IN THE CORONERS COURT
OF VICTORIA
AT MELBOURNE

Court reference: COR 2017 0325
COR 2017 0327
COR 2017 0328
COR 2017 0329
COR 2017 0343
COR 2017 0465

INQUEST INTO THE DEATHS OF MATTHEW POH CHUAN SI, THALIA HAKIN, YOSUKE KANNO, JESS MUDIE, ZACHARY MATTHEW BRYANT AND BHAVITA PATEL

RULING NO.1

BACKGROUND

1. The hearings in the inquest into the deaths of Matthew Poh Chuan Si, Thalia Hakin, Yosuke Kanno, Jess Mudie, Zachary Matthew Bryant and Bhavita Patel are scheduled to commence on Monday, 18 November 2019 and continue until Friday, 20 December 2019. It is anticipated that the evidence to be given in the course of the inquest will be of intense interest to the Victorian public.

2. Prior to a directions hearing held on 2 April 2019, the Court distributed to the interested parties a draft scope of the issues to be canvassed during the course of the inquest and a list of 46 witnesses who the Court proposes to call to give oral evidence. The overwhelming majority of those witnesses are present or former members of Victoria Police.

3. One of the proposed witnesses is Sergeant Frank Caridi who, as at 20 January 2017, was a supervisor at the South Melbourne uniform branch. He has since retired from Victoria Police and in these reasons is therefore referred to as Mr Caridi.

4. At the time of the directions hearing on 2 April 2019, the coronial brief had not yet been prepared. In the course of the directions hearing I indicated that it was anticipated that it would be prepared by about the end of April or in early May 2019.

5. Prior to the directions hearing, Senior Counsel for the Chief Commissioner of Police (**Chief Commissioner**) foreshadowed the prospect that the Chief Commissioner would make an application based in claims of public interest immunity or for a suppression order in respect to parts of the coronial brief. A timetable of orders was made to accommodate that indication with a view to any such application being heard by me on 14 August 2019.

6. Pursuant to that timetable, the coronial brief was prepared and provided to the Chief Commissioner. The coronial brief is comprised of more than 4000 pages which includes a great number of statements, exhibits and other material. A considerable part of the coronial brief is itself a subset of the material prepared and assembled by the Homicide Squad of Victoria Police in connection with the criminal prosecution of the offender, that culminated in his sentencing to life imprisonment by his Honour Justice Weinberg of the Supreme Court on 22 February 2019. Some of the other material in the coronial brief was prepared specifically for the inquest.

7. During the directions hearing on 2 April 2019, Senior Counsel for the Chief Commissioner foreshadowed the prospect that individual but unnamed police members or groups of police members might ultimately come to seek leave to appear as interested parties at the hearing of the inquest. No further elaboration was provided at that time.

8. On 22 July 2019, Mr Caridi made contact with the Court. Among other things, he sought and has since been granted leave to appear at the hearing of the inquest as an interested party and has filed a statement that, in part, relates to the present application. At the directions hearing on 14 August 2019, Mr Caridi was unrepresented, but I understand he will be represented at the inquest.

9. At the directions hearing on 14 August 2019, I reminded Senior Counsel for the Chief Commissioner that the issue of separate representation would need to be addressed by the next hearing date, being 23 August 2019. Senior Counsel for the Chief Commissioner advised that the issue was "*well advanced*"[1] and would shortly move into the implementation phase.

[1] Transcript of directions hearing dated 14 August 2019, p 77.

THE APPLICATIONS AND SUBMISSIONS

The Applications and supporting material

10. On 31 May 2019 the Chief Commissioner gave notice of an application for the making of a proceeding suppression order sought pursuant to section 18(2) of the *Open Courts Act 2013* (Vic) (**Open Courts Act**).

11. The notice of application is based on section 18(2) of the Open Courts Act, not the doctrine of public interest immunity.

12. By the notice of application, the Chief Commissioner seeks that the evidence in respect of:

    (a) the entire contents of the Victoria Police Operation Titan Critical Incident Review prepared by Assistant Commissioner Stephen Fontana (**Review Report**);

    (b) the contents of the statement of former Assistant Commissioner Douglas Fryer dated 19 October 2017, together with attachments thereto as they pertain to the Victoria Police's current pursuit policy in the Victoria Police Manual (**VPM**), titled 'Pursuits' issued on 27 July 2016, and as updated on 16 January 2017 (**2016 policy**) and 14 January 2019 (**2019 policy**);[2]

    (c) the contents of the VPM 'Pursuits' issued on 27 July 2016, and as updated on 16 January 2017 and 14 January 2019, which represents the Victoria Police's current pursuit policy;[3] and

    (d) the name, image and any information that would identify, or tend to identify (including, but not limited to any photographs or visual depictions) the members of the Special Operations Group (**SOG**) or the State Surveillance Unit (**SSU**);

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[2] The term 'pursuit policy' has been widely used to refer to both of these policies together, or to either of these policies where the distinction is not relevant. The 2016 policy is used to refer to the three iterations where there is no cause or reason to distinguish between them. The term is so used in this ruling, and the specific version of the policy will only be specified where required.

[3] The term 'current pursuit policy' is used to refer to the 2019 policy.

not be published or broadcast in Victoria or elsewhere in Australia pursuant to section 18(2) of the Open Courts Act.

13. This application was supported by the Affidavit of Assistant Commissioner Michael Grainger dated 31 May 2019 (**AC Grainger affidavit**).

14. On 12 June 2019 the Chief Commissioner filed a notice of application seeking a further suppression order pursuant to section 18(2) of the Open Courts Act, in relation to a statement of Assistant Commissioner Michael Grainger dated 11 June 2019 and attached documents (**AC Grainger statement**). In broad terms, that statement and attachments relate to the current police training arrangements directed to the pursuit policy.

15. The present applications have essentially three limbs:

    (a) the contents of the entire Review Report;

    (b) the pursuit policy and associated material, which is a more confined sequence of documents and identified passages in the statement of Assistant Commissioner Fryer and attachments, together with the AC Grainger statement (**associated material**); and

    (c) the name, image and any information that would tend to identify a SOG member or an SSU member in the coronial brief or during the inquest.

16. Although, strictly speaking, there are two notices of application, and therefore two applications, the subject matter of the second application overlaps with the part of the first application that concerns the pursuit policy. For that reason, I will refer to the applications collectively as 'the application' (**application**).

17. In respect to the application, the Chief Commissioner filed the following:

    (a) the AC Grainger affidavit and statement;

    (b) written submissions; and

    (c) a sequence of versions of the coronial brief or parts of the coronial brief with the portions in respect to which a proceeding suppression order is sought highlighted in yellow.

18. Pending the hearing and determination of the application, the Chief Commissioner also sought interim suppression orders, which I made pursuant to section 20(1) of the Open Courts Act specifically without determining the merits of the underlying application.

19. While I made the interim suppression orders sought, it does seem to me that no real issue of publication can arise until the hearing of evidence during the inquest, as the application seeks to suppress from publication the content of certain evidence given at the inquest.

20. I confirm that the coronial brief, which includes the Review Report, pursuit policy and associated material, is currently subject to and restricted by an order made pursuant to section 115 of the Coroners Act by the Court at the time the coronial brief was released to interested parties.

21. The Chief Commissioner notified the interested parties of the application pursuant to section 10(1)(b) of the Open Courts Act.

22. The Coroners Court duly notified the media of the application pursuant to section 11 of the Open Courts Act.

23. A number of media organisations including The Herald & Weekly Times Pty Ltd, Nine Network Australia Pty Ltd, The Age Company Ltd, Seven Network (Operations) Pty Ltd, Nationwide News Pty Ltd and the Australian Broadcasting Corporation (**Media Entities**) notified the Court of their intention to be heard on the suppression order application and were jointly represented at the directions hearing on 14 August 2019.

24. The interested parties that are legally represented can and have had access to the yellow highlighted versions of the coronial brief referred to above. Mr Caridi has not yet had access to the coronial brief. Nor has the coronial brief been available to the Media Entities, as they are not interested parties.

The submissions of the Chief Commissioner

25. By written submissions, the Chief Commissioner contends, among other things, that:

    (a) for the purposes of section 18(2) of the Open Courts Act, 'public interest' involves a discretionary value judgement which subsumes the test of necessity;

(b) the word 'necessary' sets the bar high and there should be derogation from the open administration of justice only where there are exceptional circumstances or where a high standard of satisfaction is reached;

(c) in respect to each of the limbs of the present application, the Chief Commissioner relies upon the AC Grainger affidavit and statement;

(d) in respect to the Review Report, it is submitted, among other things, that it is "*critical*" that Victoria Police members make frank and full disclosure of their involvement in incidents and express opinions "*without fear or favour*" and that these considerations demand that "*such matters remain confidential*";

(e) in that regard, the Chief Commissioner refers to and places considerable reliance upon some general observations made by the then State Coroner, her Honour Judge Coate, in a ruling delivered in 2010 in the course of the inquest into the death of Tyler Cassidy.

(f) it is also submitted that it would be inappropriate to air such material when the facts are "*yet to be fully ascertained, tested and validated*" and the opinions there expressed are "*preliminary*";

(g) in respect to the pursuit policy and associated material, there is a public interest in the confidentiality of "*current operational procedures and methodology*" in order that they be effective; and

(h) in respect to the pseudonym orders sought in respect to references to members of the SOG and the SSU, it is said that such an order may be made pursuant to section 62(1) of the *Coroners Act 2008* (Vic) (**Coroners Act**) and that such an order is necessary in order to protect the safety of those members and their families.[4]

26. In respect to the practical impact of the orders sought, in the written submissions filed by the Chief Commissioner it is stated:

> *... While the suppression order will mean that the contents of the Review Report and of the pursuit policy cannot be published, the parties will, and are entitled*

[4] Submissions on behalf of the Chief Commissioner of Police dated 31 May 2019, pp 3-5.

to, have access to that information and cross-examine witnesses in relation to it. … .[5]

The submissions of the families

27. On about 18 July 2019, the representatives of the families of the six deceased filed written submissions in response to the Chief Commissioner's application. In broad terms, the families opposed the orders sought by the Chief Commissioner.

28. The families submitted that the proper contradictor to the application was the relevant media organisation.

29. More immediately, the families highlighted various provisions of the Open Courts Act and made submissions concerning the principles of open justice, particularly in the coronial jurisdiction.

30. The families referred to features of section 18(2) of the Open Courts Act and submitted that in construing the meaning of 'public interest' the Court should be mindful of rights enshrined in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**), particularly the right to freedom of expression stated in section 15 of the Charter.

31. The families also directed submissions to the notion of reasonable belief, by reference to which an application under section 18(2) must be determined.

32. The families criticised the orders sought by the Chief Commissioner as in the nature of a 'blanket' claim and emphasised that the terms of any order made must go no further than is required to give effect to the purpose of the order. The families also emphasised that a proceeding suppression order must have a specified duration.

33. The families specifically queried the practical operation of the orders sought, including in respect to the prospect that the Chief Commissioner might come to seek an order for a closed court in respect to that particular evidence during the course of the hearing of the inquest. The families highlighted the practical difficulty that such a proceeding suppression order would present to the Court when making written findings.

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[5] Submissions on behalf of the Chief Commissioner of Police dated 31 May 2019, p 6.

34. In respect to the Review Report, the families submitted that the rationale for the order sought did not apply to the majority of the Review Report and would, in any event, be met by applying pseudonyms in respect to the names of the police officers involved. In substance, it was submitted that no 'blanket' order should be made.

35. It was also submitted that any concerns about incomplete information could be met by the author of the Review Report, Assistant Commissioner Fontana, having the opportunity to clarify the position in oral evidence given by him at the inquest.

36. In that regard, I should note that although no affidavit from Assistant Commissioner Fontana was specifically prepared and relied upon by the Chief Commissioner in respect to the present application, Assistant Commissioner Fontana has prepared a statement for the inquest that is directed to other issues and he is listed to give evidence at the inquest.

37. Further, it was submitted by the families that parts of the Review Report are already in the public domain. Specific reference was made to the transcript of a Four Corners episode in June 2019 that was appended to the written submissions. Reliance was also placed upon the sentencing remarks of his Honour Justice Weinberg, which are included in the coronial brief. It was submitted that these were "*illustrative examples of material in the Review Report that is already in the public domain*".[6] The families submissions suggested that "*it is incumbent on the [Chief Commissioner] to identify material that is not already in the public domain that requires protection*".[7]

38. In respect to the pursuit policy and associated material, the families observed that "*there may be public interest in protecting against exploitation of current policy by offenders*",[8] but also submitted that the documents concerned the policy in place at the time of the events in early 2017. The families also highlighted various aspects of the material that did not appear to relate to operational details.

39. In respect to the proposed pseudonym orders, the families referred relatively briefly to the general principle and otherwise stated that those members that are said to be SOG and SSU operatives must clearly be identified.

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[6] Submissions on behalf of the families of the victims dated 18 July 2019, p 12.
[7] Submissions on behalf of the families of the victims dated 18 July 2019, p 12.
[8] Submissions on behalf of the families of the victims dated 18 July 2019, p 13.

The submissions of the Media Entities

40. On 24 July 2019, the Court received written submissions filed on behalf of the Media Entities. In short, the Media Entities opposed the following:

    (a) the order sought in respect to the Review Report "*on the basis that it is excessively broad, and that it is plainly not necessary in the public interest to suppress the entirety [of] the Fontana Report*";[9] and

    (b) suppression of the parts of the pursuit policy that are "*no longer current*".[10]

41. The submissions of the Media Entities also addressed the provisions of the Open Courts Act and the principles of open justice.

42. In relation to the Review Report, the Media Entities emphasised the importance of the Review Report in the inquest and, in the first instance, opposed the fallback submission of the families that the application of pseudonyms was an appropriate solution (although the submissions of the Media Entities also seem later to accept that such a course would be appropriate if it was 'necessary').

43. The Media Entities submitted that the Court should not be convinced by the submissions of the Chief Commissioner and any evidence to the effect that police officers would not perform their duties in engaging in internal investigations and the review of incidents due to concern about later exposure.

44. The submissions of the Media Entities did not address the pseudonyms sought to be ordered in respect to references to particular members of the SOG and SSU.

The statement/submissions of Mr Caridi

45. On 22 July 2019, Mr Caridi contacted the Court and requested that he be called as a witness at the inquest. Mr Caridi indicated to the Court that he opposed the making of the proceeding suppression order so far as it concerns the Review Report.

46. Subsequently, the Court granted Mr Caridi leave to appear at the inquest as an interested party and received from him a statement that reflected the fact and basis of his

[9] Submissions on behalf of the Media Entities dated 23 July 2019, p 2.
[10] Submissions on behalf of the Media Entities dated 23 July 2019, p 2.

opposition to the making of a proceeding suppression order in respect to the Review Report. In that statement Mr Caridi criticised some aspects of the AC Grainger affidavit as "*not entirely accurate, and misleading*".[11]

47. Mr Caridi stated that he had not been invited to speak to anyone in a formal capacity regarding his involvement in the Bourke Street event, he had not been spoken to during the compilation of the Review Report (except by way of a request for a statement in July 2017 which he duly provided) and he had not been asked vital questions in respect of prevention opportunities or remedial changes.[12]

48. As I have earlier noted, as he is presently unrepresented, Mr Caridi has not had access to the coronial brief, including any part of the Review Report.

The further material/submissions of the Chief Commissioner in reply

49. On 6 August 2019, the Chief Commissioner further refined the application made in so far as it concerned the pursuit policy and associated material.

50. The application was no longer pressed in relation to certain identified parts of and attachments to the statement of former Assistant Commissioner Fryer. The application was maintained, however, in respect to a more confined collection of proposed references highlighted in yellow in the material then provided.

51. On 7 August 2019, the Chief Commissioner filed written submissions in reply. Those submissions addressed particular aspects of the submissions of the families and the Media Entities. Nothing was said concerning the statement of Mr Caridi.

52. Among other things, the Chief Commissioner submitted that:

    (a) the Review Report "*was prepared as an internal Victoria Police process to identify at the earliest opportunity any issues that needed to be learned from the tragedy*";[13]

[11] Statement of Mr Frank Caridi dated 23 July 2019, p 2.
[12] Statement of Mr Frank Caridi dated 23 July 2019, pp 2-3.
[13] Reply submission of the Chief Commissioner of Police dated 7 August 2019, p 1.

(b) either directly or by implication, the Review Report was a "*preliminary report*" that "*may be based on incorrect or unascertained facts*";[14]

(c) the fallback position involving pseudonyms was opposed;

(d) in respect to the Review Report, Assistant Commissioner Fontana was "*critical of the operational decision-making by a number of members*" and if he had "*known that his Review Report would be made public he may not have been so forthright in his views, especially as the information he relied upon was preliminary in nature and many of the perceived facts that Assistant Commissioner Fontana relied upon for his opinions may not be borne out*";[15]

(e) the Chief Commissioner will not make any application to close the court during the evidence of Assistant Commissioner Fontana;[16]

(f) the position that the disclosure of the whole Review Report is against the public interest is maintained, although it was floated, perhaps rather indirectly, that "*all references to opinions expressed by AC Fontana*"[17] might be suppressed;

(g) whilst the ruling of her Honour Judge Coate in the inquest into Tyler Cassidy is not a precedent and does not bind the Court, there is "*no good reason to make a different decision*";[18]

(h) a proceeding suppression order should be in place for the statutory maximum period of five years;[19]

(i) in respect to the pursuit policy, the Chief Commissioner has further targeted that part of the application in various respects and "*only seeks suppression over those parts of the police pursuit policy that are current*";[20] and

[14] Reply submission of the Chief Commissioner of Police dated 7 August 2019, pp 1-2.
[15] Reply submission of the Chief Commissioner of Police dated 7 August 2019, p 2.
[16] Reply submission of the Chief Commissioner of Police dated 7 August 2019, p 3.
[17] Reply submission of the Chief Commissioner of Police dated 7 August 2019, p 3.
[18] Reply submission of the Chief Commissioner of Police dated 7 August 2019, p 4.
[19] Reply submission of the Chief Commissioner of Police dated 7 August 2019, p 5.
[20] Reply submission of the Chief Commissioner of Police dated 7 August 2019, p 5.

(j) pseudonym orders in respect to members of the SOG and SSU "*have been granted on many occasions*", including in two particular identified previous inquests.[21]

Other interested parties

53. No other interested party has taken a position supporting or opposing the orders sought by the Chief Commissioner.

THE APPLICATION FOR PROCEEDING SUPPRESSION ORDER HEARING

54. The application was heard on 14 August 2019. In the course of that hearing, Counsel Assisting as well as each of the interested parties and the Media Entities had the opportunity to and did further address the issues in the application. No witness was requested for cross-examination or required to give oral evidence.

55. Counsel Assisting made confined submissions, particularly directed to certain legal principles involved. Neither the interested parties nor the Media Entities made any contrary submission. The points made were essentially accepted, and, relevantly, expressly so by Senior Counsel for the Chief Commissioner.

56. The oral submissions of Senior Counsel for the Chief Commissioner gave focus to the overall submissions advanced on behalf of the Chief Commissioner. I did not understand any of the underlying submissions to be abandoned, but the focus, orally at least, was to the following general effect:

(a) the application concerning the Review Report amounted to an "*issue of fundamental principle*", as, it was submitted, critical incident reviews by a "*number of entities*", including the Chief Commissioner, are "*generally done relatively soon after the fatal incident and they're an internal document that looks to measures that may need to be undertaken promptly in the aftermath of a tragedy*".[22] If, "*generically*", such documents are made available, "*this goes beyond just the Victoria Police, there's a risk that the full candour of persons who are the subject of discussions with those executing the documents, will be*

[21] Reply submission of the Chief Commissioner of Police dated 7 August 2019, p 6.
[22] Transcript of directions hearing dated 14 August 2019, p 12.

inhibited", to the detriment of the whole community, and there is a difference between "*full candour*" and "*inhibited communication*";[23]

(b) there will be a "*deleterious, chilling impact upon the responsiveness of persons*" to internal investigations in relation to critical incidents if the Review Report was broadly made available;[24]

(c) the approach suggested by the Chief Commissioner was undertaken by Judge Coate in the ruling in respect to the inquest into the death of Tyler Cassidy and also in high profile inquests interstate, the specific example given was the "*Lindt Café inquest*";[25]

(d) in respect to the present critical incident review, the level of material that will be available in the inquest was not available to Assistant Commissioner Fontana and his process was "*inevitably narrower*" and the process "*quicker*" and "*inevitably limited*".[26] It was also submitted that the Review Report was "*increasingly dated*" and based upon "*limited information*";[27]

(e) there were not really any practical difficulties for the Court or the Media Entities presented by suppression orders of the kinds proposed;[28]

(f) the application concerning the pursuit policy and associated material was primarily directed to the "*contemporary pursuit policy*",[29] although it was later submitted that if it was thought that there had been only modest changes between the 2016 policy and the current pursuit policy then it was "*crucial that the 2016 policy [also] be the subject of suppression*";[30]

(g) the foundation for that aspect of the application is the risk to the public if the policy becomes publicly known, which was said to be a "*risk of manipulation*

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[23] Transcript of directions hearing dated 14 August 2019, p 13, see also pp 39-45.
[24] Transcript of directions hearing dated 14 August 2019, p 14.
[25] Transcript of directions hearing dated 14 August 2019, p15, see also pp 51-52.
[26] Transcript of directions hearing dated 14 August 2019, p 16.
[27] Transcript of directions hearing dated 14 August 2019, p 36.
[28] Transcript of directions hearing dated 14 August 2019, pp 34-38, see also p 46 & p 49.
[29] Transcript of directions hearing dated 14 August 2019, p 17-18.
[30] Transcript of directions hearing dated 14 August 2019, p 62.

and exploitation" that was said to be exemplified in the behaviour of the present offender;[31] and

(h) in respect to the pseudonym orders, this was described as "*standard practice*" in this and other courts.[32]

57. On the morning of the hearing, the representatives of the families distributed written reply submissions that attached certain news items. The submissions essentially reiterated their previous written submissions but confirmed that:

(a) they did not accept that the Review Report was preliminary;

(b) the opinions formed by Assistant Commissioner Fontana in the Review Report were similar to an expert witness;

(c) disclosure of the pursuit policy would cause minimal, if any, increased risk of the policy being exploited by offenders; and

(d) the pursuit policy was not a 'no pursuits' policy, it was in fact a risk assessment based policy.[33]

58. Senior Counsel for the families essentially spoke to the submissions, in substance, as follows:

(a) the applications in respect to the Review Report and pursuit policy and associated material are opposed, as they go to the "*heart of the issues in the inquest*",[34] although there is "*no real objection*" to the pseudonyms sought;[35]

(b) the orders sought would render the inquest unworkable, much of the material is in the public domain[36] and the so-called "*chilling effect*" does not really exist;[37]

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[31] Transcript of directions hearing dated 14 August 2019, p 18 & pp 46-48.
[32] Transcript of directions hearing dated 14 August 2019, p 20.
[33] Reply submissions of the families dated 14 August 2019, pp 1-3.
[34] Reply submissions of the families dated 14 August 2019, p 3 & Transcript of directions hearing dated 14 August 2019, pp 20-21.
[35] Transcript of directions hearing dated 14 August 2019, p 28.
[36] Transcript of directions hearing dated 14 August 2019, pp 24-27.
[37] Transcript of directions hearing dated 14 August 2019, pp 27-28.

(c) the Review Report is not "*preliminary*", nor was it "*done as a form of quick responsiveness*" to the incident; no interviews were conducted and nor were guarantees of confidentiality given;[38]

(d) in any event, as a fallback, consideration might be given to a suppression order made until the time that Assistant Commissioner Fontana gives evidence;[39] and

(e) as to the alleged example of the present offender, "*it is not clear what the offender knew*" and it is "*not clear whether the offender knew about the pursuit policies because they were public, or because of his own previous experience and his own priors*" or because of an "*extensive history of driving dangerously*".[40]

59. On behalf of the Media Entities, Mr Otter adopted the submissions advanced by Senior Counsel for the families and added, among other things, that:

(a) it was in the public interest for the police review process to be known for reasons that included public confidence in the coronial process;[41]

(b) the evidence that police members would not be fully frank and candid should not be accepted;[42] and

(c) the submission that Assistant Commissioner Fontana would not have been fully frank and candid with his opinions was "*remarkable*" and should be rejected.[43]

Chief Commissioner's amended application and consequential submissions

60. On 16 August 2019, the Chief Commissioner submitted an amended application and consequential submissions. As requested at the directions hearing, the Chief Commissioner confirmed that the Review Report was dated 19 February 2018.

61. The Chief Commissioner provided a copy of the VPM 'Pursuits' as applicable on 20 January 2017 and a copy of the VPM 'Pursuits' updated as of 14 January 2019. These

[38] Transcript of directions hearing dated 14 August 2019, p 23.
[39] Transcript of directions hearing dated 14 August 2019, p 24.
[40] Transcript of directions hearing dated 14 August 2019, p 53.
[41] Transcript of directions hearing dated 14 August 2019, p 29.
[42] Transcript of directions hearing dated 14 August 2019, p 30.
[43] Transcript of directions hearing dated 14 August 2019, p 31.

documents had green highlighting to assist in comparing and contrasting the two versions of the policy.

62. It was submitted that balancing the relevant considerations is necessary under the Open Courts Act, however "*the public interest of minimizing community safety in respect of persons prepared to flout the road rules in order to evade apprehension should be regarded as a weighty consideration*".[44]

63. The copies of the 2016 and 2019 pursuit policies provided with the amended application had yellow highlighting to mark sections over which the Chief Commissioner was now seeking a proceeding suppression order, rather than seeking an order over the entirety of one or both of the documents. The amended application also provided a copy of part of the statement of Assistant Commissioner Fryer dated 19 October 2017 with yellow highlighting to mark the portions over which the Chief Commissioner was now seeking a proceeding suppression order.

64. Finally, on 19 August 2019, the representatives of the families provided further written submissions. To a considerable extent those submissions confirmed or repeated submissions earlier advanced.

65. As will be evident from the above, although I have not recited the detail of every single part of the oral and written submissions advanced by every one of the parties interested in the present application, I have carefully considered the whole of those submissions in the course of determining this application, as well as the Review Report, pursuit policies and associated materials.

RELEVANT PRINCIPLES

Coronial jurisdiction

66. In determining any application for a proceeding suppression order before this Court, it is important to specifically have regard to the following principles associated with the coronial jurisdiction, including:

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[44] Amended application and consequential submissions on behalf of the Chief Commissioner of Police dated 16 August 2019, p 2.

(a) the Coroners Court is established as a specialist inquisitorial court;[45]

(b) coroners are empowered to conduct independent investigations into deaths in specified circumstances;[46]

(c) coroners are required to make findings as to the identities of the deceased, the causes of death and the circumstances in which the deaths occurred;[47]

(d) coroners may make recommendations or provide comments on any matter connected with a death, including recommendations that "*contribute to the reduction of the number of preventable deaths*" and *"the promotion of public health and safety and the administration of justice"*;[48]

(e) unless otherwise ordered, the findings, comments and recommendations made following an inquest must be published on the internet in accordance with the rules;[49]

(f) the coronial system should operate in a fair and efficient manner;[50] and

(g) coroners should take a broad public health approach to investigations and "*clarify on the public record the causes and circumstances of death, to provide a public hearing in those matters where it is appropriate and to draw lessons from deaths so as to minimise the risks of recurrence, where possible, in the future*".[51]

Victorian Charter of Human Rights and Responsibilities

67. In making my determination, I have also considered the Charter. The Charter recognises a number of human rights that may bear upon interpretative issues that can arise in the course of a coronial inquest, including the right to recognition and equality before the

[45] *Coroners Act 2008* (Vic) s 1(d).
[46] *Coroners Act 2008* (Vic) preamble & s 1(b).
[47] *Coroners Act 2008* (Vic) s 67(1).
[48] *Coroners Act 2008* (Vic) preamble.
[49] *Coroners Act 2008* (Vic) s 73(1).
[50] *Coroners Act 2008* (Vic) s 9.
[51] Second Reading Speech of Attorney-General Rob Hulls dated 9 October 2008 at p 4034.

law,[52] the right to life,[53] the right to freedom of expression[54] and the right to a fair hearing.[55]

68. In respect to the right to a fair hearing, all judgments or decisions by a court must be made public unless, relevantly, a law other than the Charter otherwise permits.[56] So far as is possible, consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights. In this context, the provisions of the Charter have been understood to constitute a statutory endorsement of the open justice principle.[57]

69. The freedom of expression protected by section 15(2) of the Charter is of fundamental importance to any genuinely free and democratic society and has long been recognised by the common law.[58] The values underpinning the freedom of expression of the Charter were described in *McDonald v Legal Services Commissioner*[59] when Bell J said that:

> *the fundamental values and interests represented by the right to freedom of expression are freedom, self-actualisation and democratic participation for individuals personally; and freedom, democracy under the rule of law and ensuring governmental transparency and accountability for society generally.*[60]

70. The principle of open justice is a vital aspect of the right to a fair hearing and is a principle intimately associated with the right to seek, receive and impart information stated in section 15(2) of the Charter. It is a notable corollary of the principle of open justice that, subject to any restrictions imposed by legislation or the court, all interested persons, including the media, have the right to attend and publish fair and accurate reports of legal proceedings.[61] By exposing the conduct of legal proceedings to public scrutiny, the freedom to seek, receive and communicate information about legal

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[52] *Human Rights and Responsibilities Act 2006* (Vic), s 8.
[53] *Human Rights and Responsibilities Act 2006* (Vic), s 9.
[54] *Human Rights and Responsibilities Act 2006* (Vic), s 15.
[55] *Human Rights and Responsibilities Act 2006* (Vic), s 24.
[56] *Human Rights and Responsibilities Act 2006* (Vic), s 24(3).
[57] *Cargill Australia Ltd v Viterra Malt Pty Ltd (No.23)* [2019] VSC 417 at [62]-[64].
[58] See, for example, *Evans v New South Wales* (2008) 168 FCR 576 at [74], referring to Blackstone's *Commentaries on the Laws of England*, Vol 4, pp 151-152, and several English authorities; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564; *Coleman v Power* (2004) 220 CLR 1 at [185]; *Eatock v Bolt* (2011) 197 FCR 261; [2011] FCA 1103 at [227]-[239].
[59] *(No 2)* [2017] VSC 89.
[60] *McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89 at [22].
[61] *Hogan v Hinch* (2011) 243 CLR 506; *News Digital Media v Mokbel* (2010 30 VR 248; *PQR v Secretary, Department of Justice and Regulation* (2017) 53 VR 45.

proceedings assists in protecting the right to a fair hearing and the maintenance of the rule of law.[62]

71. In a general sense, as observed by her Honour Judge Coate in the ruling in respect to the death of Tyler Cassidy:

> *... A public hearing, required in this case to uphold the procedural right to a public and independent investigation which flows from the right to life, carries with it a requirement that the publication of the evidence produced at the public hearing should generally be available, but there are limits on that obligation. Again, it is a balancing of all of the various factors which needs to be done to arrive at a decision which least infringes those rights and is proportionate to the harm sought to be avoided.*[63]

Open Courts Act

72. Turning now to the provisions of the Open Courts Act, section 4 states "*to strengthen and promote the principles of open justice and free communication of information, there is a presumption in favour of disclosure of information*". I must have regard to that presumption and have borne it steadily in mind when determining the parts of the present application that fall for determination pursuant to the provisions of the Open Courts Act.

73. Section 5 abrogates any common law power to make an order restricting the publication of information in connection with any proceeding and also states that the Court has no implied jurisdiction to make such an order.

74. However, section 7(d) provides that the Open Courts Act does not limit the making of an order by a court (defined to include the Coroners Court) that, among other things, "*conceals the identity of a person by restricting the way the person is referred to in open court*" or "*prohibits or restricts access to a court or tribunal file*".

75. It follows that, by operation of section 7(d), the Open Courts Act does not displace the power of the Court to make pseudonym orders and other orders that, in effect, restrict the availability or preserve the unavailability of information ordinarily derived from court processes.[64]

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[62] A. Pound and K. Evans, *Annotated Victoria Charter of Rights*, 2nd Ed, p 152.
[63] Ruling of Judge Coate in the inquest into the death of Tyler Cassidy dated 8 November 2010, para 44.
[64] *Cargill Australia Ltd v Viterra Malt Pty Ltd (No.23)* [2019] VSC 417 at [43].

76. Thus, a 'pseudonym' order is not a 'proceeding suppression order' for the purposes of the Open Courts Act.[65] It follows that to the extent that the form of the present notice of application seeks that a 'pseudonym' order be made pursuant to section 18(2) of the Open Courts Act, I cannot act upon it.

77. Section 18(2) of the Open Courts Act specifically directed to this Court, provides relevantly as follows:

> *The Coroners Court may make a proceeding suppression order in the case of an investigation or inquest into a death or fire if the coroner constituting the Coroners Court reasonably believes that an order is necessary because disclosure would –*
>
> *(a)* ...
> *(b)* *be contrary to the public interest.*

78. The operative words of section 18(2) bear some resemblance to those previously appearing in section 73(2) of the Coroners Act.[66] Until its repeal, section 73(2) of the Coroners Act provided that:

> *A coroner must order that a report about any documents, material or evidence provided to the coroner as a part of an investigation or inquest into a death or fire is not to be published if the coroner reasonably believes that publication would –*
>
> *(a)* *be likely to prejudice the fair trial of a person; or*
>
> (b) *be contrary to the public interest.*

79. It may be noted that section 73(2) used imperative language ("*must*") in respect to the making of an order once a coroner formed the requisite state of mind.

80. The structure and terms of section 18(2) of the Open Courts Act are different. That sub-section grants a discretion to the coroner ("*may*") and now requires that the coroner reasonably believe that such an order is "*necessary*". The discretion given to a coroner in the Open Courts Act, as explained in the Second Reading speech *"seeks to balance the public's interest in the information presented to a particular coronial inquiry*".[67]

81. Further, any consideration of an application made pursuant to section 18(2) must be approached in light of the other provisions of that Act, including the presumption stated

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[65] *RN v Commonwealth* (2014) 41 VR 699.
[66] As repealed by *Open Courts Act 2013* (Vic) 39(2).
[67] Second Reading Speech of Attorney-General Robert Clark dated 27 June 2013, p 2418.

in section 4. I note again that the Second Reading speech refers to only making orders "*where there is a strong and valid reason for doing so*".[68]

82. In that regard, in particular:

(a) section 12 requires that a suppression order operate only by reference to a fixed or ascertainable period or the occurrence of a specified future event (in which latter event the order must specify a period of not more than 5 years after which the order might expire) and in any event must operate for no longer than is reasonably necessary to achieve its purpose; and

(b) section 13 requires that any suppression order must be particular so as to ensure that it is limited to achieving the purpose for which the order is made and that such an order does not apply to any more information than is necessary to achieve its purpose.

83. For these reasons it is important that the difference in both statutory language and overall emphasis between section 73(2) of the Coroners Act and section 18(2) of the Open Courts Act not be overlooked.

84. Accordingly, although I have considered carefully the reasoning of her Honour Judge Coate in the ruling made in the course of the inquest into the death of Tyler Cassidy in 2010, there are limits to the assistance that can be derived from it. Importantly, that ruling concerned an application made pursuant to section 73(2) of the Coroners Act, not section 18(2) of the Open Courts Act.

85. It is important that any weight afforded by me to her Honour's reasoning not be overstated. It should be determined primarily by reference to the statutory provisions now applicable and the evidence and other sufficiently credible information now before me.

86. Returning to section 18(2), the terms of that sub-section require that I must reasonably believe that a proceeding suppression order is necessary because disclosure of the material in question would be contrary to the public interest. Reasonable belief must be formed by reference to the material and circumstances before me. The Open Courts

[68] Second Reading Speech of Attorney-General Robert Clark dated 27 June 2013, p 2418.

Act requires that such satisfaction be reached on the basis of "*evidence or sufficient credible information*".[69]

87. Whether any particular evidence or information is sufficiently persuasive must come down to the weight that can be afforded to it in the whole of the circumstances before the Court.

88. The written submissions of all of those interested parties in the present application made reference to the statutory word "*necessary*". In *Chaarani v Director of Public Prosecutions,*[70] the Court of Appeal considered the word "*necessary*" as it appears in section 18(1)(a) of the Open Courts Act and stated:

> *... the word 'necessary' imposes a high standard of satisfaction. The onus is on the applicant for a suppression order to persuade the court that the order is necessary – not merely reasonable or desirable.*[71]

ANALYSIS AND DETERMINATION OF THE APPLICATION

The pseudonym orders sought in respect to the SOG and SSU members

89. I will begin with the third limb of the application. The starting point in any such application must be the proposition that the names of interested parties and witnesses involved in an inquest should be known and publishable. For that reason, the Court should be cautious before making any such order and only do so on the basis of evidence that discloses a cogent risk of prejudice to the administration of justice if the order were not made.[72]

90. As I have noted, in respect to all limbs of the present application the Chief Commissioner relies upon the AC Grainger affidavit.

91. In respect to the 'pseudonym' orders sought in relation to particular operatives of the SOG and SSU, Assistant Commissioner Grainger states, among other things, that:

    (a) SOG operators are involved in anti-terrorist response and covert surveillance and reconnaissance;

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[69] *Open Courts Act 2013* (Vic) s 14(1).
[70] [2018] VSCA 299.
[71] [2018] VSCA 299 at [41].
[72] See, generally, *RN v Commonwealth* (2014) 41 VR 699 and *PQR v Secretary Department of Justice and Regulation (No.1)* (2017) 53 VR 45.

(b) the protection of the identities of SOG members is critical to the viability of their roles and the security of their families;

(c) the SOG has a fully covert workplace and precautionary security measures are taken to prevent members being identified;

(d) SOG members go to great lengths to limit the ability of criminals to identify them;

(e) organised crime groups have previously obtained identity details and members have been threatened and targeted for retribution, which is of concern for those members and their families;

(f) the SSU is a covert unit of Victoria Police that conducts undercover operations and surveillance and so it is equally important that the operatives in that unit not be identified; and

(g) the potential for the SOG and SSU members to be identified could cripple recruitment to those units, which would be contrary to the public interest.

92. For those reasons, the Chief Commissioner seeks redactions of the names of the particular operatives in the coronial brief, the use of pseudonyms to refer to them and that any such operatives give evidence at the inquest anonymously.

93. Although, as I have noted, the written submissions of the Chief Commissioner included the contention that the Court may make 'pseudonym' orders in respect to the names of particular SOG and SSU members pursuant to section 62(1) of the Coroners Act, the terms of that section are wholly general and not in any way directed to the making of pseudonym or other such orders.

94. When the matter was heard, Counsel Assisting submitted that the power of the Court to make a 'pseudonym' order resided in section 55(2)(e) of the Coroners Act, which provides that a coroner may "*give any other directions and do anything else the coroner believes is necessary*".

95. None of the interested parties or the Media Entities submitted to the contrary.

96. I note that in the present context the word 'necessary' appearing in section 55(2)(e) of the Coroners Act tends to fit with the cautious approach ordinarily taken by courts to

the making of pseudonym and other such orders required to preserve as confidential particular information in the public interest.[73]

97. In the circumstances, I accept that the power to make such an order resides in section 55(2)(e) of the Coroners Act and is unaffected by the various provisions of the Open Courts Act.

98. There is no contrary evidence and neither the families nor the Media Entities have made strenuous submissions in response to this part of the application. Mr Caridi has not opposed this part of the application. Neither the families nor the Media Entities have disputed that there is or could be a public interest in the anonymity of members of covert police agencies engaged in combatting organised crime and terrorism.

99. On the present evidence, the public interest in the covert and proper functioning of the SOG and SSU is both palpable and cogent.

100. In addition, and importantly, in his evidence Assistant Commissioner Grainger has given specific examples of instances in which the disclosure of the identity of covert operatives has stood to compromise or at least risk the significant compromise of those covert functions. It is not unlikely that the function of covert police agencies and operatives of this kind could be at risk of being compromised by criminal elements if the secret identity of those members was to become publicly known.

101. For these reasons, I am satisfied that it is necessary to make a 'pseudonym' order pursuant to section 55(2)(e) of the Coroners Act that would have the effect referred to in paragraph 47 of the AC Grainger affidavit. Such an order is limited to achieving its purpose and, in my view, does not do any more than is necessary to achieve that purpose. It is very far from being a 'blanket' order of the kind otherwise criticised in the submissions of the families and Media Entities.

The pursuit policy and associated material

102. This limb of the application has evolved from the original position and has been recently refined even further. The substance of the present position seems to be that the Chief Commissioner seeks suppression of highlighted material said to comprise

[73] *PQR v Secretary, Department of Justice and Regulation (No.1)* (2017) 53 VR 45.

"*the essence of the 2016 Guidelines*"[74] still in force. This application is strenuously opposed by the families and the Media Entities.

103. The intent of the present application is evidently to prevent the publication of any evidence given at the inquest concerning the 'essence' of the 2016 policy still in force. In summary, the key reasons asserted by the Chief Commissioner for seeking a proceeding suppression order over the highlighted parts of the pursuit policy and associated material are that:

(a) it is in the public interest to keep current operational procedures and methodology confidential in order to be effective, and there have been a number of subsequent changes to this policy, including significant amendments in 2015, and 2016; and

(b) once the pursuit policy became publicly known a significant number of offenders, including the offender in this matter abused the knowledge and put members of the public at significant risk,[75] therefore there is a risk of manipulation and exploitation[76] and therefore it is vital for community safety.

104. The families' submissions contended that:

(a) information about the 2016 policy is already in the public domain; and

(b) it would be unworkable in a practical sense to run the inquest if the pursuit policy were suppressed.

105. The Media Entities largely agreed with the submissions of the family but added that suppressing the pursuit policy would impact the public's confidence in the coronial jurisdiction and therefore the public's ability to understand the coronial inquest and allow for public scrutiny.[77]

Operational procedures and methodology

106. Assistant Commissioner Grainger states, in substance, that the previous pursuit policy was introduced in July 2015 and was made public and there was public perception that it was a "*no pursuits*" policy. He states that in that context, "*police members were*

[74] Amended application and consequential submissions on behalf of the Chief Commissioner, p 2.
[75] Transcript of directions hearing dated 14 August 2019, p 18.
[76] Transcript of directions hearing dated 14 August 2019, p 46.
[77] Transcript of directions hearing dated 14 August 2019, p 29.

'baited' by offenders, including by car rammings, attempting to harm police or refusing to stop when asked by police because of the knowledge offenders would not be pursued and knowledge concerning the details of the pursuit policy".[78] Consequently, a detailed review of the policy was undertaken in 2016 and a finding of that review was to the effect that there should be a new policy implemented. It was decided that the new policy and working documents should have a security classification. Therefore, when the 2016 pursuit policy was introduced, police members were advised to keep it 'in-house' and to not publicly discuss the policy.

107. Aspects of the statement of Assistant Commissioner Fryer, including the annexures to it, tend to confirm this approach in respect to the 2015 policy, the conduct of the 2016 review and the subsequent implementation of the policy in July 2016. Interestingly, the 2016 review found that some police supervisors and members had not fully understood the 2015 policy and themselves had incorrectly interpreted the policy as a 'no pursuit policy'.

108. In this context, Assistant Commissioner Grainger, deposed that there is a public interest in maintaining confidentiality in the particular 'current' details and procedures referred to. I do not regard it as unreasonable to consider that this evidence extends to what has subsequently come to be described as the 'essence' of the policy since July 2016.

109. As I have noted, the families submit that the pursuit policy is a matter of proper public debate and without it being in the public domain the public understanding of coronial findings in the present inquest will be inhibited.

110. In their submissions, neither the families nor the Media Entities disputed that for the purposes of section 18(2) of the Open Courts Act there could, in specific circumstances, be a public interest in protecting particular police operational procedures and methods from wide dissemination. On the other hand, this does not imply that there is always necessarily a dominating public interest in protecting all police operational details and procedures from examination and disclosure.

[78] AC Grainger affidavit dated 31 May 2019, p 5.

Increased exploitation and manipulation by offender behaviour

111. The Chief Commissioner's submission is that disclosure of the current pursuit policy would permit offenders (including the offender in this case) "*to know where the lines are*",[79] and therefore to manipulate and exploit the policy if its essence was disclosed publicly. However, the evidence of Assistant Commissioner Grainger did not identify either:

(a) what particular aspect of the of the policy would be open to exploitation and manipulation; or

(b) how such manipulation or exploitation of any such aspect of the policy might specifically occur.

112. The general import of the evidence of Assistant Commissioner Grainger is that the policy has not been publicised in order to avoid or at least reduce such potential consequences. However, his affidavit did not provide any evidence as to the effect positive or otherwise of the non-publication of the pursuit policy on crime rates. He did not state that such events have become less prevalent since the introduction of the 2016 policy. At best, his affidavit does no more than give rise to an implication to that effect, in circumstances where the statement of Assistant Commissioner Fryer does tend to suggest that some statistical analysis might have been possible.

113. In the evidence before me, Assistant Commissioner Grainger deposes to the fact that the pursuit policy introduced in 2015 was public and, in that setting, that there was baiting of police members, car rammings, attempts to harm police officers and refusing to stop when asked. However, some of the material in the 2017 statement of Assistant Commissioner Fryer concerning the 2016 review into pursuit policies and the rate of offences such as evasion of police and the like does tend to suggest that the cause of such underlying offending is debateable.[80] The AC Grainger affidavit does not engage with or seek to explain either those statistics or any more current understanding of the statistics and events referred to by Assistant Commissioner Fryer.

114. During the hearing, I asked Senior Counsel for the Chief Commissioner about whether there was any such data or evidence of these issues, but I was referred back to what was

[79] Transcript of directions hearing dated 14 August 2019, p 47.
[80] See in particular, at [110] and [111].

described as the "*phenomenon*" described by Assistant Commissioner Grainger rather than to any particular data or other statistical evidence.[81] It was not said to me that such data was, for some reason, now unavailable.

115. The state of the relevant evidence, therefore, does seem to leave as at least debateable the proposition that it was any actual content of the public 2015 pursuit policy that led to or was causally associated with such incidents, as opposed to, as the families have essentially submitted, at best an oversimplified public and perhaps police understanding of the operation and effect of the 2015 policy as involving 'no pursuits'.

116. In this context, it seems to me that the actions taken by Police Command upon the introduction of the 2016 policy, and the associated evidence of Assistant Commissioner Grainger, are entitled to weight as demonstrating the concern that offenders with knowledge of the 'new' policy may be able to manipulate and exploit it, but the fact of those actions and evidence cannot foreclose the determination by the Court of the issue presently before it.

117. Further, having considered the terms of the policy, it is not readily apparent how any such manipulation and exploitation might occur. I am conscious that the policy now does identify certain actions that may not be undertaken.[82] But, the evidence does not specify how it is that such prohibitions may be manipulated or exploited by offenders having regard to what, on the evidence, is now permitted by police to be done pursuant to the policy. At the very least, to me, any risk of exploitation and manipulation does not speak for itself and, as I have noted, no specific risks of exploitation or manipulation were identified in the evidence of Assistant Commissioner Grainger.

Pursuit policy in the public domain

118. There can be no doubt that police pursuits are a matter of great public interest and debate, to which representatives of Victoria Police have contributed.

119. In the families' reply submissions, they attached three news items associated with pursuit policy. In one dated 8 February 2016, the former Secretary of the Police Association, Ron Iddles, is quoted as critical of the 2015 policy and as referring to it as "*a no-pursuit policy*". He is further quoted as saying that "*... therefore pursuits weren't*

[81] Transcript of directions hearing dated 14 August 2019, pp 47-48.
[82] See, for example, VPM 'Pursuits' as at 14 January 2019, highlighted sections at p 10.

even initiated so then you had motorists who were baiting members, who were drag racing, and then members weren't able to actually pursue."[83]

120. The families have submitted that such contributions have continued since the introduction of the 2016 policy, or at least relating to it. The example given is the 3AW news item comprising Annexure C. It is not clear that the 3AW item concerns the 2016 policy. The item is dated 8 June 2016, and it is there said that Assistant Commissioner Fryer sent out a video message to all police members "*a month ago*" in which he "*set the record straight*" and stated that "*You can consider a pursuit if the risk doesn't outweigh the benefit*".

121. In that regard, albeit that the 2016 policy seems to have come into force on 27 July 2016, the statement of Assistant Commissioner Fryer,[84] does refer to a notification to police members of forthcoming changes to the policy in advance of the formal introduction of the policy and does refer to a video/email titled "*Assistant Commissioner Doug Fryer sets record straight*".

122. In light of the consistency between the reference to the content of the video in the news item and apparent description of that video in the statement of Assistant Commissioner Fryer, I tend to think that submission of the families is more likely correct and that the 3AW item shows that the substance of the current pursuit policy has been publicly discussed, at least to a limited extent.

123. Such discussion would be consistent with the concerns of some police members, including, it seems, Assistant Commissioner Fryer, that the "*record*" should be set "*straight*" and that any notion in mid-2016 that the applicable policy was a "*no pursuit policy*" should be dispelled.

124. It is clear from the news items provided that the issue is one of public safety no matter what policy is adopted, as, on the one hand, the conduct of police pursuits can give rise to dangerous situations, as, according to the evidence of Assistant Commissioner Grainger, can the perception that there will not be pursuits.

125. In the circumstances earlier referred to, it must have been foreseeable to Police Command at the time of its introduction that the contents of the 2016 policy may later

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[83] Police car chases: Officers slam pursuit policy in Police Association survey", *The Age* dated 8 February 2016 by Tammy Mills.
[84] Paragraph 134.

fall for public consideration and investigation. The 3AW news item, also attached to the families' submissions appears to be an example of a limited form of such public consideration.

126. In this context, it is not evident from the material that Police Command considered that any issue of public interest immunity would arise if the 'new' policy were required to be disclosed in public proceedings, and none has been claimed.

127. In respect to this particular news item, I should add that the Chief Commissioner really advanced no submissions and did not seek any leave to lead any further evidence to contradict it.

128. The families also submit, however, that the highlighted aspects of the statement of Assistant Commissioner Fryer tend to suggest that the issues that arose during the time of the 2015 policy "... *lay not with the policy itself, but with dissemination and understanding of the pursuit policy*".

129. Put another way, the latter submission is to the effect that the problem in the time of the 2015 policy might be thought to lie not in the fact that the details of the policy were public, but in a public perception – to which Assistant Commissioner Grainger deposes – that the effect of the policy was that there would be "*no pursuits*", which was then sought to be taken advantage of by offenders in various anti-social and criminal ways of the kind to which he also deposes.

130. In that sense, it is submitted that the problem is not with the fact of public disclosure of the details of any policy and associated procedures *per se*, but with what was evidently publicly understood to be the operational effect of the 2015 policy and procedure.

131. The submissions of the Media Entities are considerably less detailed on this topic than those of the families, although, as I have noted, the Media Entities have not had access to the coronial brief and therefore have not had access to the underlying material.

132. Mr Caridi says nothing about this particular element of the application.

The practicalities

133. The pursuit policy will play a pivotal role in this coronial inquest and is part of the scope. Understanding the pursuit policy in this inquest will be of utmost importance. Therefore, the ability to discuss and dissect it is essential.

134. Although the Chief Commissioner has submitted that there is no real practical difficulty presented by the orders sought, it seems to me that an order in respect to the material now said to comprise the 'essence' of the pursuit policy since 2016 does have the potential to give rise to difficulties. This is particularly true if such an order does not specify what, if anything, may actually be published concerning the topic of police pursuits.

135. There also seems to me to be a wider potential problem of a practical nature, which is that the pursuit policy and procedures have the potential to be considered and debated in contexts other than the present inquest.

136. Previous inquests in this Court have considered those policies and procedures and I am presently aware of another inquest pending in the Court in which the issue is again likely to arise. Such policies and procedures also have the potential to arise for consideration in civil proceedings, including actions brought against Victoria Police members.

137. In these circumstances, if I were to make an order of the kind presently sought for a period such as, for example, the statutory maximum period of five years, that would seem to me to also have the potential or actual effect of suppressing reporting concerning the current pursuit policy where that issue arises in other similar proceedings. This would be a potentially disproportionate effect. At the very least, the potential arises for an awkward interaction between such an order and the fair and accurate reporting of such other proceedings.

138. Such an order might also be sought in other proceedings. That would also give rise to the potential for differences between the effect of different orders concerning the same or similar subject matter.

139. At the very least, there seems to be a potential for difficulty in circumscribing with precision the effect of any such order made, as is required by section 13 of the Open Courts Act, or in determining for what period such an order should operate or when or upon what event such an order should cease to operate, as is required by section 12 of the Open Courts Act.

140. It follows that there do seem to me to be considerable practical difficulties associated with the making of any suppression order to the effect sought.

Public confidence in the coronial jurisdiction

141. On the evidence before me, the need to make a suppression order in respect to what the Chief Commissioner describes as the "*essence*" of the current pursuit policy is debateable.

142. As I have noted, the pursuit policy has been the subject of public examination and is and will likely remain a legitimate topic for public investigation and debate.

143. In the course of the present inquest it will be necessary for the Court to consider the evidence concerning the evolution of police pursuits policies and operations, including, inevitably, the present practices.

144. In the present instance, that will occur in respect to a sequence of incidents in which the conduct or not of 'pursuits' or other means of following the vehicle driven by the offender will loom large. That is, of course, a sequence of events that culminated in the tragic deaths of the deceased, which were perpetrated by the offender in and using his vehicle. It was also an event in which many others were injured and many others could have lost their lives.

145. The examination of these incidents, of course, occurs in a wider setting in which, in recent years and in other places, there have been notorious events in which offenders have used vehicles as weapons.

146. Police pursuits and the means by which they may be effected will be a major issue in the inquest. A suppression order of the kind sought would restrict public consideration of that issue and, inevitably, limit the public consideration of the findings, comments and recommendations ultimately to be made.

147. I am also conscious that earlier inquests in this Court have examined and referred publicly to the applicable pursuit policy in force in 2015, including an inquest I conducted into the death of Rutiano Chong Gum.[85] Indeed, there have been a number of coronial inquests that have extensively canvassed this issue[86] and I am not aware of any suppression orders over other pursuit policies prior to this request.

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[85] Finding into the death of Rutiano Chong Gum dated 8 October 2015.

[86] Finding into the death of Sarah Booth dated 14 July 2014, Findings into the death of Roberto Bartolo, Findings into the death of Jason Govan, Findings into the death of Goran Cosic, Finding into the death of Kyra-Lee Clarke.

148. In any event, the affidavit of Assistant Commissioner Grainger did not provide any evidence as to the effect of non-publication of the pursuit policy on crime rates. He did not state that such events have become less prevalent since the introduction of the 2016 policy. His affidavit does no more than give rise to an implication to that effect, in circumstances where the statement of Assistant Commissioner Fryer does tend to suggest that some degree of statistical analysis might have been available and my own experience of prior inquests does tend to suggest that, if anything, the problem was with either the 2015 policy, and perceptions in respect to it, rather than to do with publicity *per se* concerning police pursuit policies.

Conclusions and determination in relation to pursuit policy

149. I note that in order to make a suppression order of the kind sought pursuant to section 18(2) of the Open Courts Act, I must reasonably believe that it is "*necessary*" to make such an order because disclosure of the contents of the present policy would be contrary to the public interest.

150. As I have noted, it is uncontroversial that section 18(2) presents a high bar.

151. Further, the sub-section requires that I must feel an actual sense of persuasion, on the evidence, that it is "*necessary*" to so order in the public interest. It is, as I have observed, not simply a question of whether such an order is reasonable or desirable; it must be necessary. In the present circumstances, as I have considered and discussed them, I do not feel the necessary sense of persuasion.

152. I am not convinced that the pursuit policy is wholly confidential, at least in broad terms. Indeed, it seems to me that it must have been in the interests of Victoria Police to dispel the misapprehensions apparently evident in the time of the 2015 policy, and the 3AW item to which I have referred appears to be one example of that.

153. Further, although I have given weight to the evidence and opinions of Assistant Commissioner Grainger, in the end he points to no firm foundation for concluding that any disclosure of the contents of the current pursuit policy would give rise to the onset of or increase in the incidence of the concerns and dangers that he identifies.

154. I am therefore not satisfied that public disclosure of the contents of the 'essence' of the current pursuit policy and the contents of Assistant Commissioner Fryer's statement dated 19 October 2017 together with attachments is likely to give rise to a significant

risk of exploitation or an increased incidence in anti-social or criminal conduct of the kind that is attributed to the 2015 policy that was apparently perceived by the public and at least some police to be a "*no pursuits*" policy.

155. For these reasons, I am not satisfied that it is necessary to order pursuant to section 18(2) of the Open Courts Act that the 2016 policy or the 2019 policy be suppressed.

156. I should add, for completeness, that in light of the approach that I have taken in respect to the 2016 policy and the 2019 policy, I also reject the further application for a suppression order in respect to the highlighted portions of the statement of Assistant Commissioner Grainger dated 11 June 2019 and the annexed materials. Very little, if any, attention was given to that part of the present application in submissions or argument. That statement is directed to training arrangements in respect to the current policy and operational details in respect to which, for the reasons identified, I am not satisfied it is necessary to make the order sought.

The Review Report

Practical difficulties of a 'blanket' request

157. In contrast to the essential approach adopted in respect to the other limbs of the application, the Chief Commissioner's application in respect to the Review Report is correctly described by the families and Media Entities as 'blanket' in nature. It is an application to suppress from wider disclosure and public consideration the entire contents of an extremely detailed report of 496 pages which goes to the heart of the inquest.

158. The reply submissions of the Chief Commissioner might be said to conceive of a limited fallback position, involving the suppression of only the opinions or critical comments expressed by Assistant Commissioner Fontana in the Review Report.

159. However, the Chief Commissioner opposes the fallback position suggested by the families (and, at best perhaps reluctantly acknowledged by the Media Entities), namely the application of pseudonyms to the names of officers.

160. During the hearing the families also advanced another fallback position to the effect that a suppression order only be made until Assistant Commissioner Fontana comes to give evidence. I took it implicitly that the suggestion was opposed by the Chief

Commissioner. In any event, the utility of such a suggestion is doubtful, as any distribution of the coronial brief in the hands of the interested parties is restricted.

161. The real thrust of the present application is in the nature of a 'blanket' suppression of the entire Report.

162. To be clear, it is sought that it be ordered pursuant to section 18(2) that "*the evidence in respect of the contents*" of the Review Report "*not be published or broadcast in Victoria or elsewhere in Australia*".

163. Any making of a 'blanket' order of the kind sought in relation to the whole of the contents of a 496 page report has the potential to cause significant practical problems in the hearing and, subsequently, in the publication of findings, comments and recommendations.

164. The practical difficulties include identifying the criteria by which the media reporting on the evidence given during the course of the inquest might be able to determine what would or would not amount to "*evidence in respect of the contents*"[87] of the Review Report.

165. The problem is particularly acute in the present instance because the Review Report includes extensive consideration of and quotation from many of the same statements and other contemporaneous materials that are included in the coronial brief. In those circumstances, it is not evident how it is that a media representative could be sure that reporting evidence given by a particular witness at the inquest does not also amount to reporting some of the "*contents*" of the Review Report.

166. In a sense, the point is illustrated by the submissions of the families to the effect that "*parts*" of the Review Report have already been published on Four Corners and in the sentencing remarks of his Honour Justice Weinberg. Those documents do not seem to refer specifically to the Review Report, but it is true that those documents refer to underlying facts that feature in it. If a media representative were to report on such facts emerging in evidence during the inquest, would the reporter be in breach of an order that prevents any publication of the whole of the contents of the Review Report,

[87] Notice of application for suppression order dated 31 May 2019.

including facts stated in that Review Report to the very same effect as evidence given by witnesses at the inquest?

167. Further, as I have noted, such difficulties have the potential to affect the ability of the Court to publish the inquest findings, comments and recommendations as required by section 73(1) of the Coroners Act.

168. There is the potential for significant if not insoluble problems of lack of definition in the boundaries of a suppression order of the 'blanket' type presently sought. Such difficulties must bear upon the extent to which the Court is realistically able to give the required effect to section 13(1) of the Open Courts Act if such an order were to be made. If such effect realistically cannot be given, that seems to me to raise real questions about whether an order of that kind should properly be made pursuant to the provisions of the Open Courts Act.

169. In the course of submissions, as I have noted, Senior Counsel for the Chief Commissioner submitted that the practical problems were not significant. In part, it was submitted that the order would only preclude a "*direct reference to the content of the report*" and that the media might be able to publish the answers given by witnesses even if the answers were the product of questions arising from the report.

170. To me, as I have indicated, it is not evident how it is that representatives of the media, who do not have a copy of the Review Report, could readily determine what is and is not a "*direct*" reference to the contents of the report.

171. Further, the notice of application uses the expression "*in respect of*", which is potentially wide and indirect in operation, and not the word "*direct*".

Review process and methodology

172. The AC Grainger affidavit deposes, in substance, that:

(a) the application is made in respect to the "*entirety*" of the Review Report;

(b) to allow publication of the Review Report would be "*contrary to the public interest*";[88]

[88] AC Grainger affidavit dated 31 May 2019, p 3.

(c) Victoria Police conducts reviews and commissions reports into incidents so as to identify promptly and address opportunities for immediate improvement in policing which, it is said, leads to improvements in safety;[89]

(d) in order for "*these reviews*" to be effective, those providing information to the reviewer and reporting on incidents must be able to be "*as frank and candid as possible*" and, in order to encourage such candour, "*the reports are provided to a very limited number of senior management ... [and are] ... not even circulated to the members directly involved*";[90]

(e) by this process, Victoria Police personnel "*will be comforted in the knowledge that their identity will not be revealed other than for the purpose for which the process was undertaken*";[91]

(f) such reports are often compiled when the facts in relation to the incident are "*yet to be entirely ascertained, tested and validated and so it would be inappropriate to make this material publicly available*", particularly "*the preliminary opinions expressed in the reports*";[92]

(g) disclosure could have serious consequences for "*those persons both personally and professionally*", which is said to be undesirable when any "*forensic process or curial process*" is still to be concluded;[93]

(h) such "*processes*" have been "*very effective*" and "*in my experience those involved in the processes have been open and honest in providing information and expressing their opinions, confident in the knowledge that their information is imparted for specific purposes and certain audiences only*";

(i) the processes "*will be inhibited*" if such reports enter the public domain and consideration would need to be given to whether such processes should be put "*on hold*" pending completion of "*outstanding investigations and court proceedings*" which would compromise the ability of Victoria Police to assess

[89] AC Grainger affidavit dated 31 May 2019, p 3.
[90] AC Grainger affidavit dated 31 May 2019, pp 2-3.
[91] AC Grainger affidavit dated 31 May 2019, p 3.
[92] AC Grainger affidavit dated 31 May 2019, p 3.
[93] AC Grainger affidavit dated 31 May 2019, p 3.

its processes, systems, policies and capacity and could impair the timeliness of any improvements effected.[94]

173. It is a feature of the AC Grainger affidavit, and this aspect of the application generally, that it is sought to suppress from publication the contents of not only the present Review Report but, inferentially at least, the products of what is sought to be described in the affidavit as the review "*process*" within Victoria Police.

174. In that sense, in oral submissions at least, the Review Report was also sought to be included within a broader category of what was described as 'critical incident reviews' undertaken by Victoria Police and other agencies that are "*generated soon after the tragic events*" and, it was said to therefore give rise to an issue that is "*generic*" in that such reports are, as a matter of "*principle*", entitled to protection regardless of their specific content.[95]

175. In respect to the AC Grainger affidavit, I note the following:

(a) Assistant Commissioner Grainger does not depose to having been involved in the preparation of the Review Report;

(b) it is also not explained or stated that Assistant Commissioner Grainger has had specific experience in the preparation of any similar report;

(c) he describes his experience with these reviews and the need to be frank and candid and what he describes as the comfort of members in the knowledge that their identity will not be revealed other than to a limited readership. He does not identify any formal or even informal confidentiality process of which members were informed, including how members' identities will be protected, how any information provided by them to such a review might be used or to whom that information might be given. He does not exhibit or provide any document or policy that would suggest that any such process was in place with respect to the Review Report;

(d) Assistant Commissioner Grainger refers to these reports often being compiled when the facts in relation to such an incident are yet to be entirely ascertained, but does not state directly that that is a feature of the present Report;

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[94] AC Grainger affidavit dated 31 May 2019, p 3.
[95] Transcript of directions hearing dated 14 August 2019, pp 39-40.

(e) he deposes to his belief that members will be inhibited in the process with consequences for the management of Victoria Police if such reports could find their way into the public domain, but gives no example of any such incident ever having occurred or any such inhibition ever having been evident or any police member ever having refused to participate in such reports in the absence of assurances about how the information that they might provide might be used;

(f) in that regard, Assistant Commissioner Grainger does not refer to or address the oath or affirmation given by Victoria Police members and the requirements of the VPM that commit members to the highest ethical standards, to act honestly, to demonstrate moral strength and courage and to behave with honour and impartially;

(g) particularly, he does not explain how it is that the potential for a Review Report of the present kind to become public could cause such members to do other than abide their oath and the requirements of the VPM when providing information to a review, and he gives no specific examples of incidents in which any such thing has ever occurred; and

(h) Assistant Commissioner Grainger deposes to the potential for serious consequences for those persons both personally and professionally, but does not explain the consequences that would occur if the contents of such reports were made public. He states that the Review Report was available to senior management personnel within Victoria Police and so it might be thought to have been open to be used against members professionally from that time.

176. In this sense, it is striking that in contrast to the evidence given by Assistant Commissioner Grainger concerning the occurrence of incidents involving threats to SOG operatives, in respect to the present topic, Assistant Commissioner Grainger provides no documents relating to the operation of "*such processes*" and any associated system of confidentiality, identifies no specific features of any such system and deposes to no incidents in which any police member has ever expressed reservations about participating in "*such processes*" in the absence of assurances of confidence or other protections.

177. Further, the AC Grainger affidavit sits somewhat uncomfortably with several features of the present Review Report and, at the very least, does not engage with or seek to explain them. In particular:

(a) it is now confirmed that the Review Report is dated 19 February 2018, which is obviously more than a year after the events concerned and, in the circumstances, it seems to me to be stretching the language to describe it as "*generated relatively soon after*" those events;

(b) the Review Report specifically identifies the "*methodology*" by reference to which it was prepared, but that methodology is said not to have included interviews with individual members;

(c) unlike other kinds of reports that, in my experience, are sometimes provided to the Court and not published, the present Review Report details and names individuals and Victoria Police units,[96] analyses the available documentary and other evidence in a detailed way and is not based primarily on any interviews undertaken with particular members, particularly in any interviews hastily undertaken shortly after the incidents concerned;

(d) indeed, as was acknowledged in oral argument, the "*principal sources*" for the present Review Report are the signed and formal statements prepared for the criminal prosecution of the offender;[97]

(e) so far as I can tell, many of those statements were made by witnesses who will be called to give evidence at the inquest, and their statements appear in the coronial brief and are formal and signed. In many or all such statements, immediately prior to the signature line, it is declared: "*I hereby acknowledge that this statement is true and correct, and I make it in the belief that a person making a false statement is liable to the penalties of perjury*";

(f) the "*methodology*" stated in the Review Report refers to the fact of numerous findings and recommendations being made, but at no identified point are any such findings identified as "*preliminary*";

[96] Transcript of directions hearing dated 14 August 2019, pp 42-43.
[97] Transcript of directions hearing dated 14 August 2019, p 45.

(g) in addition, unlike the other kinds of reports to which I have referred, the present Report also refers to the coronial inquest (together with another identified investigative process), but it is not said that the Review Report should not be produced to the inquest because it has been generated in circumstances of confidence. Indeed, it seems to be contemplated that the findings of the Review Report will provide the opportunity to advise the inquest of the action taken to address issues that have been identified;[98] and

(h) albeit that the "*methodology*" stated in the Review Report seems to have included some unidentified debriefs with police members, any subsequent references to such debriefs appear to be both isolated and, in some cases, cryptic. I note that I was referred to no such references at any point in the written and other submissions made.

178. In this context, it is striking that the evidence presently relied upon by the Chief Commissioner is adduced from a witness who seems to have had no involvement in the preparation of the present Review Report. He does not address any aspect of the features of the Review Report that I have referred to (except in the most general terms seemingly addressed to the preparation of all "*such reports*") and in circumstances in which the author of the Review Report is on the list of witnesses proposed to give oral evidence at the inquest and has provided a statement to the inquest concerning an unrelated topic.

179. In that regard, the present approach of the Chief Commissioner may be contrasted with that adopted in respect to the applications before her Honour Judge Coate in the ruling made in the course of the inquest into the death of Tyler Cassidy. In that context, the Chief Commissioner relied upon specific evidence given by both Assistant Commissioner Fontana and Superintendent Williams.

180. In the present instance, I have only the relatively general evidence of Assistant Commissioner Grainger and no direct evidence in support of the application from the author of the Review Report or anyone else seemingly directly involved either in the

[98] I do not overlook the fact that the Review Report is endorsed with a heading "Sensitive: Legal". On the other hand, I note that no claim of legal professional privilege has been advanced in respect to the contents of the Review Report.

preparation of the Review Report or any debriefings or other consultations conducted in connection with it.

181. In this sense, in evaluating the evidence of Assistant Commissioner Grainger and considering the extent to which I can be persuaded that, on the evidence, an order suppressing the Report is 'necessary' and that the 'high bar' imposed by that requirement has been reached, it will be evident that I have given consideration to the potential for the Chief Commissioner to have called more detailed evidence and from a more immediate source.[99]

Mr Caridi's opposition to the suppression order

182. Finally, Mr Caridi does oppose this aspect of the Chief Commissioner's application and the matters to which Mr Caridi deposes do tend to confirm that in respect to this particular review process:

(a) Mr Caridi provided his statement by email to the reviewers at the request of the Homicide Squad in July 2017;

(b) all he received in response was an email acknowledging receipt;

(c) no individual police members, including Mr Caridi, were interviewed by the reviewers in respect to the incidents the subject of the review or the subject matter of their individual statements;

(d) no individual police members, including Mr Caridi, made any formal or other written statements solely for the purpose of the review; and

(e) there was no mention of an identifiable system of confidentiality or other assurances expressly given to individual police members in respect to the use of the information that they provided to the reviewers.

183. In this respect, the statement or statements that Mr Caridi provided to the reviewers seem to have been the formal statements that he made in February and July 2017, the latter of which he identified specifically to be supplementary and in order to "*provide further details for the information of an associated Coronial Inquest*". Neither statement seems to have been taken by any of the police members associated with the production of the Review Report.

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[99] *Blatch v Archer* (1774) 1 Cowp 63 at 65.

184. As I have noted, in oral submissions, Senior Counsel for the Chief Commissioner endeavoured to sidestep many of the observations outlined above by submitting that the issue was a "*generic*" and "*fundamental*" one that "*arises from the nature of such a review and the need to protect it, nurture it and not inhibit it in any way*".[100] Central to that contention is that publicly disclosing the present Review Report would risk the inhibition of future candour by police members in the same or similar processes.

185. I am conscious that section 18(2) of the Open Courts Act requires that I reasonably believe that a suppression order is necessary because disclosure would be contrary to the public interest.

186. In the present instance, as I have described it, the public interest said to make such an order "*necessary*" is what is believed to be the effect of publication to the public of contents of the present Report upon the integrity and proper operation of the review "*processes*" that Assistant Commissioner Grainger describes. I take account of the belief he expresses that such an impact would ensue.

187. For my part, however, the requirement of reasonable belief requires, on the evidence and other information before me, that I feel an 'actual persuasion' that such an effect would follow from public dissemination of the contents of the present Report.[101]

188. In the present instance, on the evidence and information before me, I am not satisfied that such an effect would flow from the public dissemination of the contents of the Review Report.

189. As I have said, I am mindful of the opinion on the issue expressed by Assistant Commissioner Grainger, but an opinion of that kind necessarily relates to a future matter and therefore must involve uncertainty, especially when the evidence before me does not disclose what has occurred in any similar previous instance (if there has been one).

190. Further, for the reasons that I have identified, there are some features of the present Review Report that do not sit comfortably with Assistant Commissioner Grainger's very general evidence concerning the "*processes*".

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[100] Transcript of directions hearing dated 14 August 2019, p 45.
[101] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362.

191. That evidence does not explain precisely how that "*process*" worked. For example, I have not been provided any evidence in relation to any individual officers who may have been interviewed by the reviewers. Further, much of the analysis actually undertaken in the Review Report seems to have occurred by reference to underlying contemporaneous documents and sworn statements taken for the purpose of the criminal prosecution.

192. It would seem extremely unlikely that the witness, police officer or other, would, in that context, be inclined to be other than 'frank and candid', for reasons that include, at least in respect to the police members, the oath or affirmation sworn by such an officer and the relevant requirements of the VPM.

193. The Chief Commissioner asserts that public disclosure of the Review Report could lead to the consequence that police members will in the future be less frank and candid. However, the Review Report will feature in the cross examination of a considerable number of the police members who will give oral evidence.

194. It is not clear what additional effect upon those officers, or police officers more generally, could flow from public dissemination of the contents of the Review Report.

195. It follows from the above that I am not persuaded that:

(a) the "*communications*" of any police members with Assistant Commissioner Fontana or those involved in this particular review process, to the extent that they occurred at all, were "*made in circumstances of confidence*" – certainly not in circumstances of express confidence or in which any definite assurances of confidentiality were given;

(b) the Review Report was of the kind spoken of by her Honour Judge Coate in general terms in her ruling in the inquest into Tyler Cassidy, namely a report or review in which an agency responds rapidly or as quickly and fully as possible in order to make changes to ensure the on-going protection of the public (in that regard, of course, the Review Report seems to have been prepared and completed more than a year after the subject incidents);

(c) the findings made in the Review Report were "*preliminary*" in nature; and

(d) the risk of any wider dissemination of "*communications*" made by police members to the reviewers in the present instance, which communications seem

primarily to have been in the form of signed and formal statements made by police members to the Homicide Squad and which now form part of the Coronial Brief, could be said to imperil the effectiveness of any underlying system of review undertaken from time to time by Victoria Police because police members would in those quite different settings be less inclined to be "*self-critical*" or "*frank and candid*".

196. In reply submissions (but not in oral submissions), the position of the Chief Commissioner might be thought to have shifted ground slightly and sought to emphasise the fact that the Review Report was "*critical of the operational decision-making by a number of members*". In that respect it was submitted that:

> *Had Assistant Commissioner Fontana known that his Review Report would be made public he may not have been so forthright in his views especially as the information he relied upon was preliminary in nature and many of the perceived facts that Assistant Commissioner Fontana relied upon for his opinions may not be borne out when the matter is more thoroughly examined during this inquest.*[102]

197. No such evidence was given by Assistant Commissioner Grainger and, perhaps more importantly, nor was any such evidence given by Assistant Commissioner Fontana.

198. The terms of the Review Report specifically referred to the coronial investigation, did not state that the Review Report could not or should not be provided for the purposes of that investigation and yet still contained the comments and criticisms of Assistant Commissioner Fontana.

199. Whether or not Assistant Commissioner Fontana expressed those criticisms in the Review Report, the submissions of the Chief Commissioner acknowledge that he will give evidence at the inquest. The fact that Assistant Commissioner Fontana made such comments and criticisms in the Report is not a good enough reason to suppress what would likely be similar oral evidence at the inquest.

200. Further, the Chief Commissioner has not provided any evidence or directed me to any part of the Review Report that involves conversations with individuals (or groups of individuals) about the confidential debrief process or content and the impact any such content might have had on Assistant Commissioner Fontana's views or opinions or recommendations. It is very difficult for me to disentangle what might have been the

[102] Reply submission on behalf of the Chief Commissioner of Police dated 7 August 2019, p 2.

content of a conversation or debrief, when it is not apparent from the document or submissions.

201. If he does modify his criticisms when giving oral evidence, he can explain why. None of those considerations form a good basis for suppressing the making of such criticisms either in or during his evidence at the inquest or at any earlier time.

Conclusions and determination

202. For these reasons, I am not satisfied that the evidence in respect to this limb of the application is sufficient to displace the presumption in favour of disclosure of information and the principles of open justice stated in section 4 of the Open Courts Act.

203. Further, for the purposes of section 18(2) of the Open Courts Act, I do not reasonably believe that it is necessary in the public interest to make a suppression order in respect to the disclosure of any evidence given in the inquest concerning the contents of the Review Report.

204. As the Chief Commissioner has acknowledged, the bar is "*high*", and for the reasons that I have identified, in the present instance I am not satisfied that it has been reached.

205. For the same reasons, I am not persuaded that it is necessary to make some more limited order in respect to the expressions of comment and opinion in the Review Report by Assistant Commissioner Fontana, even if that fallback position is in fact being sought by the Chief Commissioner.

206. It follows that it is unnecessary further to consider the fallback positions of the families (and, perhaps, the Media Entities).

ORDER

207. Pursuant to s 55(2)(e) of the Coroners Act, I order that the identities of the SOG and SSU members referred in the affidavit of Assistant Commissioner Grainger dated 31 May 2019 be referred to in all documents and in all other ways in this inquest as "SSU Operative 005" and "SOG Operator 19".

208. The applications are otherwise dismissed.

209. I order that this Ruling be published on the Coroners Court website.

210. I order that the Interim Suppression Orders dated 7 June 2019 and 17 June 2019 be revoked.

Signature:

JACQUI HAWKINS
Coroner
Date: 23 August 2019