CORONERS REGULATIONS 1996

Form 1

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21st January, 200521st January, 2005
Case No: 1328/02

RECORD OF INVESTIGATION INTO DEATH

I, **LEWIS PHILLIP BYRNE**, Coroner,

having investigated the death of GARRY WHYTE with Inquest held at Coronial Services Centre, Southbank on the 8th to 12th and at Melbourne Magistrates' Court, Melbourne on the 15th to 17th November, 2004
find that the identity of the deceased was GARRY WHYTE and that the death occurred on 7th May, 2002 at St Vincent's Hospital from

1(a). GUNSHOT INJURY TO CHEST

in the following circumstances:

In broad terms, Gary Whyte, a prisoner in lawful custody attending St Vincent's Hospital for assessment in an attempt to escape was shot and killed by a bullet discharged from his service revolver by Prison Officer Fabizio Federico.

Mr Federico was charged with murder and subsequently discharged at committal by Magistrate Mealy.

It is imperative at the outset, lest there be misunderstanding, to establish what is the precise role/function of a coroner. It is not in any way to review the decision of the magistrate who discharged Mr Federico.

The *Coroners Act 1985* provides that a coroner must, if possible, find the cause of a death and how the death occurred, that is the circumstances surrounding the death (see Section 19(1)(b) and (c) of the *Coroners Act 1985*). Furthermore, a coroner may comment on any matter connected with the death including public health or safety or the administration of justice (see *Coroners Act 1985*, Section 19(2). Furthermore, a coroner may make recommendations to any Minister or public statutory authority on any matter connected with the death (see *Coroners Act 1985* Section 21(2)).

There is a specific statutory prohibition precluding a coroner in a finding or comment stating that a person is or maybe guilty of a criminal offence.

Keown v Kahn (1999) 1VR69 represents in my view, a landmark judgement which provided much needed guidance to coroners. His Honour Mr Justice Callaway adopting a statement contained in the report of the Brodrick Committee (UK) Report said:

> *"In future the function of an inquest should be simply to seek out and record as many of the facts concerning the death as public interest required, without deducing from those facts any determination or blame."*

Again quoting the Brodrick Committee (UK) Report, His Honour noted:

> *"In many cases, perhaps the majority, the facts themselves will demonstrate quite clearly whether anyone bears any responsibility for the death; there is a difference between a form of proceeding which affords to others the opportunity to judge an issue and one which appears to judge the issue itself."*

So while not laying or apportioning blame a Coroner should endeavour to establish the CAUSE, or CAUSES, of a death; the distinction is fine but real. As Callaway J.A. described it in Keown v Kahn (1999) 1VR69 @ 76:

> *"In determining whether an act or omission is a cause or merely one of the background circumstances, that is to say a non-causal condition, it will sometimes be necessary to consider whether the act departed from a norm or standard or the omission was in breach of a recognised duty, but that is the only sense in which para. (e) mandates an inquiry into culpability. Adopting the principal recommendation of the Norris Report, Parliament expressly prohibited any statement that a person is or may be guilty of an offence. The reasons for that prohibition apply, with even greater force, to a finding of moral responsibility or some other form of blame: the proceeding is inquisitorial; the conclusion would be more indeterminate than a conclusion about legal responsibility; and there would be no prospect of a trial at which the person blamed might ultimately be vindicated by an acquittal."* (My emphasis).

So not only is it inappropriate for me to suggest Prison Officer Federico may have committed an offence, it is also impermissible to even suggest he was negligent, let alone recklessly negligent.

In his final submission Mr Bruce Walmsley, SC, counsel for Mr Whyte's widow, urged that I make a finding the use of lethal force by Prison Officer Federico was "unreasonable and unnecessary" and there was no basis to excuse his actions. That submission was supported, indeed adopted by Ms Randazzo, SC, counsel for Ms Gauld, the mother of Mr Whyte. As to Mr Walmsley's contention, it is not for me to "excuse" Mr Federico or otherwise. Furthermore, it is not for me to specifically find whether Federico's actions were "unreasonable" or "unnecessary", nor make a finding whether the shooting of Mr Whyte was, as claimed, a lawful act of self defence.

The facts in Keown v Kahn are apposite to the present case. In that case the Deputy State Coroner Iain West made a formal finding that Constable Keown, who shot and killed Colleen Richman, did not contribute to the cause of death because his action in shooting Ms Richman was a justifiable act of self defence. It was that finding and the associated

finding that Ms Richman's actions were the sole contributing cause of her death that the family sought to challenge, not whether a finding of self defence was open to the coroner.

The judge at first instance found the finding that Ms Richman contributed solely to her death was not open to Coroner West and directed the inquest be re-opened and the finding re-examined.

As His Honour Mr Justice Ormiston observed in Keown v Kahn:

> *"The findings of coroners ought to eschew use of language which connotes legal conclusions as opposed to factual findings"*

I have heard contended that if there is no determination of criminal or civil liability what is the point of the exercise. That contention is, in my view, not only cynical, but ill founded.

The coronial function is however important. Leaving aside the ability to make recommendations (the preventative role) it provides a forum where the facts surrounding a death can be drawn out and elucidated. By its very nature it is inquisitorial. The coroner has an obligation, to quote His Honour Mr Justice Callaway, "to seek out and record as many of the facts as the public interest requires". Unlike some other proceedings which may flow from the same death " interested parties", who often do not have the resources, knowledge or experience to pursue the facts are entitled to be legally represented at inquest. Once the facts are elucidated parties can do with them what they will.

In his judgement in Keown v Kahn (1999) 1VR69 @ 75, Callaway J.A. referred to the Norris Report upon which the 1985 Coroners Act was largely founded and the Brodrick Committee Report a similar review of the English coronial systems and observed:

> *"A coroner is not concerned with questions of law of that kind. Instead the coroner is to find the facts from which others may, if necessary, draw legal conclusions."*

Importantly in the context of this case His Honour, on the next page, continued:

> *"It follows that a person who kills necessarily contributes to the cause of death and that is none the less true where the killing is in lawful self defence. A coroner is not concerned with the latter question but will ordinarily set out the relevant facts in the course of finding how death occurred and the cause of death. The facts will then speak for themselves, leaving readers of the record of investigation to make up their own minds about lawful self defence or any similar issue."*

On any view of the evidence (leaving aside for the moment that often there may be not only one, but several causes of a death) that statement of the law renders incontrovertible a finding that Fabizio Federico, in shooting Whyte, contributed to the cause of the latter's death. I now seek to set out in more detail the pertinent facts as I find them.

I dispose of one issue at the outset. Mr John Goetz of counsel represented St Vincent's Hospital and staff. To some extent I cut short his final submission by indicating that an

adverse finding or comment was not, nor had ever been in contemplation. I accept unreservedly that medical attention including the emergency procedures that followed the code blue call were entirely appropriate and timely; in fact I commend the medical and nursing staff for their efforts.

When doctors initially attended where Mr Whyte lay mortally wounded in the east/west corridor there was a short delay in attending to him when Prison Officer Federico, with his firearm trained on him refused to allow immediate access to his prisoner. I am satisfied that short delay did not alter or effect the final outcome.

It is clear to me Mr Whyte feigned an illness to get out of the MAP into what he perceived to be a less secure hospital environment with a view to taking the opportunity, should it arise, to attempt an escape.

After being taken to the scan room and some explanation of the procedure Mr Whyte was placed on the scanning table. The armed prison officer, Federico, positioned himself in the north/south passageway outside the double door from the scan room. The other prison officer, Mr Riordan, retreated to the control console room behind the glass windows with the radiographer undertaking the scan.

Radiographer, Andrew O'Reilly, related how shortly after commencing a preliminary scan he heard his colleague Jennifer Kay exclaim *"he's running"*, or words similar. He said as he looked up he saw Mr Whyte *"face down at the ground scampering and moving towards the double doors into the north/south passageway"*. At the same time he said the other prison officer, Riordan, rushed into the scan room. As he and his colleague Ms. Kay made for the exit from the control console room to the same passageway Mr O'Reilly said he heard two shots *"in quick succession"*.

Another radiographer, Stewart McNestie, was in the north/south passageway some 5-6 metres south of the exit to the scan room. He related how he had a good view down the corridor and having heard two loud bangs about a second apart he <u>then</u> saw a person he subsequently learnt was prisoner Whyte *"barge out"* of the scan room, crash into the wall and then run towards a set of double doors at the north end of the corridor. Mr McNestie is adamant both shots were fired before Mr Whyte appeared into his view in the passageway. The doors into the scanning room are not flush with the eastern wall of the north/south corridor. Mr McNestie said that from his location he saw no one else in the corridor other than Mr Whyte until the other guard, obviously Riordan, came running out of the scan room only one to two seconds behind the prisoner. The only inference able to be drawn from that version is that at the time of the second (and fatal) shot Mr Whyte was either still in the scan room or in the alcove area between the exit doors and the passageway proper. This alcove area is shown in the scale plan of the immediate location - see Exhibit "E" and is depicted in photo 13 of Exhibit "A".

Another witness, Jason Villaceran gave another perspective from his position in an area opposite the double exit doors on the western side of the north/south corridor; a position generally to the rear a little to the right of Mr Federico. Mr Villaceran drew on a scale plan the position of himself, the prison officer and the course he says the prisoner took after

coming out the double doors of the scan room. At first I thought he was suggesting the escaping prisoner proceeded out the door and took a course behind the prison officer. He clarified on the diagram this was not the case and indicated Mr Whyte cut across in front of the armed guard heading north towards the east/west corridor. Mr Villaceran maintains he first saw Mr Whyte through an open door which Whyte swung open as he exited the scan room. Like all other eye witnesses Mr Villaceran commented that everything happened very quickly.

It is important to examine carefully what was said by Prison Officer Riordan, who it is clear was a very short distance behind the fleeing Gary Whyte, so close infact that when the second and fatal shot was fired gun shot residue was deposited on the left side of items of his clothing.

Mr Riordan said initially he observed the back of Mr Whyte through a gap in the doors, which was closing and Mr Federico's face through the window of the door. He said he then concluded Whyte was escaping. He said when the second shot was fired he was through the double doors with Whyte a couple of metres in front <u>to the right</u>. Significantly, he said the noise of the second shot was in his left ear in close proximity and Federico was in front of him <u>to the left</u>. On the clock he placed Whyte at 12 o'clock and Federico at 10-11 o'clock. Mr Riordan said he could not say how far back into the corridor Federico was, but he said it was his perception they were very close together. He said in answer to a question from Mr Walmsley that at the time of the second shot the prisoner had changed position to his right from where he had first observed him.

In response to questions put by Mr Ruskin, Riordan stated Mr Whyte was <u>running very fast at Federico</u> at the time of the first and second shots, *"confronting"* Federico, *"moving his body toward"* Federico. He further stated all the events happened very quickly. Of course, it is critical to determine whether Mr. Whyte was, to put it in the venacular, "going for" Federico's gun, or whether he burst through the scan room doors and <u>immediately</u> headed right towards the doors at the northern end of the north/south corridor in a frantic endeavour to make good his escape.

In re-examination, Mr Ryan, Counsel Assisting, raised with Mr Riordan the fact that in his earlier formal statements there was no reference to Whyte *"confronting"* or *"moving his body"* towards Federico, raising the spectre of a recent invention. I examined carefully what Riordan said at paragraph 6 of his statement where this issue is addressed. He said:

> *"I realised at this time that the prisoner was running out of the examination room through the double doors. I think the doors were swinging. I ran towards the double doors. I observed the prisoner running towards Mr Federico. I heard Mr Federico issue a loud command, "Stop, Don't move." The prisoner was in front of Mr Federico and was blocking most of my view of him. They were very close together. I ran through the doors."*

A little later in his statement Mr Riordan said:

> *"I then heard a second gunshot. I could see that Mr Federico had his revolver out and was pointing it in the direction of the prisoner. I was definitely through the double doors at this time. I could see clearly what was going on. The second shot sounded the same as the first shot.*

It was evident that the prisoner had been shot by Mr Federico. There was blood on the wall in the corridor. The prisoner started staggering towards the right along the corridor. He was still trying to run away." (My emphasis).

The necessary inference is that at the point the second shot was fired Mr Whyte was not in line between the observer (Riordan) and the person who fired the shot (Federico). The evidence when considered as a whole confirms Whyte was off to Riordan's right, Federico's left.

There are however aspects of his *viva voce* evidence about which I am not comfortable. I perceive a none too subtle shift in Mr Riordan's versions.

Mr. Fabrizio Federico did not give evidence at the inquest. His counsel Mr Jeremy Ruskin, QC, predictably made an application that his client be excused from giving evidence relying on the fundamental tenet that one is not required to incriminate oneself. The Victorian Supreme Court in R. v The State Coroner, ex parte Alexander (1982) VR731, confirmed the principle is applicable in the coronial jurisdiction. His Honour Mr. Justice Gray stated:

"It is, in my opinion, a wise practice and one which might profitably have been followed in this case, particularly in view of the grave nature of the allegations levelled at the applicant. The order nisi must be absolute and the matter remitted to the Coroner so that he can excuse the applicant from giving evidence, in accordance with this judgment."

In the event, while he did not give viva voce evidence Mr Federico did participate in a formal record of interview and a videotaped re-enactment. Both were tendered and form part of the public record of the proceedings. (See composite Exhibit "YY" and Exhibit "D").

To get a proper appreciation of the basis of Mr Federico's claim that he acted in self defence I have very carefully examined the transcript of the formal record of interview and the transcript of the videotaped re-enactment. There is an obvious danger in endeavouring to paraphrase his position, but for this finding I think I must endeavour to do so. It should be understood that this is a very broad "bare bones" summary.

Mr Federico maintains Mr Whyte burst through the doors very fast *"going at a great rate"*, made a beeline at him *"right there ... right on top of me ... virtually on me..."* leading him (Federico) to conclude the prisoner was *"gonna get the gun off me and kill me..."*. Mr Federico further claimed no recollection of drawing the revolver, or pulling the trigger. He said he just *"heard the bang"*, *"one bang"*. It should be noted Mr Federico did not specifically claim he discharged the firearm to prevent Mr. Whyte escaping.

Other evidence impacts upon this consideration, not the least the evidence of the forensic pathologist, Dr. Matthew Lynch.
In his autopsy report, Dr Lynch commented:

"(a) The gunshot entrance injury was situated in the left supraclavicular fossa (adjacent to the left collar bone).

(b) The projectile has passed through skin, left clavicle, aortic arch at origin of brachiocephalic trunk, right brachiocephalic vein, right upper and middle lung lobes, right sided parietal pleura and right 7th rib. A distorted projectile was recovered from adjacent to the fractured right 7th rib.

(c) The range of the gunshot entrance injury is distant with no blackening and no tattooing (stippling). The projectile has however passed through the clothing being worn by the deceased man at the time of discharge of the firearm.

(d) The direction of the projectile track is left to right, above to below (approximately 45 degrees) and very slightly anterior (front) to posterior (back)."

Dr Lynch maintained the entry wound and the path of the bullet was not consistent with the deceased and Federico being face to face but more consistent with the prisoner being almost side on and bent over at roughly an angle of 45 degrees.

Dr Lynch also considered the weapon at the time of discharge of the fatal shot was unlikely to be within a couple of feet of the entry wound although he conceded he could not be precise. He explained that *"distant"* in terms used by a forensic pathologist had it's own meaning somewhat different from that understood by lay people. The evidence of Dr Lynch forms part of the mosaic and has to be considered not in a vacuum, but in context.

The evidence of the firearms expert, Harold Wrobel, and the crime scene bloodstain expert, Maxwell Jones, has also to be considered, not in isolation, but in context; their evidence also forms part of the mosaic. Mr Jones undertook a reconstruction of the incident based on his observations of the scene. He concluded Mr Whyte was positioned somewhere near the location of the torch on the floor depicted in photograph 34 of Exhibit "A". He said the blood stains were very typical and indicative of a breached artery and the source of the pulsing blood was less than one metre from the north/west wall (see particularly photograph 34) and that smudge marks observed indicate Mr Whyte moving upwards and moving north to west. Mr Jones conceded some of these conclusions were predicated on blood instantly exiting the wound site. When Mr Jones' evidence is looked at with the rest of the body of evidence whilst not absolutely conclusive, his placement of the location of Mr Whyte at the instant of the fatal shot (the torch in photograph 34) is reasonably accurate.

Mr Jones also gave evidence of the distance from the muzzle of the revolver to the entry wound. He said the blood splatters on, around and in the barrel indicated to him a range of ten centimetres to thirty centimetres. He accepted that once again it would depend on whether there was an immediate release of blood from the wound site. As to his claim there could have even been contact between muzzle and target at the time of discharge Mr Jones said he was happy to defer in that view if there was other good evidence inconsistent with contact. There is other *"good"* evidence on this issue and I am not satisfied the weapon was in contact with Mr Whyte at discharge. Mr Jones retreated to an estimate proffered in response to a question from Mr Ruskin of forty to sixty centimetres at the outside.

Firearms expert Harold Wrobel suggested, looking especially at propellant grains and gunshot residue, the distance at discharge of the muzzle to the hole in the shirt was sixty centimetres to three metres. Once again in response to a question from Mr Ruskin was prepared to conclude it was more likely nearer sixty centimetres than three metres.

The evidence overwhelmingly supports a finding that while Mr Whyte initially burst through the doors and was obviously facing Mr Federico on the other side of the corridor, he immediately veered off to his right in an attempt to put as much distance as he could between himself and Prison Officer Federico stationed in the corridor.

I accept Mr Walmsley's contention that there is virtually no evidence that Mr Whyte posed a real or immediate threat to Mr Federico let alone evidence that Whyte proposed to take Federico's firearm and turn it on him. I do not accept Mr Whyte, at any time, proposed to tackle or seek to disarm Mr Federico. His sole focus, as was his wont, was escape.

The cruel irony is that Prison Officer Riordan was hot on the heels of the handcuffed prisoner and assuredly would have brought him to ground in metres. The escape attempt could have been thwarted as simply as Whyte's previous ill conceived escape attempts.

Verbal Warning

Whether or not a warning was issued was canvassed at some length during the hearing so that although I consider the issue could be seen as somewhat of a *"red herring"* I feel obliged to address the issue in this finding. I suggest the matter is somewhat of a red herring because the provision in the Regulations authorizing the use of deadly force relates specifically to the use of a firearm to prevent escape, whereas here although Mr Whyte was obviously trying to escape, Mr Federico from the outset and thereafter has claimed he shot the prisoner in a lawful act of self defence, not to prevent an escape *per se*.

The relevant part of Regulation 10 of the Corrections Regulations 1998 provides at paragraph 10.1 :

> *"If a prisoner escapes or attempts to escape from custody, a prison officer may discharge a firearm against the prisoner if the prison officer believes on reasonable grounds that it is the only practicable way to prevent the escape of the prisoner."*

And at paragraph 10.4 :

> *"Before discharging a firearm against a person, the prison officer must:*
>
> - *if circumstances permit give the person a verbal warning that he or she is about to discharge a firearm against the person. The authorised warning given will be "PRISONS DONT MOVE".*
> - *satisfy himself or herself that the discharge of the firearm does not create an unnecessary risk to any other person."*

So before discharging a firearm to prevent an escape a prison officer must believe on reasonable grounds that to do so is the only practicable way to prevent the escape of the

prisoner and <u>must if circumstances permit</u> before discharging the firearm issue the authorised warning *"Prisons dont move"*.

Federico himself, in answer to a question <u>at interview</u>, conceded *"I just sort of lost it".* As to the issue of whether a command/warning was given to the prisoner that he (the prisoner) would be shot if he did not immediately abandon his attempt to escape Mr Federico stated he couldn't recall if he issued a warning or not even though he had been trained to do so. At the <u>re-enactment</u> Mr Federico himself conceded that although he was trained to say words to the effect *"prisoner stop",* he could not recall if he issued that warning.

Prison Officer Riordan maintained procedures were followed; everything was done according to Hoyle. He claimed he heard Federico issue a loud firm command *"stop, don't move"* before he heard the first shot and maintained and there was a further warning before the second shot, the shots being only seconds apart.

Mr Melbon who was in his office a short distance around the corner claimed he heard the bang before the *"utterances".* In response to a question from Mr Ruskin he conceded the very loud bangs *"heightened his senses"* and there may have been a prior instruction which he did not hear, although in conclusion he maintained had there been a prior warning he believes he would have heard it.

Other witnesses who were in the immediate area were more equivocal - Mr Villaceran said the shouting followed the gunshot, but also conceded to Mr Ruskin it was *"possible"* there was shouting and yelling before the bang. Mr O'Reilly claimed he did not hear any command, but then conceded a warning could have been given. Ms. Jones, who was further south in the corridor, stated she heard shots and did not notice any prior voices. It was pointed out that at the committal hearing she conceded, when asked, that she heard a scuffle and voices both before and after the shots. Mr McNestie initially maintained at no stage did he hear yelling but also conceded in cross examination his attention was drawn to *"the action"* by the shots, but there could have been shouting which he either took no notice of or did not hear.

Ms Lynda Sparks who was in Mr Melbon's office also heard the two loud bangs and a male voice say *"Police - Get Down".* In her statement Ms Sparks conceded she could not say whether it was before or after the banging noise.

Another witness, Jacqueline Wallace in her statement said:

> *"As I left the waiting room I heard a noise like shots and heard men yelling aggressively. I think I heard two shots and then men yelling after that. I'm not sure what the men were shouting, but I heard some people shouting to get down. Everything happened at once and I was confused as to what was happening."*

In *viva voce* evidence I asked Ms Wallace about the sequence of sounds and she said she could not be sure whether the shots preceded the yelling, or vice versa.

Ms Kerrie Rundle who was at her work station at the Patient Desk south along the corridor also gave evidence. In her statement she said:

> *"Just before 4.00pm I was sitting at the desk and I can't really remember what I was doing, but all of a sudden, I heard the shuffling of feet down the corridor near the CT room. My attention was drawn to this shuffling noise because it sounded like someone was in a hurry or something was happening. The next thing I heard was someone shouting "Get down". I think I only heard this yelled once. This was a man's voice and it was very loud. It was less than a couple of minutes after I heard this man yell out that I heard two shots. I would say the time between the man's voice and the gun shots were a couple of minutes, not seconds. I didn't know whether the shots were from a gun or whether someone had fallen over or what it was. The shots occurred in very quick succession, only about 5 seconds apart."*

I was somewhat puzzled by her estimate of a *"couple of minutes"* between the shouts of *"Get Down"* and the sound of shots. A test against the wall mounted clock in the court room resulted in an estimate of a little less than 10 seconds. It is difficult to know what to make of this evidence, because it is clear on all of the versions that *"the action"* in the north/south corridor took considerably less than 10 seconds. The point is, however, Ms Rundle maintains there was shouting prior to the sound of shots.

Ms Ljubica Ljubic was on duty at the Transplant Desk a short distance to the south of the scan room. Her attention was drawn to the incident to noises she described as *"like a loud explosion"*. She confirms the noises, *"just like bang, bang"* were very close together in time. Ms Ljubic added:

> *"Everything seemed to happen at the same time. After I heard the two noises I heard loud yelling and someone calling out, 'get down, get down'. I couldn't tell if it was just one person yelling, it sounded very loud though."*

Whilst the evidence is not conclusive and some witnesses are equivocal the preponderance of the evidence on this discreet issue leads me to a comfortable satisfaction no prior warning was issued by Mr Federico that he would shoot if Mr Whyte persisted with his attempt to escape. A command, or commands, were subsequently issued but precisely when and precisely where the principle players were when issued I am unable to say, save to say it was after the fatal shot was fired and consequently too late to represent a valid warning. Mr Riordan's evidence on this issue boarders on the surreal. I suspect it represents a misguided loyalty to his colleague.

I am of course unable to say what, if anything, would have been Mr Whyte's response had a warning been issued and comprehended. He may or may not have acted upon it.

TRAINING AND PROCEDURES

Often there will be not one single cause, but several causes of a death. I believe I have to examine whether Mr Federico's shooting of Mr Whyte, in the circumstances was a consequence of a flawed, inadequate training regime so that the prospect of a bad decision was heightened; or did Federico react in a blind panic irrespective of the efficacy

of his training and shot as a first resort, not after conscious consideration as a last resort. A good deal of the evidence led at the inquest went to this discreet issue. Mr Walmsley in a submission adopted in total by Ms Randazzo claimed the training of Mr Federico was *"sadly inadequate"* which resulted in him *"losing it"* and firing instinctively in panic when to do so was unreasonable and unnecessary.

In September 2002 following the death of Gary Whyte (and it would appear due at least in part to his death) the Acting Correctional Services Commissioner initiated an independent review of the use of force in the Victorian Prison system. The review was undertaken by a panel comprising Mr Neil Comrie, former Chief Commissioner of Police, and Ms Vivienne Roach. Their report titled, *"Report to the Correctional Services Commissioner on the management of risk associated with the use of force in the Victorian Prison system"* (referred to as the *"Use of Force Review"*) was delivered in December 2002. A copy of that report was provided and forms part of the formal public record of these proceedings. It must be said the review was comprehensive, thoroughly objective and identified *"a number of risks associated with the present arrangements"*.

It is <u>not</u> my role to undertake a broad review of the issue of use of force within Corrections, in effect to review the review, but to focus on whether Mr Federico's training, or a culture that flowed from it impacted upon his instinctive reaction to shoot and kill a fleeing prisoner.

I bear in mind the timely advice of Nathan J. in <u>Harmsworth v The State Coroner</u> (1989) VR989 where His Honour stated a Coroner's power to comment is not *"free ranging"*, it must be a matter connected with the death. A power of enquiry is not a separate and distinct source enabling a coroner to enquire for the sole or dominant reason of comment or recommendation, but is incidental and subordinate and arises as a consequence of the prime function of a coroner to make the finding required by Section 19(1)(a)(b) and (c) of the Coroners Act 1985.

In undertaking my far more restrictive enquiry I have however been greatly assisted by the *"Use of Force Review"*. The report discusses the legislative framework in which the use of lethal force is authorised. Whilst as the panel pointed out there are circumstances where police and prison officers may legitimately use lethal or deadly force, those circumstances are circumscribed. There is, to borrow their expression:

> *"... an onerous obligation on correctional authorities to ensure, through policy, operational guidelines, training and organisational culture, that force is used sparingly, responsibly and only when absolutely necessary."*

Regulation 10 of the Corrections Regulations 1998 (SR 52/98) proscribes the ground rules for the discharge of a firearm by a prison officer:

> ***10. Discharge of firearms***
>
> *(1) If a prisoner escapes or attempts to escape from custody, a prison officer may discharge a firearm at the prisoner if the prison officer believes on reasonable grounds that it is the only practicable way to prevent the escape of the prisoner.*

(2) A prison officer may discharge a firearm at a person whom he or she reasonably believes to be aiding a prisoner in escaping or attempting to escape from custody, if the prison officer believes on reasonable grounds that it is the only practicable way to prevent an escape.

(3) A prison officer may discharge a firearm at a person if the person is using force or threatening force against-

(a) another person in the prison; or

(b) an officer (including the prison officer carrying the firearm) acting in the execution of his or her duties outside a prison; or

(c) a prisoner outside a prison-

and the prison officer reasonably believes that shooting at the person using or threatening force is the only practicable way to prevent the person causing death or serious injury.

(4) Before discharging a firearm at a person, the prison officer must-

(a) if it is practicable to do so, give an oral warning to the effect that the person will be shot at if he or she does not stop escaping, attempting to escape or using or threatening force (as the case may be); and

(b) satisfy himself or herself that shooting at the person does not create an unnecessary risk to any other person.

The Crimes Act 1958 section 462A provides when a person is entitled to use force to prevent the commission of an indictable offence:

"A person may use such force not disproportionate to the objective as he believes on reasonable grounds to be necessary to prevent the commission, continuance or completion of an indictable offence or to effect or assist in effecting the lawful arrest of a person committing or suspected of committing any offence."

So it can be seen concepts of proportionality and reasonableness in a broader sense are, for all intents and purposes, missing.

I must say I was alarmed at the following observation contained in the Use of Force Review :

"... one respondent submitted that he felt that some corrections officers may feel under some pressure to shoot at an escaping prisoner to comply with the thrust of the legislation and to avoid being criticised for not shooting in the circumstances."

If that comment was made, as I suspect, by a prison officer it reflects upon the culture impacting upon those at the coalface who, like Mr Federico, may one day have to make a difficult judgment call.

Mr Ronald Penney, Senior Prison Officer, confirmed Mr Federico was firearm trained having originally been trained by Group 4 and requalified in January 2002. Ironically that initial training was provided to Group 4 under contract by CORE. Mr Penney maintained

that during training *"a fair bit of time"* (he thought three blocks) was spent on the issue of *"lawful justification"* of the use of deadly force.

Mr Penney, as I understood him, said that the training concerning lawful justification of firearms is founded on a concept of *"force continuum"* and in his statement commented that in that continuum *"lethal force"* is a last resort. However, in viva voce evidence when asked on several occasions whether he accepted that philosophically use of lethal force should be a very last resort, Mr Penney hesitated, there was a long pause before he agreed to the proposition; it was as if it was a reluctant acceptance of that basic philosophical position.

Mr Grant Reeves, Operations Manager of Group 4 Corrections Services, confirmed that in the training provided by his organisation the underlying philosophies are last resort and no greater force that necessary (proportionality) apply.

In a memorandum to my Registrar dated 6 April 2004 I advised I had marked the Brief of Evidence and perused the Comrie Report. I noted the six recommendations and enquired:

> *"I would be interested to know what, if any, action has been taken on the recommendations as the issue of training will likely be one of the major foci of the proposed inquest. Please make the necessary enquiry of the Commissioner."*

In a letter dated 11 May 2004 under the hand of Mr Kelvin Anderson, Correctional Services Commissioner, I received a *"Report to the Coroner"* dated 30 April 2004 (described in the letter as an Action Plan) which detailed the status of the implementation of the recommendations of the Comrie Report. Mr Anderson advised a Working Party had been established to consider the implementation of the recommendations.

External hospital escorts are surprisingly common place (over 4000 last year), I was told by Mr Dennis Roach, Director Statewide Services Correction that the operational requirements for external escorts is the first priority of the working party he chairs charged with implementing the recommendations of the Comrie Report.

Through Mr Roach, Mr Ruskin tendered a dossier titled *"Change In Practice"* arising from an incident on 7 May 2002 at St Vincents Hospital involving Prisoner Gary Whyte CRN 19605 (Exhibit "QQ"). The dossier, *inter alia*, updated and expanded upon the matters discussed in the *"Report to the Coroner"* referred to earlier. The real question is what is actually happening to progress the implementation process; is Action Plan a misnomer.

In broad terms a revised philosophical approach, the Tactical Options Model, is proposed. It is considered legislative amendment if not necessary then preferable to provide the solid framework upon which the revised model is founded. It is also considered appropriate that an *"overarching organisation philosophy"* be promulgated to found formal operational guidelines issued by the Correctional Services Commissioner on the use of force. Mindful of the limits of my role (see Harmsworth) all I say is the approach being mooted may well be appropriate but is it being satisfactorily progressed.

In cross examination Mr Walmsley took Mr Roach to an excerpt at Page 37 of the Review and Ethical Standards Report in the dossier (Exhibit "QQ"). It is stated:

> *"In relation to firearms, the armed Officer Fabrizio Federico acted, within the authority granted, on this occasion in the carriage of a firearm and its subsequent use."*

Mr Roach indicated he agreed with the observation. For me to formally disagree with the proposition may well be to form a legal conclusion, which would be beyond the scope of the coronial function (see Callaway J.A. in Keown v Kahn). All I say is Mr Roach and the reviewers are entitled to their opinion! Having said that it may be a matter of concern if the deliberations and proposals for reform are founded upon the efficacy of that view.

In the Use of Force Review the panel referring to the present training observed:

> *"This type of training is very limited and does not provide correctional officers with a reasonable representation of the operational circumstances under which they may have to make a decision to discharge their firearm. Consequently, this inadequacy in training means that the level of risk associated with the operational discharge of a firearm is unacceptable."*

The need for more sophisticated training is obvious.

At the conclusion of the multi-day hearing I observed it had been an extremely valuable excerise for a variety of reasons. Those at the cusp of the reform process agenda were challenged. Issues were raised and suggestions made that should provide much *"food for thought"*. Mr Roach, who it appears will play a pivotal role in the reform process, even conceded several suggestions made may well be *"taken up"*.

Mr Whyte had made three *"attempts"* (using the word fairly loosely) to escape from custody within a short period prior to the incident at St Vincents Hospital. The Prisoner Indent for Mr Whyte is in evidence (Exhibit "KK"). \As was its purpose it flagged warnings; a possible psychiatric issue (the deceased had apparently been banging his head on the wall in an observation cell) and perhaps more importantly a tendency to try to escape. The escort should have been aware of those warnings. Mr Riordan said he did not see the document nor to his knowledge was the escort briefed.

Mr Polkinghorne, Operations Manager, conceded in evidence that a briefing was perhaps warranted in respect of a prisoner on escort who has a propensity to seek to escape; but in any event he would have presumed the escort would have examined the Prisoner Indent.

Mr Polkinghorne maintained however that even if that information was known the escort would, in all likelihood, have proceeded on the same basis; the prisoner hand cuffed with one armed and one unarmed guard.

The proposed E-Justice System anticipated to operate from early 2005 should ensure that this sort of problem does not re-occur.

In broad terms it must be said there are some obvious deficiencies in training and procedures. It would appear that is recognised and a process of reform is underway. There are, I concede, complex issues involved that require careful consideration. Counsel for family members, Mr Walmsley and Ms Randazzo and Counsel Assisting, Mr Ryan, were critical of the apparent inordinate delay in the implementation of key recommendations of the Comrie Report, the former alleging the reform was *"on the back burner"*.

Mr Ruskin described the implementation of the reforms as a *"moveable feast"* that took time. To expand upon his analogy, whilst the *"menu"* appears acceptable I suggest some of the courses are slow in coming.

I suggest a thorough examination of the transcript of these proceedings should lead those charged with the task of moving the reform process forward to conclude it is now time to hasten a little less slowly.

I concur with the conclusion reached by the Use of Force Review panel encapsulated in the following excerpt (part of paragraph 3.6):

> *"**Findings***
>
> *The Panel formed the view that the Victorian legislation pertaining to the discharge of firearms by correctional officers may be too open-ended. It concluded that, when taken together with the absence of a clear and unambiguous statement of organisational philosophy on use of force (see section 4.4 below), this substantially increased the level of risk in the management of situations where the use, or potential use of force, is an issue in the Victorian Prison System. Nevertheless the Panel recognises that legislation should also protect correctional officers in carrying out their duties, including acting to prevent escapes. Although it is the Panel's considered view that force should only be used when absolutely necessary, this should not mean that correctional officers are so reluctant to use necessary force that they fail to respond to escapes or place themselves or others at risk."*

I turn to the critical question of whether the identified deficiencies in training and procedure could properly be considered in isolation or combination, a cause of Mr Whyte's death, or are they background circumstances, adopting Mr Justice Callaway's dichotomy. I have found this the most difficult aspect of this case.

In Chief Commissioner of Police v Hallenstein (1996) 2VR1, Hedigan J. suggested the statements of principle relating to causation in the context of negligence are applicable in the coronial context. Causation is a complex and difficult issue. Leading authorities suggest the concept is not susceptible of reduction to a satisfactory principle or formula. The application of common sense to the particular circumstances in determining the issue is appropriate (see March v Stramare P/L (1991) 171 CLR 506; Fitzgerald v Penn (1954) 91 CLR 268, and Chief Commissioner of Police v Hallenstein (supra).

As I have observed in previous findings, for an act or omission to be the cause, or one of several causes, of a death the connection between act and/or omission and death must be logical, proximate, and readily understandable, not illogical strained or artificial.

At first blush one could conclude Mr Federico's spontaneous action may have stemmed from a deficiency in training. Further reflection renders that conclusion problematic for several reasons:

- Who is to say that even an individual trained to the Nth degree may not, in the heat of the moment, respond in aberrant fashion.
- The training regime was after all predicated upon the Corrections Regulations 1998, subordinate legislation approved by Governor-in-Council.
- In any event it could be argued the training issue is to some extent a 'red herring' because it was never contended Mr Federico shot Mr Whyte to prevent an escape; it was always contended his was an act of lawful self defence.
- Because a regime of instruction and training is, with an element of retrospect, found to have some deficiencies requiring refinement/improvement does not necessarily render it at that time fatally flawed - virtually everything can be improved, *"conventional wisdom"* is not static.
- The training was not, as contended, the minimum necessary to enable an armed officer to get a handgun shooters licence.

Standard of Proof

The Supreme Court of Victoria has repeatedly emphasised that the test expounded in Briginshaw v Briginshaw (1938) 60 CLR 336 should apply to findings of causation and contribution where the questions relate to individuals or other entities acting in their professional capacity (see Anderson v Blashki (1993) 2VR89; Health and Community Services v Gurvich (1995) 2 VR 69 and Chief Commissioner of Police v Hallenstein (1996) 2 VR 1).

The standard of proof applicable is therefore quite high, so that findings of causation cannot be made on inexact proofs, indefinite testimony or indirect inferences, but only on cogent and persuasive proofs; a COMFORTABLE DEGREE OF SATISFACTION must be reached to conclude an act or omission caused a death.

CONCLUSION

I formally find Mr Fabrizio Federico caused the death of Gary Whyte who, by attempting to escape from an escort he knew to be armed also contributed to his own death.

I am not *"comfortably satisfied"* perceived and/or established deficiencies in procedures and training caused Mr Whyte's death, but conclude they represent somewhat unsatisfactory *"background circumstances"*.

RECOMMENDATIONS AND COMMENTS

Recommendation 1

I formally suggest the recommendations made in the Comrie Report be promulgated without undue delay. To found altered operational guidelines an overarching philosophical position within an appropriate legislative framework is preferrable. I therefore recommend Regulation 10 of the *Correctional Regulations 1998* be reviewed and amended so that the circumstances in which prison officers can use lethal / deadly force are in line with the broad thrust of the law in that regard. Presently it appears Regulation 10 is somewhat convoluted and in at least one important aspect is out of kilter with other accepted fundament tenets.

Recommendation 2

I further recommend that the expression *"Prisons don't move"* be deleted from the corrections lexicon and be substituted by the blunt warning *"Stop or I'll shoot"*.

Recommendation 3

I further recommend the diagram referred to as a "carousel" which forms part of the explanation of the Tactical Options Model be reviewed as it contains no real guidance with the "firearms" option being located between the options of "Baton" and "Negotiation".

Recommendation 4

As to training the Comrie Report (at page 27) observed:

> *"Firearms training programs are largely "stand alone" and are not adequately balanced against training in other restraint options and/or underpinned by a clear statement of organisational philosophy. Neither is there any meaningful quality control mechanism applied to "use of force" training. Trainers are often part-time with little opportunity to develop their own skills or to engage in peer interaction. Moreover, no psychological assessment is conducted of trainers to determine their suitability to deliver sensitive "use of force" training."*

I recommend that at least those responsible for the delivery of training undergo psychological assessment to determine their suitability for the important task.

Recommendation 5

Consideration be given by Corrections Victoria to the feasibility of a suggestion made by Counsel at the hearing that <u>all prison officers</u> who are (or are to be) firearm trained first undergo a psychological profiling/screening process.

Recommendation 6

I also recommend that consideration be given to providing at least those officers who are firearm trained more sophisticated specific scenario training, such as, *"Shoot - Don't Shoot"* exercises.

Comment

I accept there is little new in these recommendations; I merely wish to reinforce much of what was recommended in the Comrie Report and urge a less timid, more robust approach to reform.

PHILLIP BYRNE
CORONER