



**Local Court of
New South Wales
Coronial Jurisdiction**

Inquest:	Inquest into the death of Sebastien YEOMANS
Hearing Date(s):	17 – 18 March 2015 Armidale Local Court
Date of findings:	1 April 2015
Place of Findings:	Armidale Local Court
Findings of:	Magistrate K STAFFORD
Findings:	Sebastien Daniel YEOMANS died at John Hunter Hospital, New South Wales on 16 May 2012. The cause of his death was hypoxic brain damage due to drowning in a swimming pool at 47 Fletcher Street Armidale on 12 May 2012.
Parties:	
Representation	Sgt S KELLY (Coronial Advocate) Mr C ZUCKER (Mr & Mrs YEOMANS) David CLIFTON (Armidale Dumaresq Council) S PRIESTLEY instructed by Rice More Gibson (Philip CAMERON)
File number(s):	2012/157613
Publication Restriction:	

RECOMMENDATIONS

Recommendations pursuant to s 82 Coroners Act 2009

- **To: the Minister responsible for the administration of the Swimming Pools Act 1992.**
 - That consideration is given to increasing the maximum penalties applicable to breaches of the safety requirements of the Swimming Pools Act 1992.

- **To the Attorney- General:**
 - That consideration is given to the enactment of a criminal offence, analogous to that of negligent driving occasioning death, to apply in circumstances where a person dies as a result of the negligence of a third party with respect to the maintenance or use of a private swimming pool.

- **To Armidale Dumaresq Council:**
 - That consideration be given to allocating sufficient staff to properly implement all aspects of its swimming pools inspection program
 - That consideration be given to changing its website to include a statement under the section “Pool Fencing” that the cost of constructing and maintaining a boundary fence that forms part of a pool fence, is the responsibility of the pool owner
 - That consideration is given to supplying each swimming pool inspector with a device to record digital photographs as part of the implementation of the inspection program, and that such photographs be stored with the corresponding inspection record.
 - That consideration be given to consulting with Hannah’s Foundation in relation to the production of pool safety information to be sent to swimming pool owners.

REASONS FOR DECISION

Introduction

- 1 Sebastien YEOMANS was a 2½ year old boy living in Armidale. On Monday 14 May 2012, he wandered into the backyard of his next door neighbours, the MELVILLE, at 18 Johnson Street.
- 2 The MELVILLES had for some time been engaged in a dispute over a fence that divided their property from another neighbour, Philip CAMERON, who lived at 47 Fletcher Street.
- 3 The disputed fence also served as part of a fence that surrounded an inground swimming pool in Mr CAMERON's backyard.
- 4 On 14 May 2012, a section of the disputed fence was lying on the ground, part of it covered by leaves. There was no other barrier between the pool and the MELVILLE's backyard.
- 5 That day, Sebastien walked through the MELVILLE's yard, into the pool area of 47 Fletcher Street and eventually into the pool itself, where he drowned.
- 6 Sebastien died two days later, on 16 May 2012 at John Hunter Hospital in Newcastle of Hypoxic Brain Damage.
- 7 Philip CAMERON was later charged with manslaughter on the basis of Criminal Negligence.
- 8 The charge was taken over by the Office of Director of Public Prosecutions.
- 9 On 7 December 2012, the DPP advised that he had discontinued proceedings against Mr CAMERON relating to Sebastien's death.
- 10 The Director had concluded that there was no reasonable prospect of conviction on a charge of manslaughter.
- 11 Following the Director's decision, Sebastien's family requested that an Inquest be held into Sebastien's death, hoping to prevent the same tragedy happening to another family.
- 12 As the Coroner for the Armidale area, I decided to hold an Inquest to inquire into issues of public safety that had arisen from his death.

- 13 The death of young children in private swimming pools remains a significant cause of child death in Australia. Research undertaken by the Royal Life Saving Society – Australia, records that the number of drowning of deaths in Australia among children aged 0 – 4 years in private swimming pools, portable pools and outdoor spas for the period 2009 – 2014 was as follows:
- 2009/2010 – 17.
 - 2010/2011 – 11.
 - 2011/2012 – 8.
 - 2012/2013 – 19.
 - 2013/2014 – 14.
- 14 A sudden and unexpected death of any person can raise troubling questions and issues. Civilised societies know that what harms one of its members may harm many others.
- 15 Where the death is of a young child, the impact on his family, on their friends and on his community is particularly significant and widespread. It touches all of us and is particularly troubling for those of us who are parents.
- 16 It has often been recognised that one of the functions of a coroner is to speak for the dead. The voice of a young child, whose life has been cut short, must be recognised and heard.
- 17 The primary statutory function of a Coroner is to seek answers to the following questions: Who died? When and where did he die? What was the cause of death? And what was the manner of death?
- 18 Another function of a coroner is to make appropriate recommendations aimed at preventing future deaths, thus helping the living commemorate the dead with some peace of mind.
- 19 In this case, the first 4 questions are not in issue.
- 20 The focus of this Inquest has been on what could have been done to prevent Sebastien's death and what more can be done to help prevent similar sorts of deaths recurring.

Sebastien YEOMANS

- 21 Before considering the evidence, it is important to remember that at the centre of the Inquest is a human being who was loved and mourned by his family and friends. His family, through his cousin Nicholas, depict him in loving terms.
- 22 Sebastien Daniel YEOMANS was born at Armidale Hospital on 14 November 2009 to Leisa and Garry YEOMANS. He was the result of IVF treatment and his birth was a miracle that his family never thought they would experience.
- 23 Sebastien was a loving, happy and sociable child who lived a busy life, surrounded by his loving parents and a close-knit family of grandparents, aunts, uncles and cousins. His cousins were like big brothers to him.
- 24 Sebastien went to TG's child care centre three days a week while Leisa worked. He enjoyed the interaction with the other children and their carers. Some days, other family members would collect him from day care, and he would love this.
- 25 For a young boy, he was well travelled. He went with his parents to car rallies and on family camping holidays. Once he flew with his grandparents to Sydney to visit his parents.
- 26 At the end, his loving family and close family friends were all by his side.

THE ISSUES

- 27 Before the inquest commenced, an issues list compiled by the Coronial Advocate was circulated as follows:
- 1/. What was the 'manner' and 'cause' of death?
- 2/. What system did Armidale Council have in place in 2012 for inspecting residential swimming pools to ensure compliance with the Swimming Pools Act?
- 3/. What is the current system in place for conducting pool inspections in 2014/15?

4/. What action did Armidale Council take to ensure the owner of the property complied with the Swimming Pools Act 'after' it was informed of the death of Sebastien Yeomans?

5/. Should any recommendations be made to the Ministry for Local Government responsible for enforcement of the Swimming Pools Act regarding amendments to the Act where a breach of the Act results in the death or serious injury to a person?

- 28 There is no question that Sebastien died on 16 May 2012 at John Hunter Hospital.
- 29 There is no issue that the cause of death was hypoxic brain damage.
- 30 Nor is there any issue that the manner of death was drowning, in the swimming pool at 47 Fletcher Street Armidale on 14 May 2012.
- 31 In essence, the issues in this Inquest may therefore be distilled into four questions:
- What happened on 14 May 2012?
 - What went wrong and why?
 - What can be learned from this experience?
 - What more should be done?

WHAT HAPPENED ON 14 MAY 2012?

- 32 Sebastien lived with his parents Leisa and Garry at 18 Johnson Street Armidale.
- 33 On Monday 14 May 2012, Sebastien had spent the day with Leisa, and they both had lunch at home with Garry, who then returned to work. Leisa tried to settle Sebastien for his afternoon sleep but he did not go to sleep. In the afternoon, after playing with Sebastien, Leisa took him next door to the MELVILLES at Number 20. Jim was not at home when they arrived but Sue was and she invited them inside. Leisa showed Sue some professional photos of Sebastien that had just arrived in the mail. Jim arrived home and looked at the photographs.
- 34 Leisa decided to take Sebastien home to watch Play School. Leisa, Sebastien and Sue went out of the front door at about 4:25pm and stood at the front porch for a couple of minutes.
- 35 Sebastien walked off in the direction of his house.

- 36 However instead of walking home, he walked around the side of the MELVILLE's house and into the rear yard. He then walked across their yard in the direction of 47 Fletcher Street. Sebastien walked over the dividing fence that was lying on the ground, partly covered with leaves.
- 37 He entered the property of 47 Fletcher Street and walked up to the swimming pool.
- 38 Sebastien then entered the water and became face down in the water before drowning.
- 39 Meanwhile, Leisa had walked to their house, minutes after Sebastien had left, believing that he had gone home. When she could not locate him inside, she went back to the MELVILLES house and the three adults went searching for him.
- 40 Jim ran along their western boundary to the damaged fence. He walked through the damaged fence into 47 Fletcher Street and ran straight to the pool.
- 41 Jim found Sebastien floating face down in the pool under 50mm of water.
- 42 Jim pulled Sebastien from the pool and called Leisa who started administering CPR. Emergency services were called and attended. Police and ambulance officers continued CPR and Sebastien was taken to Armidale Hospital.
- 43 He was later airlifted to John Hunter Hospital where he died on 16 May 2012.

WHAT WENT WRONG AND WHY?

- 44 Sebastien's death was preventable.
- 45 Sebastien was able to walk quietly and quickly from the yard of 20 Johnson Street to the swimming pool at 47 Fletcher Street because part of the fence dividing those two properties was down on the ground.
- 46 This meant that there was an inadequate child barrier around the swimming pool.
- 47 There is no evidence of how Sebastien entered the water or how he came to be face down in the water, once he had reached the swimming pool.
- 48 However his ability to reach the water by himself at all could have been prevented by a proper child barrier surrounding the pool.

49 As Mr ZUCKER, who appeared for the YEOMANS family, submitted so succinctly, this was a case where common sense was sadly lacking. Sebastien's life could have been saved by taking any step to prevent any person wandering into the swimming pool.

50 We do know that the water was murky and cold. There was a metre of leaves under the water on the base of the swimming pool.

51 The pool had been the subject of past complaints to Armidale Council. Inspections done following complaints had revealed problems associated with the water quality. The last complaint was received in 2003 and related to barrier fencing.

Fencing

52 There had been past problems with the dividing fences around 47 Fletcher Street.

53 In 2000, Mr CAMERON lived at 47 Fletcher Street with his then wife Lorraine.

54 Their adjoining neighbour to the north was Ali NADIMI who lived at 49 Fletcher Street.

55 Mr NADIMI told the Inquest that he needed to replace his boundary fences. The fence dividing his property from the CAMERONS' was in a particularly poor state. He negotiated with his neighbours about the replacement fencing. Mr CAMERON asked him to first replace the fence that did not form part of the fence around the swimming pool, because he was concerned about the pool being left unfenced.

56 This was impractical so Mr NADIMI replaced the whole fence.

57 Mr NADIMI recalled that in 2000, the condition of the fence between the CAMERONS and the MELVILLES was in a pretty poor condition.

58 He said that the water in the swimming pool at No. 47 was initially maintained however over the years, the water quality was no longer maintained.

59 In 2011, Sue MELVILLE wrote to a number of neighbours, including the CAMERONS, about problems being caused by the neighbours' trees, including roots systems that were structurally affecting the MELVILLE's property.

- 60 In March 2011, Mrs MELVILLE took photographs of the fence that divided their property from the CAMERONS. It shows the majority of the fence lying on the ground. At that time, other parts of the fence were held up by rope. She took a further photograph in June 2011. It showed that the remaining part of the fence that had still been up had now fallen further to the ground.
- 61 On 25 June 2011, Mrs MELVILLE included the June photograph in a letter delivered to the CAMERONS. In her letter, she said that the trees on their property had caused damage to the fence.
- 62 Mr CAMERON responded to a further letter sent by Mrs MELVILLE in November 2011.
- 63 He said that he was not responsible for the trees or the problems caused by them. He emailed a link to a NSW government website that he said supported his view.
- 64 Mrs MELVILLE spoke with Mr CAMERON in January 2012 and they each decided to obtain some quotes for the replacement of the fence. Ms Melville provided two quotes to him on the 18th January 2012 for two different sized fences. Mr CAMERON emailed his quote to the MELVILLES on the 27th March 2012 which was for the erection of a 1.8m high fence.
- 65 Around this time, Mrs MELVILLE obtained legal advice that she should not agree to pay for half of the fence until the problem with his trees was rectified. She relayed that advice to Mr CAMERON in April 2012 when he was in Melbourne. He asked her to have her solicitors send him a letter and he would consider it when he returned to Armidale.
- 66 They did not speak again before 14 May.
- 67 Mrs MELVILLE thought that the collapsed fence was about 6 metres in length.
- 68 Her husband Jim estimated the distance to have been 13 metres.
- 69 Before May 2012, the MELVILLES' two grandchildren had visited their home and gone into their backyard. In 2012, their grandchildren were aged 12 and 8 years. They had never gone onto the property at 47 Fletcher Street.
- 70 Lorraine CAMERON gave evidence at the Inquest. In 2011, she and Philip were separated but she spent considerable time at the house. In March

- 2011, she told Philip that a paling was missing from the back fence and he fixed it.
- 71 In May or June 2011, she noticed a section of the fence was leaning significantly towards the Melville's property, and advised Philip to have it repaired. He said he would. In her evidence at the Inquest, Mrs CAMERON said that it was leaning back far enough for a dog to get through.
- 72 By September 2011, the fence had fallen further so that it was almost touching the ground towards the MELVILLE's property. Mrs CAMERON spoke to her husband who obtained a quote in September.
- 73 In her evidence she said that Philip said after Christmas that he had the money to fix the fence but that Mrs MELVILLE wanted him to fix the trees first.
- 74 Mrs CAMERON told the Inquest that she was very concerned about the condition of the fence, particularly after Philip showed her the photograph that Mrs MELVILLE had included in her letter. She discussed her concerns with Philip. She suggested that Philip replace the fence then seek half the cost later from the MELVILLEs. Philip agreed that that was one option but said that Mrs MELVILLE's letter showed that she was concerned about the trees, not the fence, and he did not want to pay for the full cost of the fence.
- 75 Mrs CAMERON said that she was concerned about the fence because anyone could have walked in. Her concern was heightened because she knew that the fence was in a poor condition and that it was a fence around a pool.
- 76 She did not discuss her concerns with Philip that a child could get in.
- 77 In April 2012, she and Philip were in Melbourne when he had a short telephone conversation with Mrs MELVILLE. Mrs MELVILLE said that she was not concerned about the fence, but wanted the tree problem resolved first. Philip said he would sort it out when he returned to Armidale.
- 78 Philip CAMERON did not give evidence at the Inquest.
- 79 Mr CAMERON participated in a police interview on 14 May 2012.

- 80 He agreed that the fence had collapsed for a '*few months*',¹ probably 6 months or a little bit longer² although he was not certain of the exact date.
- 81 He said that a couple of years ago the Council had to come onto his property with a bobcat in order to get access to a sewer box and they took a panel out of the side fence and also pushed dirt up against the fence which according to him 'started it going'. As a result of that he had to use some blue and yellow ropes which were tied between two trees to help keep the fence upright.³ He said he first tied it up with rope approximately 3- 4 years previously⁴. It took a fair while for the dirt to subside and push against the fence.⁵
- 82 He had also considered propping the fence up with some '*star pickets*' he had bought from Bunning's however there was too much damage to the fence for that to be a solution.⁶
- 83 At the time of Sebastien's death he had been in the process of trying to replace the fence ; he had obtained approximately 4 quotes⁷.
- 84 He also rang Sue Melville when he was in Melbourne (in April 2012) to see if he could get something started on the fence but she had basically told him that 'until he did something about the trees' that she was not going to do anything about the fence.⁸
- 85 He said he had actually looked up on the internet what the laws were for fencing, being that there is a pool there.⁹ He said from what he had read (on the internet) he believed he could serve Sue Melville with a notice to replace the fence and that she would have 21 days to reply and if she did not reply he could just go ahead and replace it anyway.
- 86 He said he had been sent a letter by them a while back.
- 87 He said he had drawn approximately \$2000 out of his account (before he went to Melbourne) to cover the trip and half his cost of the fence.

¹ ERISP interview A119.

² ERISP interview A121-A122.

³ ERISP interview A124-129.

⁴ ERISP interview A272-273.

⁵ ERISP interview A318.

⁶ ERISP interview A182-183.

⁷ ERISP interview A41.

⁸ ERISP interview A45.

⁹ ERISP interview A46.

- 88 He also said he did receive a general letter from the Council about pool fence requirements a couple of months before the fence collapsed¹⁰.
- 89 When asked by police whether he thought the fence was safe he said, 'no definitely not'.¹¹ He said it was 'down, pretty much all of it, laying flat on the ground'.¹²
- 90 He also acknowledged that he did have concerns that a child might get in there and that there was nothing to stop a child walking in off the streets.¹³

Council Inspection in 2008

- 91 The swimming pool at 47 Fletcher Street had been inspected by Armidale Council on 23 June 2008 and was found to comply with the relevant standard. An Inspection Report/Compliance Certificate was issued on 27 June 2008 and was valid for 5 years.
- 92 This inspection had followed a complaint made to Council in April 2007 that the pool had not been cleaned for months and appeared to be unfenced.
- 93 There had been no routine inspection of the fence since the Compliance Certificate was issued in June 2008.
- 94 The 2008 inspection was done in accordance with the Council's 2007 – 2010 Management Plan that aimed to inspect 50% of Armidale's registered residential swimming pools by June 2008, and the remainder by 2009.
- 95 At that time there was no register of pools in the area. Council estimated that there were 100 pools in the Armidale local government area.
- 96 Although in 2012 Armidale Council had the power under the Swimming Pools Act to conduct random pool inspections, the last time this had been done was in 2008.
- 97 At that time, about 20% of the inspected swimming pools failed to meet the required standards, mainly in relation to fencing, gates and signage.

¹⁰ ERISP interview A254-263.

¹¹ ERISP interview A186.

¹² ERISP interview A 186-190

¹³ ERISP interview A194-198.

- 98 There was nothing then in the local government legislation or regulations which required Councils to inspect swimming pools for compliance. The onus for compliance was on the property owner.
- 99 The Inspection program became an education and promotion campaign to ensure compliance. This consisted of Armidale Council distributing letters, checklists and brochures to each known pool owner.
- 100 A media release was published in the Armidale Express and the Armidale Independent in September 2011 with information about swimming pool laws.
- 101 On 4 October 2011, Council sent a letter to all registered pool owners, including the CAMERONs, enclosing a checklist on "How to keep your pool safe".
- 102 Armidale Council had no regular pool inspection system in place before 2013.
- 103 There were no routine inspections of residential swimming pools conducted in Armidale in 2010, 2011 or 2012.
- 104 Nathan SMITH, Armidale Council's Environmental Health and Building Surveyor, was first notified on 21 May 2012 that a child had drowned in a swimming pool at 47 Fletcher Street Armidale and that there was no permanent fence surrounding the swimming pool. This was one week after Sebastien's drowning.
- 105 Mr SMITH attended the property on 21st May and inspected the swimming pool.
- 106 He accessed the property via 20 Johnson Avenue.
- 107 He saw that the boundary fence was collapsed on the ground and covered with grass and leaves. The fence clearly did not comply with the Swimming Pools Act (the "Pools Act").
- 108 There was a temporary fence made from star pickets and orange plastic safety barricading. This had been erected by the Council after police had attended on 14 May.
- 109 Mr SMITH did not enter the property but could see from 20 Johnson Street that the pool water was murky.
- 110 He concluded that the lack of permanent fence was a serious breach of the Pools Act that required urgent work.

- 111 He rang Mr CAMERON that day and told him to erect a permanent compliant safety barrier fence, as soon as possible. He suggested that a 14 day period was reasonable. Mr SMITH stated that if he did not hear from Mr CAMERON, he would serve a Direction to conduct the works.
- 112 At that time, Mr SMITH had the legislative power to issue a Notice on the spot, but chose not to do so as Mr CAMERON had agreed to have the work done, and the Council's emphasis was on compliance. Nor did Mr SMITH issue a penalty.
- 113 Mr CAMERON notified Mr SMITH on 23rd May that he had engaged a fencing contractor who specialised in pool fences, to erect a permanent fence, in the middle of the week commencing 28th May. Mr SMITH was satisfied that the contractor was carrying out the work as soon as possible.
- 114 Council had discussed the option of Council staff erecting the fence but it was decided that it was more appropriate for a specialist swimming pool fencing contractor, to undertake the work.
- 115 The contractor carried out the work and Mr SMITH made another inspection. He found other non-complying items that needed fixing: a loose fencing panel between the house and the pool, the pumping equipment could be used to climb over the fence and the pool sign was cracked and faded.
- 116 Mr SMITH told the Inquest that prior to May 2012, Council had received complaints in relation to the pool at 47 Fletcher Street: three had related to water quality and two related to fencing.

Regulation of Swimming Pools

- 117 The legislative regulation of home swimming pools is found in the Swimming Pools Act 1992 (the Pools Act) and Swimming Pools Regulation.
- 118 Those laws have been the subject of recommendations made in the past by numerous coroners investigating child drowning.
- 119 Armidale Dumaresq Council was granted leave to appear as a party to the Inquest. The Office of Local Government did not seek leave to appear, however a statement was tendered by Stephen ORR, the Acting Chief

- Executive of the Department, and oral evidence was given by Corrine MOFFATT, the Department's Director of Innovation and Development.
- 120 This Inquest cannot be a review of the law that surrounds home swimming pools, but it is necessary to refer to the structure of regulations that were in place in 2012 and the current regulations.
- 121 The underlying principle of the legislation is to minimise the risk of backyard swimming pool child drowning.
- 122 The focus of the Pools Act is on compliance and education rather than enforcement.
- 123 Section 7 of the Pools Act requires that owners of swimming pools must ensure that the pool is surrounded by a child-resistant barrier that separates the pool from the residence and neighbouring properties and that is designed and maintained in accordance with the Australian standard. The maximum penalty for breaching this section is a \$5500 fine.
- 124 Section 5 of the Pools Act provides that each local council is required: to ensure that it is notified of all swimming pools within its area, and promote awareness within its area of the requirements of the Pools Act and investigate complaints about breaches of the Pools Act.
- 125 Section 15 provides that an occupier must, as long as the pool exists, maintain the barrier in a good state of repair as an effective and safe child-resistant barrier. A breach of that section attracts a maximum penalty of a \$5,500 fine.
- 126 Section 33 provides that the expenses of constructing, replacing and maintaining a dividing fence that forms a child barrier is to be borne by the pool owner. That section prevails over the Dividing Fences Act.
- 127 The Pools Act was amended in 2009. It provided for a consistent standard of four-sided child resistant pool barriers for all new pools.
- 128 One of the 2009 amendments related to the obligations of local councils.
- 129 The reasoning for the amendment was to ensure that councils' focus remained on education and encouraging compliance rather than enforcement.
- 130 Councils were required by the amendment to investigate any written complaints received about possible non-compliance, within 72 hours of the

- complaint where practicable and assuming it was not a vexatious complaint.
- 131 Councils were given the power to enter a person's property to rectify deficient pool barriers where the owner had failed to comply or where there was a significant risk to public safety.
- 132 But notice of intention had to be served before council could do the work.
- 133 Again, this amendment reflected the focus on compliance and education rather than enforcement.
- 134 Prior to the 2009, the penalties for offences had been \$1100. These were increased to \$5500.
- 135 The Act was again amended in 2012, following coronial findings and recommendations made in 2010 by Deputy State Coroner McMahon after holding an inquest into the death of 8 young children who had drowned in swimming pools, and following further recommendations made at another inquest in 2011.
- 136 The 2012 amendments provided for online registration of swimming pools in NSW by their owners and inspection requirements on local councils.
- 137 The amendments were designed to address widespread concern about the high level of non-compliance of pool barriers and to ensure that pools that pose the highest risk to children are made safe.
- 138 All private pool owners are required to register their pools on a NSW state-wide online register. Over 320,000 pools are now registered.
- 139 Private pool owners are required to self-assess their pool barrier compliance as part of the registration process. However self-assessment is not a pre-condition to registration.
- 140 Councils are now required to develop and implement a program for the inspection of swimming pool barriers in consultation with their local communities.
- 141 That program must include mandatory inspections every 3 years of pools associated with multiple-occupancy dwellings and tourist and visitor accommodation.
- 142 Other residential pools are to be inspected at the request of the pool owner, prior to sale or lease, or following a complaint. Councils may charge an inspection fee.

- 143 Once inspected, if the pool barrier complies with the legislation, Council is to issue a Compliance Certificate. That Certificate is valid for 3 years.

Section 78 Consideration

- 144 Section 78 of the Act requires a Coroner to suspend an inquest and refer the matter to the Director of Public Prosecutions if the Coroner forms the view that there is a reasonable prospect that a known person would be convicted of an indictable offence related to the death the subject of the inquest.
- 145 The Coronial Advocate has handed up very carefully considered and helpful written submissions.
- 146 He submits that the indictable offence of manslaughter is open on the evidence. The basis of manslaughter would either be unlawful and dangerous act or manslaughter by way of criminal negligence.
- 147 Most of the evidence before this Inquest was contained in a Police Brief of Evidence that was submitted to the DPP. That Brief formed the evidence upon which the Director concluded that there would not be a reasonable prospect of conviction on a manslaughter charge.
- 148 It is true that I must make my own independent assessment of the evidence before me. However, I cannot lose sight of the fact that if I did form an opinion under Section 78 and refer the evidence to the DPP, the Director is unlikely to reverse his Direction unless there is a significant change in the admissible evidence.
- 149 Additional oral evidence was given at the Inquest by Mr NADIMI as to conversations he had with Mr CAMERON.
- 150 On the other hand, Mr NADIMI told the Inquest that the CAMERONS' requests about the timing of the fence work, were based on their concern that the pool not be left unfenced.
- 151 Lorraine CAMERON gave clear evidence that her concern about the pool's lack of fencing meant that anyone could have walked into the pool area.
- 152 I am not of the view that non-compliance with the Pools Act would amount to an "unlawful act". This is because the "act" is really an omission, omitting to maintain a compliant child barrier. A breach of the Pools Act may not constitute an act that is, by itself, unlawful.

- 153 If I am wrong about that, I am not of the view that there would be a reasonable prospect of conviction because an omission to comply with the Act would not be found beyond reasonable doubt to constitute a “dangerous act”. Failure to comply does not by itself carry with it an appreciable risk of serious injury.
- 154 The alternative basis of manslaughter that arises on the evidence is manslaughter by criminal negligence.
- 155 However, I am not of the view that a properly instructed jury would bring in a verdict of guilty on that count.
- 156 To do so, the jury would have to be satisfied beyond reasonable doubt that any negligence involved such a great falling short of the standard of care and involved such a high risk that death or grievous bodily harm would follow, that the omission merited criminal punishment.
- 157 The Crown may also have difficulty proving the essential element of duty of care.
- 158 Further, there would be difficulties in proving beyond reasonable doubt that any omission was an immediate and direct cause of death. In addition, a jury may not be satisfied beyond reasonable doubt that any omission carried with it a high risk that death or grievous bodily harm would follow.
- 159 Assessing all of the evidence as a whole, including the oral evidence of Mr NADIMI and Mrs CAMERON, there is not to my mind a reasonable prospect of conviction on the basis of manslaughter by unlawful and dangerous act or manslaughter by criminal negligence.
- 160 Accordingly, I have no obligation to suspend the Inquest and refer the matter to the Director of Public Prosecutions under Section 78 of the Coroners Act.

WHAT CAN BE LEARNED FROM THIS EXPERIENCE?

Armidale Council’s Response to 2012 Amendments

- 161 Armidale Council enacted an inspection policy that came into effect on 30 August 2013.
- 162 That Inspection Program stated that “All swimming pools in the Armidale Dumaresq Council area are to be inspected at least once every 3 years”. It

- notes that the Act requires that pools on multiple-occupancy dwellings or in tourist accommodation must be inspected at least once every three years.
- 163 The program informs property owners that property owners will be charged an inspection fee. It further states that once Council has inspected a pool and found it to be compliant, they will issue a Certificate of Compliance.
- 164 Armidale Council employs two inspection officers; one of whom is Nathan SMITH.
- 165 He gave evidence at the Inquest that he and the other inspector also have duties in their roles as building inspectors for residential and commercial developments. As well, their duties include the protection of the environment by pollution control.
- 166 The Council does not have an employee whose sole job it is to inspect swimming pools.
- 167 Ms SMITH's evidence was that staffing issues were always a problem. Inspection time had to be prioritised among the competing demands on him and his one colleague.
- 168 Pool owners are told that they will be able to engage an Accredited Certifier to conduct the inspections and to issue the Certificate. If their Certificate is lodged with Council prior to the next three year scheduled inspection, Council will not undertake an inspection.
- 169 Mr SMITH told the Inquest that he has heard anecdotally that independent certifiers in Armidale are unwilling to undertake inspection work.
- 170 Council has given higher priority to the inspection of pools belonging to multiple occupancy dwellings and tourist and visitor accommodation. All such pools have been inspected since 2013.
- 171 There were no random pool inspections in 2014.
- 172 Approximately 50% of those that were inspected were found to be non-compliant.
- 173 No infringement notices have been issued.
- 174 In line with the education and compliance focus of the Act, Armidale Council sends information to pool owners by mail, usually in Spring.
- 175 The Council website advises that ensuring that a pool fence complies with safety regulations is the property of pool owners. It also advises that proper maintenance of pool fences will drastically reduce the number of

child drowning in NSW. It provides links to the fencing and safety requirements of the Pools Act, including section 33 that states that expenses of constructing or replacing a dividing fence is to be borne by the pool owner, and that this section prevails over the Dividing Fences Act.

- 176 Until Sebastian's death, there were deficiencies in the proper record keeping at Armidale Council. However most paper records have been scanned and are now electronically recorded.

State-wide Compliance with the Pools Act

- 177 There is significant non-compliance within the community at large.
- 178 In 2014, in feedback from the top 20 local government areas with the highest number of registered pools, councils and private certifiers indicated that over 95% of pools were non-compliant at first inspection and the time taken to finalise inspections was between 6 and 12 weeks.
- 179 As Deputy State Coroner McMAHON noted in 2010:
- 180 "non-compliance with the safety requirements of the Pools Act is a significant contributing factor to the deaths of children under four years of age who drown in home swimming pools. A greater level of compliance with the safety requirements of the Pools Acts would thus be likely to contribute to the protection of vulnerable young children...greater effort by local government authorities at ensuring that the safety requirements of swimming pools meet and continue to meet, the requirements of the Pools Act would assist in the prevention of deaths of young children."
- 181 Despite the passage of 5 years since those recommendations, the levels of non-compliance remain significant and troubling. Children continue to drown in swimming pools and local councils are not enforcing the safety requirements that could prevent such drowning.
- 182 Deputy State Coroner McMahon recommended in 2010 that the government consider developing a systemic plan for the regular review of all pools to ensure compliance with the Act. In other words, developing a standardised format to promote compatibility across councils.
- 183 The response to that recommendation was the Office of Local Government providing guidance to councils in developing their inspections programs.

- 184 There is no systemic plan or standardised format consistently applied across councils.
- 185 Evidence was given at the Inquest by Ms MOFFATT that the lack of a State-wide systemic approach was due to the large variation among the 152 local councils, particularly in relation to the number of registered pools in each area.
- 186 Ms MOFFATT's evidence was that in relation to private swimming pools, there is no State-wide inspection requirement; that is a matter for individual Councils.
- 187 Another previous coronial recommendation that was not implemented was that all councils be required to develop a swimming pools register and store information for all pools installed or constructed in the future.
- 188 Individual councils do not have a register of all pools in their particular areas, however, council employees are able to access the NSW state-wide register and examine the registration of pools in the local area.
- 189 Ms MOFFATT gave evidence that this is dependent on three factors: first, registration by the pool owner; second, self-assessment compliance check by the owners; and three, Council accessing the on-line register to examine how many pools are registered to that area.
- 190 The NSW Government gave guidance to local councils in developing inspections programs outside the mandatory inspections, but left the program itself up to individual councils.
- 191 Ms MOFFATT emphasised that the focus of the 2012 Amendments was on education and compliance.
- 192 The high levels of non-compliance led the Office of Local Government to work with Councils and bodies such as Royal Life Saving Society on their education campaigns.
- 193 It was also previously recommended that laws be implemented to give councils the power to do remedial work on swimming pool fences where there is an immediate hazard and where the owner does not undertake the work. Council's power would be controlled by a court order.
- 194 The current situation is that if immediate action is required, Council must first serve a Notice of Intention. The Act gives Council the power to enter within 24 hours of Notice being served.

195 Ms MOFFATT explained that the Notice period aims to strike a balance
between the rights of property owners and the need for compliance.

196 Another important recommendation from 2010 has not been not
implemented.

197 That recommendation was made to the Attorney-General to consider
enacting a criminal offence, analogous to that of negligent driving causing
death, to apply where a person dies as a result of the negligence of a third
party with respect to the maintenance or use of a private swimming pool.

198 The reason advanced by the Government for declining to enact such an
offence, is that the focus of the swimming pools legislation is on
compliance and education rather than enforcement.

199 The Deputy State Coroner also made findings and recommendations in
2011 following another inquest.

200 One recommendation was that private pool owners be required to provide
a certification of compliance within three years and after that, that such
certification is required to be provided every two years.

201 In response, the Government required inspection every three years of
multiple occupancy dwellings and tourist accommodation, and not private
pools. The Government has twice extended the date by which all
properties with a pool that are offered for sale or lease are required to
have a valid compliance certificate. That date is now 29 April 2016.

202 The validity of a certificate is three years, not two.

203 Another recommendation was that each local council develop a system of
compliance audits of private swimming pools in that area.

204 The Government response was to require that all councils have
established a backyard swimming pool inspection program.

205 It was further recommended that within 3 years, each Council be required
to establish a register of all local pools. This was not implemented, given
the creation of the State-wide pools register.

206 Again, a recommendation was made that there be an increase in penalties
for breaches of the safety provisions of the Act.

207 The Government again pointed to the increase in penalties in 2009 from
\$1,100 to \$5,500, and emphasised that the focus of the Act was
compliance and education rather than enforcement.

208 The evidence given at this Inquest strongly suggests that:

- There is significant non-compliance with the Pools Act
- There is no systematic assessment of home swimming pools for compliance with the requirement of the Pools Act
- There is a lack of consistency of approach to the regulation of home swimming pools among different local government authorities
- The NSW Government has guided local government areas however the implementation of the safety requirements under the Pools Act has been left to individual local councils.
- Armidale Council's program of inspection of all private swimming pools has not been implemented
- This lack of implementation is due to staffing shortages and prioritisation of mandatory inspections over private swimming pools
- The lack of inspections and the emphasis on self-assessment allows for non-complying pools to continue for long periods without detection.
- The minimal number of prosecutions for breaches under the Pools Act, the maximum penalties it provides for and the dissemination of safety information to pool owners has done little to deter owners against non-compliance.

WHAT MORE SHOULD BE DONE?

209 Section 82 of the Coroners Act provides that a Coroner conducting an inquest may make such recommendations as is considered necessary or desirable, in relation to any matter connected with the death with which the inquest is concerned. Recommendations usually relate to matters of public health, public safety or the conduct of public services.

210 Sadly, children continue to drown in swimming pools because they have access to those pools and no-one sees them enter the water.

211 To try and prevent this from happening, many recommendations have been made in the past by coroners, legislation has been changed and attempts have been made to educate the public.

- 212 Despite the emphasis by the State and local governments on compliance and education, the safety of children remains at risk.
- 213 The Coronial Advocate points to the wide spectrum of penalties for non-compliance: at one end are fines under the Pools Act and on the other, criminal prosecution for manslaughter.
- 214 It appears that fines are rarely imposed due to the emphasis on factors other than enforcement.
- 215 The high level of non-compliance with the safety requirements of the Pools Act is disturbing. A greater emphasis on enforcement is required. But of course a pre-condition of enforcement is a comprehensive system of inspection.
- 216 Armidale Council does not appear to have sufficient resources to regularly inspect all private swimming pools. This means that non-complying pools may go uncorrected for many years. There also appears to be a reluctance to issue penalty notices, even in cases of multiple breaches.
- 217 As Mr PRIESTLEY, Counsel for Mr CAMERON submits, Council operates under financial constraints, however if there is no properly implemented system of regular compliance checks, the number of child deaths will not decline.
- 218 If greater allocation of resources within the Council were made to the Inspection team, and if an equal emphasis was placed on enforcement, owners of non-complying pools would have greater incentive to ensure compliance.
- 219 It is one thing for a Council to fulfil its obligations under the Pools Act and develop an inspection program. However if the resources of the Council do not stretch to the implementation of that program, then its practical value is greatly diminished.
- 220 It must always be remembered that the true value of an inspection program is the prevention of loss of life.
- 221 There should be greater emphasis on enforcement, given the failure of education and compliance. This will require more resources at the local council level.
- 222 Mr CLIFTON, who appears by leave for the Council, submits that Council would support an increase in maximum penalties for non-compliance,

- because it would assist the Council in better implementing the safety requirement of the Pools Act.
- 223 I propose to recommend that consideration be given to increasing the maximum penalties applicable to breaches of the safety requirements of the Pools Act.
- 224 At the other end of the deterrent spectrum is a possible charge for manslaughter. However prosecutions for manslaughter where there is a breach of the Pools Act are rare, given the minimal prospect of conviction.
- 225 Recommendations have been made in 2010 and 2011 to Parliament to consider enacting a charge analogous to Negligent Driving occasioning Death. That offence was created to recognise that although the negligent driving may not have been dangerous, a life has been lost.
- 226 Where a pool owner has failed in his or her duty to maintain the safety of a pool, and the life of a vulnerable child has been lost due to the pool owner's negligence, a criminal offence may be appropriate.
- 227 I propose to once again recommend that consideration be given as to whether or not a criminal offence should be enacted to apply in such circumstances.
- 228 There is no systemic uniform approach to be taken by individual councils regarding inspection programs. What is uniform however, is the high rate of non-compliance.
- 229 The requirement for inspections once every 3 years is only legislated in relation to multiple occupancy dwellings and tourist/visitor accommodation. There is no such mandatory requirement for private residential pools.
- 230 This Inquest heard that in Armidale, priority was given to the inspection of pools where there was a legislative requirement to do so.
- 231 Given the inclusion of private pools in the Armidale Council inspection program and past recommendations made by other coroners, I do not propose to again recommend that there be a legislative requirement that all swimming pools in NSW be inspected once every 3 years.
- 232 Despite the emphasis on education, there appears to be conflicting and sometimes confusing information as to the obligations of pool owners.
- 233 Ms PLINT from Hannah's Foundation has produced a coloured pamphlet "Essential Steps for Pool Safety" that is used in Queensland. It is a

colourful and clear document with graphics that many pool owners would find easy to follow.

- 234 I recommend this pamphlet to Armidale Council for their consideration as a format that could improve their education of local pool owners. The assistance of Hannah's Foundation in that regard may be beneficial to the Council.
- 235 Many people rely on internet searches for information. This case is one example, where neighbours were involved in a fencing dispute, and an internet search generated one interpretation of the law.
- 236 The Armidale Council website advises that ensuring that a pool fence complies with safety regulations is the property of pool owners. It also advises that proper maintenance of pool fences will drastically reduce the number of child drowning in NSW. It provides links to the fencing and safety requirements of the Swimming Pools Act, including section 33.
- 237 Apart from the link, the Council website does not specifically address the issue of expenses of boundary fences that form part of a pool barrier.
- 238 I propose to recommend that Armidale Council gives consideration to changing its website to include a statement under the section "Pool Fencing" that the cost of constructing and maintaining a boundary fence that forms part of a pool fence, is the responsibility of the pool owner.
- 239 Despite the improvement in record keeping by Council, it appears from the evidence that the inclusion of photographs with an inspection report may be of assistance in some cases. There is now easy access to technology that records digital photographs that can be quickly uploaded and printed.
- 240 I propose to recommend that Armidale Council supplies each swimming pool inspector with a device to record photographs as part of the implementation of the inspection program.

Conclusion

- 241 On behalf of the Armidale community, I wish to express my gratitude to those members of emergency services who tried so hard to help revive Sebastien on 14 May 2012: ambulance officers Joanne WARD, Frank FERNANDEZ, Shane PAUL and Mick BAIRD, and police officers Acting Inspector Gemma GALLAGHER and Acting Sergeant Joel AIKEN. Senior

Constable Fiona McCORMACK gave comfort and assistance to Leisa and Garry. We expect emergency personnel to respond to a crisis but it must be acknowledged how difficult it is to perform in such a professional manner when a small child is involved.

242 At the Inquest, we heard that the staff at Armidale Hospital, the transport unit, and at John HUNTER Hospital gave tremendous support to Sebastien's family, for which they are most grateful.

243 The Officer in Charge, Detective Senior Constable Mark SYMONS has stayed with this matter from the beginning and has shown great dedication throughout.

244 In this Inquest, I was greatly assisted by the thorough preparation of the Coronial Advocate, Sergeant Stephen KELLY.

245 Support to Leisa and Garry during the Inquest was also given by Ms Katherine PLINT on behalf of Hannah's Foundation.

246 And finally, I wish to acknowledge the dignity shown by Leisa and Garry YEOMANS throughout this inquiry. It has no doubt been a very long three years for them, and for the rest their family and friends, but I hope that this Inquest has provided some opportunity to honour Sebastien.

247 I now turn to the formal findings and recommendations.

Findings under s 81 Coroners Act 2009

248 Sebastien Daniel YEOMANS died at John Hunter Hospital, New South Wales on 16 May 2012. The cause of his death was hypoxic brain damage due to drowning in a swimming pool at 47 Fletcher Street Armidale on 12 May 2012.

Recommendations pursuant to s 82 Coroners Act 2009

➤ To: the Minister responsible for the administration of the Swimming Pools Act 1992.

- That consideration is given to increasing the maximum penalties applicable to breaches of the safety requirements of the Swimming Pools Act 1992.

➤ To the Attorney- General:

- That consideration is given to the enactment of a criminal offence, analogous to that of negligent driving occasioning death, to apply in circumstances where a person dies as a result of the negligence of a third party with respect to the maintenance or use of a private swimming pool.

➤ To Armidale Dumaresq Council:

- That consideration be given to allocating sufficient staff to properly implement all aspects of its swimming pools inspection program
- That consideration be given to changing its website to include a statement under the section "Pool Fencing" that the cost of constructing and maintaining a boundary fence that forms part of a pool fence, is the responsibility of the pool owner
- That consideration is given to supplying each swimming pool inspector with a device to record digital photographs as part of the implementation of the inspection program, and that such photographs be stored with the corresponding inspection record.
- That consideration is given to consulting with Hannah's Foundation in relation to the production of pool safety information to be sent to swimming pool owners.

Magistrate Karen Stafford
Coroner, Armidale

1 April 2015