorial conduct



the Prosecutor **echoes a now discredited theory** by the British paediatrician, Sir Roy Meadow ...

The court [in R v Clark] also commented that “the graphic reference by Professor Meadow to the chances of backing long odds winners at the Grand National year after year may have had a major effect on the jury’s thinking”. The same may well be said of the remarks by the Prosecutor ... This is not, of course, an appeal from the conviction and **it is no part of my role to reach a conclusion as to the propriety or otherwise of the Crown Prosecutor’s remark. ...**

**It is not my role to comment** on whether this [further] statement **was appropriate in an address to the jury by a Crown Prosecutor.**

Bathurst, Final Report

# Bathurst commentary on first inquiry



## Re the relevance of context to interpreting the diaries

Ms Folbigg was not cross-examined about the context in which the diary entries were made at the 2019 Inquiry, as the Inquirer ruled that it was irrelevant. Having regard to the psychiatric and psychological evidence led at the present Inquiry, **in my opinion, the context is relevant.** I deal with this in detail when I come to deal with the question of whether the diaries contained reliable admissions of guilt.

Bathurst, Final Report

# Bathurst commentary on first inquiry



## Re cross-examination of Ms Folbigg

It is **not for me to say whether this was an appropriate exercise of discretion** by the Inquirer. Suffice to say, **Ms Folbigg was subjected to hostile cross-examination by two counsel over a period of two days** and despite Mr Folbigg's counsel's statement at the outset of her cross-examination that she would endeavour not to repeat the areas covered by the Director of Public Prosecutions, it is self-evident from [the] extensive cross-examination by both counsel on the same diary entries, that she failed in this endeavour.

Bathurst, Final Report

# Bathurst commentary on first inquiry



## Re cross-examination of Ms Folbigg

I have read and listened to the cross-examination of Ms Folbigg at the 2019 Inquiry. It is fair to say that **the object of the cross-examination was to reinforce the finding of guilt** and her examination, by both Senior Counsel acting for the Director of Public Prosecutions and Senior Counsel for Mr Folbigg, was openly hostile

Bathurst, Final Report

# Bathurst commentary on first inquiry



## Re Inquirer Blanch's rejection of evidence given by an expert

It is **not my task to determine whether it was open to the Inquirer** to reject the evidence of Dr Ryan in such absolute terms. ...

The possible qualification to the proposition that Patrick was a healthy baby before the ALTE hardly warrants a total rejection of her evidence. In my opinion, **it does not it show that Dr Ryan was “inexplicably unprepared” to give serious consideration to the consensus of other medical opinions** which are inconsistent with her own, or accept the weight of records and evidence indicating that Patrick was healthy and developing normally prior to the ALTE.

Bathurst, Final Report

# Responses to the second inquiry





# The NSW Court of Criminal Appeal's task



The exercise which this Court must undertake is to satisfy itself that the jury's verdict should be set aside. It is not simply a matter of adopting or deferring to the Report, although it is by reference to the Report (which relevantly, together with the submissions, constitutes the evidence) that this Court must act.

*R v Folbigg* [2023] NSWCA 325

# NSW Court of Criminal Appeal, on why they acquitted



First and most significantly, the “substantial and extensive body of new scientific evidence” to which the Crown referred in written submissions and which was before Mr Bathurst and considered in the Report substantially diminished any probative force of what had been relied on at the original trial as powerful coincidence and tendency evidence.

*R v Folbigg*, 2023 NSWCCA 325

# NSW Court of Criminal Appeal



Secondly, in relation to the diary entries, it may readily be understood how certain entries, viewed in isolation, had a powerful influence **on the original jury** in a manner adverse to Ms Folbigg. Viewed in their full context, however, as they must be, and informed by the expert psychological and psychiatric expert evidence referred to extensively in the Report and which was not before the jury, we agree with Mr Bathurst's conclusion that the diary entries were not reliable admissions of guilt.

*R v Folbigg*, 2023 NSWCCA 325

# NSW Attorney General Daley



The result today is confirmation that our judicial system is capable of delivering justice

AG Daley, 5 June 2023

# NSW Attorney General Daley



when you talk about delay, part of the delay was attended by the fact that the scientific evidence that played a major role in her exoneration didn't exist. Mr Bathurst told me that even while he was conducting his inquiry, brand-new, not formerly known evidence was rolling into his inquiry.

AG Daley, 6 March 2023

# Five lessons from the course of the *Folbigg* case



# Finding facts (fairly) about women's lives





No doubt [the defence] will point to some evidence that was called in the defence case from the girls at the gym, that the accused was a good mother. Well, ladies and gentlemen, the girls from the gym, you might think, would have no real idea what sort of a mother Kathleen Folbigg was.



# Epistemic injustice



When a listener relies on a prejudicial stereotype to pre-emptively diminish a speaker's credibility:

*then two things follow: there is an epistemic dysfunction in the exchange – the hearer makes an unduly deflated judgment of the speaker's credibility, perhaps missing out on knowledge as a result; and the hearer does something ethically bad – the speaker is wrongfully undermined in her capacity as a knower.*

Miranda Fricker, *Epistemic Injustice* (Oxford: OUP, 2007)

# Finding facts fairly?



- Legal strategies of disparaging women's evidence and lived experience as inherently trivial, implausible or incapable of belief.
- The 2019 Inquiry's approach to Folbigg's testimony
- Folbigg offered a clear and consistent account of how her diaries should be interpreted – but ultimately, it was the experts who were heard
- The risks of stripping out the feminist critique

# The limits of adversarialism and the ethical responsibilities of trial work



# Confirmation bias can function structurally



**Three important things can be true at the same time**



## Three important truths

1. A strong defence case was mounted at trial, arguably strong enough to raise a reasonable doubt when evaluated carefully.
2. The evidence presented at trial presented a misleading picture of medical research into unexplained infant death *and* the relevance of trauma and grief to the interpretation of a mother's behaviour and narratives. When these shortcomings were pointed out, the system should have acted to review the soundness of the convictions.
3. Evidence of uncertainty and the unreliability of key Crown evidence was insufficient to establish a wrongful conviction. Scientific evidence that offered an alternative explanation – plus a scientific rebellion against the legal process – was ultimately necessary for this exoneration.







THE UNIVERSITY OF BRITISH COLUMBIA