

CITATION: *Inquest into the death of Kumanjayi Walker (Ruling No 6)*
[2022] NTLC 027

TITLE OF COURT: Coroners Court

JURISDICTION: Alice Springs

FILE NO(s): A51 of 2019

DELIVERED ON: 1 December 2022

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FINDING OF: Judge Elisabeth Armitage

CATCHWORDS: Coronial proceedings; inquests; death in custody;
application for non-publication order under s 43
of the *Coroner's Act 1993* (NT)

Coroner's Act 1993 (NT), s 43

John Fairfax & Sons v Police Tribunal of New South Wales (1986) 5 NSWLR 465

John Fairfax Group v Local Court of New South Wales (1991) 26 NSWLR 131

John Fairfax Publications v District Court (NSW) (2004) 61 NSWLR 344

Commissioner of the Australian Federal Police v Zhao (2015) 316 ALR 378

Hogan v Hinch (2011) 243 CLR 506

PQR v Secretary, Department of Justice and Regulation (No 1) [2017] VSC 513

Herald & Weekly Times v Medical Practitioners Board (Vic) [1999] 1 VR 267

Attorney-General v Mayas (1988) 14 NSWLR 342, 347 (Mahoney JA)

Rockett v Smith [1992] 1 Qd R 660

News Digital Media Pty Ltd v Mokbel (2010) 30 VR 248

Raybos Australia Pty Ltd v Jones (1985) 2 NSWLR 47

David Syme & Co Ltd v General Motors-Holden's Ltd [1984] 2 NSWLR 294

Russell v Russell (1976) 134 CLR 495

Balog v Independent Commission Against Corruption (1990) 169 CLR 625

Jarvie v Magistrates' Court of Victoria [1995] 1 VR 84

Victorian Lawyers RPA Ltd v X [2001] VSC 432

G v Medical Practitioners Board of Victoria [2010] VSC 79

Herald & Weekly Times Ltd v Jones (unreported, Vic Sup Ct, Nathan J, 25 March 1992)

REPRESENTATION:

Counsel Assisting:	Dr P Dwyer with Mr P Coleridge
For Zachary Rolfe:	Mr D Edwardson KC and Mr F Merenda
For the Brown Family:	Mr G Mullins with Ms P Morreau
For the Walker, Lane and Robertson families:	Mr A Boe with Mr D Fuller and Ms G Boe
For the Northern Territory Police Force:	Dr I Freckelton AO KC with Ms A Burnnard
For the Department of Health:	Mr T Hutton
For NAAJA:	Mr P Boulten SC with Ms B Wild and Mr J Murphy
For the Parumpurru Committee:	Mr J McMahan SC
For the Northern Territory Police Association:	Ms S Ozolins
For James Kirstenfeldt:	Mr C Gnech
For Lee Bauwens:	Ms KM McNally with Mr JM Suttner
For Paul Kirkby:	Mr SA Robson SC
For Anthony Hawkings and Adam Eberl:	Mr I Read SC
Judgment category classification:	A
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IN THE CORONERS COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. A51 of 2019

In the matter of an inquest into the death of
Kumanjayi Walker

Introduction

1. This inquest examines the death of Kumanjayi Walker, a 19-year-old Warlpiri man who was fatally shot by Constable Zachary Rolfe at Yuendumu on 9 November 2019.
2. On 20 October 2022, Constable James Kirstenfeldt applied for a permanent non-publication order (**NPO**) under s 43 of the *Coroners Act 1993* (NT). The proposed order would prohibit Constable Kirstenfeldt from being identified as the author of a text message he sent to Constable Rolfe on 11 November 2019, two days after Kumanjayi's death. Anticipating this application, I had made an interim order to that effect on 14 October 2022 to preserve the status quo.
3. The text message reads as follows:

Kirstenfeldt to Rolfe: Have you got a sympathy fuck out of this yet??
4. Constable Kirstenfeldt seeks the permanent NPO on the basis that the publication of his name would be contrary to his 'personal security' and/or to the 'administration of justice' under s 43 of the *Coroners Act*. While I am mindful of Constable Kirstenfeldt's personal circumstances, I am not satisfied that the publication of his name would be contrary to his 'personal security' or contrary to the 'administration of justice'. Accordingly, I am constrained by the terms of s 43 of the *Coroners Act* and the open justice principle to dismiss the application for a permanent NPO.

Non-publication orders under s 43 of the Coroners Act 1993 (NT)

5. Open justice is ‘one of the most fundamental aspects of the system of justice in Australia’.¹ In *Commissioner of the Australian Federal Police v Zhao*,² the High Court said that the basic ‘rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principle save in exceptional circumstances.’³ Accordingly, a ‘statute which affects the open-court principle ... should generally be construed, where constructional choices are open, so as to minimise its intrusion upon that principle’.⁴
6. Section 43 of the *Coroner’s Act* qualifies the open justice principle. It provides as follows:

43 Restriction on publication of reports

- (1) A coroner must order that a report of an inquest or of part of the proceedings, or of evidence given at an inquest, not be published if the coroner reasonably believes that, to publish the report, would:
 - (a) be likely to prejudice a person's fair trial; or
 - (b) be contrary to the administration of justice, national security or personal security; or
 - (c) involve the disclosure of details of sensitive personal matters including, where the senior next of kin of the deceased have so requested, the name of the deceased.
7. The requisite state of mind for the making of a NPO is a ‘reasonable belief’ as to one or more of the matters set out in sub-ss (a)-(c). The belief must be formed on the basis of ‘cogent evidence or credible information’.⁵ The ‘purpose of this

¹ *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344, [18].

² (2015) 316 ALR 378.

³ *Zhao* (2015) 316 ALR 378, [44].

⁴ *Hogan v Hinch* (2011) 243 CLR 506, [27] (French CJ).

⁵ *PQR v Secretary, Department of Justice and Regulation (No 1)* [2017] VSC 513, [54] (Bell J).

requirement is to assist in ensuring that suppression orders are kept for exceptional cases'.⁶

8. It is not generally permissible to make a NPO simply because the disclosure of information would be embarrassing or cause reputational harm.⁷ Nor will it generally be sufficient that a person's business affairs will be adversely affected.⁸ Having made those general observations, I turn to the specific grounds on which Constable Kirstenfeldt seeks the permanent NPO under s 43(1)(b): namely, that the publication would be contrary to 'the administration of justice' and/or his 'personal security'.

'Administration of justice'

9. Ordinarily, open justice serves the 'administration of justice' by:
- (a) Exposing judicial officers to public scrutiny, which increases judicial accountability;
 - (b) Exposing witnesses to public scrutiny, which may discourage them from giving false evidence;
 - (c) Placing law enforcement officers' conduct under public scrutiny;
 - (d) Promoting public discussion of issues arising out of court cases;
 - (e) Increasing public understanding of court procedures;
 - (f) Maintaining public confidence in the integrity and independence of the courts;
 - (g) Increasing the possibility of additional witnesses coming forward; and
 - (h) Facilitating the media's ability to fully and contemporaneously publish fair and accurate reports of proceedings.⁹

⁶ *PQR* [2017] VSC 513, [54] (Bell J).

⁷ *Herald & Weekly Times Ltd. v Medical Practitioners Board of Victoria* [1999] 1 VR 267, [93] (Hedigan J): Unless some considerations broadly within the range of the exceptions are made to appear, the cases do not support damage to reputation or fear of loss, embarrassment and related matters as being sufficient to justify the making of suppression orders.'

⁸ *Attorney-General v Mayas* (1988) 14 NSWLR 342, 347 (Mahoney JA); *Rockett v Smith* [1992] 1 Qd R 660, 672.

⁹ See, generally, *Hogan v Hinch* (2011) 243 CLR 506, [20] (French CJ); *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, [35] (Warren CJ and Byrne AJA); *Raybos Australia*

10. The ‘open administration of justice serves the interests of society and is not an absolute end in itself’.¹⁰ Hence, the common law recognises a number of ‘special exceptions’ to the open justice principle where a restriction on publication ‘is *really necessary to secure the proper administration of justice* in proceedings before’ the relevant court.¹¹ The ‘common justification for these special exceptions is’ that, ‘the very openness of court proceedings would destroy the attainment of justice in the particular case’¹² or ‘derogate from even more urgent considerations of public interest’.¹³ Recognised exceptions include cases in which a NPO is necessary to prevent an anticipated breach of confidence, injustice to a blackmailer’s victim, the disclosure of secret technical processes, the disclosure of the identity of a police informant or an undercover police officer, and cases involving national security.¹⁴ Although these categories are not closed, they ‘will not lightly be extended’.¹⁵
11. In my view, the obligation to make a NPO where a coroner reasonably believes that the relevant publication would be ‘contrary to the administration of justice’ embodies these common law principles.¹⁶ The recognised common law exceptions provide some indication of the nature and degree of the competing interest required to displace the ordinary operation of the open justice principle under this clause of s 43(1) of the *Coroners Act*. Orders under this clause should be ‘special cases’

Pty Ltd v Jones (1985) 2 NSWLR 47, 50-60 (Kirby P); *David Syme & Co Ltd v General Motors-Holden’s Ltd* [1984] 2 NSWLR 294, 299-301 (Street CJ); *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J) and 532-3 (Stephen J).

¹⁰ *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131, 141 (Kirby P).

¹¹ *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465,

¹² Such as by vindicating the activities of a blackmailer or revealing confidential information in proceedings for breach of confidence: *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131, 141 (Kirby P).

¹³ Such as by endangering national security: *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131, 141 (Kirby P).

¹⁴ *Hogan v Hinch* (2011) 243 CLR 506, [21] (French CJ); *John Fairfax Group v Local Court of New South Wales* (1991) 36 NSWLR 131, 141 (Kirby P).

¹⁵ *Hogan v Hinch* (2011) 243 CLR 506, [21] (French CJ).

¹⁶ See, *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, 645-636: ‘where ... alternative constructions of legislation are open, that which is consonant with the common law is to be preferred’. This is also consistent with the principle that a ‘statute which affects the open-court principle ... should generally be construed, where constructional choices are open, so as to minimise its intrusion upon that principle’: *Hogan v Hinch* (2011) 243 CLR 506, [27] (French CJ).

consistent with the observation that ‘courts will not act contrary to the [open justice] principle save in exceptional circumstances.’¹⁷

‘Personal security’

12. This category is well-established at common law and traditionally protects the identities of persons, like police informers and undercover operatives, in respect of whom there is a real risk that ‘[l]oss of anonymity could lead to death or injury’.¹⁸ In addition, I will assume, without deciding, that ‘personal security’ extends beyond ‘physical security’ and ‘encompasses the health, mental or otherwise, of a person whose health might be materially and adversely affected were publicity to be given to these proceedings’.¹⁹ On that assumption, in order to justify making a NPO on this ground, the court must be satisfied that it is ‘really necessary’ to make the order in order to protect the applicant’s personal security, which includes their mental health, ‘not merely that it is desirable to do so’.²⁰ ‘Necessary’, in the context of an application for a NPO, is a ‘strong word’.²¹

Decision

13. In support of the application, Mr Gnech tendered a psychological report of Angela Lebar.²² In the interests of Constable Kirstenfeldt’s privacy I will not repeat the substance of that evidence here. I accept that a psychologist has made a probable diagnosis of a significant psychiatric condition, which is likely to be secondary to Constable Kirstenfeldt’s military and police service, and that the investigations and proceedings that have followed Kumanjayi Walker’s death have been ‘triggers’ for him.

¹⁷ *Zhao* (2015) 316 ALR 378, [44].

¹⁸ *Jarvie v Magistrates’ Court of Victoria* [1995] 1 VR 84, 88.

¹⁹ See, considering a similar expression, *Victorian Lawyers RPA Ltd v X* [2001] VSC 432, [21] (Harper J); *G v Medical Practitioners Board of Victoria* [2010] VSC 79, [15] (Emerton J).

²⁰ *Herald & Weekly Times Ltd v Jones* (unreported, Vic Sup Ct, Nathan J, 25 March 1992).

²¹ *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 4)* [2012] FCA 1439, [4].

²² Dated 30 August 2022.

14. The report does not say that the publication of Constable Kirstenfeldt's name in connection with the text message will materially and adversely affect his mental health. Nor does it suggest that the publication will affect the treatment which it appears Constable Kirstenfeldt is now receiving. When examined by his counsel, Constable Kirstenfeldt was not asked questions about whether the publication of the text message would affect his mental health.
15. Constable Kirstenfeldt's counsel submitted that given 'the scrutiny and coverage of these proceedings and the previous criminal trial there is a real, not fleeting, danger Constable Kirstenfeldt will be subject to unnecessary violence by members of the community when he returns to duty if his name is published in connection with the text message.'²³ When examined, Constable Kirstenfeldt gave evidence that he 'was recognised around the committal and I was assaulted for that'. The assault occurred while he was 'on his own time'. Save for describing his injuries, Constable Kirstenfeldt gave no evidence of the context of this assault, nor any explanation of why he thought the assault was connected with his evidence at the committal. The first time he disclosed the assault to a 'superior officer' was on 19 October 2022, the day before he gave evidence on this application.
16. While I remain of the view that the probative value of the text message may turn out to be slight, I am not satisfied that the evidence on this application supports the conclusion that it is necessary to prohibit the publication of Constable Kirstenfeldt's name in association with the text message in order to protect his mental health or physical security. Nor does it support a conclusion that such an order would be necessary to ensure the due administration of justice. In particular, there is no cogent evidence that the publication of this detail will materially and adversely affect Constable Kirstenfeldt's mental health. Similarly, there is little, to no, evidence of a nexus between the assault, which is said to have occurred over two years ago, and Constable Kirstenfeldt's participation in these or related proceedings.
17. However, I am satisfied that it would be contrary to the administration of justice to publish the evidence and submissions relevant to Constable Kirstenfeldt's mental

²³ Submissions of Constable Kirstenfeldt (17 October 2022), [21].

health. It is essential to the effective exercise of the power under s 43 of the *Coroner's Act* that persons like Constable Kirstenfeldt with genuine mental health conditions are not deterred from adducing evidence relevant to their mental health on applications such as these.

18. Finally, when examined by counsel assisting Constable Kirstenfeldt explained to the court that the message was ‘an ill-attempt at injecting humour into a very stressful situation.’ He said that it ‘if [the message] has offended anyone, which it obviously has, I do apologise for that.’ He said he ‘regret[ted] having done that’ and that he had ‘no excuse for myself.’ The Walker, Lane, Robertson and Brown families, and the Parumpurru Committee of Yuendumu informed me that this apology appeared to the families and Committee members to be genuine.²⁴

Conclusion

19. Accordingly, I order that:
- (1) Constable Kirstenfeldt’s application for a permanent non-publication order is dismissed.
 - (2) The interim non-publication order dated 14 October 2022 over the redacted passages of the copy of Ruling No 3 annexed to that order is revoked.
 - (3) Subject to order 4, and save to the extent referred to in the written reasons for these orders, there be no disclosure or other publication of the contents of the following documents:
 - a. Paragraphs [5] and [20] of the submissions filed on behalf of Constable James Kirstenfeldt dated 17 October 2022;
 - b. Paragraph [2](b) of the submissions filed on behalf of the Northern Territory Police Force dated 21 October 2022;
 - c. The evidence of Constable James Kirstenfeldt given on 20 October 2022 regarding his mental health;
 - d. The report of Ms Angela Lebar dated 30 August 2022;
 - (4) Order 3 does not prevent the publication of the abovementioned documents to and between:

²⁴ Joint submissions of the Walker, Lane, Robertson and Brown families and the Parumpurru Committee (20 October 2022), [14].

- a. The families of Kumanjayi Walker and their legal representatives;
- b. The Commissioner of NT Police and his legal representatives;
- c. Persons granted leave to appear because they have a sufficient interest in the coronial proceedings, and their respective legal representatives;
- d. Those persons assisting the Coroner in her investigation, including legal representatives.

Dated this 1st day of December 2022

ELISABETH ARMITAGE
TERRITORY CORONER