IN THE CORONERS COURT
OF VICTORIA
AT MELBOURNE

COR 2020 4101

IN THE MATTER OF AN INQUEST INTO THE DEATHS OF RESIDENTS OF ST BASIL'S HOME FOR THE AGED

Ruling on Applications by Kon Kontis and Vicky Kos under section 57 of the *Coroners Act 2008* (Vic.)

Introduction

1. Konstantin ('Kon') Kontis and Vesna ('Vicky') Kos were respectively the Chairman of the Board and the Facility Manager (and Director of Nursing) of St Basil's Home for the Aged (**St Basil's**), a residential aged care facility in Fawkner, Victoria.

2. St Basil's Home for the Aged in Victoria is the 'approved provider' of aged care services at St Basil's under the *Aged Care Act 1997* (Cth).[1]

3. During the 'second wave' of the COVID-19 pandemic in Victoria in 2020, a COVID-19 outbreak occurred at St Basil's. The first case of COVID-19 at St Basil's was a staff member who tested positive on 9 July 2020.

4. Following further cases among staff and then residents, ultimately all St Basil's staff were furloughed on 22 July 2020. During this period, and in the weeks following the outbreak, 50 residents of St Basil's died. According to an independent investigation commissioned by the Commonwealth government, 45 of those deaths occurred as a consequence of COVID-19 infection.[2]

Application

5. At all relevant times during this period, Mr Kontis and Ms Kos played central roles in the management of St Basil's. Both were summoned under section 55(2)(a) of the *Coroners Act 2008* (Vic) (**the Act**) to attend before this Court to give evidence in the Inquest.

6. By application dated 6 December 2021, Mr Kontis and Ms Kos, through their Counsel, seek to be excused from giving evidence to the Inquest pursuant to section 57 of the Act.

[1] Exhibit 13 – ACQSC s 67 request dated 23 July 2020.
[2] See Professor Gilbert and Adjunct Professor Lilly, 'Independent Review of COVID-19 outbreaks' dated 30 November 2020 (**Gilbert and Lilly report**), p 6 (Inquest Brief (**IB**), 2960).

Inquest – stage of hearing, scope of inquiry

7. The inquest before me is in relation to the deaths of 50 residents of St Basil's in the immediate aftermath of the second wave of the COVID-19 pandemic which took place between March-July 2020 (**Inquest**).

8. To date, 55 witnesses have given oral evidence to the Court during 23 hearing days. A great many others have provided written witness statements and other evidence, much of which is collected in a voluminous Coronial Brief or has been tendered over the course of the Inquest.

9. The Inquest has heard evidence from witnesses who were employed by St Basil's at the relevant time, including the Deputy Director of Nursing, a number of registered nurses, personal care assistants and a kitchen hand; numerous family members of the deceased residents; surge workers including nurses and personal care assistants; the Chief Health Officer of Victoria; the Chief Nursing and Midwifery Officer of the Commonwealth; various senior officers of the Commonwealth and State Departments of Health; the Aged Care Quality and Safety Commissioner; surge workforce providers; geriatricians at private and public hospitals and others.

10. Mr Kontis and Ms Kos are the only two witnesses who are yet to give evidence to the Inquest and they seek to be excused.

***Section 57 of the Coroners Act 2008* (Vic).**

11. Section 57 of the Act sets out the process by which a witness may object to 'giving evidence, or evidence on a particular matter' at an Inquest on the ground that the evidence tends to incriminate that witness. It is in substantially similar terms to s 128 of the Evidence Act 2008 (Vic) (**Evidence Act**) and serves a similar purpose as the Evidence Act does not apply to coronial proceedings.[3]

12. Section 57(4) of the Act authorises the abrogation of the long-standing common law privilege against self-incrimination, which has been described as the 'first principle of our law that nobody shall be called upon to contribute to his or her own conviction'.[4]

13. Section 57 of the Act owes its origin to a report by the Law Reform Committee of the Victorian Parliament which examined the predecessor statute, the *Coroners Act 1985 (Vic)*. In making the recommendation to include a provision such as section 57, the Law Reform Committee Report observed, relevantly:[5]

    - *In many cases…abrogation of the privilege is justified in order for a coroner to establish the facts surrounding a person's death and to make recommendations to prevent future deaths and injuries;*

    - *A number of statutory provisions are required in order to ensure that a witness is encouraged to give a full and frank disclosure of the circumstances surrounding a death;*

[3] Section 62 (3) of the Act.
[4] *Re O'Callaghan* (1899) 24 VLR 957, 967 per Madden CJ.
[5] See Law Reform Committee, *Coroners Act 1985*, Parliamentary Paper No 229 of Session 2003-06, p 287.

- *A witness should be entitled to give self-incriminating evidence without fear that it will later be tendered at a federal or state criminal trial or civil proceeding;*

- *[a] certificate…has the advantage of encouraging reluctant witnesses because they would be provided with tangible proof that particular evidence given at an inquest may not be tendered at later proceedings.*

14. Under section 57, it is for the person raising the objection to testifying to identify whether there are 'reasonable grounds' for their objection. This obliges the person to demonstrate that the evidence may tend to prove that the person has committed an offence against, or arising under, or is liable to a civil penalty under, an Australian law: s 57(1) of the Act.

15. Once the objection is made, the Court must then determine whether there are reasonable grounds for the objection: s 57(2).

16. If the Court is satisfied that reasonable grounds for the objection exist, the Court must inform the person that he or she need not give evidence unless the Court requires them to do so under section 57(4), and that the Court will provide a certificate if the person willingly gives evidence without being required to do so, or gives evidence after being required to do so, and must explain the effect of the certificate: s 57(3).

17. A Coroner may require the person to give evidence if the Coroner 'is satisfied that the interests of justice' require that the person gives evidence: s 57(4)(b).[6]

18. During oral argument on the application on 15 December 2021, I ruled that both Mr Kontis and Ms Kos make their objections on 'reasonable grounds'.[7]

19. The determination of their applications therefore turns on whether I am satisfied that the 'interests of justice' require Mr Kontis and Ms Kos to give evidence in the Inquest.

Applicants' submissions

20. On 15 December 2021 Mr Kontis and Ms Kos were called by Counsel Assisting to give evidence and both objected to giving evidence. It was submitted by the applicants that they had 'reasonable grounds' to object to giving evidence.

21. These grounds were, broadly, that there is a proper basis for Mr Kontis and Ms Kos each to hold a real concern that any answer they may give in evidence in the Inquest might tend to prove an element of an offence under the *Occupational Health and Safety Act 2004* (Vic) (**OHS Act**).

22. It was submitted on their behalf that there are four primary reasons why it is not in the interests of justice to require either to give evidence against their objections.[8]

[6] The requirement in section 57(4)(a) is not presently relevant.
[7] See T3413.2-9 (15/12/21 - Mr Kontis); T3415.3-8 (15/12/21 - Ms Kos).
[8] Written submissions by the Applicants dated 6 December 2021 at [26]-[40].

Overlap between inquest and criminal investigation

23. First, it was submitted that the matters about which it is proposed Mr Kontis and Ms Kos be compelled to give evidence are 'directly relevant' to potential offences against the OHS Act that may be alleged against them.

24. The OHS Act imposes duties upon employers and workers in relation to ensuring health and safety at work, and imposes criminal penalties for breaches of those duties.[9] The duties said to be relevant to this application include:

    i Duties on an employer to provide and maintain for employees, so far as is reasonably practicable, a working environment that is safe and without risks to health, including systems of work[10] and provision of information, training and supervision;[11]

    ii Duties on an employer to ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the employer;[12]

    iii Duties on an employee, inter alia, to take reasonable care for his or her own health and safety, and the safety of others who may be affected by their acts or omissions in the workplace;[13]

    iv Duties on 'a person (whether as an owner or otherwise) who has, to any extent, management and control of a workplace' to ensure so far as reasonably practicable that the workplace and the means of entering and exiting it are safe and without risks to health;[14]

    v Criminal liability on an officer of a body corporate where the body corporate has contravened the OHS Act (for example by breach of ss 21 or 23 above) and the contravention is attributable to the officer failing to take reasonable care.[15]

25. The applicants refer to WorkSafe having sought leave to appear as an interested party by Form 31 dated 28 July 2021 and being granted that leave prior to the commencement of the Inquest, and the 'parallel criminal investigation' they say is currently underway in respect of suspected breaches of the OHS Act by St Basil's.

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[9] Summarised at [16] of Written submissions by the Applicants dated 6 December 2021.
[10] Section 21(2)(a) of the OHS Act.
[11] Section 21(2)(e) of the OHS Act.
[12] Section 23 of the OHS Act.
[13] Section 25 of the OHS Act – this is an indictable offence punishable by a fine not exceeding 1800 penalty units.
[14] Section 26 of the OHS Act – this is an indictable offence punishable by a fine not exceeding 1800 penalty units for an individual.
[15] Section 144 of the OHS Act. 'Officer' is defined in section 5 of that Act to include a person who makes, or participates in the making of, decisions that affect the whole, or a substantial part, of the business of the body corporate.

26. The applicants also refer to a number of materials in support of their submission relating to matters of direct relevance to questions of workplace management and the exposure of employees and others to risk, including:

    i the dot-point list of topics set out in the s 42 Notice dated 12 August 2021 served on Mr Kontis requesting a statement setting out the following:[16]

        - *A description of your position and responsibilities as Chairman, Director and Secretary of St Basil's Homes [sic] for the Aged (**the residential aged care facility - RACF**), Fawkner,*

        - *Details of your qualifications, background and experience in similar positions and the date on which you commenced your roles as Chairman, Director and Secretary of the RACF.*

        - *Details of your experience in the management of aged care facilities.*

        - *The date on which you first became aware of people in Victoria having tested positive for COVID-19.*

        - *Your recollection of, and involvement in, any meetings, consideration, discussions or consultations with residents, residents' families, staff, the managers, and directors of the RACF of the potential effect of COVID-119 being identified in Victoria on the operation of the RACF and welfare of residents.*

        - *Your recollection of and involvement in implementation of any and all changes to the operation of the RACF including changes to staffing or protocols for engaging staff (including through agencies) after the first of the directors and managers became aware of people in Victoria having tested positive for COVID-19 and the dates on which the directors and managers becoming* [sic] *so aware.*

        - *Your recollection of any and all formal or informal risk assessments undertaken in relation to the effect of a member of staff or one of the managers becoming infected with COVID-19 on the well-being of the residents and the results of any such assessments including strategies, practices, practices or procedures recommended and/or implemented including dates on which any changes were implemented.*

        - *Details of all practices, protocols or strategies that were considered by the managers, for preventing, identifying, limiting, controlling or otherwise dealing with infectious diseased* [sic] *in the RACF including in relation to COVID-19.*

        - *Details of strategies that were considered or adopted by the managers for testing residents, staff, managers and others visiting the RACF for COVID-19. When were any such strategies implemented or deployed?*

[16] Exhibit 22 – Section 42 Notices issued to Kon Kontis and Vicky Kos dated 12 August 2021.

- *What strategies were considered in relation to the exclusion from the RACF of any person who showed symptoms of COVID-19 infection or had within 14 days (or any other nominated period) prior to seeking such entry tested positive for COVID-19?*

- *Who was responsible amongst the manager and directors, for communicating with the Victorian State Government Department of Health and Human Services and the Australian Government Department of Health regarding the current COVID-19 pandemic?*

- *Details of any education and training that were provided to staff members in relation to infection control including the use of personal protection equipment (**PPE**) between 1 January 2020 and 31 July 2020.*

- *Details of whether the RACF had any PPE available between 1 January 2020 and 31 July 2020 and if so, the quantity that was available.*

- *Details of arrangements that were in place for cleaning the RACF and disposal of contaminated waste, including used PPE between 1 January 2020 and 31 July 2020.*

ii the dot-point list of topics set out in the s 42 Notice dated 12 August 2021 served on Ms Kos,[17] requesting a statement setting out the following:

- *A description of your position and responsibilities as Facility Manager of St Basil's Homes* [sic] *for the Aged (**the residential aged care facility – RACF**), Fawkner.*

- *Details of your qualifications, background and experience in similar positions and the date on which you commenced your employment as Facility Manager of the RACF.*

- *The date on which you first became aware of people in Victoria having tested positive for COVID-19.*

- *Your recollection of, and involvement in, any meetings, consideration, discussions or consultations with residents, residents' families, staff, the managers and directors of the RACF of the potential effect of COVID-19 being identified in Victoria on the operation of the RACF and welfare of residents.*

- *Your recollection of and involvement in implementation of any and all changes to the operation of the RACF including changes to staffing or protocols for engaging staff (including through agencies) after the first of the directors and managers became aware of people in*

[17] Exhibit 22 – Section 42 Notices issued to Kon Kontis and Vicky Kos dated 12 August 2021.

Victoria having tested positive for COVID-19 and the dates on which the directors and managers becoming [sic] *so aware.*

- *Your recollection of any and all formal or informal risk assessments undertaken in relation to the effect of a member of staff or one of the managers becoming infected with COVID-19 on the well-being of the residents and the results of any such assessments including strategies, practices, practices or procedures recommended and/or implemented including dates on which any changes were implemented.*

- *Details of all practices, protocols or strategies that were considered by the managers, for preventing, identifying, limiting, controlling or otherwise dealing with infection diseased* [sic] *in the RACF including in relation to COVID-19.*

- *Details of strategies that were considered or adopted by the managers for testing residents, staff, managers and others visiting the RACF for COVID-19. When were any such strategies implemented or deployed?*

- *What strategies were considered in relation to the exclusion from the RACF of any person who showed symptoms of COVID-19 infection or had within 14 days (or any other nominated period) prior to seeking such entry tested positive for COVID-19?*

- *Who was responsible amongst the managers and directors, for communicating with the Victorian State Government Department of Health and Human Services and the Australian Government Department of Health regarding the current COVID-19 pandemic?*

- *Details of any education and training that were provided to staff members in relation to infection control including the use of personal protection equipment (**PPE**) between 1 January 2020 and 31 July 2020.*

- *Details of whether the RACF had any PPE available between 1 January 2020 and 31 July 2020 and if so, the quantity that was available.*

- *Details of arrangements that were in place for cleaning the RACF and disposal of contaminated waste, including used PPE between 1 January 2020 and 31 July 2020.*

iii the Revised 'Scope of the Inquest', circulated to parties on 8 October 2021,[18] which includes, relevantly, the following items:

[18] Exhibit 18 – Revised Scope of the Inquiry, dated 8 October 2021.

1. <u>Preparation: 19 February 2020 to 7 July 2020:</u>

a. The adequacy of preparation for an outbreak of COVID-19 at St Basil's Residential Aged Care Facility (St Basil's) by:

…

iv. the approved provider [St Basil's] and any consultants engaged by the provider;

b. The adequacy of any external assessments of the approved provider's preparedness conducted by or on behalf of the provider.

…

2. <u>Index Case and Notification: 5 July 2020 – 14 July 2020</u>

a. the circumstances of the index case;

b. the adequacy of response by the approved provider to notification of a suspected case including:

i. the timeliness of information provided to staff, residents and families; and

ii. communication with authorities.

…

3. <u>Initial Spread: 9 July 2020 – 21 July 2020</u>

a. The control of spread by the approved provider; and

…

4. <u>Replacement Workforce: 21 July 2020 – 31 July 2020</u>

…

a. The adequacy of the replacement workforce deployed to St Basil's by the Commonwealth Department of Health including:

…

v. whether the approved provider co-operated appropriately with the replacement workforce.

27. The applicants submit that the language of the Revised Scope 'is the language of a WorkSafe investigation…the language that one might expect to see in a template for [a] WorkSafe investigation into the approved provider'.[19] The applications made by

[19] T3417.21-24 (15/12/21).

other parties to cross-examine Mr Kontis and Ms Kos were referred to by Counsel for the applicants.[20]

28. The applicants submit that Counsel Assisting accept that the evidence, if given by the applicants, would be directly relevant to potential offences under the OHS Act.[21] They submit that this demonstrates that any examination of the applicants in the Inquest is apt to be a 'dress rehearsal' for a subsequent prosecution.[22]

29. The applicants resist the suggestion that they should seek information or assurances from WorkSafe, as was done by the Victorian Department of Health and Human Services (**DHHS**).[23] The applicants refer to advice in a letter sent by WorkSafe to the DHHS that it (WorkSafe) was 'not presently investigating suspected contraventions by the Department or any of its employees', but 'as with any ongoing investigation this situation may change'. It is submitted by the applicants that any representations made to them in the same terms would not provide any assurance that they are free from the risk of prosecution.

Derivative use – forensic advantage to investigators and prosecutors

30. Secondly, the applicants submit they are exposed to prejudice from the derivative use of the evidence. They say a certificate under section 57(5) of the Act is 'no protection' against prejudice from derivative use, and even exculpatory evidence can be used adversely by alerting investigators and prosecutors to potential defences. This, it is said, confers a potential forensic advantage on investigators and prosecutors by allowing them to close off defences and craft particulars of charges around the evidence, thereby creating prejudice to the applicants.

31. The applicants submit that this prejudice is a well-recognised and highly important consideration in determining whether the 'interests of justice' require them to give evidence.[24]

32. The fact that WorkSafe was granted leave to appear at the Inquest as an interested party pursuant to s 66 of the Act at the same time as it is conducting its own criminal investigation into the same matters, is said to emphasise the prejudice.

33. Other factors are said to serve to make the prejudice that would flow to the applicants 'profound' should they be compelled to give evidence, including:

    - The applicants would be forced to bring into existence an account of the evidence, over their valid objections, in circumstances where no account exists and they have, to date, exercised their right to silence;[25]

[20] T 3420.13 – T3422.3 (15/12/21).
[21] Written submissions in reply by the Applicants dated 15 December 2021 at [5].
[22] Written submissions in reply by the Applicants dated 15 December 2021 at [5] and [21].
[23] Exhibit 1 – Letter from WorkSafe to the Victorian Department of Health, dated 14 November 2021.
[24] Written submissions in reply by the Applicants dated 15 December 2021 at [9]; referring to *Villan v State of Victoria* [2021] VSC 354 at [18]; *Attorney-General (NSW) v Borland* [2007] NSWCA 20 at [19]; and *Workcover v Lindores Contractors Pty Ltd* [2003] NSWIRComm 422 at [26].
[25] Written submissions in reply by the Applicants dated 15 December 2021 at [11].

- Compelling the applicants to give evidence would 'alter the criminal process' which *at all stages from investigation to trial, whether charged or not charged, is fundamentally accusatorial in nature*;[26]

- The applicants' declining to speak with Professors Gilbert and Lilly in a lawful exercise of their right to silence does not enliven a requirement that they be coerced to give evidence. On the contrary it demonstrates the 'high degree' of prejudice to which they would be exposed through derivative use of that evidence and 'distortion to the accusatorial system of justice caused by compelling them over their valid objections'.[27]

X7 prejudice – alteration to accusatorial process, forensic disadvantage

34. Thirdly, the applicants submit that even if they are able to give evidence *in camera* or under the protection of a suppression order or other means, they remain at risk of the prejudice described by the High Court of Australia *in X7 v Australian Crime Commission*:[28]

> *Requiring the accused to answer questions about the subject matter of a pending charge prejudices the accused in his or her defence of the pending charge (whatever answer is given). Even if the answer cannot be used in any way at the trial, any admission made in the examination will hinder, even prevent, the accused from challenging at trial that aspect of the prosecution case. And what would otherwise be a wholly accusatorial process, in which the accused may choose to offer no account of events, but simply test the sufficiency of the prosecution evidence, is radically altered. An alteration of that kind is not made by a statute cast in general terms. If an alteration of that kind is to be made, it must be made by express words or necessary intendment.*
>
> *…*
>
> *Even if the answers given at a compulsory examination are kept secret, and therefore cannot be used directly or indirectly by those responsible for investigating and prosecuting the matters charged, the requirement to give answers, after being charged, would fundamentally alter the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial (and adversarial) trial in the courtroom. No longer could the accused person decide the course which he or she should adopt at trial, in answer to the charge, according only to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial, or to the strength of the evidence led by the prosecution at the trial. The accused person would have to decide the course to be followed in light of that material and in light of any self-incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination. The accused person is*

[26] Written submissions in reply by the Applicants dated 15 December 2021 at [11].
[27] Written submissions in reply by the Applicants dated 15 December 2021 at [12]-[13].
[28] (2013) 248 CLR 92 at [71] per Hayne and Bell JJ.

thus prejudiced in his or her defence of the charge that has been laid by being required to answer questions about the subject matter of the pending charge.

35. The applicants in their written submissions observe that in the cases of *X7*, *Strickland (a pseudonym) v CDPP*[29] and *Hammond v R,*[30] the High Court described the prejudice flowing to a witness that results from *pre-trial* coercive examination – whether lawful or lawful - on matters that subsequently become the subject of prosecution, by 'locking them in' to a particular account.[31]

36. It is further submitted by the applicants that, in exercising my discretion under section 57(4) of the Act, I must consider whether the 'interests of justice' require the applicants to give evidence in circumstances where to do so would result in the 'alteration of the accusatorial process' described in *X7*.[32] This is, it is submitted, a 'relevant and significant' factor to be weighed in my consideration.[33]

37. The applicants distinguish *R v IBAC*,[34] relied upon by Counsel Assisting, on the basis that there is no equivalent discretionary provision, analogous to section 57(4) of the Act, in s 144 of the *IBAC Act 2011* (Vic). Section 144 abrogates the self-incrimination privilege for the purpose of coercive examinations conducted by IBAC. It is said that section 57(4) (and its equivalent section 128(4) in the Evidence Act) contain an injunction *not* to compel a witness to give evidence *unless* the interests of justice require it.

Evidence of low probative value to inquest

38. Fourthly, the applicants submit that their evidence is not of such importance to the Inquest that I will be unable to make the findings required to be made under s 67 of the Act without the evidence of Ms Kos and Mr Kontis. In support of this submission, the applicants point out that there is already a voluminous coronial brief, including contemporaneous communications and recordings relevant to my inquiries.[35]

39. Even if their evidence is 'relevant and probative', the applicants maintain this is not sufficient to enliven the 'interests of justice' such that they ought to be compelled to give evidence.[36]

40. The applicants submit that I would not fail to exercise my jurisdiction should I decline to compel the applicants to give evidence as there is no lacuna in the evidence that cannot be filled by the 'ample' evidence already before me. Moreover, they submit that even if they are not compelled to give evidence, I may still afford them procedural fairness by allowing them the opportunity to make submissions in relation to any proposed adverse findings.

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[29] (2018) 266 CLR 325.
[30] (1982) 152 CLR 188.
[31] Written submissions in reply by the Applicants dated 15 December 2021 at [15].
[32] Written submissions in reply by the Applicants dated 15 December 2021 at [16].
[33] Written submissions in reply by the Applicants dated 15 December 2021 at [17].
[34] *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459.
[35] Written submissions by the Applicants dated 6 December 2021 at [19]-[20].
[36] Written submissions by the Applicants dated 6 December 2021 at [19]-[20].

41. Finally, I am urged by the applicants to apply the principles enunciated in *Villan v the State of Victoria*[37] given what are said to be commonalities between this Inquest and that proceeding, namely:[38]

    - the witness in *Villan* had not been charged but was likely to be the subject of a criminal investigation;

    - the subject matter of the evidence to be given and the criminal investigation were identical; and

    - the Supreme Court acknowledged that the prejudice of the kind described in *X7* would result from the proposed lawful examination.

Submissions by Counsel Assisting

42. On 13 December 2021, Counsel Assisting filed written submissions in response, resisting the applications.[39] In essence, Counsel Assisting submit that I can be satisfied that the 'interests of justice' require that both Mr Kontis and Ms Kos give evidence.

43. In response to the applicants' four primary submissions (as detailed above), Counsel Assisting submit:

    - First, although it is correct that the applicants have not been offered an indemnity or an assurance they will not be prosecuted, it is relevant they have not sought such an assurance; moreover, WorkSafe, through its counsel, told the court that it was investigating suspected contraventions of the OHS Act by St Basil's, but made no mention of any investigation of the personal liability of either Mr Kontis or Ms Kos;

    - Secondly, the certification regime under section 57(5) of the Act is a 'neutral consideration' as it is a result of a deliberate choice by the legislature to balance the interests of individuals against broader public interests sought to be advanced by the Act;

    - Thirdly, *X7* and *Strickland* were concerned with *unlawful* compulsory examinations by an investigative body *after* the witness had been charged with serious criminal offences and are therefore distinguishable on three bases:

        (i) the power in this Inquest is to be exercised by a Court and not by an investigative body;

        (ii) this Court is acting lawfully in accordance with the Act; and

        (iii) there are no charges on foot.

      Counsel Assisting submit that the decision of *R v IBAC* is more closely analogous to the situation in this Inquest as it concerned an unsuccessful

[37] [2021] VSC 354.
[38] Written submissions by the Applicants dated 6 December 2021 at [42].
[39] Written submissions of Counsel Assisting dated 13 December 2021.

attempt to invoke the *X7* principle to enjoin IBAC from pursuing a *lawful* examination of two police officers who had not been charged with any criminal offences.

- Fourthly, the applicants' evidence will be directly relevant to, and probative of, matters under investigation in the Inquest given they performed senior roles at the facility. Further, the applicants' submission on this point 'proceeds on a mis-understanding of the Coroner's function'.[40]

Submissions by the Families

44. On 14 December 2021, Counsel on behalf of family members Christine Golding and Klery Loutas filed written submissions adopting the submissions of Counsel Assisting.[41]

45. Carbone Lawyers, on behalf of 61 other family members, also adopted the submissions of Counsel Assisting by way of a brief oral submission on 15 December 2020.[42]

Consideration

46. As noted above, the applicants advance four reasons why they should not be compelled to testify. I will address each in turn.

The applicants do not face charges

47. The applicants point to overlap between the evidence they will be required to give if called and the criminal charges they may face.

48. I note in this regard that neither of the applicants has been charged with an offence relating to the matters under investigation by me. Their circumstances may therefore be contrasted with those in a number of the cases upon which they rely. For example, the applicants in both *X7* and *Strickland* had been charged with serious criminal offences. In such circumstances, it is hardly surprising that the High Court considered that unlawful attempts by investigative agencies to investigate those very offences constituted an unjustified interference with the accusatorial judicial process.

49. By contrast, in the case of *R v IBAC,*[43] the High Court was not prepared to interfere with the lawful coercive questioning of two police officers who had not yet been charged with an offence. The Court distinguished *X7* on the basis that, in that case, 'the person to be compulsorily examined … had been charged with an offence and was, as a result, subject to the accusatorial judicial process'.[44]

50. Notwithstanding this important difference between the present case and the *X7/Strickland* cases, the applicants argue that it is not in the 'interests of justice' for

[40] Written submissions of Counsel Assisting dated 13 December 2021 at [12]; [13]-[23]; and [31]-[44].
[41] See also T3497.13 – T3498.13 (15/12/21).
[42] T3498.15-24 (15/12/21).
[43] (2016) 256 CLR 459.
[44] (2016) 256 CLR 459 at [41] per French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ.

them to be compelled to give evidence in this Inquest because there are 'potential offences' which may be alleged against them.[45]

51. As noted above, the 'potential' charges identified by the applicants concern offences against various provisions of the OHS Act. Offences against sections 21, 23, 25, 26 and 144 are identified.[46] I consider that sections 21 and 23 may be immediately disregarded as each imposes a duty on an 'employer' and there is no evidence that either of the applicants was an 'employer' as that term is defined in the OHS Act.[47] The evidence is that the employer of the staff who were working at St Basil's residential aged care facility at the relevant time was 'St Basil's Homes for the Aged'.[48]

52. I accept that it is conceivable that the applicants could be charged under one or more of sections 25, 26 and 144 of the OHS Act although even this is not without some uncertainty. For example, it is not immediately obvious that Mr Kontis was in day-to-day 'management or control' of the workplace for the purposes of s 26 of the OHS Act. Nor is it beyond argument that Ms Kos was an 'officer' of the body corporate for the purposes of s 144 of the OHS Act.

53. Assuming for present purposes that there is some risk of the applicants being charged, I note that each of these offences attracts a penalty of a fine. The applicants do not contend that they face the prospect of being charged with an offence that would expose them to the risk of a custodial sentence.[49]

54. In relation to the likelihood of the applicants being charged personally, I note that through its Counsel, the Victorian WorkCover Authority (**VWA**), the agency that is empowered to file such charges, informed me at the commencement of the Inquest that 'the investigation [by the VWA] is into suspected contraventions of the Occupational Health and Safety Act by *St Basil's Homes for the Aged in Victoria*'.[50] As noted, that entity is the 'approved provider' of aged care services at the facility.[51] There has been no suggestion of any investigation of the applicants' personal liability.

55. In the circumstances, I consider that any risk of the applicants being charged is speculative and may be contrasted with the circumstances in another of the cases upon which the applicants rely where the Supreme Court concluded, on the evidence before it, that there was a 'real prospect of [the person concerned] being charged with very serious offences and of being exposed to a significant period of imprisonment if found guilty'.[52]

56. The applicants further submit that 'the matters about which it is proposed to compel evidence from Mr Kontis and Ms Kos are directly relevant to potential offences against the OHS [Act] that may be alleged against them'.[53] This is the principal basis

[45] Written submissions by the Applicants dated 6 December 2021 at [26].
[46] Written submissions by the Applicants dated 6 December 2021 at [16].
[47] An 'employer' is a 'person who employs one or more persons under contracts of employment or contracts of training' – see OHS Act, section 5.
[48] See, eg, statement of Jagmeet Nagra dated 3 November 2021 at [2] (IB 6348).
[49] cf. *Villan* at [26].
[50] T3.8-17 (15/11/2021), emphasis added.
[51] See Exhibit 13 – ACQSC section 67 Request dated 23 July 2020.
[52] *Villan v State of Victoria* [2021] VSC 354 at [26] *per* Keogh J.
[53] Written submissions by the Applicants dated 6 December 2021 at [26].

upon which the applicants contend that the section 57(4) discretion should be exercised in their favour.

57. The difficulty with this submission is that, in the absence of a charge having been filed against either or both of the applicants, it is very difficult to assess the extent of any overlap. For example, if one or both of the applicants was charged with failing to meet their duty in respect of the health and safety of the employees working at St Basil's, the overlap would be minimal. That is because the health and safety of the employees is not within the scope of the Inquest. On the other hand, if the charge related to the health and safety of the residents, the overlap would be considerable.

58. In summary, the present case is distinguishable from cases where charges were on foot (*X7* and *Strickland)* and a case such as *Villan* where there was a 'real prospect' of the person being charged with 'very serious offences' and where there was an incontestable factual overlap between the likely charges and the subject matter of the extant proceedings. I must assess the 'interests of justice' against the background that the applicants may face one or more charges of moderate seriousness and where the extent of any overlap of subject matter between those potential charges and my inquiry is unclear.

The limits of a certificate granted under section 57(5)

59. The second ground upon which the applicants rely is that a section 57(5) certificate 'is no protection against prejudice from derivative use'.[54] This overlaps with their third ground, which relies upon *X7.*

60. The applicants rely on the 'companion principle' discussed by Hayne and Bell JJ in *X7.* That principle is that an 'accused person cannot be required to testify to the commission of the offence charged'.[55] As its name suggests, it is 'an adjunct to the rights of an accused person within the system of criminal justice'.[56]

61. While I accept that the principle is an important consideration in the exercise of my discretion, I note that it has been clarified to some extent by subsequent decisions of the High Court.

62. In particular, the subsequent case of *Lee (No 1)* explained that a case (such as the present Inquest) in which statutory powers are conferred on a court to be exercised judicially 'tends in favour of a more liberal construction of those powers than in the case in which they are conferred on a non-judicial body'.[57]

63. Secondly, in *IBAC,* the High Court explained that the 'companion principle' is only engaged in circumstances where a witness has been charged with a criminal offence. The Court refused to extend the operation of the principle to a case, such as this Inquest, where charges may possibly be filed against the witness in future.[58]

64. In reliance on *X7*, the applicants contend that a certificate under section 57(5) of the Act only provides them with limited protection. In particular, they submit that a

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[54] Written submissions by the Applicants dated 6 December 2021 at [29].
[55] *X7* at [159] per Kiefel J.
[56] *IBAC* at [43] per French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ.
[57] *Lee (No 1)* at [56] per Hayne J.
[58] The Court cited four reasons for refusing to do so – see *IBAC* at [48]-[51].

requirement in this Court that they answer questions about their involvement in the response to the COVID-19 outbreak at the facility they managed would prejudice them in relation to any charges they face in the future arising from the same facts. The forensic choices open to them and their representatives will be restricted.[59]

65. A certificate granted under section 57(5) of the Act prohibits both the direct and derivative use of any evidence given in this Inquest, and thus confers a 'substantial measure of protection' against the use of a witness's evidence against them.[60] I accept that it does not prevent any and all prejudice in the event that the applicants face one or more charges in the future. However, as was recognized by the NSW Court of Appeal in respect of s 61 of the *Coroners Act 2009* (NSW), the 'premise of s 61 is that a person is forced to give evidence, contrary to a well-founded claim of privilege, and with the benefit of the inevitably imperfect protection of the certificate'.[61] I note that section 57 of the Act closely resembles s 61 of the NSW Act.

66. Further, as was also explained by the NSW Court of Appeal in *Rich,* any prejudice to the witness is required 'to be weighed in the balance of the interests of justice favouring obtaining the evidence'.[62] The premise of section 61 of the NSW Act '… is that a witness is exposed to risk, in which case, s 61(4) *obliges* the Coroner to undertake an evaluative assessment of the interests of justice'.[63] Section 57(4) of the Act requires me to make the same evaluative assessment, to which I now turn.

Interests of justice in the proceeding

67. The phrase 'interests of justice' is to be given the widest possible meaning, being undefined in the Act.[64] The content of the phrase is determined by reference to the context in which it is used in any particular circumstance.[65]

68. *Rich v Attorney-General (NSW)* [2013] NSWCA 419 provides some guidance about the meaning of the phrase in a coronial statute. The applicant in that case was a police officer who had shot a man dead in the course of his duties. The Coroner was investigating the death and directed the officer to give evidence. The officer objected arguing that the NSW equivalent to section 57 of the Act[66] provided him with insufficient protection.

69. The NSW Court of Appeal (Leeming JA; Bathurst CJ and Beazley P agreeing) rejected the officer's argument and noted the following:

- the Coroner's power to determine whether examination of a witness is in the 'interests of justice' is 'an instance of that class of broadly worded and undefined discretionary powers';[67] and

[59] *X7 at* [124]; see also *Lee (No 1)* at [54] (French CJ); at [79]-[82] (Hayne J); and [211] (Keifel J).
[60] See *Attorney-General of NSW v Borland* [2007] NSWCA 201 at [18] per Handley AJA (with whom Ipp and McColl JJA agreed) referring to the similarly worded s 33AA (3) of the former *Coroners Act 1980* (NSW).
[61] *Rich* at [38] *per* Leeming JA (with whom Bathurst CJ and Beazley P agreed).
[62] *Rich* at [39].
[63] *Rich* at [39], emphasis added.
[64] *Rich* at [18]-[19] and the authorities cited therein.
[65] *Rich* at [19].
[66] Section 61 of the *Coroners Act 1980* (NSW).
[67] *Rich* at [19]; see also *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [67].

- the words 'interests of justice' are of the 'widest possible reference.'[68]

70. One final observation by the Court of Appeal is significant. As the Court pointed out, the 'precondition for the exercise of the power is *not* that the interests of justice require the evidence to be given under compulsion'. Rather, it is 'merely that the Coroner be *satisfied* that the interests of justice so require'. [69]

71. The starting point for the application of the test in section 57(4)(b) is a correct understanding of the statutory task imposed on this Court. As Counsel Assisting submitted, 'in evaluating where the "interests of justice" lie in this matter, regard must be had to the scope and purpose of the Act and the Coroner's functions and powers as conferred by the Act and in particular section 57'. [70]

72. Counsel Assisting made submissions about my statutory functions. With one exception, these were not challenged by the applicants. For convenience, I set out Counsel Assisting's submissions on the statutory functions of the Coroners Court:

> The jurisdiction of the Coroners Court is inquisitorial; it is neither accusatorial nor adversarial in nature.[71]
>
> A Coroner is empowered to investigate deaths falling within the jurisdiction of the Coroners Court,[72] and in so doing, to make findings with respect to matters in s 67 of the Act, including, relevantly, the circumstances in which a death occurred.[73] The requirement that findings must be made 'if possible' underscores that it is obligatory for a Coroner to 'pursue all reasonable lines of inquiry'.[74]
>
> A Coroner is not bound by the rules of evidence but may be informed in any manner that he or she reasonably thinks fit.[75] As has been observed in the Court of Appeal:
>
> > *It is precisely because the Coroner must do everything possible to determine the cause and circumstances of the death that Parliament has removed all inhibitions on the collection and consideration of material which may assist in the task.*[76]
>
> A Coroner is obliged to investigate all of the circumstances of a death within the Court's jurisdiction.[77] The Coroner 'must discover all he or she can about the circumstances surrounding the death'.[78] A failure to make a relevant inquiry can give rise to jurisdictional error by a constructive failure to exercise

[68] *Rich* at [18] citing *Herron v Attorney-General for NSW* (1987) 8 NSWLR 601 at 613 per Kirby P.
[69] *Rich* at [20] emphasis in original; see also *Buck v Bavone* (1976) 135 CLR 110 at 119.
[70] Written submissions of Counsel Assisting dated 13 December 2021 at [13] citing *Lee* at [14] and [56] per French CJ and *Priest v West* (2012) 40 VR 521 (***Priest v West)*** per Tate JA at [167].
[71] *Priest v West* per Maxwell P and Harper JA at [3]; Tate JA at [167]-[172].
[72] See Part 4 of the Act.
[73] Section 67 of the Act.
[74] *Priest v West* per Maxwell P and Harper JA at [4].
[75] Section 62(1) of the Act.
[76] *Priest v West* per Maxwell P and Harper JA at [6].
[77] *Thales Australia Ltd v The Coroners Court of Victoria & Anor* [2011] VSC 133 at [72] per Beach J.
[78] *Priest v West* per Tate JA at [167] citing Victorian Parliament Law Reform Committee, *Coroners Act 1985: Final Report (September 2006),* Parliamentary Paper No 229 of Session 2003-06 at p 251 (emphasis added).

jurisdiction.[79] In fulfilling these statutory functions, a Coroner must be an active investigator.[80]

It is for a Coroner, and a Coroner alone, to determine both the witnesses to be called and the relevant issues for the purpose of an inquest.[81] In this inquest, the Coroner outlined the relevant issues on 8 October 2021.[82] The Coroner has determined that he wishes to call Ms Kos and Mr Kontis.

These statutory requirements are particularly important where a Coroner is investigating not one but 50 deaths. There is a very great public interest in such an inquest being thoroughly conducted with all lines of inquiry pursued and all relevant witnesses examined so as to inform the s 67 findings.

The Coroner also has a discretion to make recommendations to a Minister, public statutory authority or entity, including in relation to public health and safety or the administration of justice.[83] This important power underpins the preventative function that may be discharged by the Court.[84]

In exercising powers under the Act, a Coroner is obliged to have regard, as far as possible, to certain objectives, including, relevantly, the 'desirability of promoting public health and safety and the administration of justice'.[85]

If the Coroner forms a belief that an indictable offence 'may have been committed in connection with [a] death', he or she must, through the principal registrar, notify the Director of Public Prosecutions.[86]

In discharging the functions conferred by the Act, the Coroner enjoys broad investigatory powers, including coercive powers that expressly override common law protections.[87]

73. Subject to one matter, the applicants did not dispute these submissions. The one area of dispute about the Court's function concerns whether a failure by a Coroner to consider an important matter could amount to a constructive failure to exercise the investigative jurisdiction conferred on the Court. While Counsel Assisting submitted that it may, the applicants submitted that such a submission 'is a stretch'.[88]

74. I note that, in *Priest v West,*[89] the plurality considered, by reference to the decision of the High Court in *Minister for Immigration v SZGUR,*[90] that a failure by an inquisitorial body to 'make an obvious inquiry about a critical fact' could constitute a jurisdictional error.[91] However, the resolution of the question was unnecessary in that appeal and is also unnecessary for me to determine. It is sufficient for me to note for

[79] *Priest v West* per Maxwell P and Harper JA at [10]-[11].
[80] *Priest v West* per Maxwell P and Harper JA at [3]; Tate JA at [171].
[81] Section 64 of the Act.
[82] St Basil's Inquiry – Revised Scope of Inquiry.
[83] Section 72 of the Act.
[84] Section 1(c) of the Act.
[85] Section 8(f) of the Act; see also *Lee* at [56] per French CJ.
[86] Section 49(1) of the Act.
[87] See, e.g., section 55 of the Act.
[88] Written submissions in reply dated 14 December 202 at [22].
[89] (2012) 40 VR 521.
[90] (2011) 241 CLR 594 at [23].
[91] See also *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at 1129 [25].

present purposes, that this Court is required to discover *all it can* about the circumstances of the 50 deaths under investigation.[92]

Probative value of the applicants' evidence

75. It is against this background that I need to consider the significance of the evidence that the applicants are in a position to give if they are called. As noted, the applicants submit that the evidence is of 'low probative value', a matter Counsel Assisting dispute.

76. As noted above, Mr Kontis and Ms Kos were, at all relevant times, respectively the Chairman of the Board and the Director of Nursing and Facility Manager at St Basil's. The evidence before the Court is that they played a 'hands on' role in the day-to-day management of the facility. In particular, they played important roles in preparing for a possible outbreak of COVID-19 at the facility and responding to such an outbreak once it commenced on 9 July 2020. They are therefore clearly in a position to give direct evidence about nearly all of the topics identified in the scope of this inquiry as was recognized by their counsel at the commencement of his oral submissions.[93]

77. I accept the submissions of Counsel Assisting that, contrary to the Applicants' submissions at [39], the question is not whether I am *able* to make the findings required by s 67 of the Act in the absence of evidence by the applicants. It is whether, in the absence of that evidence, I am able to fulfill the statutory requirement of conducting as complete and thorough an examination of the circumstances of the deaths as can be reasonably done.

78. As submitted by Counsel Assisting, the evidence of Mr Kontis and Ms Kos is plainly directly relevant to, and highly probative of, my Inquest for several reasons. The applicants performed senior roles at the facility. Other than answering some questions asked by independent investigators Professors Gilbert and Lilly,[94] they have yet to provide evidence to the inquiry in respect of a number of particular events and issues relevant to the scope of the Inquest.

79. In their written submissions, Counsel Assisting set out what they described as 'an indicative list of questions' that, if they give evidence, Mr Kontis and Ms Kos will be asked by Counsel Assisting in relation to the question of why there was no notification of the outbreak by St Basil's to the email address maintained for that purpose by the Commonwealth Department of Health. This issue has occupied a great deal of time in the Inquest.

80. The evidence on this topic before the Court may be summarized as follows:

    (a) Aged care providers had been informed by the Commonwealth Department of Health and the Aged Care Quality and Safety Commission (ACQSC) by

[92] *Priest v West* per Tate JA at [167] citing Victorian Parliament Law Reform Committee, *Coroners Act 1985: Final Report (2006),* Parliamentary Paper No 229 of Session 2003-06 at p 251 (emphasis added).
[93] See T3416.22-3417.20 (15/12/21).
[94] See Gilbert and Lilly Report at p 24 (IB 2978) – 'responses to written questions…'. This undermines the applicants' submission at [36] which appears to be that they have never given an account relevant to the matters subject of the Inquest.

no later than 29 June 2020 (and probably earlier)[95] of the need to email the DOH on a particular email address if they had a positive case of COVID-19 at their facility;

(b) Aged care providers had also been informed by the Victorian Department of Health and Human Services (DHHS) of the need to notify by calling a particular phone number of any positive COVID-19 cases at their facility

(c) Ms Kos was informed of a positive case of COVID-19 concerning one of her employees on 9 July 2020;

(d) Ms Kos notified the Victorian DHHS by dialing the correct phone number on 9 July 2020;

(e) Ms Kos did not send an email to the Commonwealth DOH;

(f) The officers at the Commonwealth DOH who were responsible for implementing the Commonwealth's case management model were not informed of the St Basil's outbreak until 14 July 2020;

(g) Testing of residents and staff at St Basil's was not organized until 14 July 2020, did not occur until 15 July and the results were not provided until 17 July 2020; and

(h) By the time the first test results were known, 'the outbreak had already spread within the home and continued to do so…'.[96]

81. In these circumstances, it is clearly important for the Court to investigate thoroughly the question of why St Basil's did not send the email to the DOH email address.

82. The questions that Counsel Assisting submit they will ask of the applicants arise from evidence already before the Court:

- *Was St Basil's registered on the bulk information distribution service (BIDS) prior to 9 July 2020?*
- *Did St Basil's have an email address: manager@stbasilsvic.com.au in 2020?*
- *Did St Basil's receive the ACQSC newsletter dated 15 March 2020?*
- *Did St Basil's receive the DOH newsletters dated 7 April 2020, 18 April 2020 and 9 May 2020?*
- *Were Mr Kontis or Ms Kos aware of the ACQSC's flow chart dated April 2020?*
- *Did Mr Kontis or Ms Kos receive the 'First 24 Hours' guideline from the DOH or the ACQSC prior to 9 July 2020?*
- *Had Ms Kos seen the 'First 24 Hours' guideline before receiving it by email from Elpida Papakonstantinou on 14 July 2020?*
- *Had Mr Kontis seen the 'First 24 Hours' guideline before receiving it by email from Ms Kos on 19 August 2020?*

[95] See Exhibit 16 (Covid-19 Management Flow Chart dated 3 April 2020) and IB 8635-8637.
[96] Gilbert and Lilly Report at p 22 (IB 2976).

- *Did Mr Kontis or Ms Kos have a system in place to ensure they remained informed of new COVID-19-related information promulgated by the DHHS, the DOH and the ACQSC?*
- *Did Ms Kos read the Guide dated 1 July 2020 forwarded to her by the DHHS on 12 July 2020?*
- *If so, what did she understand were her reporting obligations in the event that there was a confirmed case of Covid-19 at the facility?*
- *Did Ms Kos tell the ACQSC officer during the conversation on 10 July 2020 that she had read the 'First 24 Hours' guideline?*
- *Were Mr Kontis or Ms Kos aware, as at 9 July 2020, of the guidance from the DOH that a confirmed case of COVID-19 at the facility should be notified to the DOH COVID-19 email address in addition to notifying the PHU by phone?*

83. I note that there is little or no evidence in relation to these matters presently before the Court. The answers are known only to the applicants. Their answers to these questions will enable the Court to fulfill its statutory duty to investigate the circumstances of the 50 deaths thoroughly as required by the Act.

84. The applicants' answers to these questions will also inform the exercise by the Court of the discretion to make recommendations about public health and safety conferred by s 72(2) of the Act. That this is a broad power is clear from the words 'connected with'.[97]

85. However, the power is not unconstrained. An important qualification on the power is that it is 'incidental and subordinate to the mandatory power to make findings relating to how the deaths occurred…'.[98] It is therefore of the utmost importance that my findings are based on all available evidence. At the moment there are two important gaps in the evidence being the evidence that the applicants are respectively able to give.

86. For example, if the evidence of the applicants is that the government guidance documents were sent to an incorrect email address, a recommendation under s 72(2) might focus on the importance of the government maintaining an accurate data base. If, however, the evidence is that the applicants were unable for whatever reason to understand the information and implement its guidance, a recommendation might focus on the type of information provided to stand-alone aged care providers such as St Basil's so as to maximise its impact. Finally, if the evidence is that the applicants followed the advice provided by the Victorian department, a recommendation might focus on the importance of there being one 'source of truth' or, at the very least, consistent messages from the various agencies. The crucial point is that, in the absence of the applicants' evidence, the court is not adequately informed to make a meaningful recommendation on this vital issue.

87. The present case is therefore an example of an inquest where '…the abrogation of the privilege [against self-incrimination] is justified in order for a coroner to establish the

[97] *Thales Australia Ltd v The Coroners Court of Victoria & Anor* [2011] VSC 133 at [74]-[76]
[98] *Harmsworth v State Coroner* [1989] V.R. 989 at 996

facts surrounding a person's death *and to make recommendations to prevent future deaths and injuries*'.[99]

88. According to the submissions of Counsel Assisting,[100] if the applicants give evidence, they will also be asked questions about other matters including:

- things said or done (or not said or done) by them between the 9 July 2020 and 22 July 2020 of which there are abundant (and often conflicting) accounts from a number of St Basil's care staff;
- communications between the applicants and various actors including the DHHS, the ACQSC and DoH;
- the applicants' attendance at meetings between St Basil's and a range of actors including Commonwealth and State Governments, the ACQSC, in-reach clinicians and other stakeholders (and, in particular, whether there were communications between Mr Kontis and Ms Kos between the meeting at 3pm on 21 July 2020 and the 22 July 2020);
- what was said by Ms Kos at the handover meeting on 22 July 2020;
- whether, and if so, why Ms Kos refused to provide clinical information about the residents to the surge workforce; and
- Mr Kontis's understanding that the close contact direction dated 21 July 2020 made by Professor Sutton was apparently conditional on St Basil's being satisfied that the replacement workforce was adequate.

89. The applicants' accounts of these matters have not been provided to the Court. Where accounts have been provided about these important topics, there are, in many cases, conflicts between witnesses' accounts which will be unable to be resolved without the applicants' evidence.

90. The applicants appear to accept that the evidence they are able to give on these matters is both relevant and probative. However, they contend that this 'does not tip the balance towards compelling them to testify'.[101] They also contend that 'it is not sufficient that the evidence is relevant to a fact in issue in the proceeding'.[102] Finally, the applicants submit that 'there is ample evidence …before the Coroner on every topic of inquiry, from which findings can be made'.[103]

91. I consider that these submissions proceed on a mis-apprehension about the nature of an inquest in which there are no 'facts in issue' as there are in adversarial litigation. As noted above, the Court's task is to 'do everything possible to determine the cause and circumstances of the deaths' under examination. The findings that the court is able to make on the evidence as it stands will not satisfy this requirement.

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[99] Victorian Parliament Law Reform Committee, *Coroners Act 1985: Final Report (September 2006),* Parliamentary Paper No 229 of Session 2003-06 at p 287 (emphasis added).
[100] Written submissions of Counsel Assisting dated 13 December 2021 at [42].
[101] Written submissions of the applicants in reply dated 14 December 2021 at [19].
[102] Written submissions of the applicants in reply dated 14 December 2021 at [20].
[103] Written submissions of the applicants in reply dated 14 December 2021 at [22].

92. I accept Counsel Assisting's submission that 'a significant lacuna exists in respect of the evidence'.[104] As a result, I consider that there is a real risk that the inquisitorial and remedial functions of the inquest – and therefore the interests of justice to be served by the inquest process - will be frustrated if the evidence of Mr Kontis and Ms Kos is not before the Court.

93. The applicants appear to accept this but submit that adjourning the finalisation of the Inquest 'until a criminal investigation or proceeding is concluded would not cause irreparable prejudice to the Coroner's interests'.[105] I note that this submission was only advanced by the applicants in reply on 15 December 2021 and therefore other interested parties, such as the families, have not had an opportunity to respond to it.[106]

94. Quite apart from that concern, I am troubled by the prospect that this Inquest, which is examining events that occurred 18 months ago, would not be finalised for what may be several years. This may be the time that elapses after charges are filed and the proceedings make their way through a committal hearing and a trial in the County Court beset as that Court is by COVID-19-related delays.

95. As Counsel Assisting point out, such a delay to the finalisation of this important inquest would likely exacerbate the distress of the 50 families and others affected by the deaths.[107] Section 8(b) of the Act requires me to exercise my functions under the Act to avoid, as far as possible, just such an outcome.

96. In the circumstances, I do not consider that adjourning the finalisation of the Inquest pending the resolution of any criminal proceedings that may be commenced against the applicants is a practical or desirable course to adopt.

Conclusion

97. For the reasons explained above, I am satisfied that it is in the interests of justice for both Ms Kos and Mr Kontis to be required to give evidence in this Inquest.

Signature:

Judge John Cain
State Coroner
Date: 22 December 2021

[104] Written submissions of Counsel Assisting dated 13 December 2021 at [44].
[105] Written submissions of the applicants in reply dated 14 December 2021 at [23]; see also T3459.25-3460.9 (15/12/21).
[106] As was pointed out by Counsel Assisting in their oral submissions – see T3494.8-21 (15/12/21).
[107] T3494.4-18 (15/12/21).