

2019

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CORONER'S REPORT – DEATH OF TIMOTHY ALLEN SMITH-BROWN

**Presented by
Mick Gentleman MLA
Minister for Police and Emergency Services**

CORONERS COURT OF THE AUSTRALIAN CAPITAL TERRITORY

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|--------------------------|---|
| Case Title: | AN INQUEST INTO THE DEATH OF TIMOTHY ALLEN SMITH-BROWN |
| Citation: | [2018] ACTCD 13 |
| Date of findings: | 14 August 2018 |
| Dates of hearing: | 24, 25, 26 October 2016; 20 February 2017 |
| Before: | Coroner P. J. Morrison |
| Findings: | <ol style="list-style-type: none">1. Timothy Allen Smith Brown died at approximately 17:45 hours on 4 September 2015 as a result of multiple injuries (including subarachnoid haemorrhage, and left pleural effusion suggesting rupture of the pulmonary vessels with exsanguination into the left haemothorax) sustained in a motor vehicle collision that occurred at the intersection of Drakeford Drive and Boddington Circuit, Kambah, in the ACT, immediately after a police pursuit; and2. Pursuant to the requirements of s 52(4)(a)(i) of the <i>Coroners Act 1997</i> I state that a matter of public safety arises in connection with this inquest. |
| Authorities: | <i>Coroners Act 1997</i> (ACT), ss 13, 52(1), 52(4), 55 <i>Evidence Act 2011</i> (ACT), s 55 <i>Finding - Inquest into the Death of Ahmad Numan Haider</i> (unreported, Victorian Coroners Court, Coroner Olle, 31 July 2017) |

Keown v Khan (1999) 1 VR 69

*R v Coroner Maria Doogan & Ors; ex parte Australian
Capital Territory* [2005] ACTSC 74

X7 v Australian Crime Commission [2013] HCA 29

Appearances:

Mr K Archer as Counsel Assisting the Coroner, instructed
by Ms S Baker-Goldsmith as in-house solicitor

Mr R Bhalla for the Australian Federal Police instructed by
AFP Legal

Mr D Perkins for Ms Smith and the family of Mr Smith-
Brown

File Number:

CD 179 of 2015

REASONS FOR FINDINGS, COMMENTS AND RECOMMENDATIONS

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OPENING COMMENTS

- 1 It is convenient to commence these reasons by reciting those circumstances surrounding the death of Timothy Allen Smith-Brown (“**the deceased**”) which are not in dispute.
- 2 On 4 September 2015, the deceased was driving a maroon Mitsubishi Magna along Drakeford Drive in Kambah, ACT. He was not wearing a seatbelt. Also

in the car was his pregnant partner, Ms Felicity Jessop, who was wearing a seatbelt.

- 3 At approximately 5:40pm, the deceased's vehicle became the subject of a police pursuit by ACT Policing members of the Australian Federal Police ("**AFP**"). During the pursuit both the deceased's vehicle and the police pursuit vehicle reached speeds significantly in excess of the posted speed limit. The pursuit lasted less than three minutes.
- 4 Ultimately, the deceased's vehicle was involved in a crash after it entered the intersection between Drakeford Drive and Boddington Crescent in Kambah, ACT, against a red traffic light, and struck a vehicle being driven by a Mr Rodney Gray. Mr Gray was completely blameless in respect of the collision that occurred.
- 5 Travelling with Mr Gray were his wife, Mrs Annette Gray, and their granddaughters Ms Emily Gray and Ms Kaylee Gray. Mr and Mrs Gray both suffered very serious injuries as a result of the collision and were hospitalised after being taken by ambulance from the scene of the collision. Ms Emily Gray suffered, amongst other injuries, a broken collarbone. Ms Kaylee Gray was able to get out of the car on her own and was not injured.
- 6 Both the deceased and Ms Jessop initially survived the crash. However, the deceased passed away at the scene shortly afterwards as a result of his injuries. Ms Jessop was severely injured, including head injuries. She gave birth to her child later that day by caesarean section. Mercifully the child survived.
- 7 Relevantly for present purposes the obligations placed upon a coroner under the *Coroners Act 1997* (ACT) ("**the Act**") are set out below.
- 8 Pursuant to section 52(1) of the Act I am required to make findings as to:
 - a. The identity of the deceased;
 - b. When and where the death happened;

- c. The manner and cause of death; and
 - d. In the case of the suspected death of a person – that the person has died.
- 9 Pursuant to section 52(4) of the Act I am further required to:
- a. State whether a matter of public safety is found to arise in connection with the inquest; and
 - b. If a matter of public safety is found to arise – comment on the matter.

SECTION 52(1) FINDINGS

- 10 On the basis of the evidence before me the section 52(1) findings are largely uncontroversial.
- 11 Police and other emergency services personnel attended the scene of the accident soon after the collision. The deceased was still located inside the Mitsubishi Magna. He was bleeding heavily. He was alive immediately after the collision but died shortly thereafter and before he could be extracted from the vehicle or medical attention could be provided to him. At about 21:20 hours on 4 September 2015, Dr Jane Van Diemen attended at the scene of the accident and formally pronounced life extinct. The deceased's body was conveyed to the Phillip Forensic Medicine Centre.
- 12 On 6 September 2015 Dr Derek Glenn reported on a CT scan of the deceased which had been performed at my direction at The Canberra Hospital. The scan revealed extensive injuries to the brain, chest, spine and limbs (particularly the legs) consistent with involvement in a motor vehicle collision. Dr Glenn noted that multiple causes of death were evident including subarachnoid haemorrhage, and left pleural effusion suggesting rupture of the pulmonary vessels with exsanguination into the left haemothorax related to blunt chest trauma. An autopsy was also conducted by Dr Jain on the same day. The finding of Dr Jain

was that the deceased died of multiple injuries due to involvement in a motor vehicle accident.

- 13 Toxicology conducted on the blood of the deceased detected the presence of drugs: amphetamine at less than 0.02 mg/L, methylamphetamine at less than 0.02 mg/L and tetrahydrocannabinol (“**THC**”) at 12 mg/ml. A report from Associate Professor Morris Odell from the Victorian Institute of Forensic Medicine suggested that the results for amphetamine and methylamphetamine were both at trace levels. His view was that the amphetamine and methylamphetamine had probably been used some days previously. He stated that because of possible post mortem re-distribution, the effect of the level of THC could not be interpreted accurately. The Associate Professor’s opinion was that the drugs found in the blood of the deceased were unrelated to death. That opinion was not challenged at hearing and I accept it.
- 14 In the circumstances, my findings for the purposes of section 52(1) of the Act are that Timothy Allen Smith-Brown died at approximately 17:45 hours on 4 September 2015 as a result of multiple injuries (including subarachnoid haemorrhage, and left pleural effusion suggesting rupture of the pulmonary vessels with exsanguination into the left haemothorax) sustained in a motor vehicle collision that occurred at the intersection of Drakeford Drive and Boddington Circuit, Kambah, in the ACT.

FOCUS OF HEARING AND SUBMISSIONS

- 15 Most of the evidence at hearing and the submissions received were directed towards any finding of matters of public safety and comment for the purposes of section 52(4) of the Act.
- 16 In written submissions Counsel Assisting submitted that a matter of public safety arises in connection with the inquest. Following receipt of those submissions I caused two section 55 notices to be issued to Senior Constable Stone and Constable Noble. They were the two police officers in the police vehicle, Vehicle

T55, which instigated the police pursuit of the deceased's motor vehicle. The notices foreshadowed potential adverse comments against them.

- 17 In written submissions in reply, counsel for the AFP raised some preliminary issues going to the jurisdiction and role of a coroner.
- 18 Those submissions, as I understand them, can be summarised as follows:
 - a. Any proposed adverse comments about Senior Constable Stone and Constable Noble fall outside the ambit of section 52(4) because the Act *“does not provide a general mechanism for an open-ended inquiry into the merits of government policy, the performance of government agencies or private institutions, or the conduct of individuals, even if apparently related in some way to the circumstances in which the death occurred”*; and/or
 - b. Any proposed adverse comments touch on areas which are *“disciplinary matters”*.
- 19 The submissions go on to press that adverse comments against Senior Constable Stone and Constable Noble are, in any event, not justified by the evidence. I deal first with the submissions as to jurisdiction.

JURISDICTION OF CORONER

Ambit of section 52(4)

- 20 The first submission just referred to appears to treat section 52(4) of the Act as a legislative provision informing a determination as to the jurisdiction of a coroner. I do not agree that it has that effect and so it is appropriate that, by way of preliminary observation, I record my understanding of the interaction between sections 13, 52(1) and 52(4).
- 21 It is section 13(1) which sets out what is fundamentally the role and therefore the jurisdiction of a coroner. That jurisdiction is to inquire into the manner and cause

of death of a person whose death falls within one of the listed categories. The scope of a coronial inquest is limited in that way. This approach to jurisdiction is consistent with decisions such as *R v Coroner Maria Doogan & Ors; ex parte Australian Capital Territory* [2005] ACTSC 74 (“*R v Doogan*”).

- 22 The extent to which the obligation to make the findings set out in section 52(1) extends the jurisdiction of a coroner is not a question which needs to be determined for present purposes.
- 23 A coroner’s obligations are also extended by section 52(4) of that Act. The extended obligations so imposed are limited, in the first instance, to stating whether a matter of public safety has been found to arise in connection with an inquest.
- 24 The obligation is not expressed in terms of requiring a coroner to find whether a matter of public safety arises, but rather of requiring a coroner to state whether a matter of public safety *is found to arise* in connection with an inquest.
- 25 The plain meaning of the language used in section 52(4) indicates a legislative intention not to extend the fundamental role and jurisdiction of a coroner, but rather to require a coroner to record a finding about a matter of public safety, if such a finding can be made as part of the investigation into the manner and cause of death.
- 26 This approach to the effect of section 52(4) is consistent with that taken in *R v Doogan* as to the power in a fire inquiry to make findings both as to the cause and origin of a fire and as to the circumstances in which it occurred. Speaking of the latter, the Court expressed itself at paragraph 37 in these terms:

The section only requires the coroner to make such findings [as to circumstances] to the extent permitted by the evidence adduced at the inquiry conducted under s 18(1), seen as relevant in the legal sense, to the “cause and origin of the fire”.

- 27 Having placed those observations on the record I return to the AFP submissions referred to above.
- 28 At the hearing into the manner and cause of death of the deceased, much evidence was received about the driving of the deceased's vehicle and of the police vehicle, and about Senior Constable Stone and Constable Noble's compliance (or otherwise) with the AFP National Guideline in relation to urgent duty driving and pursuits which was in force at the time of the pursuit ("**the Old Pursuit Policy**").
- 29 No objection was raised that the evidence was irrelevant. It is difficult to see how such an objection could have been sustained if it had been raised. Adopting the test for relevance in section 55 of the *Evidence Act 2011* (ACT) (which reflects the common law) the question to be answered would have been this: if evidence of police compliance or otherwise with the Old Pursuit Policy was accepted, could it rationally affect the assessment of the existence of a fact in issue, namely, what was the manner and cause of death of the deceased?
- 30 In *R v Doogan* the Court referred to the difficult issues which arise in relation to the concept of causation in the Act. In doing so, their Honours said, at paragraph 29:

A line must be drawn at some point beyond which, even if relevant, factors which come to light will be considered too remote from the event to be regarded as causative. The point where such a line is to be drawn must be determined not by the application of some concrete rule, but by what is described as the "common sense" test of causation affirmed by the High Court of Australia in March v E & MH Stramare Pty Ltd (1991) 171 CLR 506. The application of that test will obviously depend upon the circumstances of the case and, in the context of a coronial inquiry, it may be influenced by the limited scope of the inquiry which, as we have mentioned, does not extend to the resolution of collateral issues relating to compensation or the attribution of blame.

- 31 Against that background, in an inquest into the death of a person after a police pursuit, an argument that evidence about compliance or otherwise with the then-extant police pursuit policy could not rationally affect an assessment of the cause of the person's death would have faced some obvious difficulties.
- 32 The evidence about compliance or otherwise with the Old Pursuit Policy having been properly received at the hearing into the manner and cause of the deceased's death, the basis for objection in the first of the AFP submissions is not to the point.
- 33 If, on the basis of the evidence received, a finding can properly be made that a matter of public safety arises then I am obliged to make a statement to that effect, and comment on it. No question of the "ambit" of section 52(4) arises, beyond of course what is meant by the expression "a matter of public safety". No submission was made by any party that non-compliance with the Old Pursuit Policy, if found to have occurred, could not amount to a matter of public safety.

Disciplinary matters

- 34 The second of the submissions made by the AFP going to the question of jurisdiction is that referring to "disciplinary matters".
- 35 The submission cites the decision of Coroner John Olle in *Finding - Inquest into the Death of Ahmad Numan Haider* (31 July 2017) ("**the Haider inquest**") where the Coroner, at paragraph 62, said:

It is not the role of the coroner to lay or apportion blame, but to establish facts. It is not the coroner's role to determine criminal or civil liability arising from the death under investigation, or to determine disciplinary matters.

- 36 At the end of the first sentence just referred to Coroner Olle cites as authority *Keown v Khan* (1999) 1 VR 69. That decision dealt generally with the limited fact finding role of a coroner. There is no indication in the published reasons in

Keown v Khan that any question of disciplinary proceedings arose at the original coronial hearing, before Hampel J, or before the Victorian Court of Appeal.

- 37 The Haider inquest investigated the death of Ahmad Numan Haider, who was shot by a Victorian Police officer on 23 September 2014 outside the Endeavour Hills Police Station after stabbing both the officer who shot him and another officer.
- 38 That inquest considered the circumstances leading up to the death of Mr Haider, including what was described as conduct that involved radicalisation of Mr Haider, and the investigative and other activities of police, ASIO, the Joint Counter Terrorism Team and the Security and Organised Crime Intelligence Unit.
- 39 In his reasons the Coroner recorded, at paragraphs 314 and 315, that he made no adverse findings *“against Ms Mayfair or of JCTT members in respect to information conveyed to the officers at the Endeavour Hills Police Station” or “against Officer E or any member responsible for planning the engagement with [Mr Haider] on 23 September 2014.”*
- 40 Further, the findings made by Coroner Olle include a comment at paragraph 328 that *“[i]n my view, despite the horror of this tragic event, the endeavours of the personnel involved in [Mr Haider’s] investigation were exemplary.”*
- 41 I have not had access to a complete transcript of the proceedings before Coroner Olle, but there is nothing in the published reasons to suggest that any question ever arose on the evidence of any potential disciplinary proceedings against any person, much less that his decision involved any determination about the relationship between any such proceedings and the jurisdiction or role of a coroner.
- 42 It is trite to record that the role of the coroner is clearly not to determine disciplinary matters. I accept that to be so. What is pressed by the AFP however appears to be a proposition that, as a matter of law, the jurisdiction of a coroner does not extend to making findings about matters which are, may be, or may

have been, also the subject of some disciplinary proceedings. If that be the submission I reject it. Such a restriction is not expressly imposed in the Act nor necessarily implied from other language, by context or by the application of legal principle. The decision of Coroner Olle in the Haider inquest is not authority for the proposition pressed in the AFP submissions and it ought not to have been referred to in the submissions for that purpose.

- 43 There may be circumstances whereby coronial proceedings must be deferred until the completion of, for example, criminal proceedings, for the reasons given in decisions such as *X7 v Australian Crime Commission* [2013] HCA 29, but they are not the circumstances before me.
- 44 Having dealt with those preliminary matters, and having made findings as to the deceased's manner and cause of death, what remains is for me to consider whether, on the basis of the evidence received, a matter of public safety is found to arise in connection with the inquest.

WHETHER A MATTER OF PUBLIC SAFETY IS FOUND TO ARISE

- 45 I first record some findings about what are largely non-contentious matters about the pursuit.
- 46 It is not in dispute that the Old Pursuit Policy applied in the circumstances and at the time of the pursuit.
- 47 Counsel Assisting submits that the pursuit (for the purposes of the Old Pursuit Policy) began just prior to the Taverner Street intersection. As I understand the submissions on behalf of the AFP that is accepted to be the case and I find accordingly.
- 48 It is also not in dispute that the pursuit was terminated immediately prior to the collision.

- 49 Counsel Assisting made submissions about the original decision by Senior Constable Stone to direct the deceased to stop his vehicle. Those submissions concluded that, in the circumstances, it was reasonable for Senior Constable Stone to have formed the view that the vehicle should have been stopped and inquiries made of the driver as to his licence status and the registration of the vehicle. That submission is supported by the AFP and I find accordingly.
- 50 Further I also accept as accurate the observations of Counsel Assisting that:
- a. The alert to which Senior Constable Stone was responding suggested the possible commission of driving offences which may have been punishable only by a fine;
 - b. The alert did not indicate the possibility of any more serious offence by the driver of the vehicle; and
 - c. Senior Constable Stone himself indicated that he felt the system may have misread the number plate of the vehicle.
- 51 Counsel Assisting submits that at least prior to the Taverner Street intersection Senior Constable Stone's driving constituted urgent duty driving for the purposes of the Old Pursuit Policy. As I understand the AFP submissions that is accepted to be the case and I find accordingly.
- 52 Counsel Assisting goes on to refer to what he describes as the "*somewhat vague*" guidance to drivers contemplating beginning a pursuit. He acknowledges what is described as the "*instantaneous nature*" of a decision to commence a pursuit and submits that, in the circumstances of this case, Senior Constable Stone could not be criticised for commencing the pursuit. Again I accept that submission.

Speed of vehicles

- 53 It is convenient to deal at this point with the evidence received at hearing about the speed of the vehicles.
- 54 Exhibit FF is the statement of Senior Constable Cooper. The Senior Constable is a Collision Analyst of considerable experience. He undertook calculations of the police vehicle's average speed throughout the pursuit based upon two methods of calculation, the results of which are set out in his statement.
- 55 The first method relied upon GPS data obtained from a Garmin GPS device installed in the police vehicle. The Garmin device logged the location of the vehicle at frequent, known intervals, permitting an average speed to be calculated as between each logged location by reference to the police vehicle's change in location each time the log was updated.
- 56 The second method relied upon Senior Constable Cooper noting the time, (calculated to a thirtieth of a second) that light poles visible on the in car recording reached the left extremity of the image. The Senior Constable then manually recorded the actual distance between each of those light poles in order to calculate an average speed for the police vehicle between them.
- 57 As Exhibit FF shows there is a difference between the results based upon the two methods of calculation. I treat the AFP submissions as being to the effect that the GPS calculations should be preferred, as those calculations are cited throughout the AFP submissions. Evidence was received about the reasons for the difference and Senior Constable Cooper was asked about which he regarded as more accurate at any point.
- 58 The exchange which took place was this:

[Counsel Assisting:] In your opinion, which of the two methodologies gives a reflection of a point of time speed? Which is the more accurate?---If you're looking for a point of time speed, I suppose the pole speeds, if I can

refer to them as that, are more representative I suppose of a specific point in time by virtue of the fact that they are over a shorter distance. So it's still an average speed but computed over a shorter distance.

(24 October 2016, page 93)

- 59 Unfortunately a malfunction of the court recording equipment resulted in other evidence given by Senior Constable Cooper not being decipherable. My own recollection is that the extract to which I have just referred accurately reflects the overall tenor of his evidence.
- 60 A significant consideration in my deliberations has been the speed of the vehicles between the Taverner Street intersection and the Athllon Drive intersection.
- 61 The maximum speed estimated for the pursuit vehicle between those two points is:
- a. In the case of the GPS method – 171 km/h (at 17:44:16 – 17:44:20); and
 - b. In the case of the light pole method – 174 km/h (at 17:44:20 to 17:44:21).
- 62 It is obvious that the speed of the pursuit vehicle is not the same as the speed of the Mitsubishi Magna between the two intersections. At one point the Mitsubishi Magna is pulling away from the pursuit vehicle and at another the pursuit vehicle is gaining on the Mitsubishi Magna. Despite that observation, it is apparent from what can be seen on the video and what is estimated to be the speed of the pursuit vehicle (according to either calculation) that the Mitsubishi Magna was travelling very fast and probably as fast as 175 km/h for at least a short time.
- 63 On the basis of the evidence received at hearing, the highest speeds reached by the pursuit vehicle at any point during the pursuit were:
- a. According to the GPS method – 177 km/h (at 17:44:52 – 17:44:57); and

b. According to the light pole method – 187 km/h (at 17:45:01).

64 For present purposes the difference between the estimated speed according to the two methods is not material.

The course of the pursuit

65 I turn to what took place in the course of the pursuit.

66 I have had the benefit of seeing the video footage from the pursuit vehicle. The course of the pursuit is described in Counsel Assisting's submissions in the following terms:

50. After the pursuit commenced the car driven by the deceased accelerated away. It drove through the Taverner Street intersection at some speed. The police car followed within two seconds at a speed around 180 kph against a freshly turned red light. The cars travelled north towards the intersection of Drakeford Drive and Athllon Drive. The journey took about 16 seconds and the highest speed of the police vehicle was approximately 174 kph. The speed of the deceased's car may have, on average, been slightly less as the police car gained on it.

51. At the intersection of Drakeford Drive and Athllon Drive the deceased's car mounted the median strip to the right of the northbound carriage way to get around the stationary traffic that otherwise impeded his northerly progress. He cut across the stationary traffic and continued his progress north. The police car did the same perhaps against a green arrow governing right hand turns from the south bound carriage way.

52. The journey from Athllon Drive to O'Halloran Circuit South took approximately 11 seconds. The speeds were harder to calculate because of the absence of poles although the GPS data suggest that

the police car was travelling in excess of 150kph -and possibly significantly so - when it went through that intersection on a green light.

53. Between O'Halloran Circuit South and O'Halloran Circuit North the journey took 18 seconds. The speed of the police vehicle was approximately 187 kph at its highest. When the deceased's car reached the O'Halloran Circuit North it veered into a bike lane to the left of the north bound carriageway to enable it to pass traffic that was queued and stationary at the lights. The police vehicle did the same thing.

54. The final segment of the pursuit was between O'Halloran Circuit North and Boddington Circuit where the collision occurred. This portion of the pursuit took 20 seconds (to the point of impact at 17.45.45). The maximum speed reached by the police car was 166 kph. The police car slowed appreciably before the incident and had probably begun slowing before the pursuit controller ordered the pursuit to be terminated in a transmission that began at 17.44.43.

67 I adopt that description of what can be seen on the video subject to the additional observations made upon the closer analysis of what occurs at the Athllon Drive intersection as at paragraph 150 of these reasons.

68 It is accepted that the video evidence largely speaks for itself, and to adopt the AFP submissions, *"is the most comprehensive record of what actually transpired during the pursuit, including transmissions made to and from"* the Police Communications centre.

69 The AFP submissions refer to and rely, in part, upon the evidence about the conclusions reached by a body described at hearing as the Driver Incident Review Committee ("**the DIRC**"). The evidence is that it is an internal AFP body charged with reviewing all police pursuits and urgent duty driving that take place

in the ACT. This is a convenient point at which to make some observations about that evidence.

The DIRC Report

70 Exhibit DD is a document which was referred to in the course of the hearing, and in submissions, as the DIRC Report.

71 Despite being referred to as a report, Exhibit DD describes itself as a “minute”. It is dated 21 October 2016 and signed by Commander John Bourke as Chair of the DIRC. It says that the meeting of the DIRC took place on 19 October 2016. The document is headed “Inquest into the death of Timothy SMITH-BROWN” and its overall tenor suggests that it is a document prepared for the purposes of this inquest rather than any more general or broad report on the proceedings of the committee.

72 That document relevantly says (in part) as follows:

*“As a result of the meeting the DIRC formed the following **majority agreement**.*

The members involved in the police pursuit substantially complied with the guideline that was valid at the time of the pursuit.” (Emphasis added.)

73 The minute runs to some three and a half pages and includes more detail than what I have set out above.

74 Exhibit DD does not say what was the extent of the majority and nor does it record the views of the dissenting member or members.

75 Exhibit DD refers to “*the video and audio files of the pursuit*”. Several video and audio files were put into evidence at hearing and it is not clear precisely which file or files were before the DIRC. In particular it is not evident on the face of the document that the DIRC had before it the electronic file which also records the

estimated speed of the pursuit vehicle from time to time. Given that the file was prepared expressly at the request of the coronial investigation team for the purposes of the coronial inquest, and no permission was sought from me for its broader use, I infer that it was not before the DIRC.

- 76 Exhibit DD does not say what if any other evidence about the pursuit was before the DIRC. It does not say whether, and if so what, submissions were received on the question of compliance or otherwise with the Old Pursuit Policy.
- 77 Exhibit DD does address in some detail some aspects of section 21 of the Old Pursuit Policy, which refers to matters to be communicated to Police Communications upon commencement of the pursuit. The relevant text is set out in full at paragraph 87 below. The minute does not explain why that subsection was the subject of particular attention.
- 78 The only reference in Exhibit DD to the speed of the vehicles appears in these terms:

As the speed was only given once the DIRC would remind the driver/passenger of responsibility for regular updates. Prior to the collision the review showed the offending vehicle and the police vehicle varied their speeds to the conditions, significantly slower for intersections and no other cars were seen to take action to avoid a collision.

- 79 That comment can only be a reference to the radio call from the pursuit vehicle notifying the Pursuit Controller that its speed was “160 over 80”. It must be assumed therefore that the DIRC was aware that, at least at that point in time, the speed of the pursuit vehicle was 160 km/h.
- 80 Nothing else is said anywhere in Exhibit DD about the speed at any point in time of the pursuit vehicle or of the vehicle being pursued. If the DIRC had other evidence before it of the speed of the vehicles (assuming that evidence to have

been the same or similar to the evidence received at this hearing) then the absence of any mention of speed whatsoever is very surprising.

- 81 If the DIRC did not have other evidence of speed before it then the absence of that evidence significantly affects the weight to be given to the conclusion reached by the majority.
- 82 In addition to the observations just made, there is also nothing in Exhibit DD to indicate that the DIRC addressed compliance with section 24 of the Old Pursuit Policy dealing with termination of the pursuit. In particular the minute contains nothing about whether the DIRC formed a view about whether anything before them amounted to “*real or potential danger to police, members of the public or people in the suspect vehicle*” for the purposes of section 24 a. and, if they did, what conclusion they reached on the balancing exercise required by the section and their reasons for doing so.
- 83 The absence of any indication that the committee addressed the question of “*real or potential danger*” adds poignancy to the comments already made about the lack of any reference to speed in the minute.
- 84 The AFP submission is that the DIRC assessment “*should be given due weight*”. Exhibit DD may well, on its face, represent an opinion that some unspecified majority of the persons comprising the Committee formed the opinion referred to in it, but for the reasons given, the omissions in it are significant and they are unexplained.
- 85 In the circumstances little or no weight attaches to the opinion expressed in Exhibit DD.

COMPLIANCE WITH OLD PURSUIT POLICY

- 86 The submissions of Counsel Assisting draw attention to the evidence in two areas where it is submitted that a finding might be made that a matter of public safety arises. They are:

- a. The obligation under the Old Pursuit Policy to provide notice of the progress of the pursuit at regular intervals - the “**regular update**” issue; and
- b. Whether and when under the Old Pursuit Policy Senior Constable Stone was obliged to terminate the pursuit – the “**late termination**” issue.

The Regular Update Issue

- 87 The relevant part of the Old Pursuit Policy is section 21 i. It is in the following terms:

When a pursuit is commenced, a member in the vehicle will notify the Police Communications of:

- i. The reason of pursuit*
- ii. The vehicle description and registration number if available*
- iii. The location and direction of the offending vehicle*
- iv. The progress of the pursuit (at regular intervals)*
- v. The speed of the offending vehicle (at regular intervals)*
- vi. The relevant speed limit*
- vii. Traffic conditions*
- viii. The category class of the member’s vehicle*
- ix. The driving qualifications of the member*

88 It is not in contest that both Senior Constable Stone and Constable Noble were aware of the relevant obligations under the Old Pursuit Policy. The information provided by way of the communications required under the Old Pursuit Policy is necessary to enable the Pursuit Controller to make an informed decision about termination of the pursuit. That follows as a matter of common sense and was confirmed by the testimony given by Detective Sergeant Dean. (The Pursuit Controller is an officer in the Police Communications Team given overall management responsibility for the pursuit under the Old Pursuit Policy.)

89 Counsel Assisting submits that:

There is no suggestion that the content of any transmission made by either Constable did not reflect their joint views or that the person at the time on control of the radio receiver was prevented or discouraged from making transmissions by the other or failed to make transmissions suggested by the other. Given the radio system only allowed communications from one side at a time, there was no technical impediment to transmissions being made from the car at any time that Police Communications was not broadcasting.

90 That submission is accepted by the AFP.

91 The communications which were made and the time at which they were made are reproduced in Counsel Assisting's submissions. The submission is accurate but for the misattribution of the source of the communication at B and a typographical error at E, both of which have been corrected in what is set out below.

| | | | |
|----|------------------------|------------------|------------|
| A. | Vehicle T55: | 1 AFP T55 urgent | (17.44.14) |
| B. | Police communications: | 55 go | (17.44.18) |

| | | | |
|----|------------------------|---|------------|
| C. | Vehicle T55: | T 55 I've got a vehicle failing to stop. It's a maroon Mitsubishi Magna, standby | (17.24.24) |
| D. | Police communications: | <i>Location?</i> | (17.44.30) |
| E. | Vehicle T55: | 55 heading north, heading north on, uh, Drakeford Drive | (17.44.34) |
| F. | Vehicle T55: | Yeah T 55 heading north on Drakeford Drive, just passing O'Halloran Circuit, we're in pursuit | (17.44.45) |
| G. | Police communications: | <i>1 AFP, T 55 warning to be given, if there is any unjustified risk to any person, you are to terminate the pursuit immediately, do you understand the warning?</i> | (17.44.51) |
| H. | Vehicle T55: | Yeah warning understood, still heading north | (17.45.03) |
| I. | Police communications: | <i>Copy that. Can you go with road conditions, speed, reason for pursuit?</i> | (17.45.03) |
| J. | Vehicle T55: | Reason for pursuit fail to stop, we're just trying to get close enough to get the registration. Maroon Mitsubishi, still heading north on Drakeford Drive coming up to the second O'Halloran on Drakeford Drive | (17.45.20) |
| K. | Police communications: | <i>Copy that, and your speed.</i> | (17.45.33) |
| L. | Vehicle T55: | Speed 160 over 80. | (17.45.38) |
| M. | Police communications: | <i>1 AFP from the DOM, terminate pursuit. T55 do you copy terminate pursuit</i> | (17.45.43) |

| | | | |
|----|--------------|--|------------|
| N. | Vehicle T55: | 55 terminated, the vehicle has crashed as it went through the intersection O'Halloran Drive can I get other emergency services here ASAP, thanks | (17.45.52) |
|----|--------------|--|------------|

92 Counsel Assisting's submission is that the requirements of the Old Pursuit Policy to provide information at regular intervals about speed and progress were not met.

93 As I understand the AFP submissions in response they are these:

- a. The most important information required to be communicated was about the location of the pursuit and the description of the vehicle. That information was conveyed.
- b. The pursuit vehicle travelled at speeds ranging from 19 km/h to 177 km/h. Communication of speed would have been limited to conveying the speed at the point in time of the communication. If the speed had been broadcast earlier the speed may well have been slower. To require anything else of an officer is to place an impossible burden on them.
- c. It was appropriate for the officers to prioritise "*situational awareness*", meaning, as I understood the submission, safety concerns, over the requirement for other communications.
- d. The evaluation of the conduct of the officers during the pursuit "*must be judged by reference to the pressure of events and the agony of the moment, not by reference to hindsight*".
- e. The evidence does not support a conclusion that the Pursuit Controller would have terminated the pursuit earlier if the speed had been communicated earlier.

- 94 The Old Pursuit Policy speaks in absolute terms – “a member in the vehicle **will notify** the Police Communications of” various matters. (Emphasis added.)
- 95 As will be apparent from the summary of the AFP submissions just given some of them go to questions of whether any departure from what was required under the policy was justified having regard to various factors, such as prioritising safety concerns.
- 96 The policy does not, on its face, allow for such matters to be taken into account. Whether it should have done so is beyond the scope of this inquiry. (It is apparent that the DIRC treats full compliance, substantial compliance or partial compliance with the Old Pursuit Policy as constituting compliance, but again no reasons are given by the DIRC for that approach.)
- 97 Having made that observation, not to have regard to the submissions going to matters of justification would be unfair to the officers insofar as the making of any adverse comment is concerned. On the other hand, the existence of a factor which might justify departure from the policy should not, ipso facto, prevent a conclusion that a matter of public safety has been found to arise.
- 98 I do accept that, as a matter of common sense, the conduct of an officer engaged in a pursuit must be judged against the background of the pressure of the circumstances existing at the time, including where immediate decisions must be made and in the absence of opportunity for calm reflection before acting on those decisions.
- 99 Insofar as the submission is that the most important information required to be communicated was about the location of the pursuit and the description of the vehicle, I do not accept that the transmission of that information amounted to proper compliance with the requirements of section 21 i of the policy. Clearly it did not. As to the (implied) submission that non-compliance was justified because what was transmitted was the most important information I do not accept that to be the case. In making that submission Counsel for the AFP relies, in part, upon the testimony of Detective Sergeant Dean.

Evidence of Detective Sergeant Dean

100 The evidence of Detective Sergeant Dean comprised his written statement dated 5 September 2015 (Exhibit N) and his sworn testimony.

101 At the relevant time Detective Sergeant Dean was on duty and occupying the role of Duty Operations Manager (“**DOM**”). His unchallenged evidence from his statement, at paragraphs 9 and 16, was that:

- a. During any pursuit the DOM assumes the role of Pursuit Controller; and
- b. A direction to terminate a pursuit may be made by various persons including the Pursuit Controller.

102 Detective Sergeant Dean said, at paragraphs 7 and 10 of his statement, that he had heard the radio transmission from Vehicle T55 to the effect that a Mitsubishi Magna vehicle had failed to stop, followed by a transmission to the effect that T55 was in pursuit of the vehicle. His statement then continued:

As the pursuit controller, I immediately turned my mind to the particular location of the pursuit. I was aware that Drakeford Drive is a bituminised arterial road, the carriageway running north on Drakeford Drive consists of three lanes and the posted speed on Drakeford Drive is 80km/h.

103 He went on to say at paragraph 14:

My immediate focus and consideration in relation to the pursuit was the volume of cars on the road and the speed of travel of the VOI. I was mindful of the time of the day, noting that traffic generally builds in volume around the end of a working day.

104 And then at paragraph 15:

I instructed Mr Heraid to seek this information, more specifically traffic conditions and road speed, from T55, in an effort to properly assess and re-evaluate the conduct and control of the pursuit. Mr Heraid immediately requested the speed of the pursuit. This was provided by T55 as 160 over 80. I took this to mean that the pursued vehicle was travelling at 160km/h in an 80km/h posted speed limit. In consideration of the high speed travelled and in absence of other information including vehicular traffic, I considered it to be too high of a risk to continue the pursuit.

- 105 In the course of his oral testimony Detective Sergeant Dean was asked a range of questions about both what guides his decision making generally on the question of when and whether to terminate a pursuit, and what guided his decision making on 4 September 2015.
- 106 Detective Sergeant Dean was shown the video footage taken from the pursuit vehicle, and the table of estimated speeds which was prepared by Senior Constable Cooper as part of Exhibit FF.
- 107 He agreed that, as Pursuit Controller, he “*should have been made aware of*” the manner in which the Mitsubishi Magna drove onto the median strip at the Athllon Drive intersection. (Transcript 26 October 2016, page 209.)
- 108 His attention was drawn to the speed of the pursuit vehicle after the Athllon Drive intersection at about the time at which the pursuit warning was given. The following exchange took place:

[Counsel Assisting:] So there'll be a debate perhaps about [which speed indicator is] more reliable but let's take the most conservative. 177, 172 [kilometres per hour] at about that time? --- Sure.

*Now that's obviously faster than at the speed at which you terminated?
--- Yes.*

If you had known that would you have terminated? --- Yes, of course.

(Transcript 26 October 2016, page 210.)

- 109 The officer was asked whether he would have terminated the pursuit if he had known that the Mitsubishi Magna had mounted the median strip. His response was:

That's a difficult question. I mean they're all hypotheticals. Just because a car mounts a median strip doesn't necessarily mean that it's presented a danger or risk to the public.

and later:

Or I could say unjustifiable risk. Look, in the absence of other information I may not have terminated at that point but if there was other information to inform me then I could make a reliable decision.

(Transcript 26 October 2016, page 210.)

- 110 Under cross examination Detective Sergeant Dean acknowledged that because the speed of the pursuit vehicle varied during the course of the pursuit a communication to him of the speed at a particular point in time might have indicated that the speed at that point in time was, in fact, very low. He agreed with a proposition that he probably would not have terminated the pursuit if told that the speed was low. In response to a proposition that his decision on whether or not to terminate the pursuit would have been based upon whatever speed was communicated he replied by saying – *"With other factors, yes."* (Transcript 26 October 2016, page 216.)

- 111 In re-examination the following exchange took place:

[Counsel assisting:] And in relation to issues of speed we've seen on the video that when they got to the Athllon Drive intersection for example they mounted the median strip and were going at whatever speed - 20 or 40

kilometres an hour. Now, you wouldn't expect a driver to phone in on doing 40 when previously he was doing 150 and afterwards he's doing 180. That's not what you're saying is it?--- No, that's not what I'm saying.

Okay. So you would expect the driver to give you a realistic impression of what's going on?--- Yes, that's right.

(Transcript 26 October 2016, pages 217-218.)

112 It is apparent that the speed of the Mitsubishi Magna and of the pursuit vehicle were very important considerations in the circumstances of this pursuit. Having regard to what is the obvious and common sense purpose behind requiring information to be conveyed by the officers in pursuit to Police Communications, I am satisfied that information giving a realistic impression about speed ought to have been conveyed before it was in fact conveyed. In my opinion proper compliance with the Old Pursuit Policy required that to be done.

113 I reject, as being blatantly contrary to the obvious intent of the Old Pursuit Policy, the submission that, in the circumstances of the pursuit under consideration, non-compliance with the Policy was justified because what was conveyed was the *"most important information"*.

114 The AFP submission goes on to say that if the speed had been conveyed earlier the speed at that point in time may well have been slower and to require an officer to do anything other than convey speed as at a point in time is to place an impossible burden on them.

115 That submission must also be rejected as a matter of common sense. To do otherwise would be to thwart the obvious (and reasonable) intent of the policy. As the testimony of Detective Sergeant Dean made clear what was expected of a driver was information giving a realistic impression of what was going on. That is again a matter of common sense. Conveying a realistic impression about speeds could have been achieved in a number of ways. The AFP submission appears to proceed on the basis that the officers were unable to do anything

other than to note and convey information about the speed at a particular point in time. The submission does not say why that is so and I do not accept that to be the case. It was obvious to both officers that both the Mitsubishi Magna and their pursuit vehicle were at times travelling at very high speeds. As the AFP submission notes, in the course of the pursuit the speed of both vehicles was at times very high and at other times much slower. Even if the officers thought it unsafe to direct attention to communications with the Pursuit Controller at the point in time when the speed was very high, there is no valid reason why they could not notify the Pursuit Controller of the high speeds which had been attained when their speed subsequently slowed.

- 116 I do accept the submission that a high level of situational awareness was called for and that there were competing demands on the time and attention of the officers. Even making a generous allowance for the pressure under which the officers found themselves I do not accept that those matters justify the failure to convey to the Pursuit Controller what was fundamentally important information about the speed of the Mitsubishi Magna and the pursuit vehicle at a point in time earlier than when that information was in fact conveyed.
- 117 The obligation to convey information was an obligation upon both Senior Constable Stone and Constable Noble under the Old Pursuit Policy. The failure to convey the information is a failure on the part of both of them. The AFP submission that it is unfair to attribute responsibility to Constable Noble because he was a very junior officer on his second day on the job is not to the point.
- 118 Having found that the information just referred to ought to have been conveyed earlier, I turn to consider the consequences of that finding.
- 119 The AFP submissions are that the evidence does not support a conclusion that the Pursuit Controller would have terminated the pursuit earlier if the speed had been communicated earlier.
- 120 The AFP submissions quote selectively from the testimony of Detective Sergeant Dean to support the proposition. I do not agree that his testimony was to the

effect pressed for in the submission. I am satisfied, on the basis of his testimony (to which I have already referred at paragraphs 100 to 111 of these reasons) that, had the required communication been made earlier, and in particular at the point in time after the Athllon Drive intersection at which the Mitsubishi Magna reached the high speeds indicated previously, then Detective Sergeant Dean would have ordered that the pursuit be terminated.

- 121 Allowing some time for the information to be conveyed and the Pursuit Controller's decision to be made and communicated I find that it is more likely than not that the pursuit would have been terminated when both vehicles were between the Athllon Drive intersection and the O'Halloran Circuit South intersection.
- 122 If the pursuit had been terminated at that time the high speed driving of the pursuit vehicle from that point would have ceased. Any assessment of what the deceased would have done after that point is speculative.
- 123 Having concluded that the pursuit would probably have been terminated when both vehicles were between the Athllon Drive intersection and the O'Halloran Circuit South intersection if the Old Pursuit Policy had been complied with, and having regard to what is apparent from the video record, I find that a matter of public safety arises because the continuation of the pursuit beyond that point unjustifiably placed other users of Drakeford Drive and the intersecting carriageways in danger.
- 124 Insofar as the finding just made is an adverse comment against the conduct of Constable Noble, it is a comment which must be viewed against the background of the evidence that he was a very junior officer on his second day on the job.

The Late Termination issue

- 125 The question which next arises is that of whether Senior Constable Stone failed to comply with section 24 a. of the Old Pursuit Policy. Constable Noble was a

junior member and was not the driver of the pursuit vehicle and had no obligation under the Old Pursuit Policy in respect of the termination of the pursuit.

126 That section of the Old Pursuit Policy is in these terms:

Termination of pursuit

- a. Where the value of apprehending an offender in a pursuit, is outweighed by any one or more of the following criteria, the member who is the driver of the vehicle involved in the pursuit will terminate that pursuit:*
 - a. The real or potential danger to police, members of the public or people in the suspect vehicle (for example, overtaking into oncoming traffic, disobeying traffic signals, crossing intersections at speed)*
 - i. The volume of road and pedestrian traffic in the area*
 - ii. The weather and road surface conditions, and features of the particular locality of the pursuit*
 - iii. The nature and comparative seriousness of the offence/matter*
 - iv. Whether there are other reasonable means available for police to identify or apprehend the relevant people*
 - v. The offenders identity is established to a point where later apprehension is likely and there is no immediate threat to public safety*
 - vi. The distance between the police vehicle and the other vehicle is so great that further pursuit is futile*

- vii. *The speed of the subject vehicle involved*
 - viii. *The experience/competency of the driver*
 - ix. *The performance capabilities of the police vehicle*
 - x. *The provisions providing exemption for urgent duty driving within Rule 305 of the Australian Road Rules no longer apply*
 - xi. *Where there are malfunctions with police equipment and/or serious damage to the police vehicle involved in a pursuit which makes the continued operation of the pursuit hazardous*
 - xii. *The vehicles in the pursuit lose radio contact with ACT Police Communications.*
- b. *A direction to terminate a pursuit may be given by one of the following members:*
- i. *A member in the police vehicle who is senior in rank or experience to the driver*
 - ii. *The team leader of the driver of the vehicle involved in the pursuit*
 - iii. *A member performing the duties of a Superintendent or above*
 - iv. *The Pursuit Controller.*
- c. *If any member considers that the pursuit should be continued and the Pursuit Controller monitoring the pursuit disagrees as to continuation, the Pursuit Controller has the authority to direct that the pursuit be terminated.*

- d. *A pursuit will not be re-initiated by any other police vehicle unless approval is first granted by the Pursuit Controller. It should be noted that this approval will only be considered if pertinent information is received which would sufficiently alter the circumstances of the original response.*

Terminate – *means to immediately cease the activity and, in the case of a pursuit, cease the pursuit and stop following the offending vehicle and return to the legal speed limit, stopping the police vehicle completely and turning off all warning devices as soon as possible and safe to do so. This applies to all police vehicles whether directly or indirectly involved in the incident.*

- e. *Upon termination of a pursuit, members will:*
- i. *Notify police communications immediately that the pursuit has been terminated and the reasons for termination*
 - ii. *Carry out a safety check of the police vehicle when safe to do so. This check will include:*
 - *Leaving the engine running to continue engine cooling*
 - *A visual inspection of the engine bay for excessive coolant loss*
 - *A visual inspection of the tyres and rims of the vehicle for damage*

- *Visual inspection of the body of the vehicle, particularly if contact with another vehicle or object may have occurred during the pursuit.*

Physical termination of pursuit

- f. Members engaged in a pursuit will not attempt to forcibly stop another vehicle, other than by the use of a tyre deflation device, unless immediate intervention is necessary to prevent imminent loss of life or serious injury.*
- g. Road blocks (with the exception of the deployment of tyre deflation devices) will not be used without the express permission of a member performing the duties of a superintendent or above, and then only as a last resort to prevent loss of life or serious injury.*
- h. Members will not deploy tyre deflation devices in a pursuit without the authority of the Pursuit Controller.*

127 I pause here to note that wording of section 24, at least in the document which was received in evidence, is not sensible. Section 24 commences with a subsection a. which sets out the balancing exercise just referred to and calls for termination if the value of apprehension “**is outweighed by any one or more of the following criteria**”. (Emphasis added.)

128 What next follows is another apparently separate subsection also headed a. It sets out what sensibly is a criterion against which the value of apprehension is to be weighed – referring to the danger to police and members of the public. What next follows are a range of other sub-paragraphs or perhaps sub-sub-paragraphs designated by roman numerals from i to xii. Some of these last matters listed would be things properly taken into account as part of the assessment of the real or potential danger called for in (the second) sub-paragraph a.

129 I have approached the matter on the basis that the effect of section 24 of the policy was to call for Senior Constable Stone to balance the value of apprehending the offender against real or potential danger and, in doing so, to have regard to all of the things which subsequently appear in section 24.

130 Counsel Assisting's submission is that the latest the pursuit should have been terminated by Senior Constable Stone was at or immediately after the Athllon Drive intersection. Counsel Assisting points to the statement of policy which appears at section 6 of the Old Pursuit Policy in these terms:

There are serious safety risks associated with police officers driving at speeds in excess of prescribed speed limits, and with the pursuit of drivers who refuse to comply with a direction to stop. The sworn duty of a police officer to protect life and property will always have primacy over the need to apprehend offenders, especially when the offence involved is relatively minor, or where there are safer options other than immediate apprehension.

131 Counsel Assisting's submission goes on to make these observations:

- a. The Old Pursuit Policy does not define what is a relatively minor offence;
- b. The evidence is that at the relevant time pursuits in the ACT were quite common and the review conducted by Sergeant McPherson suggested that traffic offences were a common justification for engaging in pursuits both in the ACT and in other jurisdictions; and
- c. The existence of an established practice does not however excuse ignoring what is required under the Old Pursuit Policy.

132 The submission then continues:

77. ... Under the Old Pursuit Policy there was no justification for standing outside the Australian Road Rules unless there was a

satisfaction reached based on given criteria that such an action was justified. The obligation is an ongoing one and lawful entitlement to operate outside the Australian Road Rules is dependent on the assessment being undertaken and the assessment ultimately favouring (here) the continuation of the pursuit. In this case there is little evidence of the process of assessment required by the Old Pursuit Policy being undertaken at all after the pursuit commenced. The pursuit happened in peak hour traffic albeit on a carriageway that carried traffic going against the flow. The volume of cars on the road was still significant, noting in this context, the build-up of traffic at the Athllon Drive and O'Halloran Circuit North intersections. The speed of the two cars was very high yet there is no evidence of the speedo even being checked before the second of the Police Communications request for speed was made. The deceased's vehicle went through a red traffic light at the Taverner Street intersection. The manoeuvres at the Athllon Drive and O'Halloran Circuit North intersections were dangerous. The offences for which the pursuit was being undertaken were minor. Indeed Constable Stone was more concerned with verifying the deceased's number plate rather than apprehending him in relation to suspected offences. The actual intent of the pursuit was obscure and Constable Stone seemed to contemplate that one outcome of the pursuit was the deceased crashing. The deceased had evidence an intention to run away and to undertake acts of driving that were dangerous to give effect to this purpose. The very reason given for ending the pursuit was that the deceased might run another red light if it was red. Given at the time Constables Stone and Noble considered this possibility it was a possibility the decision to persist with the pursuit until the possibility was confirmed as a reality underscores the reckless thinking he was engaged in.

133 As I understand the AFP submissions on the Late Termination issue they are these:

- a. Senior Constable Stone's evidence was that he continued the pursuit because, the deceased having refused to stop and a pursuit having been

initiated, he thought that there was a more serious reason for the deceased fleeing; and

- b. (In effect) that the circumstances did not involve such a real or potential danger to police, members of the public or people in the suspect vehicle to require termination of the pursuit.

134 Whilst the AFP submissions are not couched in these terms, I take them as meaning that the balancing exercise required by section 24 of the Old Pursuit Policy of the considerations mentioned in that section, did not require the pursuit to be terminated; in other words, that the value of apprehending the deceased was not outweighed by factors such as the danger to others.

135 That submission must be rejected.

136 The basis for doing so must commence with what is said in the submission about Senior Constable Stone's evidence that he thought there was a more serious reason for fleeing because he had failed to stop.

137 The AFP submission refers to reports (acknowledged in Counsel Assisting's submissions) that, historically *"the majority of pursuits commenced as a result of a traffic violation"* but that *"when a person is apprehended the charges relate to more serious offences than the reason the initial stop was requested"*. The AFP submission goes so far as to say that *"(s)elf-evidently, the manner of driving might well suggest a more serious, but unknown, offence has occurred."*

138 The correctness of what has historically occurred is not in dispute, but it is not to the point. The question for consideration is whether, on the proper application of the Old Pursuit Policy, the pursuit ought to have been terminated based on the evidence at the hearing.

139 The Old Pursuit Policy clearly requires, as part of the balancing exercise, consideration of what is to be gained in apprehending a person being pursued. It is expressed in the policy in section 6 in terms of an officer's sworn duty to

protect life and property having primacy over *“the need to apprehend offenders”* and in section 24 in terms of *“the nature and comparative seriousness of the offence/matter”*.

140 To read the Old Pursuit Policy as permitting an officer, as part of the considerations just mentioned, to take into account the fact that the vehicle pursued has failed to stop is to engage in circular reasoning which makes a nonsense of the Policy and renders meaningless the very purpose of it.

141 I accept Counsel Assisting’s submission that the offences for which the pursuit was being undertaken were minor in nature. The fact that the deceased had failed to stop, cannot logically factor into consideration of the value of apprehending him or the proper application of what was required by the Old Pursuit Policy.

142 The radio transmission exchange referred to at paragraph 91 above, includes a request for Senior Constable Stone and Constable Noble to identify the reason for pursuit. The response is *“reason for pursuit fail to stop”*. That response is an indication of the officers’ misunderstanding or misapplication of the Old Pursuit Policy.

143 That conclusion, naturally, has a significant impact upon the outcome of the balancing exercise required by section 24 of the Old Pursuit Policy.

144 The AFP made submissions to the effect that the circumstances did not present a sufficient danger to require the pursuit to be called off. On the evidence before me, I accept the AFP submission that there was minimal traffic in the direction of travel of the pursuit vehicle and that the road surface and weather conditions were good.

145 The AFP submission goes on to refer to the manner of driving which can be observed on the in-car video. In summary the submissions make the following points:

- a. Both cars proceeded through a green light at the Athllon Drive intersection;
- b. Just because the vehicles mounted the median strip does not mean that they presented a danger or risk to the public, and they did not do so on this occasion;
- c. Both vehicles slowed considerably at the O'Halloran North intersection;
- d. The Mitsubishi Magna entered the bike lane to travel past the cars stopped at the red light but there appeared to be *“ample room in that lane”* and *“the Magna does not appear to get particularly close to any vehicles lined up at the intersection at its right”*;
- e. The Magna must have been travelling slower than 47 km/h at the time of that manoeuvre;
- f. There were no pedestrians in sight;
- g. No other cars were seen to take evasive action to avoid collision; and
- h. The red light facing the Magna turned green almost as soon as it entered the intersection, such that cross traffic would have been subject to a red light for at least three to four seconds, although it is not suggested that the deceased knew that the cross traffic would have been subject to a red light before he travelled through the intersection.

146 I do not accept the submission that both cars travelled through a green light at the Athllon Drive intersection. A more detailed analysis of what is shown on the video appears at paragraph 150 of these reasons.

147 The AFP submission speaks in terms of whether the driving or particular manoeuvres were dangerous. To frame the enquiry in that way risks obscuring what is the proper analysis to be undertaken – that is, the extent of danger or risk to others.

148 It is trite to observe that there is inherent danger in travelling at high speed on any public road. So much is acknowledged in the AFP submission. Part of that danger is the unpredictability of the actions of other road users. Unsurprisingly the evidence indicates that other road users in the vicinity felt unsafe. An assessment of the danger posed in any circumstances cannot logically be based solely upon whether or not an adverse outcome resulted. A danger may exist even though the risk of the adverse outcome does not materialise.

149 A critical point in the pursuit at which the assessment of real or potential danger is important to my conclusion about compliance with the Old Pursuit Policy is the Athllon Drive intersection.

Athllon Drive Intersection

150 A close analysis of what the in car video shows took place at the Athllon Drive intersection reveals the following:

- a. The speed of the pursuit vehicle at the time the Mitsubishi Magna drove up on to the median strip is unlikely to be a reliable indicator of the speed of the Mitsubishi Magna at that precise point for obvious reasons. The way in which the rear of the Mitsubishi Magna bounces does indicate that the manoeuvre was undertaken at some speed.
- b. At the time the Mitsubishi Magna moves off the median strip and back into the turning lane, the straight through traffic lights facing the deceased are still red. That is of course why there were lines of stationary vehicles at the lights which the deceased went around. The lights remain red as the deceased drives through the intersection.
- c. The straight through traffic lights are still red as the pursuit vehicle moves onto the median strip and they change to green at about the time that it moves off the median strip into the right turn lane – a point on the video of 17:44:35:19.

- d. The right turn arrow facing the Mitsubishi Magna and the pursuit vehicle remains green until just before the pursuit vehicle enters the intersection at a point shown on the video as 17:44:40:05.
 - e. At the point in time when the police vehicle enters the intersection, the traffic light facing police was green and the turn arrow facing them had just changed from green to amber. I accept the AFP submission that Counsel Assisting's observation that the police line of travel was "*perhaps against a green arrow governing right hand turns from the south bound carriage way*" cannot be correct.
- 151 It is evident from that analysis of the video that the Mitsubishi Magna entered the intersection when the straight through light was red. That red light was visible to officers in the pursuit vehicle. The light turned to green at a point about when the Mitsubishi Magna cleared the intersection.
- 152 Assuming the lights controlling the intersection to have the usual change cycle, the lights facing cross traffic at the intersection would have been red at the time the deceased entered the intersection. There is however nothing to suggest that the deceased would have known that to be the case beyond perhaps what might have been imprecisely suggested to him by the line of stationary traffic and the right turn signal being green.
- 153 It is correct to observe that no collision occurred and that no vehicle is observed to need to take evasive action to avoid collision, but that does not mean that the deceased's conduct did not pose a danger. The officers in the pursuit vehicle were in no position to make any assessment of what if any checks the deceased had made as to presence of other cars, cyclists or pedestrians when he entered the intersection against the red light. It may be that he made no checks.
- 154 The assessment of the danger posed during a pursuit logically requires some assessment of the lengths to which the pursued driver is prepared to go in his or her attempts to avoid police.

155 I have had the benefit of being able to undertake a careful analysis of the in-car video in a calm environment. It is accepted that that does not fairly represent what was presented to the officers at the time. However, and even making a generous allowance for the difficult circumstances in which decision making was required, the combined conduct of the deceased in:

- a. Driving at very high speed between the Taverner Street and Athllon Drive intersections; and
- b. Driving onto the median strip at the Athllon Drive intersection at some speed to get around stationary cars; and
- c. Entering that intersection against a red light;

was a strong indicator to the officers in pursuit of the dangerous lengths to which the deceased was prepared to go to avoid apprehension.

156 Proper consideration of the danger to others demonstrated by that conduct, when weighed against the minor nature and comparative seriousness of the offence/matter as known to Senior Constable Stone, ought to have resulted in him terminating the pursuit immediately after the Athllon Drive intersection. Proper application of the Old Pursuit Policy required him to do so.

157 In the end result I find that the pursuit ought to have been terminated by Senior Constable Stone after the deceased travelled through the Athllon Drive intersection. If the pursuit had been terminated at that time the high speed driving of the pursuit vehicle from that point would have ceased. Again, any assessment of what the deceased would have done beyond that point is speculative.

158 Having regard to what is apparent from the video record, I find that a matter of public safety arises because the continuation of the pursuit beyond that point by Senior Constable Stone unjustifiably placed other users of Drakeford Drive and the intersecting carriageways in danger.

159 Insofar as the finding just made is an adverse comment against the conduct of Senior Constable Stone, it is a comment which must be viewed against the background of the evidence of Sergeant McPherson suggesting that traffic offences were, before the change of policy, a common justification for pursuits both in the ACT and in other jurisdictions.

OTHER MATTERS

Comment on matters of public safety

160 I am required by section 52(4)(a)(ii) of the Act to comment on the matters of public safety which I have found to arise.

161 By way of comment, I record that the Old Pursuit Policy has now been replaced. The new version of the AFP Policy on pursuits and urgent duty driving will not authorise the pursuit of a fleeing driver “*in ordinary circumstances for traffic and property offences*”, and pursuit “*will be limited to circumstances where there has been or is, an immediate or ongoing risk to life or serious injury posed by occupant/s of the fleeing vehicle, and may only be conducted where the risk posed by pursuing the fleeing driver is less than the risk posed to the community by not attempting to immediately apprehend the driver and/or occupant/s*”. (see <https://police.act.gov.au/road-safety/urgent-duty-driving-and-pursuits>)

162 Self-evidently the new policy is designed to reduce the number of police pursuits. Counsel for the family submits that the institution of the new policy is to be commended and that is a submission with which I agree.

163 In the circumstances no further comment is called for.

Synchronisation of audio and video files

164 A question arose during the course of the hearing about the accuracy of the alignment of the separately recorded audio and video files. The parties accept that any misalignment would have been only very minor. As will be apparent from the reasons given for my findings the possibility of any minor misalignment does not affect the conclusions reached.

The background of the deceased

165 Counsel for the family of the deceased submitted that undue emphasis was placed on the deceased's background, relationships and illicit substance use. Consideration of those matters has played no part in my deliberations.

Statement in relation to adverse comment

166 Under section 55 a person against whom an adverse comment may be made is entitled to give a written statement to me in relation to the proposed comment and request that a copy of it be included in my report. Senior Constable Stone has done so and a copy of his statement appears as an attachment to these reasons.

Assistance and condolences

167 I acknowledge the very valuable assistance of Sergeant Tracey Duck as my investigator and the expertise of Senior Constable Graeme Cooper. I acknowledge also the assistance of Counsel Assisting Mr Ken Archer instructed by Ms Sarah Baker-Goldsmith.

168 I have found that the direct cause of Timothy's death was his own actions. Nevertheless his death has caused tremendous suffering to his family and friends. I express my condolences to them. I also express my sympathies to the Gray family.

I certify that the preceding **one hundred and sixty eight [168]** paragraphs are a true copy of the Reasons for Decision of his Honour Coroner P J Morrison.

Associate: Narika Wicks

Date: 14 August 2018

ATTACHMENT – Section 55 Statement of Senior Constable Stone

Statement in the matter of the Death of Timothy SMITH-BROWN


Name Benjamin Richard Stone
Occupation Police Officer
Address Known to police
Date 12 October 2017

1. This statement made by me accurately sets out the evidence that I would be prepared, if necessary, to give in court as a witness.
2. I make this statement pursuant to section 55 (1) (b) of the *Coroners Act 1997* (ACT) (**the Act**) in response to the Notice of Adverse Comment (**the Notice**) issued to me on 17 August 2017. In accordance with section 55 (3) of the Act, I request the Coroner includes this statement, or a fair summary of it, in the report.
3. The statement is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I will be liable to prosecution if I have wilfully stated in it anything that I know to be false or do not believe to be true.
4. My full name is Benjamin Richard Stone and I am 37 years old. I have been employed with the AFP for 9.5 years and I am currently attached to the Traffic Operations Centre, Australian Capital Territory (**ACT**).
5. In response to the Notice, I adopt the submissions made by the Australian Federal Police (**AFP**). The AFP submits I should not be criticised in the terms set out in the Notice, or at all, in the Coroner's report.
6. The submissions say:
7. *'The DIRC's report into the pursuit, informed by the considerable experience that Committee has in the oversight of police pursuits and urgent duty driving, found that the actions of both officers were substantially compliant with the Old Policy'.*
8. *'In respect of the notice at 1(a), given that the speeds of both vehicles varied considerably over the 86 seconds of the pursuit (including in relation to each other),*


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Signature
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Witness

and the offending vehicle was not always in view of the pursuing car, it is not clear how Senior Constable Stone would have been able to comply with any direction to provide the offending vehicle's speed "at regular intervals". Accordingly, he should not be criticised for having failed to do so (or for having failed to ensure that Constable Noble did so). In any event, Constable Noble did provide the speed of the police vehicle, which was probably a fair proxy for the speed of the offending vehicle'.

9. *'In respect of 1(b), it is quite unfair to criticise Senior Constable Stone for failing to notify Coms "at regular intervals" of the speed limit on Drakeford Drive. The entire pursuit took place on Drakeford, which is a well-known major trunk road in the ACT. The Duty Operations Manager (DOM), Detective Sergeant Peter Dean, explained to the court that he was "pretty familiar with Drakeford Drive. I run that group regularly" and he agreed that "[he knew] the road well". Indeed, the evidence that he gave immediately after that observation demonstrates that he knows the road well. It is, with respect, inconceivable that he would not know the speed limit on Drakeford. Accordingly, Senior Constable Stone should not be criticised for failing to communicate "at regular intervals" (or failing to cause Constable Noble to communicate) information that was commonly known. In any event, Constable Noble did in fact communicate the speed limit at 17:45:38, and the DIRC judged this aspect "fully compliant" with the Old Policy'.*
10. *'With respect to 1(c), the ICV shows that traffic on the relevant carriageway was light. Accordingly, the DIRC noted, and it is apparent from the ICV, that "no other cars were seen to take action to avoid collision". Under such circumstances, the importance of prioritising communication of traffic conditions is lessened and, in the short time available, Senior Constable Stone should not be criticised for not having communicated (or failing to cause Constable Noble to have communicated) a piece of information that is unlikely to have contributed to any decision on the part of the DOM to terminate the pursuit'.*
11. *'And, as noted earlier, Sergeant McPherson agreed that, in respect of any information not communicated, there may well have been "a rational basis" for any failure to comply with any aspect of the Old Policy. In particular, "[h]e might not have had the opportunity to comply", and this would be so if the pursuit only lasts 86 seconds, the particular information is de-prioritised (because, in the judgment of the officer, it is less important given particular conditions of a particular pursuit), and the officer runs out of time'.*


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Signature


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Witness

12. *'With respect to 2 of the Notice, it is impossible to reconcile potential criticism of Senior Constable Stone for having not having terminated the pursuit earlier with:*
- a. the DIRC report; and*
 - b. the ICV'.*
13. *'In particular, as DIRC noted, and as is apparent from the ICV, before the collision, "the offending vehicle and the police vehicle varied their speeds to the conditions, significantly slowing for intersections and no other cars were seen to take action to avoid collision." Furthermore, there were no pedestrians at all evident on the ICV, the volume of traffic was light and there was nothing about the feature of the particular locality to suggest that the pursuit should have been terminated—indeed, Senior Constable Stone's evidence was that if the offending vehicle had turned into the suburbs, he would have terminated the pursuit, presumably because the "features of the particular locality" demanded it. This indicates that Senior Constable did have the relevant factors in mind. Furthermore, as noted above, experience has shown that it was open to Senior Constable Stone to believe that the person fleeing had committed a more serious offence than had been indicated on RAPID and, in the event, given that the plates and car did not match, it was unlikely that the fleeing driver could have been easily apprehended if the pursuit had not taken place (albeit this would not have been known to Senior Constable Stone – indeed, this aspect was, with respect, impossible to judge given the circumstances)'.*
14. *'For the reasons set out above and elsewhere in these submissions generally, the conclusions set out at 3 of the notice are not sustainable. First, the pursuit was substantially compliant with the Old Policy. Second, it was open to Senior Constable Stone to continue the pursuit: he thought, with some justification based on the AFP's experience, that the fleeing driver had probably committed a more serious offence than was apparent from the RAPID system. The manoeuvres demonstrated at the Athllon and O'Halleron North intersections in particular were not objectively particularly dangerous: the ICV does not show that any one was put in danger by those manoeuvres. And it is telling that, before Senior Constable Stone decided to terminate the pursuit, no other cars had to get out of the way to allow either car involved in the pursuit to pass by. This was for two reasons: the traffic was light, and both cars slowed down appropriately and manoeuvred in such a way that other cars did not have to take action to move out of the way, or avoid collisions (and, in respect of the police car, the*



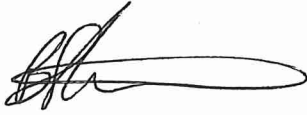
Signature



Witness

Statement of Benjamin Richard Stone continued

manoeuvres were with the siren and lights turned on – such was the level of traffic, even with advance warning of its impending arrival, other drivers did not feel the need to manoeuvre out of the way)'.



Benjamin Richard Stone

Signature of witness
Stuart Burrows
Sergeant AFP 3779
Traffic Operations Centre



Witnessed by me about 1115 on 12 December 2016 at Traffic Operation Centre, 17 Lathlain Street, Belconnen, in the Australian Capital Territory).



Signature



Witness