

FORM 37

Rule 60(1)

FINDING INTO DEATH WITH INQUEST

Section 67 of the Coroners Act 2008

Court reference: 1376/05

Inquest into the Death of ANTHONY JOHN HOGARTH CLARKE

Delivered On: 9 June 2010

Delivered At: MELBOURNE

Hearing Dates: 22,23,24,25,28,29 September,
1,2,5,6,8,9 October
7,8,9,10 December 2009
28 May 2010

Findings of: Coroner K.M.W. Parkinson

Counsel Assisting: Mr Steven Milessi

Representation: Mr Gerard McGuire of Counsel for the Chief
Commissioner of the Victoria Police

Mr Robert Taylor and Mr Robert O'Neill of Counsel for
Mrs Tina Hogarth Clarke and the Police Association of Victoria

Mr Paul Moran of Counsel for
Deputy Commissioner E. Dunne

Mr Stephen Russell of Counsel for Mr R. Hanger

Mr Gary Livermore of Counsel for the Victorian WorkSafe
Authority

Place of Death: Warburton Highway, Launching Place, Victoria 3139

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FINDING INTO DEATH WITH INQUEST

Section 67 of the Coroners Act 2008

Court reference: 1376/05

In the Coroners Court of Victoria at Melbourne

I, KIM PARKINSON, Coroner

having investigated the death of:

Details of deceased:

Surname: HOGARTH CLARKE

First Name: ANTHONY

AND having held an inquest in relation to this death on 22,23,24,25,28,29 September, 1,2,5,6,8,9 October, 7,8,9,10 December 2009 and 28 May 2010 at Melbourne

find that the identity of the deceased was ANTHONY JOHN HOGARTH CLARKE and death occurred on 24th April, 2005

at Warburton Highway, Launching Place, Victoria 3139

from

1a. GUNSHOT INJURY TO HEAD

in the following circumstances:

1. The hearing was conducted pursuant to the provisions of the *Coroners Act 1985*. Pursuant to s7 of Schedule 1 of the **Coroners Act 2008** the findings of the inquest are deemed to be findings made under 67 of that Act. However on my interpretation of the transitional provisions in the legislation the provisions of the Coroners Act 1985 apply to any findings, comments or recommendations made. This inquest was conducted over 17 days, heard from 22 witnesses, received 75 statements and 23 volumes of material comprising 76 exhibits. Together with the interested parties, I attended each of the relevant sites. Written submissions were made by the interested parties and filed on 18 March 2010. Submissions in reply were heard on 28 May 2010.

Scope of Coronial Power to investigate and burden of proof

2. Submissions have been made by the parties in relation to the scope of the inquest, the extent of the capacity of a coroner to investigate and make recommendations and as to the applicable onus of proof. I am conscious of the reasons for judgment in *Briginshaw v Briginshaw* (1938) 30 CLR 336 at 362; *Secretary to Department of Health and Community Services v Gurvich* [1995] 2 VR 69 at 73; *Anderson v Blashki* [1993] 2 VR 89; *Chief Commissioner of Police v Hallenstein* [1996] 2 VR 1 as to standard of proof. The standard of proof required to be clear and cogent proofs and to a comfortable level of satisfaction. I have considered *Harmsworth v State Coroner* [1989] VR 989 at 996 and *R v Doogan*; *Ex parte Lucas Smith* [2009] ACTSC 40 as to the scope of the inquiry. The coronial inquiry is not a wide ranging inquiry into antecedent policies and procedures, however the particular application of those processes and procedures and any direct contribution to the death is a relevant subject of coronial inquiry. I have considered the decision *Hurley v Clements* [2009] QCA 167.

Witnesses excused from giving evidence

3. Victoria Police Deputy Commissioner Emmett Dunne and former Victoria Police acquisitions manager, Mr Ric Hanger made application to be excused from giving evidence in the proceedings. Their applications were made on grounds that their evidence may expose them to prosecution for an indictable offence pursuant to Occupational Health and Safety legislation. Each application was granted. Their statements were exhibited in the proceeding¹ and form a part of the evidence.

Background

4. Senior Constable Anthony Hogarth Clarke was shot by Mark Bailey at the Warburton Highway, Launching Place at approximately 1.35 am on 24 April 2005. He was shot with his police issue revolver which Mr Bailey had obtained.
5. In considering the circumstances in which the death occurred it has been relevant to inquire into: the work being performed; the characteristics of the policing region in which it was being performed; the manner in which police perform these duties in so far as these matters relate to the particular duties of Senior Constable Clarke on 23 and 24 April 2005; the nature and effectiveness of the holster issued to Senior Constable Clarke (in a circumstance of Mr Bailey obtaining the police officer's firearm) and the training and communication resources

¹ Statement of Assistant Commissioner E. Dunne Exhibit 58 Folders R&S and Statement of Mr R. Hanger Exhibit 59 Folder T.

available to him. I have summarised the evidence and my conclusions in relation to these matters.

6. Senior Constable Anthony (Tony) John Hogarth Clarke was born on 24 January 1968 and was 37 years of age at the time of his death. He was married to Tina and was father to Connor aged 20 months. He was an experienced police officer of 11 years, attached to Region 4 Regional Traffic Tasking Unit ("RTTU") operating from the Knox Police Headquarters.
7. The evidence is that Senior Constable Clarke was a dedicated and professional police officer. The evidence is overwhelming that he was knowledgeable as to police procedure and that he was a cautious officer, both in his policing method and as to care and maintenance of his equipment. He was not prone to over-reaction and of mild demeanour in his dealings with his colleagues and the public. Region 4 RTTU officer in charge, Inspector Ian McCallum² described him as a gentle man and an officer with an extremely high work output who nevertheless maintained high standards. He stated:

"Given the number of public contacts Tony had each day and his strict interpretation of the road rules I was initially quite surprised at the lack of complaints from motorists with whom he had dealt. It was not until I saw Tony in action that I understood his complete lack of complaints. Tony had the ability to talk to motorists and explain his actions that was very good at alleviating complaints. ... I cannot recall ever dealing with a complaint regarding Tony's language or demeanour. He related well to people of all social levels and never, in my presence, talked down to, berated or spoke to people inappropriately. Tony was very even tempered and I never saw him lose his temper with anyone."

8. Senior Constable Stephen McIlroy, a police officer of 20 years standing, had known Senior Constable Clarke for 18 years, both in a private and professional capacity. He described Tony Clarke as confident in his ability to conduct himself professionally and in a safe manner. He regarded him as a competent operator, non-confrontational in style and a person who would ignore or walk away from volatile situations. He described him as even tempered and had no recollection of him ever losing his temper.³

Role and nature of the operation of RRTU the unit to which Senior Constable Clarke was assigned

9. Sergeant Stuart Thompson was the Acting Sergeant at the Region 4 Traffic Task Unit and supervising the unit on the evening. His evidence as to the role and operation of the RRTU and the nature of the Eastern Region is summarised as follows.⁴ In April 2005 the Region 4

² Statement of Inspector McCallum dated 12 September 2005 Exhibit 76 Inquest brief (IB) page 124.

³ Statement of Senior Constable McIlroy dated 15 August 2005. Exhibit 35 and T1206.

⁴ Statement of Sergeant Thompson dated 24 May 2005 and 11 September 2009, Exhibits 29 & 30.

RRTU had one acting Senior Sergeant, one sergeant, one acting Sergeant and nine members. Region 4 stretched from the Monash Freeway to the New South Wales border in North East Victoria. It covered 18 municipalities, including large rural areas, regional cities, as well as outer metropolitan industrial and residential areas. It had a population of roughly 1.13 million people over about 52,000 square kilometres. The region comprised suburban, semi-rural and rural areas.

10. The RTTU role is to target traffic management issues within the region and its targeting of traffic issues may be single operations applicable to the particular region or as part of a state-wide co-ordinated operation. On the evening of 23 April 2005 the task was drink driving in the Yarra Valley, with a focus upon the Warburton Highway. This location was described by the Sergeant Thompson as notorious for unlicensed and drink driving on weekends. The unit had access to four vehicles and a motor bike, with a mix of marked and unmarked cars. Sergeant Thompson stated:

"Traffic Management Unit members and RTTU members are highly trained in traffic management and vehicle interceptions and all TMU members complete a three week intensive advanced studies course. The interception of vehicles becomes second nature to TMU and RTTU members as are the risk assessments which are made and which are associated with such work. Thus prior to an intercept a member will be conscious of the need to conduct the intercept at a safe location and with an appropriate safety corridor where possible. Thus one is conscious of the nature of the traffic and general environment, the nature of the vehicle being intercepted, whether there is more than one person on board and the nature of the activity and driver which has led to the interception. All of these matters go into the mix. The risk assessment which is made prior to and during each interception is dynamic and ongoing."

Manning arrangements - "Two up" and "One up"

11. It is a regular practice that TMU and RTTU officers patrol alone or as is described 'one up'. The evidence is that many officers, including Senior Constable Clarke, preferred to work one up. Sergeant Thompson's evidence was that working one up increased the unit's productivity and the degree of road coverage that the unit was able to achieve. He described that ultimately working 'one up' or 'two up' was a matter of individual choice. The method of determining who works one up or two up, is left to the officer in charge of the shift and regard is had to the preference of the individual officers. However it is apparent that it is also to be governed by the number of vehicles available to the unit on the evening and the nature of the operation being performed. The evidence is that whilst specialist operations in remote areas generally used 'two up' patrols, the RTTU members often worked one up patrols in

remote locations with minimal support or back up.⁵ Senior Constable McIlroy a member of the RRTU described the Yarra Ranges district as being different to other districts he had patrolled. He stated:⁶

"I have always been wary of working 'one up' in the Yarra Ranges area on afternoon, twilight and night shifts, especially on the highways. If I am required to work by myself after sunset, I usually will try and work down the suburban end of the district where most areas are well lit and back up units are more readily available if required. When working the Valley on weekends, quite often the motorist/offender you are dealing with is intoxicated, drugged and potentially violent with little or no respect for authority. I have never had the need to discharge capsicum spray on a violent offender until I started work at the Yarra Valley TMU. I have sprayed two offenders in the last 12 months and have threatened to use it on several other occasions."

12. When working one up on a traffic patrol an officer is required to intercept and approach drivers. To administer a PBT it is necessary for the officer to breach the recommended safe distance between them and the subject. They have no immediate back up at the location. There is no other officer present to call for additional assistance in the event of difficulties. If there is an attack upon their weapon or upon their person, there is no other officer immediately available to assist or to defend. These difficulties are compounded where the intercept is late at night, in the dark, and in a country or remote area. That this is so, is apparent from the evidence of the passer by drivers to whom it did not appear the officer was in any difficulty and the fact that Senior Constable Clarke was caught by surprise and unable to call for assistance. Senior Constable Dennis Blaschko also a member of the RRTU unit gave evidence that "I'd say that if everything is going fine, it's easy but it's when it's not going fine when you want to have that second person".⁷ Whilst Victoria Police statistical analysis⁸ suggests that there is no significantly greater risk working one up than working two up, this analysis is undertaken by reference to the number of incidents. However the relevant question is really "risk of what". Some element of regard for the seriousness of the incident must be calculated into the statistic as to risk for it to be a meaningful assessment and of assistance in determining the level of risk involved.

13. Whilst the statistical analysis suggests that there have been few incidents and that those incidents occur almost as frequently with two up patrols as one, the consequences for a one up patrol and the capacity to be able to adequately defend is significantly lower than in a two up situation. Added to this is the evidence that the most dangerous intercepts involve those where alcohol is involved because of the volatility that alcohol adds to the mix. An officer is

⁵ Senior Constable Blaschko evidence at T.264.30.

⁶ Senior Constable McIlroy Statement Exhibit 35 page 7 and T 1210.

⁷ Blaschko T 382.3

⁸ Exhibits 61 and 41

relying upon their ability to assess the situation and make instant judgements about the intercept and its potential risk. Measures to ameliorate the risk are at least available to officers when working two up. They are not available to an officer working one up as the approach is necessary to administer the test, requiring that they leave their motor vehicle and approach the officer and the police vehicle and transporting persons who are in excess of the prescribed concentration of alcohol for driving purposes and who may be adversely affected by alcohol. A solo officer is not able to supervise adequately that process and is vulnerable to random attack. They are not entitled to handcuff the test recipient, nor to arrest in advance of the evidentiary test, nor on account of the suspected offence. This leaves the police officer working one up very vulnerable indeed when by necessity they transport the subject alone.

Practice of going 'CODE 4'

14. The evidence is that members are encouraged to report their location and the details of a vehicle prior to intercepting that vehicle. The practice is known as going Code 4. This practice was regarded as a useful policing safety tool as it alerts the officer's location and alerts neighbouring units to the possibility of need to respond to assist, particularly in night time situations.⁹ However, there are some impediments to going Code 4 which appear to affect the operational officer's preparedness to utilise that process as a matter of course in every intercept. The primary impediment is the availability of air time on the radio and the practical inefficiency of going Code 4 for every perceived 'minor traffic intercept'. Sergeant Thompson's evidence was that whilst officers are encouraged to go Code 4 during their OSTT training programs, he acknowledged the impediment to doing so. He stated:¹⁰

"With only one radio operator per channel in charge of up to 70 or 80 units it's impossible to go - if every single traffic unit that was working on a day went Code 4 with every vehicle they stopped no other job would ever be dispatched because there'd never be any units based to - to get out the armed robberies or anything else".

15. The effectiveness of Code 4 as a practical and effective back up tool in a developing situation such as that faced by Senior Constable Clark is doubtful. As counsel assisting submitted there does not appear to be any protocol for other units to automatically head in the direction of or to the location of an officer who has gone Code 4. The decision to do so is largely based upon any unit who may have heard the code making an assessment of the risk and balancing that against their other policing priorities.

⁹ Grossi T.858 L18

¹⁰ Thompson T.1086

16. In the absence of an automated back up response, Code 4 does not protect against a developing situation where the dispatcher and the other units are unaware of the developments. In light of these matters, and whilst Code 4 would be a preferable course for all traffic units, particularly solo, when intercepting any vehicle, in this case it is unlikely that such a measure would have resulted in a different outcome.

OSTT Training

17. Training of police officers is provided on a regular basis and covers a multitude of policing topics, ranging from defensive tactics, weapon handling, advanced and specialist driving training, managing people with mental illness, to equality and diversity training. Training is delivered as a part of an OSTT package and is specially tailored to be delivered to all levels of police from recruits to long standing officers. It is delivered by specially trained police officers and delivered in modules in six monthly cycles. The plan is to deliver the training to each police officer in various modules on a cyclical basis, with a number of core modules being delivered in those periods. The OSTT schedule for 1994 to September 2005 details the units covered in that period.¹¹ The training included weapons training, defensive tactics training and gun retention training.
18. Senior Constable Clarke had participated in regular training programs and his most recent participation in training was in January 2005. This training was identified to have included weapons retention training and in March 2003 and August 2004 would have been conducted with his 925 Holster.
19. There is no such thing as a loss proof holster and the retention features of the holster are supported by retention training as well as other operational considerations and cautions. Weapons training involves procedures for safe carriage, storage and usage of firearms. The training involves providing the officer with an understanding of the manner in which the holster retention mechanisms are designed to work. Police officers are trained and directed by police regulations that their firearm is drawn only as a weapon of last resort. The evidence of each of the police witnesses was that a routine traffic intercept would not entitle the drawing of a weapon and that in such circumstances they would not consider drawing their weapon.¹²
20. The defensive tactics training seeks to provide training to police for circumstances where they or members of the public are being attacked, or threatened with attack, by an offender. The training includes basic weapons retention techniques and the basic principles taught are to Grab, Undo and Neutralise ("the G.U.N system").

¹¹ Exhibit 34 - Project Beacon OSTT Chart 1994 to November 2005.

¹² Victoria Police Manual -Volume C IB 1313 and Blaschko T. 343.18

21. In July 2003 as a direct result of concerns regarding holster retention capacity, training on revolver retention was specifically included, although the issue of the actual concerns regarding the holster failures were not advised to police members. The system was described as a revision of previously taught revolver retention techniques, the G.U.N. system and the importance of balance and aggressive disengagement.¹³ In July 2004 the firearms retention training was developed to also include defences from both standing and ground positions and techniques to disable the offender in a weapon grab situation. This was stated to have been developed in direct response to the increase in gun grab incidents and the concerns regarding the holster's effectiveness.¹⁴
22. An issue arose in relation to the level at which some of the training is delivered and therefore its effectiveness to equip an officer in Senior Constable Clarke's position with the skills to respond to an attack. I was assisted in my understanding of these issues by the evidence of Senior Sergeant Miles and Mr David Grossi.
23. Mr Grossi is a former senior police officer and now firearms and tactical training expert based in the United States of America. Mr Grossi gave evidence in the inquest. He has extensive experience in training of police officers and the testing of and assessment of suitability of weapons and associated equipment, including holsters and I am satisfied had necessary expertise to comment upon the issues about which he reported. He was originally retained by the Victorian WorkSafe Authority ("VWA") to assist in that organisation's investigation into the circumstances of the death of Senior Constable Clark. His reports dated May 21, 2006 and June 26, 2006 prepared for the VWA, were exhibited in these proceedings.¹⁵
24. The evidence is that modifications are made to OSTT training involving physical contact to attempt to ensure that no injuries are incurred. This is for the welfare of the officer and in response to Work Cover premium costs. Witnesses commented that this is not an ideal approach to training for matters such as defensive tactics and weapon retention in circumstances where the officer is being trained for their life.¹⁶ Some witnesses observed that ideal training would be delivered at 85% of intensity, which may well result in injuries, but would leave an officer better prepared in the event that they faced such a situation in the course of their duties. The evidence is that muscle memory is an important component in defensive tactic training and the capacity to be able to respond to the threat instantaneously, as second nature.

¹³ Miles Statement Exhibit 36 IB 360

¹⁴ Ibid. IB 361.

¹⁵ Grossi Exhibit 895.2 - 898.

¹⁶ Grossi at T848.16 Miles at T.1302 - 1312

25. Some criticism was made by Mr Grossi of the extent of training and the level of intensity of the training provided and its capacity to provide an officer with effective protection in circumstances such as those faced by Senior Constable Clarke. In order for the muscle memory level of responsiveness to be achieved he said there must be frequent training and practice of techniques. His view was that a minimum of 8 hours training per annum is required to provide a minimal level of competency in defensive tactics and weapons retention.¹⁷ The evidence of Mr Grossi was however, that in the context of the identified faults with the holster he did not know of any level of weapon retention training that could be taught to police officers with such frequency and intensity that would allow them to go out in the field and perform their duties in a safe manner.¹⁸
26. Senior Sergeant Miles was of the view that the level of intensity of training is not necessarily the issue and that lack of intensity, might be compensated for by repetition and frequency, particularly where the training involved counter intuitive responses, but that would require the delivery of more frequent training programs which resources did not allow. However he agreed that less intense training may result in an officer being under prepared to respond to an attack upon their weapon. Counsel for the Chief Commissioner submitted¹⁹ that the policing context in which Mr Grossi and Senior Sergeant Miles operate are entirely different in their legislative, community and firearms context and that therefore Mr Grossi's evidence must be understood in that context. He submitted that Senior Sergeant Miles' evidence was the most useful in any consideration of the nature and effectiveness of training delivered by Victoria Police. I agree that as to the minutiae of the training and any assessment of its effectiveness, Senior Sergeant Miles was best placed to inform the court as to these matters. As counsel for Victoria Police submitted there were a number of matters which Senior Sergeant Miles identified as being significant and impacting upon the nature and level of training delivered. They were: the changing personnel profile of Victoria Police in relation to sex, size, age, cultural and educational circumstances, level of fitness and previous exposure to hard physical activity; the resource capability available to train members in relation to all the ongoing issues which emerge over time and which require attention, not just in relation to weapon retention; the need to ensure that training is effective, not injurious. This arises not only as a result of occupational health and safety issues but also because of the changing profile of police members; the need to ensure that training is integrated and not piecemeal, focusing on one or more highlighted issues rather than being holistic.
27. Significantly the evidence is that both the defensive tactics and weapons retention training was delivered in the context of a "two up" scenario and did not provide specific training or modifications to accommodate the particular issues affecting officers working 'one up'. It is submitted by Victoria police that additional 'one up' training would not have assisted Senior

¹⁷ T856.28

¹⁸ T887.15

¹⁹ Submissions VPOL pages 53 to 54

Constable Clarke. I agree that is so, as it is apparent that it was not possible to increase the defensive capacity of the solo officer by training because the very tasks they were required to perform in intercepting drivers, were necessarily undertaken in a manner which was against training and no alternative or substitute 'one up' training solution was available.²⁰

THE HOLSTER MECHANISM AND LEVEL OF RETENTION PROTECTION

28. I was assisted in my understanding of the design facets and retention components of the holster by the evidence of Mr David Grossi and Senior Sergeant Miles. It is appropriate to set out some of that evidence albeit in abbreviated form for the purpose of this finding.
29. The evidence is that firearm holsters are graded by reference to their firearm retention capability. There is a need for a holster to give up its weapon promptly to the officer when required, whilst at the same time providing security mechanisms to prevent loss of the weapon from the holster. At the time of the incident Victoria Police did not have a grading system of retentive capacity, however it has now adopted a system which does not classify by number of retention mechanisms, but by a standard which is based upon effectiveness of response in particular circumstances.
30. According to Mr Grossi, holsters are graded to three levels and there is no controversy about this grading.

Level one holsters being the lowest level of security, requiring one movement to draw the weapon and having one security device to retain the weapon, usually a strap over the hammer that has to be unsnapped to draw the gun. Level two has two security devices, usually a strap behind the hammer and also a piece of stiff leather at the rear of the holster covering the rear trigger guard. These holsters normally require two movements to extract the gun; unsnapping the strap that covers the hammer, then rocking the gun forward to release the trigger guard from the stiff piece of leather protecting it. Likewise Level 3 holsters have three security devices; the aforementioned hammer strap/snap, the rear leather trigger guard piece and a hidden knob of plastic inside the holster that presses against the side of the weapon when it is placed in the holster, which requires the grips of the gun to be twisted inward to release the weapon so that it can be pulled out.²¹

The Hellweg 925 retention mechanism is designed to offer a two retention device protection of the weapon it holds. The first on this holster is reliant upon the safety clasp. This is a leather strap secured by a stud mechanism. The second is as a result of the manoeuvre required by the officer to ready the gun for removal from the holster.

²⁰ Mr Grossi gave evidence at T.1656 of options for one up training which might be implemented.

²¹ Exhibit 22 - Mr David Grossi statement page 6.

31. Much material in this inquest relates to the design of the 925 Hellweg Holster and apparent retention flaws. This evidence is relevant to the question as to how Mr Bailey obtained the firearm. Senior Sergeant Andrew Miles gave evidence as to the nature of the flaws and of reports made to him of gun losses from the holster since 2003.
32. Mr Grossi's evidence was that the level of weapon retention capacity in the holster on issue to Victoria Police, was inadequate and that from a perspective of safety of the law enforcement officer, these faults in the holster and the reports of weapon retention failure as documented by Senior Sergeant Miles, warranted immediate response and withdrawal from service in 2003.²²

Reports as to Faults with the 925 Holster and vulnerability to gun grab

33. The evidence is that reports were received by Victoria Police as to faults with the 925 Hellweg Holster almost from its inception. A process of tendering was initiated prior to the adoption of the Hellweg Holster 925 as general issue in 2002. The tendering process followed procedures laid down by government as to the protocols and processes for tendering major acquisition projects. The process was driven by the necessity to address a number of issues with design of the existing holster, the need to accommodate a new light weight synthetic equipment belt and cost. It was also apparently driven by an obligation upon Victoria Police to make expenditure of funds allocated by the state government within a budgetary period.²³ A representative of the manufacturing company, Mr Hellweg also stated:

"Mr Liburti informed me that Victoria Police were now going to purchase new holsters based upon the model 181R holster. I advised Mr Liburti during that discussion to look at composite holsters. This was because leather holsters could never be made as secure as composite holstersI told him that the composite holster would be the better way to go. Mr Liburti told me that he didn't have time. He said that there were time constraints and that the Minister wants this closed off."

History of 925 holster acquisition and evidence as to identification of faults in holster retention capacity.

34. Senior Sergeant Miles has been a police officer for 28 years and attached to the IDSC unit for 14 years. He was in charge of the IDSC unit, a section of the operations services courses division. That unit was responsible for state-wide standardisation, co-ordination and management of OSTT Training for operational members. The IDSC unit was previously

²² Grossi Exhibits 22 and 23 and T887.9

²³ Hellweg Statement Exhibit 76 IB 1814

known as the Operations Safety & Tactics Training unit and the Firearms Operational Safety and Tactics unit. The unit was also required to monitor all incidents involving the use of operational safety equipment where death or serious injury has resulted. It was also responsible for advising force command on issues relating to OST training policy, procedure and equipment.

35. Senior Sergeant Miles was involved in the evaluation team of the holsters which were being tendered for in 2001 and ultimately he recommended that the force go back to general tender for a new holster as those proffered were not in his view suitable. A Victoria Police evaluation of weapons retention capability for holsters submitted on tender was carried out in 2002 and reported that the modified Safariland 6280 models were preferable both for security and for usability as compared to the existing Hellweg 121 Holster.²⁴ In September 2002, Acting Senior Sergeant Warren Ladgrove²⁵ provided his evaluation of the alternative equipment belt, which included the redeveloped 925 Holster. He was concerned about the short time frame of testing and limited number of participants in testing and advised:

"members of the OSTTU remain cautious and are concerned about the viability of the Hellweg holster given our previous experience. I believe a more rigorous testing of the holster and belt would be advisable in the interest of member safety."

36. An earlier Occupational Health and Safety Consultants report, albeit largely concerned with the soft tissue injury related ergonomics of the holster, had advised in similar terms that if there were to be adoption of a holster other than the existing 181R, selection should only occur on the basis of a carefully constructed 3 month user trial. In an application to government for approval to purchase the new holster,²⁶ this ergonomics report was relied upon as the basis for rejecting the Safariland Holster, as "too demanding" for many to master. That the sample number was 10 only and the time frames for teaching and mastering the new holster use were very limited and were matters which were overlooked in the application.
37. Neither Senior Sergeant Miles recommendation to re-tender, nor the report as to the Safariland Holster was adopted and instead a variation on the design of the existing Hellweg 121 Holster was developed. This was the Hellweg 925 holster.
38. Senior Sergeant Miles' evidence was that faults in the holster retention capability of the Hellweg 925 holster became apparent to him shortly after the holster was issued to general use. In January and March 2003 he received a number of notifications from Kyneton police as to incidents where the holster had given up the firearm it contained.²⁷ The firearm was

²⁴ IB 1552 and 1478

²⁵ Folder S at ED0882. Assistant Commissioner Dunne forwarded this memo to Ric Hanger on 2/9/02.

²⁶ Memo dated 30 May 2002 from Director, Business Management Department VPOL IB 1436.

²⁷ Miles Exhibit 36 Attachment B and C.

reported as being able to be removed from the holster without any conscious activation of the thumb strap and that in effect if the grip of the firearm was manipulated (as if in a struggle) the thumb strap would release of its own accord. Miles took possession of the holster and replicated the fault. He advised Victoria Police command of the faults and his concerns as to the safety of operational members on a number of occasions in 2003. He reported that whilst holsters are not totally self sufficient with regard to weapons retention it is however expected that the thumb snap will not release without conscious effort or manipulation. Senior Sergeant Miles described the failure of the holster to do this as a fundamental failure of the holster system.²⁸

39. He advised force command in March of 2003 that if the fault could not be rectified for all holsters it would leave the Victoria Police Force extremely vulnerable should a firearm be taken from a holster by a party other than the wearer.²⁹ He described that the failure was not limited to left handed holsters as originally believed. Four holsters of recent issue had identified faults in retention. Senior Sergeant Miles observed that to his knowledge the Hellweg 925 holster was not trialled to any extent in the field to identify this type of functionality prior to the general issue and that the Victoria Police relied heavily on the holster being of a similar design to its predecessor. Senior Sergeant Miles gave evidence that the testing he was appraised of in the proceedings appeared directed to ergonomic suitability, that is weight, sit, balance, and propensity of the equipment to contribute to soft tissue strain or injuries, rather than addressing retention capacity issues. He was also concerned that the level of testing had been directed to a limited number of recruits who were provided with little meaningful framework for comparison purposes.

40. Senior Sergeant Miles' evidence was that the final report of the evaluation team responsible for the selection of the 925 holster stated that it had been tested, that is as to its retention capacity, by an outside agency, however he was unable to locate any results involving this holster. The testing which appears to be referred is fabric testing and not focused upon retention testing. He commented that he was unaware if the manufacturer conducted any testing or to what level of retention the holster was classified and that as many of the features of the original holster were altered or modified, this may have contributed to the problem. His evidence was that given the level of risk associated with the identified fault, he strongly recommended in March 2003 that a working party be established to investigate. He reported that any delay in progressing this matter placed the Victoria Police and its members at risk of serious injury or death. He described that members rely upon their holsters to keep their firearms where they should be and to help them in weapons retention and that he did not consider the holsters were functioning anywhere near they way they should have. He was

²⁸ Miles Exhibit 36 and T.1411.12.

²⁹ T. 1342 -1343

concerned that somebody would end up losing their life if they lost their firearm and felt that this needed to be spelt out plainly in his reports.³⁰

41. Senior Sergeant Miles continued to receive reports of faults in the holster retention capacity throughout March and April of 2003 and forwarded advice to that effect to senior officers and to the Manager Acquisitions and Contracts, Mr Ric Hanger. He met with the manufacturer in company with Mr Hanger and Acting Inspector Williams of Logistics and Stores. The problem was demonstrated and a solution sought from the manufacturer for consideration by 30 April 2003. No further meeting was arranged and no solution was offered. In July 2003 he wrote again seeking advice as to whether there was a solution to the problem as he had another report of holster failure. He was advised "in short, no" but that further investigation as to a solution would continue.
42. On 25 July 2003 the Police Association wrote to Victoria Police raising concerns relating to the safety of the issue holster and inquiring as to incidents and proposals to address the problem. The association again wrote on 30 September requesting further advice on progress. This correspondence was forwarded to Senior Sergeant Miles to draft a response. On 20 October 2003 in a letter outlining the history of the holster concerns and numerous reported incidents, Senior Sergeant Miles again expressed his concerns with the manner in which the issue of the holster retention capacity was being addressed. In part he wrote:

"Whilst I may not be privy to all action that is being undertaken toward solving this fault, I have been privy to many of the meetings as a technical advisor. I do not believe the draft provided to the Acting Commissioner for the information of the Police Association is a true reflection of the progression of this issue. I have subsequently attended a meeting at Hellwegs (date unsure) where the issue was again raised and a solution requested from Hellwegs. Again no solution has been proffered and the holsters remain in circulation.

On the 30 September the Police Association again wrote to the Victoria Police requesting further advice on this issue and making comment on the manufacturers diligence towards finding a solution. This file has been directed to me to forward a draft response. The Victoria Police force has been aware for 10 months that on five occasions firearms have fallen from member's holsters and temporarily lost and on a number of other occasions the holster has failed to provide retention for the firearm as it should have. There has been no attempt to identify if the fault was systemic to the holster design (and this may lead back to the lack of testing and field trialling in the first instance) or restricted to the few holsters identified (which I doubt). Analysis of the use of force register shows that there have been 3 successful gun grabs to date this year (projected to 4 for 2003) as opposed to

³⁰ Miles T.1342.1 -20.

1 each for 2002 and 2001. There is no firm indication that the increase in successful gun grabs is attributed to the identified fault, equally there is no evidence that they are not."

43. It was submitted by Counsel for Victoria Police that reporting of faulty holsters ceased after 2003. Whatever the reason for a reduction in reporting, no steps had been implemented to assess each of the holsters on issue to ascertain whether they were faulty at any time prior to Senior Constable Clarke's death.
44. It is apparent that there was some difficulty experienced by Victoria Police in obtaining holsters suitable for revolver firearms for a relatively small market and compounded by the movement towards semi-automatic weapons in the major jurisdictions. This had resulted in a lack of response to tender in 2001 by suppliers for the production of the holsters and consequently a limit to the range of holsters available and made the selection process problematic. The addressing of the issue of retention after it became apparent in 2003 however was not prioritised and became a topic to be addressed in the overall future requisition of holsters and in the context of consideration being given to moving the semi-automatic weapons and different holsters in the future. Thus it was delayed.
45. Senior Sergeant Miles was a careful and considered witness who was of great assistance in the inquiry. The evidence satisfies me that by October 2003 it was apparent that there were serious safety concerns relating to the retention capacity of the holster on general issue, that firearms were being dislodged from the holster without the active manipulation of the thumb snap by the wearer and that the exact reason for the problem had not been identified³¹ and that a senior police officer, Miles, involved in the evaluation and testing processes had expressed his concerns about this issue to senior command and senior administration managers on a number of occasions. It is also apparent from the evidence that none of the steps he recommended to rectify the risk, or to attend to the identified problems, including the development and purchase of an alternative holster from a different supplier, were acted upon by force command.³²

³¹ T 1343. The exact nature of the inadequacy of the 925 Holster came to light in the briefing note of Senior Sgt Moon to Acting Superintendent Sharp dated 10 April 2006 where it was acknowledged that the 925 holster would fail any testing program and that they all failed the test for Level 1 retention, the issue being that when the firearm was pulled away from the body, the retention strap would unclip, a forward pull on the firearm then releases the firearm. The issue appears to have arisen from the fact that the 925 has a more secure shank than the previous issued 1891R. When the 181R was pulled the whole holster moved on the belt and there was no opportunity for the retaining clip to undo. The 925 holster having a secure shank and attachment to the belt only allows for movement of the firearm within the holster which then stresses the retaining clip until it releases allowing for easy removal of the firearm.

³² Senior Sergeant Miles evidence that he requested permission to enter development with Safariland for an alternative holster. The Safariland Holster was available for purchase in October 2003. The Safariland holster was introduced in limited numbers in May 2008 and then to new recruits in July 2008. (see statement of Assistant Commissioner E. Dunne at page 30.139. It was finally withdrawn by general direction email in September 2009.

46. The proposition was put to Mr Grossi, that if the problem had not been specifically identified, how could it have been fixed. He responded:

"I don't know if the problem could be fixed immediately....but if the holster has to stay in service then either increased, very intensive weapon retention or weapon disarming training needs to take place, an adherence to policies and procedures regarding calling out for vehicle intercepts and also the possibility of operating two-man units to provide an immediate back up when officers are engaged in high risk type functions. The first step is an awareness process. The training that the trainers should undertake doesn't stop with an awareness lecture, it should start with the fact that, "We've identified a potential problem here, students, and we're going to do our best to make sure you are equipped with the best techniques possible until we come up with an equipment solution to, coupled with intensive training".³³

47. Whilst additional training was implemented by Senior Sergeant Miles, there is no evidence that police officers were advised of the faults and their potential vulnerability to gun grabs and the faults in the holster played no role in any consideration as to whether one up patrols were appropriate in any given circumstance.

48. The holster remained on general issue, including to Senior Constable Clarke.

Post Event Gun Grab Reconstruction with Senior Constable Clarke's Holster

49. A video of a gun grab reconstruction undertaken at the Victoria Police Forensic services Centre on 18 May 2005 identifies the manner in which an offender may obtain access to the police officer's gun and the manner in which the gun may be released by the 925 holster when the grab is from a frontal position. Senior Sergeant Miles evidence was that the testing on Senior Constable Clarke's holster revealed that the holster gave up the gun to a front on attack by an offender. The following extract from his statement identifies the nature of the testing and the manner of release of the gun.

"I examined the holster issued to Clarke, which was a leather revolver holster model 925, serial number 107738. I was provided with a Smith and Wesson .38 calibre model 10 revolver with a square butt and wooden grips, similar to the firearm issued to Clarke. I placed the firearm into the holster and fastened the thumb snap to secure the revolver into the holster. By exerting force to the grip of the revolver forward in the holster and upward I was unable to release the thumb snap and release the revolver. However by exerting force laterally away from the thumb snap I was able to cause the thumb snap to release without direct manipulation. The firearm could then be pulled forward and upward

³³ Grossi T.871.1

releasing it from the holster. A report was submitted by me attesting the above. (Appendix K Folio 30-31) On 18 May 2005 I attended at VPFSC in company with Senior Sergeant Jeff Maher and Sergeant Andrew Ploegsma to conduct some further tests. The tests were recorded on video by Crime Scene (Appendix L). As there are no standard tests for holster retention, the tests were based on the tests used by Safariland Pty Ltd to classify their holsters. With the thumb snap closed the holster should not give up the firearm.

Test 1 - Front Grab one hand (Clipped) - Clip released, firearm removed
Test 2 - Side Grab one hand (Clipped) - Clip released, firearm retained
Test 3 - Rear Grab one hand (Clipped) - Clip released, firearm retained
Test 4 - Front Grab one hand (Unclipped) - Firearm removed
Test 5 - Front Grab two hand (Clipped) - Clip released, firearm removed
Test 6 - Front Grab two hand (Unclipped) - Firearm removed
Test 7 - Side Grab two hand (Clipped) - Functioned correctly
Test 8 - Side Grab two hand (Unclipped) - Functioned correctly
Test 9- Rear Grab two hand (Clipped) - Functioned correctly
Test 10 - Rear Grab two hand (Unclipped) - Functioned correctly

In all of the tests considerable force was placed on the grip of the firearm in a jerking motion for 3-4 cycles (except test 6) before the test was completed. For the holster to function correctly the thumb snap should not release without any direct manipulation i.e. pressure from the thumb to the side of the release. In tests 1,2,3 & 5 this holster failed to achieve that outcome, on two occasions (Tests 1 & 5) resulting in the firearm being removed from the holster. In tests 4 & 6 where the thumb snap was already unclipped the firearm was removed from the holster during the test. With test 6 the firearm was removed on the first cycle."³⁴

50: I have concluded from this evidence that Senior Constable Clarke's holster suffered with a similar deficiency to those which had been described and reported to Senior Sergeant Miles during the period since the issue of the Hellweg 925 Holster and that this retention deficiency made his firearm vulnerable to a successful gun grab.

Evidence of Psychiatric and Psychological status of Mark Bailey

51. Mr Bailey had an extensive history of drug and alcohol dependence. His psychiatric history was described by his treating psychiatrist, Dr Scott Blair-West and by his psychologist, Mr Tom McCrimmon.³⁵ Dr Blair-West diagnosed obsessive compulsive disorder attenuated by

³⁴ Exhibit 36.

³⁵ Exhibits 13 and 15

drug and alcohol dependency issues and depression. It is apparent from the evidence of Dr Scott Blair West that he was not fully informed as to the nature of Mr Bailey's propensity for and history of violence. He stated that the psychiatric conditions from which he suffered are not usually associated with violent conduct and "to my knowledge he had no past history of violence towards others or previous suicide attempts". It is apparent that Dr Blair-West did not have an accurate or complete understanding of Mr Bailey's history. Mr Bailey did report some past episodes of conflict with family but appears to have deliberately downplayed the violence involved. Mr Bailey was being treated with Paroxetine (Aropax) in increasing doses up to 40mg in combination with cognitive behavioural therapy. He had taken his medication on 23 April, 2005. He was also prescribed Valium as required.

52. The forensic history provided by Dr Maurice O'Dell³⁶ and the statements of family and friends establish that Mr Bailey had a propensity for violent rage, including physical attacks on family and friends. Mr McCrimmon became aware of this propensity during the course of his consultations, which included family members. These rages were largely attributable to occasions when Mr Bailey was consuming alcohol. The treatment regime adopted by both clinicians was directed towards this issue of substance abuse. Mr McCrimmon observed that there had been an escalation in his behaviour in March 2005 including violence directed at family members and that on 4 April 2005 he spoke to Mr and Mrs Bailey:³⁷

I explained that in my opinion Mark still required residential rehabilitation and that it was only a matter of time before his alcohol abuse and aggression would escalate. I reminded them of their own needs and urged them to insist that he either enter residential care or leave their home, even if they have to call the police to remove him. This was extremely difficult for Judith to accept but she reluctantly agreed and I asked them to keep me informed. ... In hindsight I wish that I'd had the authority to legally commit Mark to a drug and alcohol rehabilitation program, even if it were against his will - perhaps this tragedy may have been prevented.

53. It appears from Mr Bailey's history that the use of alcohol was a precursor to his becoming irrational and violent in his response to situations. Whilst s12 of the Alcohol and Drug Dependents Act 1965 enables referral, Dr O'Dell stated that in his view there are no assessment or treatment centres with the facilities to treat patients in a secure environment and that even were such facilities available, the capacity to determine the risk of relapse upon discharge was problematic.³⁸ It is not immediately apparent that any other authoritative intervention would have prevented or assisted in preventing the death of Senior Constable Clarke.

³⁶ Exhibit 76 IB page 366.

³⁷ Exhibit 15 - IB page 144 -145

³⁸ Dr Odell Statement IB page 373

54. Having summarised the background circumstances and my factual conclusions in that regard I turn now to the events of the 23 and 24 April, 2005.

The Events of 23 and 24 April 2005

55. Senior Constable Hogarth Clarke commenced his rostered shift at 6pm on 23 April 2005 at the Region 4 RTTU office at Burwood Highway, Wantirna South. He was rostered with Acting Sergeant Stuart Thompson, Senior Constables Ian McDonald, Dennis Blaschko and David Clarke. They were to patrol the Yarra Ranges with particular emphasis on drink driving offences.³⁹ The four police vehicles available to the unit were utilised that evening. Senior Constable Clarke and Senior Constable McDonald and Acting Sergeant Thompson each working alone "one up" and Senior Constable David Clark and Sergeant Blaschko working together, "two up". Senior Constable Clarke was tasked with solo patrolling the Lilydale to Upper Yarra area. He had earlier made inquiry as to whether another officer could work with him that evening as he did not want to work alone, however that officer was already committed.
56. Senior Constable Clarke was driving an unmarked Blue Ford XR6 turbo sedan registered RZU 153. The vehicle is fitted with standard police UHF (ultra high frequency) radio and an SMR (small to medium range) radio. His patrol area that evening ranged from suburban residential in the Lilydale area to the semi-rural areas beyond Lilydale further into the Yarra Valley.
57. Senior Constable Clarke was wearing an equipment belt which contained a Hellweg model 925 Holster. He was equipped with a police issue Smith and Wesson .38 Special Calibre, Model 10 six shot revolver. He also carried on his equipment belt police issue equipment including a six shot speed loader in a pouch, a canister of oleoresin capsicum spray in a pouch, an ASP extendable baton in a pouch, a portable police radio in a holder and handcuffs in a pouch. Also fitted to his equipment belt were a number of non-police issue items including an additional speed loader 6 shot in a pouch, a mini torch holder, a pocketknife with pouch and a Leatherman brand multi purpose tool in a pouch.⁴⁰ It appears he regularly carried these items on his equipment belt, including when undertaking his OSTT training. There is no evidence that the additional equipment carried by Senior Constable Clarke interfered with the regular or safe set up of his equipment belt.
58. It can be established from police call records and telephone mobile records that Senior Constable Clarke commenced his patrol at 6.30pm. He notified Police Communications that he was working 'one up' and had commenced patrol. Between 6.30pm and 9.00pm he

³⁹ Blaschko T.245

⁴⁰ Exhibit 64 - Statement of Senior Constable Henry Glaser dated 19 May 2007. IB page 321.

intercepted three motorists and issued five penalty notices. Senior Constable Clarke took a meal break at 9pm at the Lilydale Police Station and resumed his duties at approximately 9.50pm. At 10.15pm he intercepted a motorist on the Warburton Highway and issued two penalty notices.

59. At 10.34pm Senior Constable Clarke had intercepted the red Nissan motor vehicle registration RIA 668 owned and driven by Mr Mark Bailey. He issued him with an infringement notice for allegedly exceeding the speed limit at 94kph in an 80kph zone. He also administered a preliminary breath test ("PBT") which recorded a negative reading.
60. After the intercept, Mr Bailey attended the Sam Knot Hotel at Wesburn where he remained for some hours with friends including Mr Daniel Leitch, Ms Alicia McBride and Mr Robert Patterson. Mr Bailey spoke of the police intercept and reported that Senior Constable Clarke had also examined a modification to his vehicle. Whilst he described the police officer as being "pretty hard on him", Mr Patterson stated that he seemed mad at himself.⁴¹ Ms McBride and Mr Leitch say that he was annoyed about having received a ticket, but did not seem overly concerned about the event and that he had joked at the irony of it being his first speeding ticket. It is apparent that this, the first intercept was routine.
61. Mr Bailey is reported to have consumed at least five pots of full strength beer between his arrival at the hotel at approximately 10.45pm and departing at 1.15am. During the evening he is reported to have become agitated at the behaviour of another patron and indicated that he was going to "smash" that person. The evidence is that Mr Bailey was a person who would become violent or display violent tendencies after consuming alcohol and he had previously been incarcerated in New South Wales as a result of a violent domestic incident.⁴²
62. Ms McBride had arranged with her mother, Mrs Jacqueline McBride, to be collected from the hotel. Those arrangements included Mr Bailey, however at approximately 1.00am having made inquiries about the availability of alcohol at that location, he left shortly after without notice to his friends.
63. He was observed leaving the rear hotel car park in his motor vehicle at approximately 1.15am. He initially drove directly into Station Road, opposite the hotel, and then altered his direction, executing a U turn to rejoin the Warburton Highway outside the hotel. He was last seen by Mr Leitch and Ms McBride driving towards Yarra Junction and Launching Place on the Warburton Highway.

⁴¹ Exhibit 27 - Statement of Mr Robert Patterson IB page 172

⁴² Exhibit 76 - Statement of Dr M. O'Dell

64. Senior Constable Clarke intercepted Mr Bailey on the Warburton Highway at Launching place. The intercept took place approximately 500 metres east of Barak Road, at a location where the bitumen surface is elevated with each side of the road dropping away with grass banks.⁴³ I am satisfied having regard to Mrs Bailey's statement,⁴⁴ that it is likely Senior Constable Clarke intercepted Mr Bailey as opposed to came upon him on the side of the road. The Red Nissan was positioned on the verge of the road and Senior Constable Clarke's patrol vehicle a short distance, approximately one car length behind.
65. Police witnesses have described how the location of an intercept is often governed by where the intercepted driver chooses to pull over, however police usually attempt to locate the vehicles safely to the road and to other traffic. In this case, whilst the intercept point has been described by some witnesses as "not ideal", it was beyond a bend in the road, and the evidence is that the police vehicle lights could be seen flashing, through the stand of trees contained on the bend. Traffic approaching the intercept from both directions would have been able to identify that there was a police car ahead. Senior Constable Clarke was not wearing an illuminated vest when he exited his vehicle.
66. It is likely that Senior Constable Clarke recognised the Red Nissan vehicle from his earlier uneventful intercept in the evening. During the intercept, Senior Constable Clarke administered a preliminary breath test. The test was administered at 1.21.47am and the result obtained from the device revealed a blood alcohol level in excess of the prescribed limit (0.107gm/100mL). Post mortem toxicological analysis revealed Mark Bailey had a blood alcohol of 0.12g/100mL and the evidence is that this is consistent with the reading at 1.21.47am.
67. Procedure requires that the police officer then request the driver to accompany them to a police station for an evidentiary breath test. There is no power of arrest and the driver may refuse to accompany. A person who does accompany is not under arrest and accompanies the police officer as a passenger in the vehicle. They are not handcuffed. It is likely that it was in this context that Mr Bailey exited his motor vehicle.
68. At some stage after the recording of the PBT reading, Mr Bailey came into possession of Senior Constable Clarke's firearm and shot and killed Senior Constable Clarke. The PBT device was located some 20 metres from the roadside apparently thrown to that location. After shooting Senior Constable Clark, Mr Bailey either deliberately or inadvertently drove his vehicle into the culvert on the side of the embankment. He then took the police vehicle and was observed driving West on the Warburton Highway towards Lilydale at a fast rate of speed. A police patrol car observed the vehicle travelling at approximately 100kph. It had its

⁴³ Exhibit 14 Statement of Senior Constable Brendan Butland IB page 80.

⁴⁴ Mrs Bailey states that Mark Bailey told her the police officer pulled him over. IB page 184 "the policeman picked me up in the car, the policeman grabbed me again".

rear intercept lights flashing and the officers assumed that Senior Constable Clarke was driving. They radioed to advise that the lights were still on, however received no response. Civilian witnesses described the vehicle being driven erratically and at speed on the Warburton Highway at approximately 1.40am.

69. Mr Leitch, Mr Patterson and Alicia and Mrs Jacqueline McBride saw the red Nissan Skyline parked down an embankment on an angle of about 45 degrees to the road as they were driving home from the hotel. It was at this time that Mr Leitch received the first telephone call from Mr Bailey to which I will refer later.
70. Accounts of the events leading up to and likely including the shooting, were given by passing motorists. Ms Vicki Hickman recalled passing a dark coloured police car parked on the side of the road with a red Nissan Skyline about half a car length in front of it at about 1.15am. She recalled that the vehicles were off to the side of the road but not into the ditch. She was able to observe the rear tail lights of the red car and thus recognised it as a Nissan Skyline. She observed a man standing at the driver's side door of the Nissan Skyline apparently speaking with the driver, although she did not observe the driver. She thought the man standing may have had a police uniform on and recalled he had a light shirt.⁴⁵
71. Mr Scott Yeoman passed the scene of intercept shortly after Ms Hickman and stated that he saw what he described as people wrestling or grappling with each other. His evidence was that he saw one man running and then one man standing over what he thought was another man.⁴⁶ Mr Crick also in the vehicle gave evidence that he observed two people wrestling with each other at the rear of the red car in a standing position.
72. After shooting Senior Constable Clarke, Mr Bailey spoke by telephone to his mother and Mr Leitch. Telephone records for mobile phones reveal the calls made from and to Mr Bailey's mobile phone in the period 23 April 2005 at 20:40:38 to 02:21:59 on 24 April 2005.⁴⁷ He described to them what he had done and to some extent the circumstances and indicated his intention to take his own life.
73. Mr Leitch reports that in the call at 01:31:45, Mr Bailey stated "I've really fucked up. I've shot a copper and I stole a cop car. I'm going to see my Mum. I've got the copper's gun. I'm going to shoot myself". At 01:40:am in a further conversation, Mr Leitch reports he said that the police officer had pulled him over and punched him in the chest. He stated that they had a fight and he got the gun from Clarke and shot him in the head.

⁴⁵ Exhibit 3 Hickman Statement and T64.6.

⁴⁶ Exhibit 10 -Statement Scott Yeoman and T220.

⁴⁷ Exhibit 8 - Statement of Senior Constable Nicki Holmes, Homicide Squad as to analysis of calls record Exhibit 9.

74. Mr Leitch reported the events as he knew them to 000. During the recorded 000 call Mr Leitch stated: "He just said it was the same cop who pulled him over earlier in the night. He said he had a struggle with him and the copper punched him and he pulled the copper's gun out".
75. Mrs Judith Bailey described a telephone conversation with her son commencing at 2:01:07. In that conversation he told her that he had shot a policeman.⁴⁸ He stated that he had made him lie on the road and had shot him in the head. He reported that the policeman had picked him up in the car and he mentioned drink driving. Mrs Bailey stated he said: "I went to the pub and when I came back the policeman grabbed me again. She stated that she couldn't really remember whether he said he snatched his gun or I made that assumption. He said, "then I shot him". He kept saying that he was terribly sorry. He described that the man had a wife and children and the children don't have a father any more.
76. Whilst the recollection of these witnesses as to the detail of the language used may be affected by the traumatic circumstances which surrounded the conversations, I am satisfied their statements were contemporaneous and there is no basis to discount their accuracy at least as to the reports they say they were given by Mr Bailey.
77. Mr Bailey drove the police vehicle to Old Hereford Road and Sepik Vale, Mount Evelyn. He exited the vehicle and climbed a 2 metre embankment roadside where there was some tree cover, yet a view of the roadway from his position 4-5 metres from the road.

The Sepik Vale scene where Mark Bailey was located deceased

78. At approximately 1.58 am a taxi driver arriving at Sepik Vale to collect passengers from Number 1 Sepik Vale, noticed that a parked vehicle had a bullet hole in the rear passenger window on the driver's side. He contacted police. Police had already located Senior Constable Clarke's body. At about that time the police air-wing had also located the stolen police vehicle and patrol cars were directed to the location. Police arrived and spoke with the taxi driver, the passengers and local residents directing them inside the premises. Mr Bailey reported observing the taxi and the police car arrive, during the course of the telephone conversation with his mother. At approximately 2:14 am, they heard a single shot fired in close proximity. The evidence is that Mr Bailey shot himself with the police service revolver he had taken from Senior Constable Clarke. Police located Mr Bailey's body on the embankment. The stolen police revolver, together with a six shot speed loader and ammunition was located with Mr Bailey. This was the firearm used to shoot Senior Constable Clarke.⁴⁹ Senior Constable Glaser examined the scene and reported:⁵⁰

⁴⁸ Exhibit 76 Ib page 183. Statement of Mrs Judith Bailey dated 24 April 2005.

⁴⁹ Exhibit 64 - Statement of Senior Constable Henry Glaser at page 6

⁵⁰ Ibid page 2

"On the north side of Sepik Vale Road was a grassed area above a short cutting from the roadway. About twenty metres distant from the roadway, lying on the ground near the edge of this grassed area to a line of trees, shrubs and undergrowth was the body of the deceased whose name I learned to be Mark Bailey. I observed that the deceased who was lying on his back had a gunshot wound to the mouth and a subsequent wound to the top of the head. An area of foliage near the deceased, in the general vicinity of about 1.5 to 2 metres up from the ground was blood spattered.On the ground beside the deceased's left leg was a mobile phone which I collected. Lying on the ground beneath the deceased's upper thighs was a revolver. I noted the serial number of this revolver was 8D30534. I opened the cylinder and observed that the chambers contained three cartridges and three fired cartridge cases which had been fired in the normal consecutive order from the chambers they were contained within. I removed these cartridges and fired cartridge cases from the weapon. Also lying on the ground between the deceased's lower legs was a speed loader fully charged with six cartridges. On the other side of Sepik Vale Road, that is the southern side and somewhat opposite this grassed area where the deceased lay, was an unmarked Police vehicle, a blue ford sedan registered number RZU 153. This vehicle was parked parallel off the roadway facing west, therefore the drivers side of the vehicle was towards the grassed area where the deceased lay. The drivers side window was completely wound down and the driver's side rear window was partly wound down. The police two-way radio in this vehicle was turned up to a very high volume. There was a hole through the rear driver's side window which had been caused by the passage of a bullet having been fired into the vehicle. It measured by the position of the partly wound down window, 1044 millimetres up from the ground with a trajectory slightly down from horizontal and slightly rearward striking the window sill of the rear passenger side door. I observed amongst other objects on the front passenger seat, four loose cartridges."

The Launching Place scene where Senior Constable Clarke was shot and killed

79. At approximately 1:41 am Senior Constable David Clark and Sergeant Blaschko were making their way towards base as their shift drew to a close. They observed the red Nissan off the side of the road to the southern side of the Warburton Highway in a ditch facing south-west. They had passed the scene, so did a U-turn and drove east back past the car, did a further U turn and parked by the side of the road, facing west, a short distance behind the red car. I am satisfied that this police attendance was that witnessed by Mrs McBride and her passengers on the way home from the hotel.
80. The officers inspected the vehicle. There was no key in the ignition of the vehicle and its headlights were off. A traffic infringement notice was located on the front passenger side floor. They observed skid marks on the grass behind the car. The lights and engine were off. The officers located Senior Constable Clarke's body lying on the grass roadside verge area.

He was not breathing and did not have a pulse, however his body was still warm. Ambulance officers attended at 1.51am and attempted resuscitation, however Senior Constable Clarke was deceased.

81. The police issue equipment belt was located around his waist. The firearm holster, situated on his right hip, was empty and its safety catch was unclipped. The handcuff and capsicum spray scabbards were empty. Located in close proximity to Senior Constable Clarke's body were his OC Spray and police baton. The OC spray had not been activated and nor had the police baton. The unopened police issue A.S.P. baton in the grass inches from him and next to this was a small black-coloured torch which was identified as the officer's own. This is consistent with Mr Bailey taking items from the equipment belt, including the speed loader. Located several metres away on the edge of the road was a Preliminary breath test straw and a broken wristwatch. His police cap was located on the bitumen edge of the road and some distance away broken watch fragments. The preliminary breath test device was located 23 metres away in a ditch.

Crime Scene examination and evidence as to the position of vehicles at Launching Place

82. The positioning of the vehicles is of some assistance in identifying the nature of the struggle and the manner of exit by Mr Bailey. Sergeant Butland who mapped the crime scene and provided a scale plan⁵¹ gave evidence as to his conclusions. Counsel assisting has helpfully set out the nature of that evidence in his submissions and I have extracted it as follows:

Sergeant Brendan Butland gave evidence before the inquest. He is an investigator at the Major Collision Investigation Unit and prepared a scale plan of the crime scene at Warburton Highway Launching Place. That scale plan sets out the location of the body of Senior Constable Clarke, the resting place of the Red Nissan Sedan RIA 668, various exhibits found including PBT device, PBT mouth piece, asp baton, handcuffs, torch, baseball cap and watch fragments. Many of these exhibits are visible in corresponding photographs of the crime scene as well. The scale plan also details the location of skid, scuff and acceleration marks left by vehicles at the scene. Sergeant Butland described a skid mark, apparently left by a non-rotating tyre leading to the front driver's side wheel of the red Nissan, and a skid or scuff mark (as depicted in the scale map) leading to the rear drivers side wheel of the red Nissan. The mark can be clearly seen in photos 52 and 53. The plan also depicts a number of acceleration scuff marks. Three specific areas of acceleration scuff mark were identified. The first is a short distance and slightly west of the body of Senior Constable Clarke. Sergeant Butland was of the view this was left by a vehicle accelerating with one wheel on the bitumen surface and one wheel on the roadside verge. The mark can be clearly seen in photos 22 and 33. The second was a mark further

⁵¹ Sergeant Butland Statement Exhibit 14 and Scale Plan Exhibit 2.

west and slightly under an area on the scale map with a description of watch fragments. The mark is apparent in photos 21, 22 and 52 near the exhibit marker 3. Sergeant Butland accepted that the mark was consistent with a vehicle coming onto the roadway under acceleration. The third area of acceleration scuff marks included two marks roughly parallel but in a curved shape in the west bound lanes of the Warburton Highway. These marks are shown on the scale map and are visible in photos 6 and 7. Sergeant Butland accepted that the three sets of marks were consistent with a vehicle accelerating from a point where its passenger wheels were off the road but its driver's wheels still on the bitumen, then moving onto the bitumen surface fully and accelerating away in the westbound lanes of Warburton Highway. Sergeant Butland also accepted that the rear of the vehicle accelerating may have drifted out to the right as the vehicle turned left to straighten up in the westbound lanes, explaining why the pair of accelerations scuff marks appear to come closer together. Sergeant Butland disagreed with the proposition that the acceleration scuff mark nearest to the body of Senior Constable Clarke and the skid/scuff mark were likely to have both been caused by the driver's side wheels of the red Nissan. He also disagreed with a proposition that the two acceleration scuff marks visible in the westbound lanes could have been caused by different vehicles.⁵²

83. I am satisfied having regard to the evidence of Sergeant Butland and the witnesses Mr Yeoman, Mr Crick, Ms Hickman and Mrs McBride, that during the course of the intercept Mark Bailey's vehicle was located forward of the police vehicle and approximately one car length separated the two vehicles.
84. I am further satisfied that the place at which Senior Constable Clarke's body was found was the area towards the rear passenger side of where his police car had been parked at the time of the intercept. This is consistent with the analysis of vehicle tracking described by Sergeant Butland and the observations of the witnesses, Crick and Yeoman. It is likely he had sought the cover of the police vehicle in an attempt to escape the pursuit of Mark Bailey.
85. I am satisfied that the bullet hole to the rear drivers side window resulted from a shot fired by Mark Bailey whilst in pursuit of Senior Constable Clarke. That shot hit the rear driver's side window and lodged in the upholstery of the rear passenger side door. The trajectory of the bullet described by Senior Constable Glaser⁵³ as being slightly down and to the rear of the car, fired from a height likely less than shoulder height. This shot was likely the first shot fired by Mr Bailey towards Senior Constable Clarke who was on the other side of the vehicle. I am satisfied that the second shot was fired in close proximity and hit Senior Constable Clarke in the left side of his head and that Senior Constable Clarke fell to the ground at the location where he was found. Mr Bailey reported rolling the police officer over after shooting

⁵² Butland evidence T474 to 496.

⁵³ Exhibit 64 Statement Senior Constable Glaser dated 19 May 2006

him and taking the additional ammunition and speed loader from the equipment belt. The observations of Mr Yeoman and Mr Crick are consistent with the event occurring in this manner. This accounts for the 'standing over' observed by Mr Yeoman and also the 'stepping over' motion reported by Mr Crick.

The circumstances of the interaction between Senior Constable Clarke and Mr Bailey

86. Senior Constable Clarke made no contact with police communications either by going Code 4 or otherwise at or around the time of either of the intercepts involving Mark Bailey. As earlier discussed, it is not uncommon for police officers not to go Code 4 at each intercept, as to do so may involve delays on the communication channel. Nor is it seen as necessary in every routine traffic interception. The first intercept was apparently uneventful and it is likely that Senior Constable Clarke approached the intercept on the second occasion in the knowledge of his earlier dealings with the driver. There had been no conduct which would have caused him to anticipate any threat on this occasion and this may have been a factor in the outcome of this event.
87. I am satisfied that during the course of their interaction, and likely after being advised of the PBT result, Mark Bailey became enraged, took the PBT device from Senior Constable Clarke and threw it some 20-25 metres from the road-side. It is reasonable to conclude that during the course of this contest or consequent upon it and in the distraction of the event, Mark Bailey has obtained Senior Constable Clarke's firearm directly from his holster.
88. Having regard to the evidence of the psychiatrist, Dr Blair-West and the psychologist, Mr McCrimmon as to his propensity to become irrationally enraged and violent, this is consistent with his patterns of behaviour. Having regard to Senior Constable Clarke's usual demeanour, it is unlikely that he did anything to provoke such a reaction.
89. Mr Scott Yeoman stated he observed two people in a standing position, grappling between the two vehicles. Mr Crick also observed this event. Mr Bailey stated to Mr Leitch that he had been punched in the chest by Senior Constable Clarke. Watch fragments and scratches on the boot area of Mr Bailey's vehicle suggest that this was the location of the struggle.
90. Mr Yeoman's evidence was that he also observed a male person running and a struggle occurring some seven metres from the roadway.

"I saw the person that I had seen running standing over another person who was either on the ground or on his knees. I say this because the person that I saw running was bending over the person on the ground and I could see that the person on the ground was fighting back. I could see that the first man bending over did not have control over the other person and could see that they were struggling with each other".

91. Mr Yeoman's evidence was he recalled the high beams of the police car being on and the person he saw was to the left of the cars somewhere between the front of the police car and the rear of the red car. He saw what he thought were two people to the left of the vehicles in the grass area to the side of the road.⁵⁴ Mr Yeoman made the assumption that the person he saw running and standing over what he thought was another person was a police officer. He said he made this assumption because he thought he had a uniform on because of the dark colour. Mr Yeoman described the dark clothing top and bottom including a jacket that only came down to the waist. Senior Constable Clarke was wearing his police uniform including a light blue short sleeved shirt as the outer garment. Mr Bailey was wearing blue denim trousers and a dark blue long sleeved shirt. It is likely that Mr Yeoman mistook Mr Bailey for a police officer.

92. With reference to photographs 2-4 Mr Yeoman described the position of the man he saw as standing about where the blue sheet was.⁵⁵ The blue sheet to which he referred was one covering the body of Senior Constable Clarke in the position in which he was found.⁵⁶

93. Mr Crick's evidence was that he observed the two people wrestling and that they were standing up between the unmarked police car and the red car.⁵⁷ Mr Ben Closter stated:⁵⁸

"I then saw a person in front of the cop car. I am not sure what he was doing, it looked like he was sort of stepping away over a gutter, but I ride my bike along there and I know there isn't a gutter. I then thought he may have been going to handcuff someone. I only saw one person, and he had his back towards the road when I saw him. The person who I saw was wearing a light blue shirt, he didn't appear to be running, it just looked like he was taking a big step"

94. I am satisfied that what was observed by these witnesses were the events leading to and including the shooting of Senior Constable Clarke by Mr Bailey.

How did he get the gun?

95. It was submitted by counsel for Victoria Police and Counsel for Mr Dunne that as the event was not observed, I am unable to be satisfied to the requisite standard 'comfortable level of satisfaction' as to how the gun was obtained, or particularly that the gun was obtained as a result of the holster giving up the gun. The contrary was submitted by counsel for Mrs Clarke

⁵⁴ Yeoman IB207

⁵⁵ Yeoman T236

⁵⁶ Blaschko T285

⁵⁷ Exhibit 4 IB 201 and T77 and 83.

⁵⁸ Exhibit 6 IB 194 and T151-164.

and the Police Association. A number of possible scenarios exist as to how Mr Bailey came to be in possession of Senior Constable Clarke's firearm. They are:

- That Senior Constable Clarke drew his weapon and the weapon was grabbed from his hand by Mr Bailey.
- That Senior Constable Clarke may have slipped on road verge and when incapacitated Mr Bailey was able to obtain the weapon.
- That in the course of a struggle on the ground, Mr Bailey overpowered Senior Constable Clarke and obtained the weapon.
- The gun had for some reason dropped by the police officer and obtained from the ground by the offender.
- That Mr Bailey grabbed the gun from Senior Constable Clarke's holster.

96. I turn now to consider the evidence in the context of each of these scenarios. Although it is clear that my obligation in making my findings in the case do not require me to exclude each hypothetical which may be available,⁵⁹ in this case the factual matters and/or inferences drawn as to each scenario posited are of relevance to my ultimate conclusion as to how the event took place.

Police officer drew his own weapon from holster

97. I am satisfied that it is unlikely that Senior Constable Clarke would have drawn his firearm in advance of utilising other options, including the OC spray and the police baton. Neither had been activated at the roadside. I find that this police officer in circumstances of a routine traffic intercept was unlikely to draw his firearm. There were a number of other options available, including deploying OC spray and using his baton. If he was able to reach his firearm, it is a reasonable inference that he was equally able to reach the OC or baton in any confrontation. In the circumstances of an unarmed assailant, I am satisfied that Senior Constable Clarke would have utilised these options before drawing his firearm. Neither of these options were utilised by Senior Constable Clarke and nor is there any evidence that they were attempted. The items were located at the location where the policeman was shot, not at the point of initial contact between the police officer and Mr Bailey.

98. The evidence as to police regulations and training is that the drawing of a gun is a last resort response in circumstances of direct danger where no other alternative defence is available. Senior Constable Clarke was a careful and measured police officer. I am satisfied that this scenario is highly unlikely.

⁵⁹ Hurley v Clements (supra p.3)

Gun grabbed from police officers hand

99. I also regard it as highly unlikely that the gun was grabbed from his hand by Mr Bailey. Had Senior Constable Clarke already drawn his weapon, it is a more likely scenario that Mr Bailey would have been shot. Senior Constable Clarke was a strong man, with excellent upper body strength. He was trained in physical combative and defensive techniques and was not a man who would be readily physically overcome. Mr Bailey was of less sturdy build than Senior Constable Clarke and notwithstanding the age difference between the two men, it is difficult to see how he would have overcome Senior Constable Clarke in a direct physical challenge, where the police officer was already holding the gun. If the circumstances were apparently so dangerous as to require the officer to draw his gun, it is likely that the officer would be in a high state of vigilance and not likely to be off guard sufficiently for Mr Bailey to be able to grab the gun from his hand. Nor is it likely that Senior Constable Clarke would have allowed him to breach distance between them sufficient for him to be able to do so.

Gun released from or obtained from holster in a ground struggle

100. Whilst it is possible that the weapon could have been released involuntarily from the holster, during a struggle on the ground, there is little evidence of such a struggle taking place or of Senior Constable Clark being sufficiently overwhelmed by physical force of Mr Bailey, such that the latter might obtain his firearm.

101. I am satisfied that it is unlikely that a struggle of such mammoth proportions took place, having regard to the forensic pathologist's evidence as to the nature of the injuries observed at autopsy in relation to Senior Constable Clarke and also on Mr Bailey. Dr Lynch, Senior Forensic Pathologist with the Victorian Institute of Forensic Medicine, gave evidence that Mr Bailey had sustained some bruising to his hands, forearm and forehead apparently from some blunt trauma. Senior Constable Clarke had no injuries consistent with a struggle. Dr Lynch was of the view that "neither deceased looked like they had been involved in a prolonged physical altercation where they had sustained lots of injuries."⁶⁰

102. Also significant is the lack of any tearing to Senior Constable Clarke's uniform or the clothing worn by Mr Bailey. There was insignificant soiling of either Clarke's uniform or Bailey's clothing to entitle a conclusion that there had been an intense physical struggle involving going to ground, particularly in the conditions and at the location of the incident.

103. The positioning of his equipment belt when Senior Constable Clarke was located does not reveal a significant displacement of that belt as may have occurred during a ground based struggle. A watch pin from Senior Constable Clarke's watch was located resting on the boot

⁶⁰ Dr Matthew Lynch T.1967.17

of the red Nissan, and there were watch fragments at various locations at the scene, however this watch was described as not particularly sturdy in make. It appears that the location of at least some of the fragments were as a result of vehicle impact either in the driving away of the stolen police vehicle or upon arrival of other vehicles post event.

104. There were some scratches to the rear of the red Nissan vehicle. These matters are consistent with the grappling described by Mr Yeoman. He gave evidence that he saw two people grappling at the rear of the red Nissan vehicle. His evidence was that it was a standing grapple, although he said he later saw a person go to ground. Mr Yeoman described observing a person running away from the red Nissan in the direction of the police car. It is likely that he observed Senior Constable Clarke running to take cover behind the police vehicle. Mr Yeoman's evidence was that he then saw a person who appeared to be standing over another person although he did not actually see the person on the ground. Mr Alistair Crick, a passenger in Mr Yeoman's vehicle stated:

"when I went past I saw like a dark uniform, like a police uniform and arms moving around. There was definitely one person I could see. I saw one more pair of arms like there was another person there. It looked to me like there were two people wrestling. This wrestle was taking place between the unmarked police car and the other red car. I believe they were on the grassed area to the left of the two cars. It appeared to me they were both standing up".

Slip or Stumble resulting in the gun being given over to the offender

105. There is no evidence to suggest that Senior Constable Clarke slipped or stumbled and hence gave over his gun or made the gaining of the gun easier for the offender. Once again one would expect a high state of vigilance in a police officer who has drawn his gun, that he would be protective of his positioning, including his footing and aware of distance between himself and the offender.

Evidence which is consistent with gun grab by the offender from the holster

106. I am satisfied that there is sufficient evidence to enable me to conclude that the gun was obtained from the holster by Mr Bailey and not grabbed from his hand or taken after having fallen onto the ground. This is particularly so in view of the improbability of the earlier discussed scenarios when considered in light of the following matters. I am satisfied that it is likely that the firearm came away from the holster either because the retention strap failed and the firearm was withdrawn before Senior Constable Clark could apply a retention tactic, or in the application of a retention tactic, Clarke has pushed Bailey away while he had a grip on the firearm, resulting in the retention strap failing and the firearm being withdrawn.

107. Senior Constable Clarke was observed grappling with the offender in a standing front on position.⁶¹ Shortly afterwards I am satisfied he was observed running to take cover behind the police vehicle. I am satisfied that the holster was likely to have given way to the frontal grab and released the gun to the offender in the manner which has been described in these proceedings. Whilst it is submitted by counsel for Victoria Police, that the gun grab reconstruction identified that it required some degree of force from the offender, I am satisfied that the manoeuvre itself was not complicated and the force required was such that a man of Mr Bailey's stature would be easily able to exert.
108. The telephone conversations held with Mr Bailey indicate that he had taken the gun from the police officer. These reports, and particularly that to the 000 operator, describing 'getting his gun out' suggest a grab from the holster.
109. The holster had recognised and reported deficiencies as to gun retention. The evidence is that there had been a number of incidents involving the loss of a weapon from the holster, by the apparent failure of the retention mechanism. The reconstruction video exhibited with Senior Sergeant Miles statement identifies the relative ease with which the holster gave up the gun in a front on gun grab by an offender.
110. The officer had not utilised nor attempted to utilise, either of the OC Spray or the ASP baton which would be expected to be first response to a threat by an unarmed offender. There is no evidence of Mark Bailey being armed with a weapon of any type such that the utilisation of these alternatives may have been inappropriate.
111. Taking account of all of these matters I am satisfied to a comfortable level of satisfaction, that Mr Bailey obtained the weapon directly from the holster and that Senior Constable Clarke caught by surprise, was unable to intervene quickly enough to prevent the grab and unable to recover the weapon from the offender before he was shot and killed.
112. I find that Senior Constable Anthony Hogarth Clarke was shot and killed by Mr Mark Bailey at Launching Place, Victoria on 24 April 2005 at approximately 1.35am. I find that Mr Mark Bailey took the police officer's firearm from his holster and shot Senior Constable Clark in the head causing catastrophic injury which took his life.
113. I find that the fact that the police officer was working alone or "one up" in the circumstances as described on 24 April 2005 was one of a number of contributing factors to the death of Senior Constable Anthony Hogarth Clarke.

⁶¹ See evidence of Mr Scott Yeoman and Mr Crick.

114. I find that a failure by the Victoria Police command to issue a holster which was capable of providing reasonable resistance to front on gun grab was one of a number of contributing factors to the death of Senior Constable Anthony Hogarth Clarke.
115. I find that the failure by the Victoria Police command to respond in a timely manner to the issue of reports of gun loss from the holster and to either withdraw the holster from operational use or implement remedial protective measures such as two up manning, was one of a number of contributing factors to the death of Senior Constable Anthony Hogarth Clarke.
116. I find that the continuation of 'one up' manning of traffic tasking units in the face of known faults with fundamental safety equipment after March 2003 was one of a number of contributing factors to the death of Senior Constable Anthony Hogarth Clarke.
117. I find that the development and tendering process for the supply of holsters in 2002 was partially constrained in its capacity to acquire a suitable holster by the corporatized tendering process directed by government. The result was that time-frames prevented a careful analysis of holster capacity and impeded any further search for more appropriate holsters, including re-tendering.
118. It is desirable that defensive technique, weapons retention and gun grab training programs be offered more frequently and possibly trained at a more realistic or intensive level. I do not however find that these matters contributed to Senior Constable Hogarth Clarke's death having regard to the inherent difficulty of training to alleviate 'one up' risks in the type of intercept in which Senior Constable Clarke was engaged.

COMMENTS

I make the following comment(s) connected with the death (including any notification to the Director of Public Prosecutions under 21(3) of the *Coroners Act 1985*

1. It is recognised that having as many vehicles as available policing the roads has positive road safety outcomes and it is also clear that it is a more efficient use of police officer time that they work 'one up'. It is also suggested that officer preference is often to work 'one up'. However against these matters is the obligation to consider the safety of police officers. Efficiency matters or matters of personal preference, should not and do not outweigh those considerations. I am satisfied that solo police intercepts of drivers in isolated areas and particularly at night are unsafe. I note that this was also the nature of the observations made by Deputy Commissioner Hastings in his report entitled 'Single Officer Patrol Review'

produced in 2006⁶² wherein he made recommendations for the development and application of a risk assessment tool to be applied in determining the appropriateness or otherwise of one up manning.

2. There is an inherent problem with 'one up' manning in isolated areas on duties which require direct physical contact with members of the public. There is a basic incompatibility between the work required to be performed and the implementation of the defensive training tactics safety information provided in OSTT training. To administer a preliminary breath test, a significant element of TMU and RTTU duties, a police officer is required to approach within one metre of the test recipient. The test is administered by a device held at arms length to the driver by the police officer. If the driver leaves the motor vehicle as in this case, there is even less distance between the subject and the officer. After a positive PBT reading, a person is requested to accompany the police officer to a police station for an evidentiary test. This requires the recommended distances to be breached in order to transport the driver. There is no capacity for the officer to maintain protective distance measures because they are required to breach the distances to administer the test and follow up protocols.
3. Victoria Police have provided statistical information which identifies the number of incidents involving reported gun grabs or attempted gun grabs between 1994 to 2009. Also provided is an analysis of the type of involvement incident leading to the gun grab. An additional document identifies the events according to whether one up or two up. The probability of events occurring is not necessarily the way to manage the question of risk as surely the issue is the level of seriousness of events which might occur. One cannot contemplate a more serious potential consequence for a police officer than the loss of his firearm to an offender. It might be said that this case is so unusual a circumstance and that it results from the actions of a man whose response could not have been anticipated and therefore in one sense it is one of the tragic realities of policing. However in my view, that proposition in this circumstance is not entirely correct. The evidence is that alcohol and mental illness related violence attenuated by alcohol or drug taking is also a common part of policing in this community. Given that known risk and given the defensive procedures in which officers are trained, a system that provides for work to be undertaken in a manner which by necessity prevents the use of those defensive procedures, must be flawed.
4. Even had it not been regarded as practicable to provide for two up manning in remote locations and on drink drive patrols, it would have been prudent to ameliorate the risk by ensuring that the equipment that was provided was the best possible available and not suffering from basic faults with the potential to be life threatening. If that could not be done, then working arrangements should have been altered, until it was able to be achieved.

⁶² Exhibit 33

5. The training program in defensive tactics and firearm retention does not provide specific training for officers in one up situations. It is likely that this is the case because the majority of the defensive tactics are inconsistent with the requirements of the drink driver policing task.
6. It became apparent during the course of this inquest that it was difficult to identify the chain of command or responsibility through which concerns as to equipment faults and deficiencies would be notified and resolved. It was apparent from the evidence and the statements of then Acting Superintendant Dunne and Mr Ric Hanger, that their capacity to respond to concerns raised by Senior Sergeant Miles, was also limited by the administrative structure within which they worked. In written submissions Counsel for Assistant Commissioner Dunne submitted that Mr Dunne had taken all reasonable steps available to him to investigate and act upon the deficiencies identified in relation to the holster including as manager of the section, seeking of explanations from the manufacturer and alerting senior police levels. Particular reference was made to Mr Dunne's recommendation that the matter be raised with the uniform policy committee and that the issue be monitored corporately. It was submitted that no criticism might be made of Mr Dunne in those circumstances. Counsel for Mr Hanger submitted that Mr Hanger had taken all reasonable steps available to him to notify and convey the concerns in relation to the equipment failures. He submitted that he acted responsibly and within the confines of his duties and the established systems that required him to act in accordance with procedures and that he did not have the liberty, nor the expertise, to go off on a whim and take over the technical aspects of the procurement process.
7. I accept that this is the case in the circumstances of a complex reporting structure for these projects. For this reason, whilst it is apparent that there were serious failures on the part of the Victoria Police in relation to the equipment, the failure appears organisational and structural and ultimately rests at the most senior of levels of Victoria Police. It is not necessarily attributable to one or two individuals in the chain of command. It is not within the capacity of this inquest to identify with any particularity the level at which responsibility rests to act in the face of known equipment faults. That is a matter for the Director of Public Prosecutions to consider in the event I believe that an indictable offence may have been committed in connection with the death.
8. The existence of evaluation committees, including outside consultants and procedures to obtain authorisation for expenditure through ministerial and departmental channels all combined to confuse who was ultimately responsible. They also constrained the capacity for the organisation to respond in a timely manner. It is clear that even once it was finally decided as late as 2006 that the flaw in the holster required it to be replaced, the issue became one of funding. It was not until September 2009 that the replacement of the holsters was activated by the issue of the Safariland holster.

9. The internal processes and procedure for equipment evaluation is unclear and does not appear to provide for the ability to respond in a timely manner to equipment safety issues when they are raised. Issues such as the obtaining of funding approval from multiple authorities and a centrally prescribed tendering process appear to have impeded an effective tendering process suited to the particular needs of a police force. These same processes appear to have also acted as an impediment to an immediate response to safety issues when raised in 2003. This matter should be addressed by Victoria Police command, if necessary with government, to ensure that they are able to immediately respond to such risks in the future.
10. Evidence was heard in the proceedings as to matters associated with the holster continuing to be on general issue, subsequent to the death and up to and including the inquest hearing dates.
11. S21(2) of the *Coroners Act 1985* provides that recommendations may be made to any minister or public statutory authority on any matter connected with a death that the coroner investigated including public health or safety and to that end I have made recommendations which touch upon issues which arose or continued after the date of the death, but which are in my opinion "connected with the death".
12. S21(3) of the act provides that a coroner must report to the Director of Public Prosecutions if the coroner believes that an indictable offence has been committed in connection with the death with the coroner investigated. This power differs to that in s21(2) and does not give rise in my view to any power to refer any matter which may arise under Occupational Health and Safety Act 2004 as to events subsequent to the death of Senior Constable Clarke.
13. Having regard to my findings in paragraphs 113, 114, 115 and 116 herein, I have formed the belief that an indictable offence pursuant to the Occupational Health and Safety Act 1985 has been committed in connection with the death which I have investigated. Pursuant to s21 (3) of the *Coroners Act 1985* I am required to report that matter. I direct the registrar to forward a copy of this finding to the Director of Public Prosecutions.

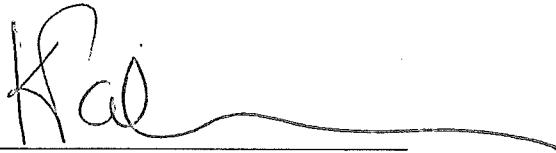
RECOMMENDATIONS

I make the following recommendation(s) connected with the death:

1. I recommend that the practice of working one up be abolished in circumstances involving high risk activities such as drink driver, late night and remote area intercepts and that a risk assessment tool be developed to assist supervisors to determine whether one or two up manning is appropriate in other circumstances.

2. I am satisfied that the equipment failure issues associated with the 925 Holster have been addressed by the withdrawal of the holster in September 2009 and therefore make no recommendation as to this matter.
3. I recommend that Victoria Police review its processes and procedures for reporting equipment failure, so as to ensure that in future any reported equipment faults are properly and fully analysed and responded to by senior force command in a timely manner.
4. I recommended that consideration be given to adopting a tendering process which provides sufficient flexibility consistent with the special requirements of Victoria Police when tendering for operational safety equipment.

Signature:



K.M.W. Parkinson
Coroner
Date: 9th June 2010



