CORONERS COURT
OF NEW SOUTH WALES

Inquest:	Inquest into the death of Michael Henry Farrell
Hearing dates:	25 February 2021 12 February 2021 9 February 2021
Date of findings:	10 March 2021
Place of findings:	Coroner's Court, Lidcombe
Findings of:	Magistrate Harriet Grahame, Deputy State Coroner
Catchwords:	CORONIAL LAW – Public Interest Immunity Claim – Non Publication Orders
File numbers	2016/00290240
Representation:	Mr M Dalla-Pozza, Counsel Assisting, instructed by Ms A Doyle, Crown Solicitor's Office Mr L Chapman, for the Commissioner of Police

Background to matter and procedural history

1. Before the Court are two applications made by the Commissioner of Police in two separate inquests; the inquest into the death of Michael Farrell and in the inquest into the death of Tyrone Adams.

2. In each application, the Commissioner seeks declarations of public interest immunity or alternatively, what has been referred to in the course of argument as "protective orders" (being non-disclosure and non-publication orders). The nature of the two applications differs significantly, of course. A public interest immunity claim is an exclusionary claim, meaning that, if made, the Court would be precluded from considering those parts of the policy in the course of the inquest (*HT v the Queen* [2019] HCA 40, at [30]). The protective orders, if made, would not have this effect and may be regarded as a "tailoring order" of a type referred to in *HT* at [33], and as such as an alternative to the making of a finding of public interest immunity, given that such a claim is necessarily exclusionary.

3. In both applications, the same claims are made over the same parts of the Safe Driving Policy of the NSW Police Force ("SDP") (although a number of further claims in respect of information that is related to, but is not included in, the SDP are also made in the Commissioner's application in the Adams inquest).

4. The Commissioner was represented by different counsel in both matters; however, the oral submissions made by the Commissioner's counsel in the Farrell inquest in relation to the SDP were adopted by his counsel in the Adams inquest.

5. Given the commonality of issues (at least insofar as they relate to the SDP), I considered it appropriate to have the applications made in both these inquests heard together. In doing so, I am conscious that, in the course of undertaking the weighing up exercise which forms part of the test both for the public interest immunity and protective orders, I may need to consider how the SDP policy will be deployed in each particular inquest. Accordingly, despite the commonality of many of the issues, I have considered the matters separately and will deliver separate judgments. This judgment deals with the Farrell inquest.

6. The applications in the Farrell inquest are sought over certain parts of the SDP. There are two version of the SDP that it is proposed will be included in the brief of evidence (version 8.2 from 2016 and version 9.2 from 2018).

7. At an early stage of receiving the Commissioner's application, I expressed a preliminary view that a number of the protective orders sought appeared justified (I did not, and as explained below, still do not, consider there to be a basis for exclusionary public interest immunity orders over any of the material). I caused a table to be prepared by those assisting me differentiating the parts of the claim where I was satisfied, as a preliminary matter, that there was a basis for protective orders from the parts which I was not and summarising the reasons I was not so satisfied. These kinds of applications should not be approached in a sweeping or broad brush manner and the need for specificity suggested that this would be a useful approach.

8. The Commissioner's then representatives, were invited to consider the information which I was not, on a preliminary basis, persuaded was appropriately the subject of protective orders and to provide further submissions in this regard. They took up that opportunity by adding their responses in a separate column which was added to the table.

9. The table as added to by the Commissioner's then representatives was tendered during the hearing of the applications (although, given the nature of it, I have treated the matters in it largely as containing submissions rather than evidence). The information I was initially persuaded should be the subject of a protective order was marked green and the information I was not initially persuaded should be the subject of protective orders was marked orange.

10. When the applications were initially listed for hearing on 9 February 2021, Counsel for the Commissioner in the Adams inquest made an adjournment application, on the basis that the Commissioner was not, at that time, prepared to run a public interest immunity application.

11. While I was surprised by the adjournment application I considered it appropriate, in order to accord procedural fairness to the Commissioner and given the duty of

this Court to properly consider any claim for public interest immunity, to grant the adjournment application and I relisted the matter for 12 February 2021.

12. I consider that the Commissioner has now been given an adequate opportunity to fully present his public interest immunity claim, noting that the Commissioner has had the table outlining my preliminary views since September last year and those assisting me notified the Commissioner in correspondence dated 26 June 2020 and 14 August 2020 that I considered, if the Commissioner was of the view that there was a proper basis for an exclusionary claim, that claim should be made in the first instance with an application for protective orders being determined if the public interest immunity claim were unsuccessful.

13. I note that the onus lies with the Commissioner to establish the basis for his PII claim.

14. The Commissioner's application is supported by:

    a. Open and closed Affidavits sworn by Assistant Commissioner Corboy APM, dated 12 November 2020;
    b. An open affidavit of Assistant Commissioner Peter Thurtell sworn 11 February 2021; and,
    c. A confidential Affidavit of Sergeant Nicholas Dixon, 11 February 2021 (which was filed in in the Adams inquest but read in the Farrell inquest).

15. I have received written submissions dated 25 June 2020, 24 September 2020 and 3 February 2021 from Counsel for the Commissioner. I also received written submissions from Counsel assisting me. I heard oral submissions from both Counsel over the course of two days.

16. During the hearing, mention was made of a press conference given by Assistant Commissioner Corboy on the occasion of another pursuit. A link to the recording of that press conference remains available under the NSWPF Facebook page. During this press conference, there was considerable discussion about police pursuits, including some discussion of the SDP. A transcript of a section of that press conference was tendered (this was accepted to be an accurate recording of that conference).

17. Upon becoming aware of this press conference and Facebook post, I caused, through those assisting me, a letter to be sent to those then representing the Commissioner. That letter was dated 18 December 2020. It asked whether, in light of some of the things the Assistant Commissioner had said publicly in the course of the press conference, he maintained certain parts of application and, to the extent that he did, inviting him to put on further evidence in this regard.

18. That letter also drew the Commissioner's attention to similar provisions of equivalent policies to the SDP that are publicly available in other jurisdictions and invited further evidence or submissions in this regard.

19. The Commissioner's submissions of 3 February 2021 responded to the letter. From that response, I understand the Commissioner to have accepted:

    a. That Assistant Commissioner Corboy has given the press conference;
    b. That a link to an audio visual recording of the press conference remained on the NSWPF website; and
    c. That the parts of the equivalent policies in the other jurisdictions were publicly available and were in the terms summarised in the letter.

20. In addition, the written submissions of Counsel Assisting drew attention to the proposition that, included in the SDP was some information over which no orders had been sought which was of a similar nature to (or was the same as) information that was the subject of the applications. It was common ground that the present application (as initially made) reflected the way in which orders had previously been made over versions of the SDP in a number of earlier inquests. (In his submissions dated 3 February 2021, Counsel for the Commissioner conceded that this was the case in the course of making a submission that, as a matter of parity, I ought to make the same ruling in these proceedings to those already made[1]).

21. To address this difficulty, the Commissioner handed up an amended application which sought orders over some of the additional information referred to by

[1] Supplementary submissions of the Commissioner of Police, 3 February 2021, at [40].

Counsel Assisting as examples of the similar information over which no orders had been sought. This amendment to the application was not opposed and I consider it appropriate to permit this application to be made. I will consider this additional material.

22. Before leaving this topic, I record that I do not consider that principles of parity preclude me from reaching any result which differs from earlier decisions made by this Court. I of course am not bound by decisions made in previous cases (and in different factual contexts). I also have had the benefit of more extensive submissions in this matter than I apprehend may have been the case in the context of these earlier inquests.

Principles governing the applications

23. There is little dispute about the general principles that govern applications of this kind. Both Counsel agreed, and I accept, that the public interest immunity claim and the protective orders application both essentially involve a balancing exercise requiring:

    a. the identification of any reasons why admitting the material or disclosing or publishing it (as the case may be) will be harmful;
    b. the identification of any reasons why failing to admit, disclose or publish the material will be harmful or undesirable (noting the presumptions accorded by the principles of open justice); and,
    c. the weighing up of any of the competing interests.

24. In this decision, I will use the word “communicate” to refer compendiously to the admission into evidence, the disclosure and the publication of information.

25. Notwithstanding the opportunity accorded to the Commissioner to put on evidence in support of a PII claim (which was taken up by the provision of the open affidavit of Assistant Commissioner Thurtell and the adoption of the confidential affidavit of Sergeant Dixon), during oral submissions, Counsel for the Commissioner confirmed that the claim of public interest immunity and the application for protective orders were co-extensive and that no specific submissions were advanced in support of one of those claims to the exclusion of

the other. This means that the first stage of the test (the identification by the Commissioner of the harm) can be done in a way which deals compendiously with the claims for public interest immunity and for protective orders. However, the different consequences for a public interest determination as opposed to an application for protective orders means that the second and, consequently, the third stage needs to be considered separately. This judgment will adopt that structure

Consideration

Stage 1- identification of the harm

26. The Commissioner's claim is one of a prejudice to methodology and (relatedly or independently) of a risk of harm to responding officers or members of the public. I accept the characterisation of Counsel Assisting of the matters the Commissioner would need to prove in respect of either such claim. That is, I accept that the Commissioner would need to show that the communication of the material could result in some change in behaviour of members of the public (specifically, those drivers who might be the potential targets of police pursuits) and that the effect of that change in behaviour would be to prejudice police methodology and/or to increase risks to officers or members of the public.

27. I further accept, as Counsel Assisting submitted to me, that information which lacks a character of confidentiality, by virtue of it already being in the public domain or being information of a type that could reasonably be deduced by members of the public is unlikely to cause any change to the behaviour of this type.

28. In relation to the "orange material" in the table, in my view, with one exception (where I am persuaded that there is an appropriate basis for protective orders), the Commissioner's claims fall at the first hurdle. In other words, I am not satisfied that any real basis has been demonstrated for considering that the harm the Commissioner points to would be the result of the communication of this material. To the extent that some link has been demonstrated between the harmful effects and the communication of this information, I consider that such a link is tenuous or slight, which causes me to place little weight on it. Alternatively

or additionally, I consider that the information is of a type that is in the public domain (or could be deduced by members of the public as it largely comprises matters of common sense) and, for this reason, will not result in a change in driver behaviour of the requisite type.

29. In reaching this conclusion, I accept and have given considerable weight to the importance of not doing anything to increase risks to the safety of the public and of serving police officers. Even allowing for this, however, I simply cannot see that any real logical connection exists between the communication of most of the material that is the subject of the application and the harmful effects for which the Commissioner contends.

30. I also accept, as was submitted to me, that the evidence of Assistant Commissioner Corboy and the exercise in which the Commissioner is engaged is necessarily speculative, at least to a degree (it involves predicting the possible adverse consequences of a hypothetical communication of material). Having said that, in matters of this kind there is still the requirement for the Commissioner to articulate an evidentiary basis for his claim. In this regard, I particularly note the evidence of Sergeant Dixon. This evidence, as I understood it, was directed to articulating the difficulty the Commissioner found in trying to locate the type of evidence that would be needed to support some of the contentions hypothesised in the remainder of the confidential evidence (the Affidavit was directed principally to the evidence read in the Adams inquest but, as already noted, was also read in the Farrell inquest). The difficulty in obtaining this evidence is not, as I see it, a reason for me not to insist on there being a proper evidentiary basis for any findings. Indeed, on one view, the matters deposed to by Sergeant Dixon serves merely to illustrate that there is an incomplete or inadequate factual basis for many of the harms pointed to in the balance of the confidential evidence (including in the confidential Affidavit of Assistant Commissioner Corboy given the similarity of his evidence to that of Assistant Commissioner Willing's to which Sergeant Dixon's evidence refers).

31. In a similar vein, the Commissioner seeks to invoke the 'mosaic principle' in support of a number of his claims. I accept that this is a principle which I ought to be mindful of and apply as appropriate. In particular, I accept that certain

information, which on its own seems innocuous, may be put together with other information to produce a harmful effect. However, I also accept, as Counsel Assisting submitted to me, that this principle does not absolve me from the need to discern a link between the communication of the information over which orders have been sought and the harmful effects for which the Commissioner contends. I must, of course, approach applications of this kind in a principled way and only make orders of this kind where there is a proper evidentiary basis for them.

32. Counsel assisting has identified that the orange information that appears in the table falls within nine broad categories. An additional category arises from the green information as Counsel Assisting submitted to me that I should, in one instance, depart from my preliminary decision. The submissions made by Counsel for the Commissioner broadly followed this structure. It is convenient for me also to do so in this judgement.

Category 1- vehicle categories

33. The Commissioner seeks orders relating to information which relates to the categories of vehicles that may be used in pursuits. That information is over the following clauses:

- p. ii “vehicle categories” lines 1-5 of version 8.2;
- p. iii, line 1 of version 8.2;
- cl 5-1-4 through to 5-1-8 of versions 8.2 and 9.2;
- cl 5-4-2 line 2 from “the” up to and incl. “riding” of versions 8.2 and 9.2;
- cl 5-4-4 of version 8.2 and 9.2
- cl 6-3 (dot point 3) of version 8.2;
- cl 7-4-1 through to 7-4-2 of version 8.2 and 9.2;
- cl 7-6-7 of version 8.2 and 9.2; and
- cl 8-2 “Code blue” (dot point 3) and “Code Red” (dot points 3, 4) of version 8.2;

- cl 8.3 of version 9.2; and,
- cl 8-5-2 “Code blue” (dot point 3) and “Code Red” (dot points 3, 4

34. In his confidential affidavit, Assistant Commissioner Corboy states:

[redacted]

36. [redacted]

37. However, the information that falls within the clauses now under consideration is of a different character. I find that this information does no more than to reveal:

a. That a category of vehicles exists;

b. That an order of precedence exists between each of the categories in terms of their suitability to engage in pursuits (with vehicles in some categories being more suitable than others to engage in pursuits); and,

[2] Exhibit 1, at [8].

c. Identifying limitations of vehicles within certain categories.

38. I do not accept that the communication of the existence of this more limited sort of information has the harmful effect contended for by the Commissioner.

39. The fact that there are categories of vehicles is not information, in my opinion, of an inherently confidential character. That such categories of vehicles exist may be supposed as a matter of common sense (and members of the public are likely already to have deduced this). It may further be supposed that the public would appreciate that some police vehicles are more suitable than others for conducting pursuits.

40. Further, the existence of categories of vehicles and the hierarchies that exist between them in terms of conducting pursuits are matters which are already in the public domain. Similar information to it has been published or publicly disclosed in a number of other jurisdictions. In this regard, I have been referred to cl [1.11]-[1. 12] of the AFP *National Guideline on Urgent Duty Driving and Pursuits (ACT Policing).* (To be clear, I accept that the Commissioner is not bound by what occurs in other jurisdictions; rather, I find that the publication of similar information in other jurisdictions means that the information is of a sort that has already entered the public domain meaning that its communication will not alter driver behaviour in the way contended for by the Commissioner.)

41. In addition, other parts of the SDP, over which protective orders have not been sought, permit an inference to be drawn that categories of vehicles, and some hierarchy between the categories (in terms of suitability to conduct pursuits), exist. In the course of argument, I was referred to cll 5-1-1 and 5-1-3 of both versions, and 7-1-7 of version 8.2 and 7-1-6 of version 9.2 as examples of such clauses. The first sentences of clauses 7-2-11, 7-2-12, and cl 7-4-3 of version 8.2 and 9.2 permit similar inferences to be made although, I note the Commissioner had amended his application to seek protective orders over this information. As already noted, the Commissioner has conceded in his supplementary written submissions that these parts of the SDP have previously

been published in earlier inquests.[3] I am satisfied that these further parts of the SDP are already in the public domain.

42. I am also satisfied that these matters have effectively been revealed by the Assistant Commissioner's public disclosure during the press conference recorded in the 2018 Facebook post. During the course of that press conference, the Assistant Commissioner states that the "top rated vehicles" driven by the highway patrol are "the ones most suitable for pursuits". This permits an inference (to the extent that it does not expressly reveal) that police maintain a category of vehicles and that there is an order of priority between those vehicles. (Again, to be clear, I do not find that Assistant Commissioner Corboy, by his comments, has waived the Commissioner's claims and I accept that he could not do so, at least in the case of a claim for public interest immunity. Rather, my finding is merely that these comments have caused this information to enter the public domain.

43. As it is information of a sort that is already in the public domain, I am not satisfied that the communication of this information would lead to any change in driver behaviour such as to result in the harmful effects contended for by the Commissioner.

44. Separately and in addition, the Commissioner has not satisfied me of the existence of a link between, on the one hand, the communication of the existence of the fact of vehicle categories, the precedence between those categories and the limitations on some of those categories and, on the other, the harmful effects contended for.

45. As already noted, I accept that, were information enabling identification of which vehicles fell within the categories of the vehicles to be revealed, communication of the order of precedence between the categories of police vehicles and the limitations of the vehicles within each category could potentially have the harmful effects the Commissioner points to. Armed with that information, drivers may react differently and more dangerously when they encounter a police vehicle of a type they know to fall within a particular category of vehicles (depending on the

[3] Supplementary submissions of the Commissioner of Police, 3 February 2021, at [40].

category of that vehicle). However, as already indicated, I am satisfied that the information presently under consideration does not reveal what vehicles fall within each of the classes.

46. I accept that cl 6-3 (dot point 3) of version 8.2 and cl 8-3 (dot point 3) of version 9.2 goes further and reveals a limitation, of sorts, on what vehicles within certain categories may or may not do. Again, however, without information revealing which vehicles fall within those categories, the potential subject of a pursuit will not know what vehicles are subjected to those limitations and will not have an opportunity to modify his or her behaviour accordingly.

47. Further, the limitation in cll 6-3 and 8-3 (which precludes category 3 and 4 vehicles from being used "unless it is life threatening or an emergency where such a response is appropriate") are sufficiently vague, in my view, so as not to give a potential subject of a police pursuit any opportunity to meaningfully alter her or his behaviour.

48. Absent the communication of that additional information identifying which police vehicles fall within the particular categories, I am not persuaded that the information could have the harmful effects contended for by the Commissioner.

49. Accordingly, I am not persuaded that orders should be made in respect of that information.

Category 2- information relating to the matters informing police decisions under the SDP

50. The Commissioner also seeks orders over information which Counsel Assisting has grouped together in a category described as: "claims over matters relating to the police decisions under the policy". The claims that are included in this category are over:

- Clause 6-2-4 of version 8.2 and cl 8-2-5 of version 9.2;
- Clause 7-2-2 of both versions;
- Clause 7-6-2 of both versions
- Clause 8-5-1 of version 8.2 and 8-6-3 of version 9.2; and

- Clause 8-6-2 of version 8.2 and cl 6-4 of version 9.2;

51. I am satisfied that the claims made in respect of each of these clauses is over information which police are required to take into account in the course of making certain decisions or taking certain actions under the SDP.

52. Counsel for the Commissioner submitted that these were mandatory considerations, not discretionary matters; and made the point that police were obliged to take these matters into account. I accept this. However, I also accept that, as submitted by Counsel Assisting, as these are only considerations, they do not provide a reliable predictor of how police will respond in any given situation. For that reason, I am not persuaded that communication of this information really will alter driver behaviour in the way contended for by the Commissioner.

53. Further, I am again comfortably satisfied that the information is of a sort that is already well within the public domain. Clause 6-2-4 of version 8.2, for example, does no more than to require police to take into account danger to police and other road users before engaging in urgent duty driving and, having done so, to provide a list of fairly self-evident matters that police might use to inform themselves of the existence and extent of such a danger (including weather, road conditions, traffic density, time of day, the driver's skills and the police vehicle). These are not matters which are likely to be of any surprise; to the contrary, even a moment's thought would reveal that these are the sort of things that would inform an assessment of danger. I am satisfied that all of the other information over which orders have been sought that has been included in this category is of a similar character.

54. In addition, Police have understandably and (with respect) appropriately, repeatedly emphasised in public fora that public safety informs the exercise of police actions under the SDP. Assistant Commissioner Corboy said as much in his press conference (to which I have already referred). In addition, public safety is a theme that appears prominently in the Commissioner's preface to the SDP (in respect of which, no orders have been sought). It is also, as Counsel Assisting has pointed out, information that is referred to in numerous other parts

of the SDP over which no orders have previously been made and in respect of which no application in this matter was made (I was referred specifically to cl 7-2-1 and 7-2-3 of version 8.2). Further, as Counsel Assisting has also pointed out, similar sort of information has been published in other jurisdictions. And finally, in any event, it is the sort of thing that members of the public would expect would govern decisions made or actions taken during pursuits. I cannot see how the information which is the subject of the application for orders is of any different character to the sort of information which is, I find, well and truly in the public domain.

55. Accordingly, I am not convinced of the existence of any link between any communication of the information and any of the harmful effects contended for by the Commissioner. Communication of the material will not, as far as I can tell, result in any change to driver behaviour of the relevant type.

Category 3- urgent driving

56. Orders are sought over cl 6-2-6 of version 8.2 and cl 8-2-7 of version 9.2. This clause provides:

> "Responding to support vehicles engaged in a police pursuit or to deploy tyre deflation devices is an urgent duty response and all urgent duty driving requirements must be adhered to."

57. Assistant Commissioner Corboy states:[4]

[redacted]

[4] Exhibit 1, at [15].

[redacted]

I do not accept the submission of Counsel Assisting that no harm would flow from the communication of the information in this clause, because the content of the "urgent duty requirements" is not disclosed. Rather, I understand the urgent duty requirements to be the matters dealt with in Part 6 of the SDP.

58. I note that the Commissioner does not claim public interest immunity or seek protective orders over the entirety of this Part. In addition to cl 6-2-6 the Commissioner seeks orders over two other clauses in Part 6, however, as is indicated elsewhere in these reasons I decline to make those orders.

59. However, I consider the information in cl 6-2-6 is of such a generic nature that I am satisfied that communicating it would not jeopardise police methodology or increase risks to officers and members of the public. For this reason, I am not satisfied that there is a link between the disclosure of this information and any harmful effects pointed to by the Commissioner.

60. In the course of argument, Counsel for the Commissioner raised the prospect of the communication of this information encouraging people to make calls to 000 in order to tie up police resources. I accept that calling out police needlessly to calls could potentially tie up valuable police resources. I accept that it may occur from time to time. However, it is not clear to me how the communication of the information in cl 6-2-6 would, in any way, further encourage people to do this. I am not satisfied that this is a result that would be caused by the communication of this information.

Category 4- Approval/authorisation required for re-initiation

61. Clause 7-1-4 of version 8.2, and cl 7-1-3 of version 9.2, relevantly provide:

> "A pursuit is not to be re-initiated by any vehicle unless approval is FIRST granted by the DOI or VKG Shift Coordinator. NO OTHER OFFICER MAY AUTHORISE REINITATION."

62. Clause 7-1-5 of version 8.2, and cl 7-1-4 of version 9.2, provide that "approval to re-initiate a pursuit will only be considered if pertinent information is received which indicates that the circumstances of the pursuit have changed significantly".

63. The Commissioner also seeks consequential orders over the definitions of re-initiation" and "termination" on p. 34.

64. Assistant Commissioner Corboy states in his confidential affidavit that [redacted]

65. I am not persuaded that any tactical advantage would arise for a driver being pursued by disclosure of the requirement for approval to re-initiate. To the extent that a period of time may elapse whilst police await approval and that allows for the driver being pursued to further evade police that advantage arises from the requirements of the policy itself. How the communication of that requirement conveys a tactical advantage remains unclear. The circumstances in which this clause applies are those in which a pursuit is already on foot. Accordingly, it would be expected that a driver would continue to drive away from police as fast as possible, with just as keen an interest in evading apprehension, regardless of any requirement applying to police themselves. This is particularly so in circumstances where the driver has no knowledge of whether or not such approval has been sought or granted.

66. It is put by the Commissioner in his supplementary submissions that disclosure of these clauses would encourage a driver to enter a high pedestrian area or school zone to terminate the pursuit in order to then take advantage of the time needed for re-approval.[7] The difficulty with accepting such a proposition is that,

[5] Exhibit 1, at [34]
[6] Exhibit 1, at [35]
[7] Supplementary submissions of the Commissioner of Police, 3 February 2021 at [28].

first, there is no requirement for police to terminate a pursuit in a school zone or high pedestrian area, and, secondly , these parts of the policy do not say anything about whether approval would be forthcoming in those circumstances.

67. Significantly, no claim is made, or protective order sought, over cl 7-5-7 of both versions of the SDP, which relevantly provides: “When of the view a pursuit should continue post-termination provide the VKG shift coordinator/DOI with relevant information and *request authorisation for re-initiation*” (emphasis added). It must therefore be assumed that the Commissioner has no difficulty with this information being in the public domain.

68. As noted elsewhere in these reasons the SDP has been served and tendered on numerous occasions in coronial inquests and, consistent with the application before me, protective orders have not routinely been made over cl 7-5-7 with the effect that its terms have been repeatedly disclosed. Accordingly, on the basis of the information already in the public domain it can be readily inferred that approval is required in order for a dispute to be re-initiated. I am aware of no particular harm arising from this prior disclosure.

69. Clause 7-1-5 of version 8.2 and cl 7-1-4 of version 9.2, which outlines the circumstances in which a pursuit can be re-initiated, is stated at a such level of generality that it could not be said that disclosure of this clause could prejudice police methodology or increase the risk to the safety of officers or the general public.

Category 5- More than two vehicles involved in a pursuit

70. Clause 7-2-10 of both versions of the SDP provides:

> “No more than two police vehicles (a primary response vehicle and a secondary response vehicle) will become involved in a pursuit unless directed by the DOI, the VKG Shift Coordinator. A DO, a Supervisor or the holder of a GOLD classification may recommend additional vehicles may recommend additional vehicles can become involved but cannot authorise.”

71. Assistant Commissioner Corboy states that:

[redacted]

72. I am not persuaded that the communication of the information in cl 7-2-10 will result in any harmful consequence. This is for the following reasons.

73. First, I accept that it is more dangerous and more difficult for police to pursue a larger group than a smaller one. That is a matter of common sense. For that reason, it is difficult to accept that disclosure of cl 7-2-10 would provide an inducement for offenders to travel in large numbers that does not already exist.

74. Secondly, cl 7-2-10 is not a prohibition on the involvement in a police pursuit of more than two police vehicles. Clause 7-2-10 provides only that authorisation is required before that may occur. In circumstances where there is no awareness among the vehicle or vehicles being pursued of whether or not that authorisation has been granted, I am not satisfied that disclosure would lead to a change in driver behaviour of the relevant type.

75. With respect to the evidence of Assistant Commissioner Corboy, it is not clear to me that [redacted] Clause 7-2-10 clearly indicates that more than

[8] Exhibit 1, at [26]

four officers may be in a pursuit. There is nothing in the terms of the clause, nor in any evidence before me, to indicate that in circumstances where multiple persons are being pursued authorisation for additional vehicles to join the pursuit would be unusual or unlikely.

76. Thirdly, no claim has been made, or protective orders sought, over cl 7-5-2 which relevantly provides "until such time the DOI, VKG Shift Coordinator, a DO or supervisor assumes control, only one secondary response vehicle will become involved in a pursuit." From this language a clear inference can be drawn that, ordinarily, only two vehicles will be involved in a pursuit. As stated above the Commissioner concedes that this provision has previously been published in earlier inquests.

77. On that basis I am satisfied that information that discloses the fact that ordinarily only two police vehicles will be involved in a pursuit is already in the public domain. I am aware of no particular harm arising from this prior disclosure.

78. Accordingly, I am not persuaded of the existence of any link between any communication of the information and any of the harmful effects contended for by the Commissioner.

Category 6 Two-second gap

79. Clause 7-2-13 of versions 8.2 and 9.2 of the SDP provides:

> "All vehicles involved in a pursuit will maintain a minimum two second gap."

80. "Two second gap" is defined on both p. 34 of version 8.2 and p. 24 of version 9.2 to mean:

> "The time taken between the rear of a vehicle passing a fixed point on the roadway and the front of another vehicle passes the same point."

81. Assistant Commissioner Corboy states that disclosure of the fact that police are required to maintain a two second gap [redacted]

[redacted]

82. Assistant Commissioner Corboy states that a further concern with disclosure of this information is that [redacted]

83. I accept that a driver being pursued by police narrowing the gap between his or her vehicle and the police vehicle is dangerous behaviour that may adversely impact upon the safety of those involved in the pursuit and other road users. I also accept that, if it were the case that police were *required* to terminate a pursuit in the event of a breach of a two second gap, communication of that requirement could (at least potentially) lead to the eventuation of the risks pointed to by Assistant Commissioner Corboy. That is because what disclosure of a requirement of that sort would reveal is that an act that a driver being pursued might readily be able to undertake (narrowing the gap) would have the direct effect of causing the pursuit to end. In those circumstances, there could be some foundation for the suggestion that disclosure could encourage some drivers to narrow the gap with the effect of increasing the risks associated with such behaviour.

84. However, on its face, cl 7-2-13 does not *require* police to terminate a pursuit in the event the two second gap is breached. Clause 7-2-13, which appears in a section of the SDP entitled "Pursuit Guidelines", does not refer to termination. This may be contrasted to other clauses in the SDP which deal expressly with this issue. Termination is dealt with in a different section of the SDP, (7-6), expressly entitled "Termination of pursuits". There, clauses 7-6-1 through 7-6-9 set out the circumstances in which a pursuit will be terminated. Breach of the two second gap is not listed among them. Further, as Counsel Assisting has

[9] Exhibit 1, at [23]
[10] Exhibit 1, at [25]

observed, the Commissioner has not adduced any evidence to establish that cl 7-2-13 is intended, or interpreted by police, to mean that police drivers are required to terminate a pursuit in the event of a breach of the two second gap.

85. During the hearing counsel for the Commissioner confirmed that it is not the case that should the two second gap be breached police are automatically required to terminate the pursuit.[11]

86. Absent any particular incentive to do so, it is difficult to see why a driver attempting to evade police in a pursuit would seek to narrow the gap between themselves and the police vehicle given this would logically be most likely to involve slowing down. In my view, communication of the information in relation to the two-second gap does not create any such incentive.

87. Accordingly, I am not persuaded of the existence of any link between any communication of the information and any of the harmful effects contended for by the Commissioner.

Category 7- Requirement of police to provide certain information:

88. This information appears at cl 7-5-1 of both versions of the SDP. The Commissioner seeks orders over a number of dot points in that clause. That information may be placed into the following subcategories:

    a. Information that reveals that police must inform radio supervisors of certain matters (dot points (e) and (j) of dot point 2 of cl 7-5-1 and dot point 4);
    b. Information that reveals that police require authorisation before taking certain actions (dot points 5, 7, 8 and 11) (clause 7-6-5 of both versions falls within a similar category);
    c. [redacted]

[11] Transcript, 12 February 2021, p. 34, lines 24 – 29.

89. In support of this claim, Assistant Commissioner Corby deposes to a concern that communication of this information will encourage drivers to drive in a more dangerous manner.[12]

90. In support of the contention over those parts of the clause that require police to inform their radio supervisors of certain matters (and do no more than that), Counsel for the Commissioner referred to a concern that revealing that police must [redacted] As I understood the argument, it was submitted that this would prejudice police methodology by allowing potential subjects of a police pursuit to bring about circumstances that would require police to discontinue their pursuits

[redacted] I have accepted on a preliminary basis [redacted]

[redacted]

93. I simply cannot accept that the fact that there is radio communications between police and other officers is not something that is not already widely known in the community. Police pursuits are a matter of particular interest to the media and a

[12] Exhibit 1, at [28]

fictitious, albeit occasionally realistic portrayal of pursuits is common in films and other media. These media reports and fictitious depictions of pursuits commonly show police radioing in to other police. Further, the radioing in by police conducting pursuits is, as Counsel Assisting submits, a matter that is referred to in other jurisdictions as well as in parts of the SDP that have been published in the course of earlier inquests presided over by this court.

94. [redacted], I make similar findings. Since the potential subject of a police pursuit has no way of knowing whether or not those approvals will be forthcoming, it appears the fact that communications are required is at the heart of the Commissioner's concerns in respect of this aspect of the claim. I have dealt with this claim in the preceding paragraph.

95. The Commissioner also submitted that the delay in providing such approvals will provide some sort of tactical advantage to potential subjects of police pursuits. There was no evidence before me as to how long such approval might take, so I am unable to assess whether such an advantage might occur in reality or the extent of such an advantage (although, I would have assumed that in a situation of urgency, some provision for rapid approvals might exist). I do not need to speculate on this, however, as, even if the delay in waiting for an approval does create a tactical advantage, it is an advantage (and corresponding disadvantage to police) which is inherent in the terms of the SDP itself. I cannot see how communicating this information will worsen this tactical disadvantage in any way.

96. Similarly, Counsel for the Commissioner submitted that the requirements for approvals could serve as a distraction for officers involved in a pursuit situation.[13] That may be so, but, again, it is a distraction which is inherent in the policy itself; the communication of this will not, as far as I can see, make this distraction any worse.

97. I am not satisfied that there is any link between the harmful effects contended for by the Commissioner and the communication of this information.

[13] Transcript, 12 February 2021, p. 33, line 20 – 22.

98. I am, however, satisfied that, to the extent that these parts of cl 7-5-1 [redacted], there is an appropriate basis for protective orders. I accept that there is, at least, a possibility of drivers changing their behaviour were they to be aware [redacted] described in these parts of the policy.

Category 8 Termination:

99. The next category is over information that requires police to terminate pursuits in various circumstances This category may be divided into sub-categories:

    a. Termination of a pursuit where to continue is futile (because the gap between police and the vehicle was too great) (cl 7-6-6 of both versions of the SDP); and

[redacted]

100. The Commissioner's arguments in relation to the former subcategory depends on the premise that, if a potential subject of a police pursuit knew that a pursuit had to be terminated where the gap was too great, this would encourage her or him to drive even more quickly to try and get away from pursuing police.

101. The difficulty with this, of course, is that the object of a person who has taken to avoid police is to avoid capture. This will ordinarily involve that person driving away from police as quickly as possible (including, in all probability, in a dangerous manner) so as to get away from police. I cannot see how communicating this information could possibly encourage drivers to drive even more quickly or more dangerously. I am not satisfied that communicating this material will have the harmful effects contended for by the Commissioner.

102. [redacted]

Category 9- debrief form

103. Claims are also made over information that appears on the debrief form on pp. 39-40 of the SDP. The debrief form appears only in version 8.2. That information can be placed into the following subcategories:
    a. Information that indicates that a vehicle may be “primary” or “secondary”;
    b. Information that reveals that there is a category of vehicles;
    c. Information that refers to a third police vehicle becoming involved in the pursuit (with direction to ascertain whether it was in accordance with the safe driving policy);
    d. Information that refers to the deployment of tyre deflation devices

104. The information on the form that reveals that there is a category of vehicles and that refers to a third vehicle potentially becoming involved in a pursuit is of the same character as that in categories 1 and 5. For the reasons I have given, I am not persuaded of the existence of any link between the communication of this information and any harmful effect.

105. The information that refers to the vehicle being primary or secondary appears to be aligned to a submission that refers to the harms said to flow from revealing that there are radio communications between police involved in a pursuit and others. I have already dealt with what I regard is the implausibility of members of the public not knowing that there radio communications between police officers involved in a pursuit occur.

106. To the extent that it is said that the fact that there is some form of monitoring or supervision of a pursuit (as opposed to mere radio contact) that is harmful, it is not clear to me that it is, or that communicating the fact that there are primary or secondary would otherwise be harmful.

107. In addition, I note that the parts of the debrief report form at pp. 39-40 allow for a facility to explain why the pursuit was not being supervised. This appears to allow for a possibility of a pursuit being continued in circumstances where no

supervision was possible (and means that police are not required to terminate pursuit in the absence of any form of supervision)

Category 10- Non-police officer in vehicle

108. A further category arises. It relates to clause 7-2-8 of both versions of the SDP.

109. I had expressed a preliminary intention to make protective orders in respect of information that prohibits police from engaging in a pursuit if a person who is not a police officer is present in the vehicle. In his written submissions, Counsel Assisting invited me to revisit this ruling. Counsel for the Commissioner addressed me orally in this regard. He submitted that the possibility of the potential subject of a police pursuit seeing in through the windows of the police vehicle and working out (for example, from the fact that the person was not wearing a police uniform) that a person who was not a police officer was present.[14] Counsel for the Commissioner then submitted that communication of this information would enable prospective subjects of a police pursuit to engineer a situation whereby a person was put in the police vehicle. This would (as I understood the argument) allow the potential subject of the pursuit to know that he or she could not be pursued. Counsel for the Commissioner invited me to consider this proposition by reference to the hypothetical example of police in a small country town (where only one police officer was present) such that there were no other police available to conduct a pursuit.[15]

110. I have considered this carefully. It seems to me to be a remote possibility. The limitations suffered by the police in the small country town are of a type that is inherent (given inevitable limitations in resources); the real question is whether communicating this will allow for the deliberate manipulation of events in the manner that has been suggested by Counsel for the Commissioner. In this regard, I cannot rule out the possibility that the potential subject of a police pursuit might be able to see through the windshield of the police vehicle and deduce from the clothes that person was wearing that he or she was not a

[14] Transcript, 12 February 2021, p. 7 lines 40 – 44.
[15] Transcript, 12 February 2021, p. 19 line 42 - p. 20 line 14.

police officer (although, an equally possible inference, it seems to me, that the potential subject of a police pursuit may draw from seeing a person not wearing a police uniform is that this was a plain clothes officer.) More significantly, however, I regard the possibility of the prospective subject of a police pursuit being able to engineer a circumstance where a third person is in a police vehicle as being quite improbable. In most cases, pursuits occur randomly as the result of a person ignoring a police direction to stop. This is inconsistent with the type of planning that would be involved in the hypothetical scenario Counsel for the Commissioner proposed.

111. Therefore, to the extent that communicating this information may be thought to any harmful consequence, I consider the risk to be slight.

112. Accordingly, I am now satisfied that there is no basis for the orders sought and depart from this aspect of my earlier view.

Additional applications sought in the amended application

113. I am satisfied that each of the additional information which the Commissioner seeks through the amended application fall within one of the existing 10 categories referred to above (most appear to fall within category 1). Indeed, I understood that a desire to achieve consistency between the type of information that was and was not included in the orders was the motivation for the Commissioner making the application. Accordingly, I decline to make the additional orders the subject of the amended application for the same reasons I have already expressed.

Considerations in favour of not making the orders

114. I accept, as submitted by Counsel Assisting, that principles of open justice provide a compelling reason against making orders of the type sought. I also accept that they are of particular relevance in this jurisdiction; part of the role of this jurisdiction is to shine a light a light on issues of public concern. I was referred to the decision of *Bilbao v Farquhar* [1974] 1 NSWLR 377 at 388 in this regard.

115. I find that an exclusionary claim would have significant impacts on the exercise by the Court of this jurisdiction. This Court has both adversarial and inquisitorial characters: *Musumeci v AG* [2003] NSWCA 77 at [33]). Its jurisdictional role (under s 81 *Coroners Act* 2009 (NSW) involves, at least in part, a fact finding exercise: *R v West London Coroner; ex Parte Gray* [1988] QB 467 at 473. This makes it difficult to identify, in advance of an inquest, the significance that a particular piece of evidence will assume.

116. Another important function of this court involves the court's capacity to make recommendations pursuant to section 82 of the *Coroners Act 2009(NSW)*. The issues list prepared and circulated for this inquest makes it clear that the operation of the SDP, at least in a limited respect, will be considered. One wonders how a proper investigation of this matter, involving the testing of evidence against relevant policy could proceed without examination of the relevant provisions of the SDP in context.

117. I accept that it is not presently possible to point to the particular use that will be made of the SDP. It may be that information over which the orders are sought end up being of peripheral relevance (noting, in particular, that the expert evidence from police in this regard is still outstanding). I would observe, though, that these matters must be informed by the terms of the SDP itself as well as what emerges during the course of the inquest. For this reason, I am satisfied that adopting a wholly exclusionary claim results in a real possibility of prejudice to the jurisdiction by (potentially) precluding me from engaging in the type of fact finding exercise which is essential to my task.

118. This consideration does not arise in the application for protective orders.

119. I am conscious of principles of procedural fairness. I consider that they militate against the making of a wholly exclusionary claim (as they potentially deny any opportunity for interested parties to have access to all of the material). Again, however, as the form of protective orders provides an opportunity for interested persons to access these policies, I do not consider principles of procedural fairness to weigh significantly against the making of those orders.

<u>Weighing up</u>

120. I do not consider that the Commissioner has articulated a logical link of any substance between the concerns he has advanced and the communication of the material marked in orange (with the exception of dot points 6 and 9- 10 of cl 7-5-1). To the extent that he has identified such a link, I find that link to be remote or tenuous. I have accorded these matters little weight in the weighing up exercise.

121. I consider that, in the case of an exclusionary claim, the possible prejudice to the court in the exercise of its jurisdiction and, potential, procedural fairness concerns wholly outweigh any (limited) harms that would be incurred by admitting the orange material.

122. I further note that, in the present context, I may, at the conclusion of the inquest, consider making recommendations under s 82 of the Act which could involve questions as to whether the SDP, in its current form, needs to be updated. This is a further matter, I find, which makes it desirable to have the SDP in its full form available for consideration by this Court.

123. I accept that the position is more difficult in the case of the protective orders. The Court would have access to the materials and a regime is proposed for any interested parties to have access to this information (potentially addressing procedural fairness concerns). The concerns I have referred to in the previous paragraphs do not apply.

124. Ultimately, however, I am of the view that, the weakness in many of the arguments advanced by the commissioner over the material marked in orange, (with the exception of dot points 6 and 9- 10 of cl 7-5-1), means that this is outweighed by the considerations that are against the making of the orders sought. In particular, I am conscious of the considerations behind the principles of open justice and the particular force with which those considerations apply in proceedings of this kind.

125. I adopt the conclusion in the preceding paragraphs in respect of cl 7-2-8 as well. I depart from my preliminary view that this was appropriately the subject

of some form of protective order and rule that no public interest immunity or protective order should be made in respect of it.

126. The balance of the green material is in a different category. Notwithstanding my preliminary views, I am required to consider a public interest immunity claim in respect of it, given Counsel for the Commissioner has maintained a public interest immunity application over all of the material. Whilst I was, and subject to one exception (cl 7-2-8- as referred to above) remain satisfied that it was appropriate for me to make protective orders, for the reasons I have already expressed, I would not be prepared to make orders excluding this information from inclusion in the brief entirely. I consider that the Commissioner's concerns can wholly be addressed by the making of the protective orders of the type the Commissioner had initially sought. This, it seems to me, is the appropriate course in cases of this kind, given what was said about the making of tailoring orders in *HT*.

Conclusion

127. I have prepared a schedule which applies my reasoning to the specific parts of the SDP.

128. I note that while neither counsel assisting nor counsels for the Commissioner addressed me directly on the nature of my power to make non-publication orders pursuant to the *Coroners Act* 2009 , the draft alternative orders sought were described as pursuant to ss 65 and 74 of the *Coroners Act* 2009 and the "coroner's incidental power." In my view my power to make the necessary non-publication orders under section 74 is sufficient for the material which will be tendered. That section offers the court some specific guidance. As is clear from my reasons above, in making non publication orders I have taken into account the matters set out in section 74(2), in particular the principle that coronial proceedings should generally be open to the public and also the personal security of members of the public, among other factors. Any later request for file material pursuant to section 65 will be dealt with in line with the reasoning set out here.

Other matters

129. As noted during the hearing, I consider it appropriate for the publication of this decision and for this decision to come into effect five days after the delivery of this judgement to enable the Commissioner to obtain advice on his options prior to the publication of this information.

130. I have referred to some information over which I am satisfied orders should be made. This is marked in “red”. It is, of course, appropriate that this information is not published and a redacted version of the judgement omitting those paragraphs will be prepared. If there is any further information which the Commissioner ought not be published, the Commissioner should advise those assisting me of this prior to 4pm on 15 March 2021.

Magistrate Harriet Grahame
Deputy State Coroner
NSW State Coroners Court, Lidcombe
10 March 2021

SCHEDULE

NSWPF Safe Driving Policy Version 8.2 – July 2016

Page	Line/Para	Decision
ii	"Vehicle categories", lines 1 - 5	No order made
iii	Line 1	No order made
18 – 19	5-1-4 to 5-1-8 up to and incl. para after last dot point	Non-publication order made
19	5-4-2 line 2 from "the" up to and incl. "riding"	Non-publication order made
19	5-4-4	Non-publication order made
20	6-2-4	No order made
20	6-2-6	No order made
20	6-3, all the words in dot point 3	No order made
21	6-4, all the words in dot point 3	No order made
22	7-1-4, line 3 from "A" until end of line 4	No order made
22	7-1-5	No order made
22	7-1-6	Non-publication order made
22	7-2-2	No order made
23	7-2-4	Non-publication order made
23	7-2-8	No order made
23	7-2-10	No order made
23	7-2-11 (first sentence only)	No order made
23	7-2-12 (first sentence only)	No order made
23	7-2-13	No order made
23	7-4-1	No order made
23	7-4-2	No order made
24	7-4-3	No order made
24-25	7-5-1 "Drivers and Escorts", sub-s €, (j), dot points 4 – 11, 15	Non-publication orders made over bullet points 6, 9, 10, and 15 only.
28	7-6-2	No order made
28	7-6-3	Non-publication order made
28	7-6-5	No order made
28	7-6-6	No order made

28	7-6-7	No order made
28	7-6-8	Non-publication order made
28	7-6-9	Non-publication order made
30	8-2 "Code Blue" dot point 3	No order made
30	8-2 "Code Red" dot points 3, 4	No order made
30	8-5-1	No order made
31	8-6-2	No order made
34	2nd and 3rd para of def'n of "re-initiation"	No order made.
34	"A pursuit is not" to end of page in def'n of "terminate"	Non-publication order made over the last sentence in the definition of "terminate" only.
37	11th line under "C"	Non-publication order made.
39-40	All references to category 1, 2, 3, or 4 vehicles	No order made
39-40	"Police Vehicle and Occupant Detains" box, except paras 1, 4, 5	No order made.
39-40	"Supervisor Details" box, para 2	No order made.
39-40	"Road Spikes" box, para 1	No order made.

NSWPF Safe Driving Policy Version 9.2 – June 2019

Page	Line/Para	Decision
12	5-1-4 to 5-1-8 up to and incl end of 1st full para after dot point	Non-publication order made.
13	5-4-2, line 3 to 3rd word on line 4	Non-publication order made.
13	5-4-4	Non-publication order made.
14	6-4, except dot point 3	No order made.
14	7-1-3, line 4, 7th word to end of para	No order made.
14	7-1-4	No order made.
14	7-1-5	Non-publication order made.
14-15	7-2-2	No order made.
15	7-2-4	Non-publication order made.
15	7-2-8	No order made.
15	7-2-10	No order made.
15	7-2-11 (first sentence only)	No order made.
15	7-2-12 (first sentence only)	No order made.
15	7-2-13	No order made.
15	7-4-1	No order made.
15	7-4-2	No order made.
15	7-4-3	No order made.
16	7-5-1 "Drivers and Escorts" sub-s €, (j), dot points 4 -11, 15	Non-publication orders made over bullet points 6, 9, 10, and 15 only.
18	7-6-2	No order made.
18	7-6-3	Non-publication order made.
18	7-6-5	No order made.
19	7-6-6	No order made.
19	7-6-7	No order made.
19	7-6-8	Non-publication order made.
19	7-6-9	Non-publication order made.
20	8-2-5	No order made.
20	8-2-7	No order made.
20	8-3, dot point 3	No order made.

20	8-5-2 "Code Blue", dot point 3	No order made.
20	8-5-2 "Code Red", dot points 3,4	No order made.
21	8-6-1, all the words in dot point 4	No order made.
21	8-6-3	No order made.
24	Defined term and its meaning between "Termination" and "Traffic Stop"	No order made.