**IN THE CORONERS COURT OF VICTORIA**
**AT MELBOURNE** **No. 5542 of 2008**

**In the Inquest touching upon the death of Tyler Cassidy**

**RULING:**

**Application of the Chief Commissioner of Police for suppression of material pursuant to Section 73(2)(b) of the *Coroners Act 2008***

1. The Chief Commissioner of Police ("CCP") seeks an order pursuant to s. 73(2) of the *Coroners Act* 2008 ("the Act") prohibiting the publication of the contents of a list of 5 sets of documents (a ) to (e) specified in its draft orders filed on November 1, 2010.[1]

2. These documents were produced to the coronial investigation prior to the commencement of the inquest. After the documents were produced to the coroner but prior to the distribution of the documents to the other interested parties, at my request, the instructing solicitors to Counsel Assisting this inquiry, provided the documents to the legal representative for the CCP to give the opportunity for any objection on any ground to distribution to the interested parties. No objection was taken. The documents were distributed to the interested parties on the same undertakings as the contents of the Inquest Brief generally.

3. This application was foreshadowed after the inquest commenced.

4. In its initial written submissions in support of this non-publication application, the CCP divided these documents into two types or classes. The documents were divided as follows: (i) The contents of internal workings, debriefs and reviews of the processes of policing in Victoria and (ii) The details of procedures, training, protocols and methods of operational police in Victoria, including, but not limited to operational training and tactics of Victoria police and those of specialist police units and the equipment available to those specialist police units .

6. The CCP provided a written submission in support of the orders it sought and upon receiving written submissions in response to the application, the CCP provided a further written set of submissions in reply. I have carefully considered all of the written submissions[2] and was both grateful for them and assisted by them. I was also assisted by the oral submissions made by all of the interested parties who participated in this application. Given the nature of this ruling

[1] Attached to this ruling as Appendix 1
[2] Attached to this ruling as Appendix 2

however, and the need to produce it as quickly as possible to minimise any interference with the smooth running of the inquest, I will not summarise all of the written and oral submissions put in the course of the application but rather turn to the heart of the issues.

**Basis of application**

7. In its original submission, the CCP sought to rely upon the court exercising the power contained in s 73(2) of the Act. In the course of developing its position during the running of the application, Ms Judd SC sought to bring in a public interest immunity claim together with a reference to a commercial –in-confidence claim. As to the commercial –in-confidence claim, it was baldly asserted. Otherwise the claim was not developed. It was not made clear as to what documents in the list such a claim related to and in what way. Consequently, I propose to say nothing more about it, other than to observe there are no submissions or evidence before me upon which I can make any relevant connection to such a claim.

8. As to the public interest immunity claim, I remain unclear as to what if anything the CCP seeks to add to its position through this claim or how it is now put, given that this application is clearly directed to a suppression order being sought rather than a non-production order. Other than making general references to the language and concepts courts use to decide claims of public interest immunity, in particular the use that can be made of the approach of public interest immunity claims to classes of documents, the grounds of such a claim were otherwise not developed. Ms Judd SC made reference to relying on classification of document types which are recognised in public interest immunity claims, but otherwise did not go to the law developed around public interest immunity claims. The written submissions in response from the CCP describe this application as ***analogous*** to a class claim for public interest immunity, rather than being one. It seems that this is done as a mechanism to make a claim over the bundles of documents in the list rather than having to go to each document and detail why it is in the public interest to suppress that particular document or parts of it.

9. It was submitted by several of the interested parties in response to Ms Judd's oral submissions that public interest immunity claims are available to assert in relation to the **production** of documents based on a set of grounds recognized by the common law and the time for such a claim has passed. Ms Judd SC responded by submitting effectively that such a claim can be made at any time, cannot be waived but in any event the Court itself can find public interest immunity of its own motion.

10. As set out in paragraph 2 above, some time was given to the CCP to make any objection to the further "production" of the documents by way of distribution to the interested parties. Other than seeking to have the documents distributed on the basis of undertakings, no objection was taken to the documents having been produced or indeed distributed to the interested parties. But more importantly, in the course of the application, the position of the CCP was re-iterated by Ms Judd

SC. That is, that the substance of what is being sought is a non-publication order rather than objection to the production of the documents on the grounds of public interest immunity.[3] Indeed, I am further bolstered in coming to this view by the draft orders that the CCP are seeking. The draft orders are headed **Suppression Order**, pursuant to s 73(2) of the Act.[4]

11. The application by the CCP is couched in the language of non-publication and the submissions are directed to the non-publication of the documents, not the non-production, which would be the proper province of a public interest immunity claim. In any event, as I have said the CCP seeks a suppression order by its own language and not a non-production order. Indeed Ms Judd SC in the course of making reference to *Sankey v Whitlam* said that she did not propose to go into the case because it was not the main theme of what was being submitted.[5] For these reasons, in my view, I do not feel it necessary to say any more about a possible public interest immunity claim with respect to these documents, but rather turn to the heart of the application which is to be found in the power residing in s. 73(2) of the Act.

12. Section 73 (2) of the Act provides:

*A coroner must order that a report about any documents, material or evidence provided to the coroner as 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*

13. The CCP relies upon s. 73(2) (b) of the Act submitting that the publication of the listed documents **would be contrary to the public interest.** The CCP submitted that the section mandates the coroner to make a non-publication order once the coroner reaches a state of reasonable belief that to publish the documents listed would amount to the harm sought to be avoided in either (a) or (b) above.

**<u>What is "public interest"?</u>**

14. It is trite to say that ***public interest***, as it is used in s. 73(2) (b) is no more amenable to precise definition than ***exceptional circumstances*** or ***beyond reasonable doubt.*** In coming to a view about what is contrary to the public interest in any particular application pursuant to s. 73, it is inevitable that there will be competing considerations which the coroner must balance to reach a decision in the context of a particular coronial investigation. This must be done in such a way that consideration is given to the purpose, function and role of the coronial jurisdiction generally and in the particular case, together with the high principles recognised by the common law such as considerations of what is best

[3] Transcript P 1410 Ln 15, Ln 30
[4] Attached to this ruling at Appendix 1
[5] Transcript P 1410 Ln 12

for a free and democratic society[6] and the relevant rights enshrined in the Charter, in particular the right to freedom of expression and the procedural obligations connected to the right to life.

**The Open Court Principle**

15. There was no disagreement in this application that the starting point for consideration of a suppression application is the fundamental principle of the need to have our courts open to public scrutiny with all that entails. This includes scrutiny, not only by those members of the public who sit in our courts, but scrutiny by the media in recognition of the important function it performs on behalf of the public.[7] This scrutiny includes being able to hear and see the evidence before the court upon which the court is coming to a decision.

16. Dr Collins on behalf of the ABC most helpfully provided a fulsome written submission on the principles of open courts set out from paragraphs 12 to 15 of his written submission, with which I take no issue. A number of the submissions directed themselves to the open justice principles (replete with authorities) from which I accept that open justice means inter alia:

- That an order prohibiting the publication of documents tendered into evidence or prohibiting the reporting of oral evidence is an incursion into the open justice principle;
- That any non-publication orders made should not be wider than necessary, proportionate to the harm sought to be avoided and not routinely made;
- That a party may be embarrassed or distressed by publication of evidence given in open court is not sufficient to make an incursion into the open justice principle;
- That the risk of ill informed debate or inaccurate reporting is not a basis for ordering non publication of evidence.

**Particular resonance in the coronial jurisdiction**

17. In the coronial jurisdiction, the principles of open justice have a particular resonance. I say this for three reasons. The first is that the coronial system as it currently operates in this State, receives between 5,000 to 6,000 reportable deaths[8] per year. About 95% of these reportable deaths are completed by investigations by the coroner which result in a finding without inquest or public hearing pursuant to s 55 of the Act. However, there are a limited category of deaths required to be reported to the coroner, for which an inquest or public hearing is mandatory. The circumstances surrounding Tyler's death make an inquest

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[6] Major Crimes (Investigative Powers) Act 2004 [2009] VSC 381

[7] For example see: *Russell v Farrelly* 134 C.L.R 1976 at 496: *John Fairfax & Sons v Police Tribunal of NSW and anor* NSWLR [1986] at 465; *Nixon v Random House Australia Pty Ltd and anor* [2000] VSC 405 per Hedigan J

[8] See Ss 3, 4 Coroners Act 2008 for definition of reportable death.

mandatory.[9] That is, Parliament has made clear that the coroner will have no discretion but to provide to the community a public hearing into the circumstances surrounding a death which occurs whilst a member or members of the police force have taken or are attempting to take someone into their custody.

18. The second reason I say it has particular resonance in this jurisdiction is as a result of the arrival of the *Coroners Act* 2008. For the first time in this State, Parliament has made clear the importance of the publication of Findings of coroners and any comments or recommendations which flow from those findings and the responses to those Findings. By making mandatory the publication of the Findings of inquests and any comments and recommendations which flow from it and the publication of the responses, unless otherwise ordered by the coroner, this legislative structure is clearly directed towards ensuring public scrutiny of inquests and their outcomes and the responses to any recommendations made by the coroner.[10]

19. This is underpinned by looking to the *Second Reading Speech* to the *Coroners Bill 2008* in which the Attorney General stated that our coronial system must take a broad public health approach to investigations and to "*clarify on the public record the causes and circumstances of death, to provide public hearings 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*".

20. The third reason to emphasise the importance of the open court principle rests in the common law behind the purposes an inquest or public hearing serves in our community. I shall turn to a couple of the Australian authorities to illustrate my point. His Honour Ashley J in *Domaszewicz v State Coroner* [2004] VSC 528 observed that one of the purposes of the inquest was to set the public mind at rest where there are unanswered questions about a reportable death. In this way, His Honour observed, the coronial investigation provides an opportunity for something positive to come from tragedy.

21. In a similar vein, Bowen JA *in Bilbao v Farquhar (1974) 1 NSWLR 377,* observed that the "purposes underlying coronial inquiries include the satisfaction of legitimate concern of relatives, the concern of the public in the proper administration of institutions and matters of public and private interest."

**Principles of Open Justice subject to exceptions**

22. The CCP submitted that the principles of open justice are subject to exceptions in order to preserve the integrity of the court process and to ensure an injustice is not caused.[11] In my view, this submission is not only correct but is underscored by the existence of s. 73 (2) in the Act. The principles of open justice are not absolute and will be justified if the applicant satisfies the coroner of the circumstances set out in s. 73(2) of the Act.

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[9] Ss 3, 4 and 55 *Coroners Act* 2008

[10] See Ss 72 and 73 *Coroners Act* 2008

[11] CCP, in its written submissions relied upon *BK v ADB* [2003] VSC 125 per Nettle J at [5]

## What is the public interest sought to be protected in this application?

23. The CCP submitted that the public interest in these circumstances is "police being effective in exercising their function as police".[12] In summary the position of the CCP was that the harm sought to be avoided, that is the damage to the public interest would be that publication of the documents sought to be suppressed would, if published:

(i) As to documents (a to c) undermine policing in Victoria in that "highly sensitive" **internal reviews and improvement mechanisms** could (and on the evidence would) be frustrated or put in jeopardy thereby limiting the ability of Victoria Police to maintain appropriate policing standards and improve its services to the people of Victoria; and

(ii) As to documents (d to e) undermine the on- going ability of police to effectively engage with volatile (and potentially violent) members of the public may (and on the evidence will ) be compromised if the general public is aware, in advance of **police tactics, operational safety tactics training, and equipment and resources of specialist units.**[13]

24. As I have understood the way in which the CCP puts its position, documents (a) to (c) in the list have been described and should be accepted as internal workings, summaries or minutes of debriefs and reports in the wake of review processes.

25. As to these documents (a) to (c), the CCP submitted that in order to ensure that the community is provided with the most informed, up to date and responsive force it must constantly monitor its training methods and interactions with the public. This will result in the production of reports and minutes of reviews and debriefs. In order to promote the necessary rigour required, full and frank discourse amongst those involved in the improvement, discussions need to be promoted, and to achieve this it is essential these reviews and reports remain "confidential".

26. The CCP submitted that without providing confidentiality to the process of de-briefing and learnings and internal reviews after incidents, the free and frank and candid explanations that come from members will "dry up" if the members come to understand that the information they give will be published at a coronial hearing.

27. Further, from time to time Victoria Police will undertake more general reviews of emerging trends or themes to enable it to monitor any issues as they

[12] The CCP has taken this term from *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 and in particular the judgment of Lord Simon at 236

[13] Summarised from the written submissions of the CCP of October 19, 2010

arise and address those issues to ensure continuous improvement. The CCP submits that the report of Superintendent Williams titled *"The examination of Police Shootings and Critical Incidents between July 2005 and December 2008"* (Document (a))is such a document. The CCP submitted that there is a public interest in the police being generally self critical and being open and blunt about their examinations of the force. However, if these internally commissioned reports are to get into the public domain, the reports are likely to be more guarded and the public interest will be harmed by reports which are less rigourous.

28. Finally, the CCP submitted with respect to Document (a), the "Williams" review, it is limited in its value because it does not examine the evidence critically and the approach is broad brush and it is done at such a time when all of the facts are not known and thus it is likely to leave a false impression of the issues.

**The Evidence in support**

29. As evidence in support of this claim, an affidavit of Assistant Commissioner Stephen Fontana sworn November 1, 2010 was filed. Ms Judd SC also sought to rely upon the statement of Superintendent Michael Williams dated October 27, 2010 as evidentiary support for the application. It was submitted by Ms Judd SC that Assistant Commissioner Fontana, given his length of service in Victoria Police and the type of duties he has performed can be relied upon to understand the risk to Victoria Police if documents such as this were published after internal reviews. Ms Judd SC sought to rely upon the statement of Superintendent Williams for an explanation as to the shortcomings of his review.

**The impact of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("The Charter")**

30. Ms Judd for the CCP in both written and oral submissions initially stated that the Charter had no application in this instance as s. 73(2) allowed only one interpretation and thus the interpretative provisions of the Charter (s. 32) and cases such as *Momcilovic*[14] had no work to do. Further, it was submitted by the CCP that the Charter does not assist in weighing up whether the principles of open justice for example, should get greater weight than the public interest considerations in this case.

31. Most of the parties to this application referred to and relied on the Charter and its implications for this application. Most of the submissions referred to the need for the court to direct itself to the "**interpretative**" provision (s. 32 (1) of the Charter) as well as the rights enshrined in the Charter relevant to this application.

[14] *R v Momcilovic* (2009) 265 ALR 751

32. The second part of the CCP submission as to the Charter was that if s. 73(2) was open to more than one interpretation, the interpretation that must be adopted is the one that least infringes the rights enshrined in the Charter. The Charter contains an interpretive provision requiring decision makers to interpret all statutory provisions in a way that is compatible with the rights enshrined in the Charter as far as it is possible to do, consistent with the purpose of the Act being interpreted and an interpretation that least infringes Charter rights.

33. Those interested parties relying on the Charter, in essence stated that when the Court comes to interpreting the meaning of *public interest* in this case, it should look to the rights enshrined in the Charter as the building blocks for coming to a view. This is because Parliament enshrined a set of rights into the Charter and therefore considered those rights worth protecting generally in the public interest and therefore there is a presumption against interfering with those rights. I accept this as the correct view.

34. CCP submitted that the Charter affirms the right to a public hearing and thus enshrines the "open justice" principle but sets out in s. 24 of the Charter the exceptions to this principle which include relying on a power embedded in another Act.[15] That power, submits the CCP is the power given to the coroner in s 73(2). I note that a similar power is found in s. 55 (2)(d) of the *Coroners Act* which gives the coroner power to exclude a person or class of persons from an inquest accepting that the exercise of such power should be based on consideration of all of the principles enshrined in the Charter as far as possible and the common law.

35. Whilst there was some disagreement about what Charter rights were enlivened by this application, I shall go through the rights which were the subject of submissions and not dealt with elsewhere in this ruling.

**Right to freedom of expression**

36. Free expression is enshrined in s 15 of the Charter. It encompasses the freedom to "seek, receive and impart information and ideas of all kinds" whilst acknowledging the special duties and responsibilities that attach to that freedom. A number of the submissions noted that freedom to obtain information is expressly linked to freedom of expression.[16]

37. The CCP submitted that there is no infringement of the right to free expression when what is sought to be "received" pursuant to this right, falls within the exceptions contained in s.15(3). The CCP submitted that the effect of s. 15 (3) of the Charter together with the existence of s.73 (2) lawfully creates that exception. The CCP also submitted that the restriction contained in s. 73(2) has been accepted as compatible with the Charter in a statement by the Attorney

[15] See s.24 (2) (3) Charter
[16] I was referred to the decision of Bell J as the President of *VCAT in XYZ v Victoria Police* [2010] VCAT 255 as authority for this proposition.

General for the purposes of the passage of the *Coroners Act* 2008. Moreover, the CCP submitted that the Coroners Court has no power to declare the section as incompatible with the Charter. Further, the CCP submitted that the exceptions to the principles of open justice do not infringe the right to free expression and support for this can be found in the UK cases.[17]

38. Finally, the CCP submitted that the right to receive information will not be fettered any more than is proportionate as the family, the interested parties and the public (through the media) will be able to know and debate the issues considered in this inquest without the documents it seeks to protect from general publication.

39. It seems clear that access to information is enshrined in the right to freedom of expression, but it is not an unlimited right. Section 73 (2) of the Act provides a power to limit that right. That power must be exercised with the least infringement of the right possible and proportionate to the harm sought to be avoided. Where the limits properly lie is part of the balancing exercise inherent in an application such as this.

**The Right to life**

40. The right to life and the right not to be arbitrarily deprived of life is contained in s. 9 of the Charter. Embedded in this right is the requirement that in the event that a life is lost as a result of action or inaction by the state, what must follow is an independent and effective investigation into that loss of life.

41. The CCP submitted that the right to life requires an effective investigation into any loss of life in circumstances such as these. The CCP submitted that a lawful suppression of the publication of some material does not infringe the right to life.
42.The CCP sought to rely upon *Jordan v UK* (2003) 37 EHRR 2 at paragraph (109) as follows:

*....."There must be a sufficient element of public scrutiny of the investigation or its results to ensure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case"....*

43. A summary of the submissions in response was that a disclosure of the material held by the State relevant to the death must not only be provided to the coroner, but must be available for public scrutiny through the media. The essence of the submissions was an acceptance that there were exceptions to the requirement for general publication of all material but the need to ensure the maximum public understanding and accountability was the underpinning of the jurisprudence in this area.[18]

[17] *Allen v Clibbery* [2002] EWCA Civ 45 (30 January 2002) at 81; *B v United Kingdom; P v United Kingdom* (2002) 34 EHRR 529 at [39]
[18] See for eg (*R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653; *Mc Cann v United Kingdom* (1996) 21 EHRR 97; *Edwards v United Kingdom* (2002) EHRR 487

44. Ultimately I did not perceive that the various submissions were at odds in this area. 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 be generally available, but there are limits on that obligation. Again, it is a balancing of all of the various factors which need to be done to arrive at a decision which least infringes those rights and is proportionate to the harm sought to be avoided.

**Analysis of documents (a) to (c) inclusive**

45. In my view, having considered the principles the next step in the balancing exercise is to go through the documents in the list, endeavour to discern their nature and contents and then apply the above principles to reach a conclusion as to whether or not I have formed a reasonable belief, based on the evidence and information available to me, that the publication of the material sought to be protected would be contrary to the *public interest.*

46. Before doing that however, there are some further general considerations relevant to this application which are necessary to touch upon. The first of those is the issue of internal reviews generally in this jurisdiction.

**Internal reviews generally**

47. The *Coroners Act 2008* gives a range of powers to coroners to assist in the conduct of their investigations. These powers include the power to compel documents, to compel statements, to compel witnesses and to issue warrants to compel witnesses to attend court and give evidence. The Act also makes clear that coroners in the conduct of their investigations should liaise with other investigative authorities to avoid unnecessary duplication of inquiries and investigations and to expedite the investigation.[19] Division 3 of the Act contains a limited list of categories of person or agency who are mandated to provide any information they may have that may be relevant to an investigation the coroner is conducting.[20] Medical practitioners involved in the care of the deceased, members of Victoria police and the CFA and MFB are referred to in this Division.

48. Notwithstanding this provision of this range of powers, coroners have long been exposed to, and continue to be exposed to the submission that if the agency the subject of the coroner's investigation were required to produce any internal review it has conducted in the wake of a reportable death, staff will not be open or frank or co-operative with the process of internal review and that would be detrimental to the public interest. The regular submissions provided to coroners are that internal reviews conducted by an agency into a reportable death in circumstances where the agency is able to get confidential information given to them frankly and voluntarily, will be of far greater benefit to the public as it will

[19] See section 7 *Coroners Act* 2008
[20] See section 36 *Coroners Act* 2008

provide timely and frank advice to the agency about what happened and thus provide the ability for the agency to be responsive. In the event that the coroner forces the production of that internal review, and then makes it public, staff will no longer be frank or co-operative with the process.

49. Coroners, as investigators, are well used to entities such as hospitals and government agencies responding in this way to requests from coroners for the results of internal reviews.

50. On one view, such a stance appears to hold the coronial system to ransom, but on the other hand common sense dictates that the human reality is that the information obtained in this way is going to be more frank and forthcoming if protected by confidentiality and non-publication. This concept is recognized in legislative schemes such as the *Whistleblowers Protection Act* 2001. The public benefit or interest is obvious. The public interest is in having the agency respond as quickly and fully as possible to a fatality to ensure the on-going protection of the public is as thorough and as immediate as possible to address any public health or safety issues in a more timely way than a coronial investigation can achieve.

51. A coroner provided with a confidential internal review can be greatly assisted in the conduct of his or her investigation and can provide a more timely completion to his or her own investigations.

52. In this particular case, the police members involved have all, as they must, provided statements to the coroner about what happened. The members have been identified. That is, I am not put in a position where an internal review has been conducted, but its contents and recommendations withheld, and as a consequence the coronial investigation risks being unaware of relevant information.

**Police operational safety, training and tactics and resources**

53. The second general issue to consider is the one of the publication of police operational tactics, training and resources.

54. It has long been accepted in the coronial jurisdiction that an investigation into the circumstances surrounding a death connected to police actions needs to balance the coroners' requirement to be fully informed about what happened with a particular focus on public health and safety and the administration of justice, with the need not to put at risk either police members in the exercise of their duties on behalf of the community or the community itself by allowing public access to details of police training and tactics and operational equipment, thereby potentially giving forewarning to enable a person or persons to take actions in retaliation or to avoid being apprehended and thus put the community and police members at risk. Whilst each application must be judged on its merits, coroners are generally sensitive to such considerations.

55. I now turn to the subject documents:

**(a) The examination of Police Shootings and Critical incidents between July 2005 and December 2008 ( other than the front page, the four pages on opportunities for improvement and Appendices A C D E F and G) ("The Williams review")**

56. This report was commissioned by Victoria police in the wake of the OPI *Review of Fatal Police Shootings by Victoria Police in 2005.*[21] According to Assistant Commissioner Fontana it was commissioned to identify systemic issues or "common themes" arising from these events to address any opportunities for improvement and to ensure current policing practices are of the highest level. Victoria Police commissioned Mr. Michael Williams (as he was at that time) to conduct this review, one assumes as a result of his extensive relevant experience in Victoria Police over a number of decades. At the time Mr. Williams conducted this review he was not a member of Victoria Police, having retired from the force.

57. The main grounds for seeking non-publication of this document appear to be as follows:

(a) The affidavit of Assistant Commissioner Fontana indicates that if it became routine for such candid and frank reviews of critical incidents to be generally published to the world at large, it would lead to those giving information to the reviewer and to the reviewer being far more inclined to be less frank and honest than they would otherwise be. Further, routine general publication of internal reviews during the coronial process would result in Victoria Police considering delaying its process of internal review pending the completion of outstanding court proceedings. In this way, the public interest in maintaining a timely and effective review process of police fatalities to try to address any areas for improvement would be constrained.

(b) Second, relying on the statement of Superintendent Michael Williams provided to the inquiry, Ms Judd SC submitted that the report suffers from being done at a time when not all of the information was available to him. Thus there are inaccuracies and shortcomings in the report as a result of being prepared so quickly and without the full information available. I understood that the harm asserted to be done to the public interest under this limb would be to have an inadequate and misleading document published which would unfairly diminish public confidence in Victoria Police.

(c) Further, the review of Michael Williams was prepared for senior police only and not for general distribution.

(d) Where reports contain criticism of individuals and units, the publication of such opinions prior to the conclusion of the investigative process could have

[21] When the whole report was initially provided to me, it contained reviews of a number of investigations extraneous to this one. A redacted copy of the review was requested to ensure that it only contained the examination of Mr. Williams into the shooting of Tyler Cassidy. It is this redacted document that is now described above and the subject of the application.

serious consequences to the professional and personal lives of the individuals under scrutiny.

(e) The report contains material which identifies equipment available to operational police and specialist units as well as operational tactics.

(f) In final submissions, Ms Judd SC added that there was also a public interest in ensuring that the coroner has the benefit of these candid reviews to assist in the conduct of his or her investigations but if it became understood that information given to the reviewer and the review itself were to routinely be generally published, it was more likely than not that the reviews would be sanitized and the coronial investigation deprived of this valuable information and indeed the interested parties to the investigation would also be deprived of this information.

**The methodology for the conduct of this review**

58. I found it helpful when considering this document, to look at the methodology of the review. At page 10 of the original unredacted document provided to me[22], the methodology of the "Williams review" is set out. In summary, it provides that a literature review was conducted from national and international published literature, an examination of force policies and standard operating procedures, incident fact sheets, CIRMC reviews, investigation files, D 24 tapes and chronologies were used. From this information, the project team then used a "time line based methodology" to determine risk markers as likely "predictors" at police shootings and then the data was grouped into themes. The methodology also included[23] what was described as **structured interviews.** This process was described as: *Consultation with key subject matter experts on critical incident management and alternative non lethal responses was undertaken with representatives from the following specialist support services:*

- Special Operations Group
- Critical incident response team
- Dog Squad
- OSTT
- Homicide Squad
- Mobile Data Network Project Group
- ESTA
- Police Communications

59. In my view, this document does not bear any of the hallmarks of an internal review such as that described by Assistant Commissioner Fontana in his affidavit or by the CCP in its oral or written submissions. It is a review that has been conducted by Victoria Police in response to a published report by the Office of Police Integrity. There is no evidence that any members involved in the death of

[22] The original unredacted document contained examinations of a number of other police shooting deaths which were removed with my permission.
[23] (described at p10)

Tyler were interviewed in the course of the review much less evidence that any member provided confidential information to this review about the detail of this incident on the understanding that identifying information would not be made public. At the time Mr. Williams did the review, he was not a serving member of Victoria Police having retired some time earlier. He was engaged by Victoria Police as an external consultant no doubt for his experience and expertise in policing as a result of the years he served in the force. This document should properly be categorised as an expert opinion provided by an external consultant. He was not provided with witness statements about the death of Tyler to conduct his review and he did not interview members involved in the incident at all, much less on the promise of anonymity.

60. Whilst the review has the obvious shortcomings properly later described by Mr Michael Williams [24], Assistant Commissioner Fontana and Ms Judd SC, that does not satisfy the test for concluding that it would contrary to the public interest to publish it. Superintendent Williams will be giving evidence to the Inquest at the time that this document and his two further statements and report go into evidence. His explanation as to the shortcomings of this document will be able to be placed on the public record to balance any concern about those shortcomings.[25]

61. In so far as the document (or any other document produced by Victoria Police) contains references (for example in Appendix B to the "Williams Review") to the detail of operational resources, the detail of operational tactics and safety principles or the details of police equipment, I am satisfied it would be contrary to the public interest to allow the publication of that material.

I turn now to document (c) in the list.

**(c) Meeting Operations Safety and Tactics training and critical incident management training standards progress report attached to the Statement of Superintendent Williams, other than to the extent that such report is already in the public domain as per the redacted report ("The Williams progress report")**

62. Given the obvious connection between this document and document(a) both being prepared by Superintendent Williams and flowing one from the other, I shall deal with it next. Assistant Commissioner Fontana in his affidavit refers to this document as a protected document but concedes that it is the public domain in a redacted version. I understand that his evidence goes to seeking to have those parts not already in the public domain suppressed as it goes to the training delivered and the methodology during training and operational tactics and police equipment.

[24] Mr Michael Williams , the author of this review, is now Superintendent Michael Williams, having re-joined Victoria Police since completing this review.

[25] Since the making of this Application by the CCP, a further 35 page statement by Superintendent Williams responding to a set of questions sent on my behalf, has been supplied to the interested parties and will be tendered into evidence when Superintendent Williams gives evidence. This statement has the value of being made after Superintendent Williams has had the opportunity to consider the contents of the Inquest Brief and to reconsider his comments, findings and conclusions in his review, the subject of this application.

63. The submissions with respect to this document were basically general in nature. That is, I was not taken to the detail of the redacted parts of the document in submissions. My examination of the redacted parts of the document leads me to conclude as follows:

i. Some of the redactions contain discussion (albeit fairly general) about tactics, safety and training that if made public, could compromise the effectiveness of Victoria Police for our community and the safety of members in carrying out their duties on behalf of the community
ii. Some of the redactions do contain direct quotes from members who appear to have been interviewed for this review and have clearly given frank and useful responses

64. For the reasons set out above, I have formed the reasonable belief that publication of the redacted parts of this document would be contrary to the public interest. In considering the nature and impact of a non-publication order, I take into account that there will now be in the public domain:

- the initial review of Superintendent Williams contained in (a) above;
- two further statements of Superintendent Williams including the second statement (addressing a range of direct questions posed by the inquiry) in which he has addressed a range of issues in scope in this inquest and
- he will be giving evidence in this inquest in circumstances where the interested parties and Counsel Assisting all have the unredacted form of the document.

**(b) Operational incident review – Fatal police shooting at Northcote on 11 December 2008 (other than the front page, the recommendations at the end of the report and Appendices C D E and F. ("The Fontana review")**

65. These documents are described as an internal review and de-brief lead by Assistant Commissioner Fontana. The objectives of the review are set out at the beginning of the document. In summary they were to examine the fatal shooting of Tyler to ascertain the circumstances, the adequacy and effectiveness of the planning, the compliance with procedures and identify what worked and where the opportunities for improvement might be and to recommend improvement strategies to enhance the outcome of future incidents.

66. The methodology for this review is set out at page 7 of the document. The methodology includes consultation with the key participants in the incident and the response to the incident. Assistant Commissioner Fontana conducted interviews himself with three of the four members directly involved in the death of Tyler and records their responses in this document.

67. In the grounds relied upon for the non-publication of this report, the affidavit of Assistant Commissioner Fontana claims that the document contains information which touches upon the following:

- Victoria police methodology for reviews
- The detail of member welfare
- General planning
- Control and command issues
- Policy development
- Training and equipment issues including the identification of resources and equipment available to specialist units.

68. As to police methodology for reviews and police policy development, I do not accept they are matters which are contrary to public interest to publish. Further, putting to one side a consideration of whether it is contrary to public interest to publish details about member welfare, the information on this topic is both scant and general. However, I do accept that the document is an internal review in that individuals involved in the incident have participated in interviews as part of an internal review to achieve the aims as set out above. I note that the review document does also cover operational tactics, training and equipment and resources.

69. In my view, the public interest is best served by ensuring that the coroner gets as much frank information as possible from the agency under scrutiny, be it Victoria Police, a government Department such as DHS or a major public hospital. As unpalatable as it may appear in public, I accept the evidence of Assistant Commissioner Fontana about the real risk that internally conducted reviews which obtain the frank co-operation of staff and members involved will be compromised if routinely made public in the course of a coronial enquiry.

70. Based on this candid evidence and my own experience of what happens in this jurisdiction when internal reviews and reports from agencies are called for, their **production** is often vigorously resisted. That did not happen in this case and the investigation is better for the production of this material. For an Assistant Commissioner of Victoria Police to candidly indicate on the public record that making these internal reviews generally public may cause them to be less than frank and of less value causes me to form a reasonable belief that such a claim is true. For this reason, together with the reasons that go to protecting operational tactics training and equipment, I have concluded that it would be contrary to the public interest to publish the contents of the "Fontana review"(b)

71. I consider this creates the necessary balance between protecting the public interest in ensuring that candid internal reviews performed by highly qualified senior people for agencies whose actions are under scrutiny by the coroner are provided to the coroner and interested parties to an inquest to enable as deep an understanding as possible as to what has happened according to those experts and to encourage agencies do this in a timely way, which cannot be achieved by the coroner.

72. Based on the reasoning set out above, I am satisfied that it is contrary to the public interest to publish those parts of this document that are sought to be suppressed in the application before me.

73. In coming to this view I take into account that myself and Counsel Assisting me and all of the interested parties have the document. Further, I note that there are statements made and provided or available from every relevant police member involved in the incident which will become part of the public record. I also take into account that the recommendations made by Assistant Commissioner Fontana will be part of the public record and further that Assistant Commissioner Fontana will give oral evidence and be available for cross examination as to his conclusions and recommendations contained in the internal document.

**(d) The critical incident response teams standard operating procedures attached to the statement of Superintendent Alway. ("The Alway material")**

74. As to this document and (e) below, the CCP submitted that the public interest would be harmed by the police being required to reveal their methods and procedures of policing, especially in dealing with volatile situations.

75. Dr Collins in his submission stated police tactics and training and operational equipment and resources are all matters of legitimate and vital public concern. There can be no doubt about that. Indeed, in this case what the police members did, what they were trained to do and the sufficiency and effectiveness of that training and the resources and policies and instructions and directives and manuals that underpin it are all in the scope of this investigation.

76. Assistant Commissioner Fontana's evidence is that the documents in (d) contain sensitive information as to the operation of Critical Incident Response Teams (CIRT) and other specialist units within Victoria Police such as the Force Response Unit, the Special Operations Group and the Canine Unit. These Units are trained and made available for intervention into the most volatile and dangerous threats to our community.

77. It was submitted that publication of CIRT operating procedures and tactics, if revealed, could reduce the effectiveness' of these units and put members lives at risk as well as compromising public safety by providing information to would be offenders about tactics, training, equipment and available resources of Victoria Police. It was submitted by the CCP that there is an even greater interest in keeping confidential the equipment, training, tactics and procedures of specialist policing units such as the Critical incident response teams, the Force Response Unit, the Special Operations Group and the Canine Unit.

**(e) The operational safety and tactics training packages attached to the Statement of Senior Sergeant Miles. ("The Miles material")**

78. It was submitted that the documents in (e) are training packages which contain sensitive information as to the operational police methodology, policy, practices, tactics and procedures in relation to the training of members of Victoria Police. The evidence in support of these documents not being published from Assistant Commissioner Fontana is consistent with what has already been stated above about the risks to safety of members and the public generally if this information is in the public domain.

79. Whilst various parts of this material is general and in parts even obscure, I am satisfied that both (d) and (e) can properly be classified as documents which go to the detail of operating procedures, tactics, equipment and training of Victoria police and for the reasons already discussed I am satisfied it is contrary to the public interest to put this material into the public domain.

80. I do not consider that the non-publication of these documents will detract from a full examination of the critical issues in this inquest. As the investigating coroner, I have been provided with documents (d) and (e) and I have distributed those documents to all of the interested parties. The relevant witnesses for these documents will be called.

81. I am satisfied that the public interest will be best served by ensuring that documents that expose police members and the community to potential danger by revealing tactics, training and operational equipment of Victoria police do not get into the public arena through the coronial process. I am satisfied that effective policing would be undermined by members of the public being made aware of police tactics, training and operating and safety equipment.

**Conclusions and orders:**

82. I have given consideration to the principles of open justice and the Charter principles enlivened by this application pursuant to s. 73(2) of the Act, much assisted by the quality and breadth of the submissions both oral and written provided to me. The state of the law is plain that the principles of open and public hearings carry with them a right to the media to attend and report on these proceedings and to have access to all relevant information. There is a public interest in the media having open access to all the relevant evidence provided to the inquest, so that they may report as fully as possible on the proceedings in open court.

83. The media has a vital role to play in informing the public of inquests conducted in this court and to do so will often further at least some of the purposes of the jurisdiction. However, the ability to examine and make public **every** document tendered into evidence in an inquest carries with it some limitations. Section 73(2) of the Act makes that clear. It should also be noted that

in this jurisdiction, a lack of ability to examine or obtain a copy of every document tendered into evidence does not lead to a conclusion that the public information necessary to follow the issues in the inquest has been compromised.[26]

84. As I have indicated above, it is important to assess this application in the context of the coronial system of investigation in Victoria. The application must be assessed in the context of how best to serve the public interest in having a mandatory public hearing inquest into a death such as this. The inquest will and quite properly should examine the actions or inactions of individuals and agencies in the public glare of open court. It is a search for the truth of what happened and how and why it happened and if appropriate to make comments or recommendations addressing any issues about public health or safety or the administration of justice that are sufficiently connected to Tyler's death that may contribute to a reduction in the occurrence of deaths in similar circumstances in the future.

85. It is crucial that through this public hearing, the family and the public have the opportunity to not only understand what the circumstances were surrounding Tyler's death but what if anything Victoria Police have done since this death occurred. Both Superintendent Williams and Assistant Commissioner Fontana will give evidence. I am satisfied that in this way, there will be a minimum incursion into the rights and principles discussed above whilst preserving the value of the internal review document to this inquiry and the need to avoid the operational details and tactics and training getting generally into the public arena.

86. Having looked at the material in the context of the entirety of the investigation, the issues of relevance to this inquest and the evidence and material that either is or will be in the public domain, I am also satisfied that in making these orders the incursion into the ability of the public through the media to be fully informed about the facts and issues in this inquest is only to the minimum necessary.

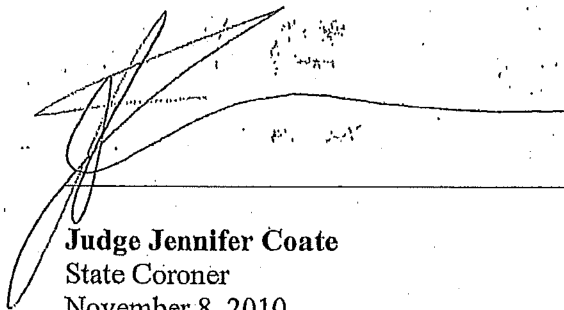
87. The material the subject of this application has all been provided to me and I have provided the material to the interested parties. Given the members of Victoria Police who will be attending to give evidence at this public hearing, there will be ample opportunity to draw out the issues and opinions and trends in the documents in general terms relevant to the issues in this inquest, without risking the safety of either the community or individual police members. The CCP has not sought to suppress the evidence of the relevant witnesses only in so far as it may touch upon the detail of tactics or training or operational methodology or resources. The material the subject of the non-publication orders will be placed on

[26] For example, there is a generally accepted practice in this jurisdiction about access to documents such as photographs depicting any imagery of a deceased person or autopsy reports being generally available on court files. These are documents which form part of the evidence tendered in open court upon which the coroner forms his or her findings or understand the evidence or conducts further aspects of the investigation, but it would be a rare circumstance indeed where general access or media access for the purposes of examination or publication would be made, much less granted.

the court file but general access to this material for examination or re-publication will not be available as a result of these orders.

88. For all of the above reasons, on the application before me I order that, until further order, the following documents or parts of documents not be published pursuant to s. 73(2) of the *Coroners Act* 2008 as I reasonably believe that publication would be contrary to the public interest :

1. Appendix B of document (a)
2. As to Document (b) to (e) orders in the terms sought by the Applicant



**Judge Jennifer Coate**
State Coroner
November 8, 2010

# IMPORTANT NOTE

Please note that the suppression order attached to this ruling was amended during the course of the proceedings and a new suppression order dated 9 December 2010 was issued in its place.

The new suppression order did not change the ruling in any way.

The new suppression order is identified as non Publication Order 5 – Tyler Cassidy on the court website.