



FINDING OF INQUEST

An Inquest taken on behalf of our Sovereign Lady the Queen at Elizabeth and Adelaide in the State of South Australia, on the 10th and 11th days of August 2009, the 21st and 22nd September 2009 and the 1st day of March 2010, by the Coroner's Court of the said State, constituted of Anthony Ernest Schapel, Deputy State Coroner, into the death of Adam Keneth McNamara.

The said Court finds that Adam Keneth McNamara aged 28 years, late of 9 Briony Way, Paralowie, South Australia died at Lyell McEwin Health Service, Haydown Road, Elizabeth Vale, South Australia on the 16 November 2005 as a result of multiple injuries due to blunt chest and abdominal trauma. The said Court finds that the circumstances of his death were as follows:

1. Introduction and reason for Inquest

- 1.1. Adam Keneth McNamara died on 16 November 2005 at the Lyell McEwin Hospital (LMH). He was 28 years of age. He died of multiple injuries due to blunt chest and abdominal trauma. These injuries had been sustained earlier that day when he had lost control of his motorcycle and struck a signpost that was situated in the median strip of Elizabeth Way at Elizabeth. He had been pursued by police after he had failed to stop when directed to do so. Mr McNamara's many injuries included lacerations of the small bowel mesentery, a retroperitoneal haematoma, a small tear of the inferior vena cava and multiple small bowel perforations. There were right-sided rib fractures and bilateral haemothoraces as well as a fracture/dislocation of the 3rd thoracic vertebra with an associated spinal cord injury at that level. He died on the operating table. A post-mortem examination was conducted by Dr John Gilbert, a

Forensic Pathologist at Forensic Science South Australia. Dr Gilbert has reported¹ that the cause of Mr McNamara's death was multiple injuries due to blunt chest and abdominal trauma. I find that to have been the cause of Mr McNamara's death.

- 1.2. This case again illustrates the dangers associated with police pursuits of motorcyclists and the general undesirability of that practice in the light of its potential consequences. In this regard one only has to contemplate the mechanism by which Mr McNamara lost control of his motorcycle to understand the potential for serious injury that the practice generates. The evidence is that the rear wheel of the motorcycle struck the kerb of the median strip which resulted in the rider being catapulted from the motorcycle into a signpost that was situated on the median strip. The injuries that Mr McNamara sustained are consistent with him having been thrown from the motorcycle and then having forcefully struck the signpost with his chest and abdomen. Although at the time of the accident Mr McNamara was wearing a full-face black and white Arai motorcycle helmet, it clearly offered no protection against chest and abdominal trauma.
- 1.3. Neither alcohol nor drugs played any part in the fatal incident.
- 1.4. The fact that Mr McNamara was riding a motorcycle, as opposed to driving a motor car, was instrumental in his suffering fatal injuries. There is no reason to suppose that if at the time of this incident Mr McNamara had been driving a car, he would have sustained mortal injuries or necessarily have lost control of his vehicle. The case exemplifies the special dangers associated with the loss of control of a motorcycle in circumstances where a motorcyclist is being pursued by police and how special considerations apply, or should apply, in the conduct of such pursuits. I have already referred to this subject in my findings in the matter of the death of Steven Michael Bradford² who also died of injuries sustained after he lost control of a motorcycle having been pursued by police.
- 1.5. At the time with which this Inquest is concerned, Mr McNamara resided with his partner, Ms Wendy Maile, at 9 Briony Way, Paralowie, South Australia 5108. According to Ms Maile's witness statement³ he had been riding motorcycles for a number of years. He owned a 2005 1000cc Yamaha motorcycle that was registered in

¹ Exhibits C3 and C3a

² Inquest 1/2009

³ Exhibits C2 and C2a

his name and at the address to which I have referred. According to Mr Christopher Graham who is a vehicle examiner with the South Australia Police Major Crash Investigation Unit, the motorcycle was in good condition and had nothing mechanically wrong with it that would have contributed towards or caused the fatal collision.

- 1.6. Mr McNamara held a full motorcycle licence but it had expired in May. He had not renewed it. Notwithstanding its expiry, it appears that he continued to ride his motorcycle in contravention of the law. However, there is no suggestion that Mr McNamara was not qualified to hold a full motorcycle licence or that he had been disqualified from holding or obtaining such a licence. If he had ridden his motorcycle while under disqualification, this would have constituted a significantly more serious offence which might have invited imprisonment if detected. Rather, his lack of licence at the time was the result of his failure to renew his licence and pay the necessary fee. There is no suggestion that his riding in contravention of his obligation to hold a current licence would have invited a term of imprisonment or even have warranted his arrest. The motorcycle was registered and insured at the time.
- 1.7. Mr McNamara was detected by police riding his motorcycle without a licence in the vicinity of the Elizabeth City Centre and his failure to stop when requested to do so precipitated the pursuit that culminated in the fatal accident. In fact this detection was not the first such detection that day. Mr McNamara had earlier on the day in question been detected riding his motorcycle without a licence at Brahma Lodge and had been issued with an expiation notice for that offence. At approximately midday on 16 November 2005, which was a Wednesday, Mr McNamara was stopped on Main North Road, Brahma Lodge by a solo uniformed police patrol manned by Constable Timothy Hughes. Constable Hughes conducted a routine check in relation to the registration of the motorcycle and the check revealed that the registered owner, Adam Keneth McNamara, was at the time unlicensed. Having pulled Mr McNamara over, Constable Hughes established that Adam Keneth McNamara, the registered owner, was indeed the rider of the motorcycle and so he issued Mr McNamara with an expiation notice for an offence of riding a motorcycle without a licence. The total amount payable by virtue of the expiation notice was \$292. When Constable Hughes pulled Mr McNamara over it appeared to him that Mr McNamara had in fact arrived at his intended destination. Constable Hughes therefore believed that there was no

question of Mr McNamara continuing to ride the motorcycle so he merely warned him not to ride the motorcycle until he had renewed his licence. Constable Hughes would that same afternoon again detect Mr McNamara riding his motorcycle, this time in the vicinity of the Elizabeth City Centre, and it was this that gave rise to the fatal pursuit.

- 1.8. Notwithstanding the warning Constable Hughes had given him at Brahma Lodge, Mr McNamara rode his motorcycle home to his premises at Paralowie. I emphasise here that the address that is recorded in motor vehicle registration details for Mr McNamara was the address at which he then currently resided. The address as depicted on Constable Hughes' expiation notice was that same address. I mention all of this because there can be no suggestion that at the time of these events there was any reason to doubt the authenticity of Mr McNamara's identity or the ownership of the motorcycle or to doubt the genuineness of Mr McNamara's stated place of residence.
- 1.9. According to Ms Maile's statement, Mr McNamara arrived home at about 1:15pm and told her that he had been pulled over by the police. Ms Maile asserts in her statement which is verified by an affidavit on her oath that Mr McNamara that afternoon tried to renew his licence over the telephone but was told that he had to appear in person in order to do so. She states that he therefore set off to renew his licence at the Elizabeth City Centre Motor Registration office. I accept that evidence and find that when Mr McNamara was later located by Constable Hughes riding the same motorcycle in the vicinity of the Elizabeth City Centre, Mr McNamara's intention was to travel to the Motor Registration office and renew his licence.
- 1.10. Constable Hughes was by then driving an unmarked police Commodore sedan which was fitted with lights and siren. He had only recently collected it from a repairer in Elizabeth. He was still on solo duty when at approximately 2pm he saw the motorcycle that he had earlier pulled over at Brahma Lodge now being ridden on Elizabeth Way. Constable Hughes signified to the rider to pull over and did so by way of lights and a short application of the siren. Notwithstanding his obligation to comply with this direction, Mr McNamara failed to oblige. In doing so he committed

another offence⁴. In fact he rode away from Constable Hughes' vehicle in an obvious attempt to avoid police intervention and did so at speeds that exceeded the various limits for the roads involved, thereby committing further offences. Constable Hughes pursued the motorcycle and in doing so also exceeded the speed limit. After a relatively short pursuit Mr McNamara lost control of his motorcycle and sustained the injuries that caused his death. Mr McNamara's failure to stop when requested to do so, and the subsequent pursuit, gives rise to the suggestion that this was a death in custody as defined in the Coroners Act 2003. Accordingly, it was considered mandatory for an Inquest to take place in respect of Mr McNamara's death. Quite apart from that, it was in any case considered necessary and desirable for an Inquest to be held into his death.

- 1.11. The circumstances and manner in which it is appropriate for police to conduct pursuits of vehicles that fail to stop when directed to do so have over the years been controlled by various manifestations of Police General Orders that relate to the subject. Pursuits of this nature very often also involve a question as to the legality of the manner of driving exhibited on the part of the pursuing police officer. In this Inquest I examined the issue as to whether in all of the circumstances it had been appropriate for Mr McNamara to have been pursued after he had failed to stop and whether any of the actions of the pursuing officer had contributed to Mr McNamara's death. I add here that after these events Constable Hughes, who is now a police officer with Western Australia Police, was found guilty by the Elizabeth Magistrates Court of driving in a manner dangerous to the public in respect of his own driving behaviour at one stage of the pursuit. While this Court is precluded from making any finding or suggestion of criminal liability, it was nevertheless an intrinsic part of my inquiry to examine such issues as the speed of the vehicle in which the officer was conducting the pursuit and the manner of its being driven when regard is had to the applicable speed limits and traffic conditions.

⁴ Contrary to Section 42(2) of the Road Traffic Act 1961

2. The relevant roads and traffic features

2.1. The relevant features of the scene are depicted below in Google earth imagery.



- A Approximate area where pursuit commenced
- B Pedestrian crossing on Oxenham Drive
- C Elizabeth Magistrates Court building
- D Elizabeth Police Station building
- E Approximate position of sign with which Mr McNamara collided

2.2. As seen earlier, Mr McNamara travelled to the Elizabeth City Centre in order to renew his licence in person. He was on the Elizabeth Way when his motorcycle was identified by Constable Hughes as the one he had pulled over earlier. The time was about 2pm. Mr McNamara was seen to execute a U-turn on Elizabeth Way and then proceed towards its junction with Oxenham Drive. Oxenham Drive divides the shopping complex from its large ground level open car park. The thoroughfare serves a number of purposes. It provides vehicular access to the car park. It provides pedestrian access to the car park as well as to the shopping complex itself. There is a bus interchange that comprises a number of bus stops on the northern footpath. There is a taxi rank on Oxenham Drive. The large shopping complex comprises stores, supermarkets and government and business offices. The large car park that is

accessible from Oxenham Drive at a number of points is situated on the northern side of Oxenham Drive. On the southern side of Oxenham Drive is the complex itself. The carriageway of Oxenham Drive consists of one lane for each direction of travel. At some point along its length it has a pedestrian crossing that serves the purpose of connecting pedestrians coming from the bus interchange and car park with the complex. That said, there is no impediment to pedestrians crossing Oxenham Drive at other points along its length.

- 2.3. The Elizabeth Magistrates Court is situated at the eastern end of Oxenham Drive on its northern side. At that point Oxenham Drive in effect becomes Frobisher Road. Traffic travelling along Oxenham Drive in an easterly direction would execute a left-hand turn of approximately 90 degrees to turn into Frobisher Road. Frobisher Road then runs north past the Court complex and the adjacent police station and then terminates at its junction with Elizabeth Way. A vehicle may execute a left hand turn into Elizabeth Way via a slip lane. One then proceeds in a westerly direction on Elizabeth Way.
- 2.4. The speed limit for Oxenham Drive is and was 20 kilometres per hour. I conducted a view of the Oxenham Drive vicinity. The evidence and the view confirms the fact that the speed limit of 20 kilometres per hour is an appropriate and unsurprising one, particularly having regard to both vehicular and pedestrian traffic that utilises Oxenham Drive and its environs.
- 2.5. The speed limit along Frobisher Road is 50 kilometres per hour.
- 2.6. The route taken by Mr McNamara from the moment he was directed to pull over on Oxenham Drive to the location at which he collided with the road sign was as follows: east along Oxenham Drive, turned left and proceeded north along Frobisher Road and then turned left and proceeded west along Elizabeth Way, a total distance of about 655 metres⁵.

3. Urgent duty driving

- 3.1. In November 2005 there was in operation a SAPOL General Order entitled 'Operational Safety - Urgent Duty Driving'⁶. Police General Orders govern various

⁵ Exhibit C35a, page 28, Statement of Inspector Peter Worth

⁶ Exhibit C35i

facets of police operational behaviour. Compliance with General Orders is mandatory. The General Order that was applicable at the time, and which has since been superseded by other versions, addresses the subject of what is described in the document as 'Urgent Duty Driving' conducted by SAPOL officers in the course of their official duties. It describes policy and procedure for police officers driving vehicles in a manner that might otherwise have breached the Australian Road Rules but for the statutory exemption that relates to the use of police vehicles. The General Order also governs police driving behaviour that might subject the public to risk irrespective of whether the driving would breach the Australian Road Rules but for the exemption. The purport of the document, and later versions of it, is to identify if not delimit the circumstances in which police officers should engage in urgent duty driving⁷ and in which they might legitimately invoke the exemption provided in Rule 305 of the Australian Road Rules. I add here that the exemption as it existed in Rule 305 of the Australian Road Rules was a limited exemption. For instance, it did not exempt police officers from compliance with the provisions of the Road Traffic Act 1961 (SA) which includes the offence of driving in a manner dangerous to the public contained in Section 46 of the Road Traffic Act and driving without due care which is in Section 45 of the Road Traffic Act. Road Traffic Act Section 110AAAA, which was enacted after these events, also provides police with certain exemptions to the operation of the provisions of the Road Traffic Act, but it too does not exempt compliance with sections 46 and 45 of the Act. Therefore, the prohibitions on dangerous and careless driving as contained in the Road Traffic Act applied then, and still apply now, to police even in the execution of their duties. It will also be noted that although the General Order refers to the Australian Road Rules and to the exemption provided in Rule 305, the document does not in any way purport to authorise police to drive in a manner that is dangerous to the public or to drive without due care and, as a matter of law, nor could it.

3.2. The General Order begins as follows:

'Operational safety - urgent duty driving

When you use the exemption provided in rule 305 of the Australian Road Rules in responding to taskings or driving in a manner which, when compared with normal risks, substantially increases the risk of injury to police, the public or suspects, or of damage to property, the driving will be considered urgent duty driving.

⁷ Now referred to variously as Urgent Response Driving and High Risk Driving

In all urgent duty driving situations SAPOL's operational safety philosophy and principles must be applied. Safety must be the primary concern ahead of capture.

Urgent duty driving is an area of great potential risk for loss of life, injury or damage to property. In all urgent duty driving situations:

- the urgent duty driving should not be disproportionate to the circumstances
- risk must be continually assessed in terms of the potential danger to all and the risk of damage to property
- police have a duty of care not to endanger other road users and must exercise an extreme level of awareness and caution
- supervisors must exercise effective command and control
- occupational health, safety and welfare requirements are to be met
- the driver of the vehicle must be responsible for their actions
- the senior member may be held accountable for the actions of the driver
- you should consider helicopter assistance as the preferred option.'

It will be seen that this part of the document in essence provides a definition of urgent duty driving. Unlike later versions of this General Order, the document does not distinguish between urgent duty driving and pursuits. In fact, under this version of the General Order, urgent duty driving encompassed pursuits as a species of urgent duty driving.

3.3. The General Order goes on to state under the heading 'Policy':

'Urgent duty driving may only be undertaken:

- in response to an emergency involving obvious danger to human life or
- when the seriousness of the crime warrants it.

In all cases the known reasons for the urgent duty driving must justify the risk involved.'

Having regard to the fact that pursuits are encompassed within urgent duty driving, it would appear that where the manner of driving during a pursuit would require the invocation of the Rule 305 exemption, or where police drive in a manner which when compared with normal risks substantially increases the risk of injury or damage, in either case such driving would only be regarded as complying with the General Order where an emergency of the kind described under the heading 'Policy' was in existence or the seriousness of a crime that the officer is endeavouring to investigate, prevent or apprehend the perpetrator thereof would warrant it. It will readily be seen, therefore, that justifying Constable Hughes' pursuit of Mr McNamara in respect of a suspected 'drive without a licence', an offence that presented no intrinsic danger or

embarrassment to the public and where relatively little was at stake, would have its manifest difficulties.

- 3.4. The General Order also sets out the factors that must be considered in relation to the institution and continuation of urgent duty driving. This section is set out as follows:

'Considerations for institution / continuation

Before commencing and while engaged in urgent duty driving the senior member and the driver must consider:

- the seriousness of the emergency or crime
- the degree of risk to the lives or property of police, the public or the suspect/s
- whether the driver holds the appropriate driving permit
- whether immediate apprehension is necessary (if in pursuit)
- the availability of other police assistance
- the capability and type of police vehicle or forthcoming assistance
- the practicability of using other stopping devices such as road spikes
- environmental and climatic conditions
- police driver competence and local knowledge.

If the urgent duty driving involves a pursuit it must be terminated when:

- the necessity to immediately apprehend is outweighed by obvious dangers to police, the public or the suspects if the pursuit is continued or
- the apprehension can be safely effected later (e.g. the identity of the owner / occupants of the vehicle is known)
- instructed by the supervisor/shift manager, State Duty Officer / Communications Senior Sergeant or nominee.

Supervisors/ shift managers should consider all factors including driver ability, history and experience generally in deciding whether to allow the urgent duty driving to continue.

If the urgent duty driving involves an emergency response it must be terminated when the necessity to attend urgently is outweighed by obvious dangers to police or the public.'

It will be noted that the duties of a police officer under the above section regarding the termination of a pursuit are quite specific and are premised on the need for immediate apprehension of the pursued offender. If the need for immediate apprehension is either outweighed by the obvious dangers posed by continuation of a pursuit, or the apprehension can be safely effected later, say because the identity of the person is known, the pursuit has to be terminated under this version of the General Order. As a matter of common sense there would be no reason to confine the operation of this

stipulation to the termination of pursuits. If the need for immediate apprehension was negated at the outset by the circumstances described, it is difficult to see how the commencement of a pursuit could be justified either.

- 3.5. The word 'terminate' as used in the General Order to describe the cessation of urgent duty driving is explained. To terminate involves:

'Immediately slowing the police vehicle and complying with the area speed limit and other traffic requirements, turning off all emergency warning equipment, and resuming patrol.'

The emergency warning equipment of which this paragraph speaks would naturally include lights and siren. One can readily understand why this should be a requirement when termination is effected. It gives some notice to the pursued motorist that he or she is no longer being pursued, in the hope that the motorist's driving behaviour will be modified for the better. I add here that the amended version of the General Order that came into effect on 1 January 2006, for the first time contained a requirement that upon the termination of a pursuit the pursuing officer must immediately stop the police vehicle in a safe manner and in a safe location. This was a clear improvement.

- 3.6. The General Order in operation in November 2005 also obligated the officer, when commencing urgent duty driving that involved a pursuit, to notify the Communications Centre or base radio of the following matters:

'Communications centre / base radio notification

When you engage in urgent duty driving involving a pursuit you must notify the Communications Centre or base radio of the following:

- initial reason for pursuit
- traffic and road conditions
- suspect vehicle's details
- that all of your vehicle's warning equipment has been activated
- the progress of the incident, speeds involved and manner of driving of the suspect vehicle
- type of police vehicle involved and, if a solo patrol, the need to be replaced as soon as possible by a two member crew in a marked police vehicle.'

It will be noted here that the first dot point for consideration is the initial reason for the pursuit which is obviously a relevant factor in determining whether a pursuit is appropriate or not. Indeed, to my mind it is the major governing circumstance to be

taken into consideration in commencing a pursuit. This is reflected in the fact that the document as a whole, and later versions of it, repeatedly emphasise the importance of the seriousness of the emergency or the crime under investigation as a factor that might justify urgent duty driving.

- 3.7. The General Order goes on to state specifically that ‘unmarked police vehicles should not be engaged in any urgent duty driving situations unless exceptional circumstances exist’. Constable Hughes’ vehicle was an unmarked police vehicle and so the prohibition at first blush applied to him. However, although I heard neither evidence nor argument on the issue, it is conceivable that an unmarked vehicle being fitted with lights and siren might either be regarded as a marked vehicle or provide an exceptional circumstance of the kind envisaged, especially where a pursuit might otherwise be justified by the nature of the emergency. In my view, Constable Hughes’ decision to pursue ought not be criticised merely on the basis that the vehicle was unmarked when it is clear that he utilised its lights and siren. The fact that it was a police vehicle must have been obvious to everyone including Mr McNamara himself. That said, as will be seen, there were other facets of Constable Hughes’ driving that brought its appropriateness into question when regard is had to the General Order as a whole.
- 3.8. As far as procedure following urgent duty driving involving a pursuit is concerned, if the pursued vehicle is not stopped or the pursuit is terminated, the General Order stipulates that the supervisor must ensure follow-up enquiries are conducted including the following:
- ‘fingerprinting vehicles once located
 - obtaining witness statements, where appropriate
 - attending the home address of the registered owner of the pursued vehicle
 - allocating the investigation with accountability
 - submitting an ancillary report.’

The inclusion of this section is in pointed recognition of the ability that police have to investigate crime by using means that would not involve an immediate apprehension of an offender following a pursuit. In particular, this part of the General Order makes specific reference to the ability of police to attend the home address of the registered owner of the pursued vehicle. It will also be seen that at the time with which this

Inquest was concerned there were powers residing in police, quite independently of this General Order, to compel members of the public to divulge information about the identity of the driver of a motor vehicle on a particular occasion⁸.

- 3.9. Finally, it would be appropriate to mention that this version of the General Order, by way of contrast to later versions, specifically deals with urgent duty driving conducted by the rider of a police motorcycle. I set out the relevant part of the General Order as follows:

'Police motorcycles involved in urgent duty driving should be replaced, wherever practicable, by a car fitted with emergency equipment and markings. The State Duty Officer/LSA commander or Communications Senior Sergeant or nominee is responsible for withdrawing a motorcycle from an urgent duty driving situation.'

There is no explanation within the document as to why a pursuing motorcycle, be it itself fitted with lights and siren or not, should be replaced with a marked car with the same equipment, but the clause may well reflect the fact that a pursuing police motorcyclist is at greater risk of mishap and serious injury than the driver of a police car. This would then beg the question as to why the same considerations ought not apply to the pursued motorcyclist. The General Order does not distinguish the types of vehicles pursued or otherwise recognise that there may be special considerations applicable to different types of pursued vehicles.

3. Mr McNamara is pursued by Constable Hughes

- 3.10. The pursuit of Mr McNamara's motorcycle commenced near the western end of Oxenham Drive. The movements of Mr McNamara's motorcycle and Constable Hughes' unmarked police vehicle along part of Oxenham Drive were captured by a video camera mounted on one of the shopping complex buildings. The video footage was produced in the Inquest⁹. The video camera was positioned to provide a view looking along Oxenham Drive towards its western end. It captures such features as the pedestrian crossing that I have described as well as the bus interchange. A viewing of the video confirms in my mind that Oxenham Drive was a busy thoroughfare both in terms of vehicular traffic, including buses, cars, taxis and commercial vehicles, as well as the presence of pedestrians either on the raised footpaths or when utilising the pedestrian crossing.

⁸ Section 38 (as it then was) of the Road Traffic Act 1961

⁹ Exhibit C35g

- 3.11. After Mr McNamara turned left into Oxenham Drive he was followed by Constable Hughes who, as I have described earlier, indicated by the use of lights and a short application of the siren for Mr McNamara to pull over. Mr McNamara then accelerated and in fact mounted the footpath in order to overtake a bus that was travelling in the same direction. In doing so, he overtook it on its left hand side. Constable Hughes pursued Mr McNamara and also overtook the same bus, albeit conventionally on its right hand side. His vehicle ventured onto the incorrect side of the road in order to do so. The pursuit was then conducted along Oxenham Drive at the eastern end of which Mr McNamara executed a left-hand turn into Frobisher Road. Constable Hughes followed. For the moment I confine my attention to the pursuit along Oxenham Drive.
- 3.12. The video footage of the incident was examined by a police officer employed in the Crash Reconstruction Unit of SAPOL, Mr Graham England¹⁰. Based upon the movements of the two vehicles as depicted in the video footage and on the measurements between relevant features of Oxenham Drive, calculations were made in relation to the speed of both the motorcycle and the pursuing police vehicle over a distance of around 200 metres along Oxenham Drive. This is the approximate extent of the distance along Oxenham Drive that is captured by the video camera.
- 3.13. I have viewed the video footage on several occasions. It is clear that there was a high level of vehicle and pedestrian traffic at the time of the incident, either on or in the vicinity of the section of Oxenham Drive that is depicted in the video footage. Mr McNamara's motorcycle can first be seen behind the bus that I have described. Constable Hughes' police vehicle is behind the motorcycle. When first seen the police vehicle has its flashing lights activated. The motorcycle is plainly seen to overtake the bus along the footpath. There appears to be an acute acceleration of the motorcycle at that point in time. After it overtakes the bus it returns to the carriageway of Oxenham Drive and appears to be accelerating at a rapid rate. It then overtakes a taxi. The motorcycle is then seen to pass over the pedestrian crossing on the incorrect side of the road. As it does so, it passes behind a couple who are crossing the pedestrian crossing and who appear to have quickened their pace in order to avoid the motorcycle. Shortly after crossing the pedestrian crossing the motorcycle disappears from view. The calculations made by Mr England, the officer then

¹⁰ Refer to Exhibits C29, C29a, C29b and C29c

attached to the Crash Reconstruction Unit, indicate that after the motorcycle overtook the bus it accelerated to a speed of no less than 94 kilometres per hour, and possibly as great as 105.1 kilometres per hour, by the time the motorcycle is last seen on the video footage. The average speed of the motorcycle over the distance of 214.75 metres over which it can be seen on the video footage was 61 kilometres per hour.

- 3.14. The video reveals that when Constable Hughes' vehicle overtook the bus it did so as it rounded a left-hand bend on Oxenham Drive. At the same time that the police car is level with the bus, the motorcycle is overtaking the taxi. In order to overtake the bus Constable Hughes had to encroach partially onto the incorrect side of the road. This involved his vehicle straddling the centre line. Thereafter, as it approaches the pedestrian crossing, Constable Hughes' vehicle for the most part is seen either straddling the centre line or travelling on the incorrect side of the road. The vehicle driven by Constable Hughes also overtakes the taxi which by then had apparently slowed down to permit pedestrians to cross the pedestrian crossing. The taxi is almost at the crossing when it is overtaken by Constable Hughes. In order to overtake the taxi Constable Hughes moves his vehicle further onto the incorrect side of the Oxenham Drive carriageway. When it passes over the pedestrian crossing it has moved completely onto the incorrect side of the road. This causes a dark coloured sedan coming from the opposite direction to take evasive action by moving into a lay-by at the side of the carriageway. After the police car crosses the pedestrian crossing it returns to the correct side of the road. Indeed, it needed to do so in order to avoid a light coloured sedan travelling from the opposite direction. The police vehicle then disappears from view.
- 3.15. As to Constable Hughes' own speed, the calculation is that Constable Hughes' vehicle accelerated to a speed as possibly as great as 97.1 kilometres per hour, but no less than 87 kilometres per hour, before moving out of the camera's view. On one calculation, it may have been travelling at 87.6 kilometres per hour (with a tolerance of 10% plus or minus) when it crossed the pedestrian crossing on the incorrect side of the road. The average speed of the police vehicle over the distance of 202.63 metres over which it can be seen in the video was 57.6 kilometres per hour.
- 3.16. I accept Mr England's evidence and in particular his calculations. It is clear, therefore, that both Mr McNamara and Constable Hughes exceeded by a significant margin the speed limit applicable to Oxenham Drive namely 20 kilometres per hour.

- 3.17. As to the separation of the two vehicles, Constable Hughes' sedan passes over the pedestrian crossing between 3 and 4 seconds after the motorcycle passes over it.
- 3.18. The driver of the unmarked police vehicle is at all times, as seen in the video, pursuing the motorcyclist. The speed of the vehicle and its manner of being driven is consistent with nothing else. The tenacity of Constable Hughes' pursuit over the distance of approximately 200 metres as shown in the video footage is quite plain. It is evidenced by his speed, his overtaking of vehicles in circumstances of intrinsic danger, his preparedness to travel on the incorrect side of the road in order to do so and his evident lack of regard for the presence of the pedestrian crossing. Constable Hughes' determination to pursue is matched by Mr McNamara's determination to get away. The video footage gives no hint of any intention on the part of Mr McNamara to surrender to the pursuit, and it is clear from the evidence as a whole that at no time did he form that intention. Mr McNamara's determination to avoid capture, and his willingness to ride dangerously and with little regard to his own safety and that of others, would have been plainly evident to Constable Hughes as he pursued McNamara along Oxenham Drive.

4. The continuation and termination of the pursuit – Mr McNamara's riding behaviour

- 4.1. The evidence suggests, and I so find, that right up to the moment of his impact with the traffic sign on Elizabeth Way Mr McNamara was endeavouring to escape the intervention of police. There were a number of witnesses in Frobisher Road who described Mr McNamara's manner of riding. Two police officers, Brevet Sergeant Gray and Senior Constable Fielder, were on the western footpath of Frobisher Road in the vicinity of the Elizabeth police station. They both witnessed the approach of the motorcycle as it proceeded in a northerly direction towards their position. In her statement¹¹ Brevet Sergeant Gray describes the motorcycle as accelerating at a fast rate of speed towards her position and travelling at not less than 70 kilometres per hour. Senior Constable Fielder does not appear to have ventured any estimate as to the speed of the motorcycle, either in her statement or in her evidence before me. Mr Allan Aitchison, who provided a statement to the Inquest¹² and who gave evidence, was standing outside the police station on Frobisher Road. His attention to the

¹¹ Exhibit C16a

¹² Exhibit C10a

motorcycle was drawn by the sound of its approach. To him it was obvious that it was accelerating hard. In his statement he estimates that the motorcycle was travelling at about 80 kilometres per hour when it passed his position. He observed it approach the junction of Frobisher Road and Elizabeth Way where the motorcyclist appeared to hesitate before turning left and accelerating in a westerly direction along Elizabeth Way. Mr Aitchison estimates that the motorcycle reached a speed of approximately 70 kilometres per hour when he last saw it. Mr Nathan Leonard, who provided a statement¹³ and gave evidence, was also a pedestrian in Frobisher Road. In his statement he describes the motorcycle proceeding past his position 'pretty quick' at a speed that he estimated to be 70 to 80 kilometres per hour but slowing for the Elizabeth Way junction. He said that at the junction the motorcycle went out wide onto the incorrect side of the road as it commenced to take the left-hand bend. Mr Leonard's impression was that the motorcyclist was endeavouring to get away from an unmarked police vehicle to the rear.

- 4.2. It is clear, therefore, and I so find that Mr McNamara was riding at a speed along Frobisher Road that was significantly in excess of the limit of 50 kilometres per hour and I draw the available inference that at that point he was still endeavouring to evade police and that his riding behaviour was influenced by that desire.
- 4.3. Mr McNamara was seen by a number of witnesses either in the process of negotiating the left-hand turn from Frobisher Road into Elizabeth Way or once in Elizabeth Way itself. Mr Anthony Garlick and Mr Gary Wharton were occupants of a vehicle that was travelling in a westerly direction along Elizabeth Way towards its junction with Frobisher Road. Both men provided statements¹⁴ and gave evidence at the Inquest. Mr Garlick's statement describes the motorcycle entering Elizabeth Way and then 'fishtailing' as it straightened. It was in the right lane closest to the Elizabeth Way median strip. Mr Garlick was unable to estimate the speed of the motorcycle but assumed that it fishtailed because it was either going too fast or had lost traction when riding over a white line. Mr Garlick's statement describes the rider as being 'tossed off the bike' and then falling to the right-hand side of the bike towards the median strip. In his evidence at the Inquest Mr Garlick said that the back wheel of the motorcycle struck the concrete edge of the median strip which caused the rider to

¹³ Exhibit C8a

¹⁴ Exhibits C6a and C7a

completely lose control of the motorcycle. Although he did not see actual contact between the rear wheel and the concrete edge, he assumed that that is what had taken place because the motorcycle had come very close to it. Mr Wharton, the other occupant of the vehicle, did not actually observe the motorcycle until after it had crashed.

- 4.4. Mr Steven Klepacki gave a statement¹⁵ to police and he also gave evidence. He was a pedestrian who made his observations from the southern footpath on Elizabeth Way. His statement describes the motorcycle as being two-thirds of the way around the corner of Frobisher Road when he first observed it coming in his direction. After he noticed the motorcycle come around the corner he saw both wheels of the motorcycle 'buried in the kerbing of the median strip'. The motorcycle then straightened up. Mr Klepacki described it as 'tram tracking the kerb'. As soon as the motorcycle began doing that, the rider stood up on the foot pegs. Mr Klepacki observed the rider holding the handle bars and that the whole motorcycle was shaking uncontrollably. The next thing he saw was that the rider came off the motorcycle to its right and fell onto the lawn of the median strip. The rider then slid on his back along the lawn until he struck the traffic sign with his mid section, pivoted around it and stopped. The motorcycle continued to slide past Mr Klepacki's position. In his evidence Mr Klepacki said that the motorcycle had come around the corner in an extremely quick manner. He was '*belting the hell out of it*'¹⁶. He suggested that the speed was definitely in excess of the speed limit which was 50 kilometres per hour.
- 4.5. Mr Ashley Oldfield, who provided a statement to police for the first time in August 2009¹⁷ and who gave evidence as well, was driving a vehicle east along the Elizabeth Way when his attention was drawn to the incident. He observed the motorcycle turn into Elizabeth Way and accelerate rapidly. The sound of the motorcycle suggested to him that it was at full throttle. Mr Oldfield observed the motorcycle accelerate before it had straightened up. As soon as that occurred the rear tyre of the motorcycle began to 'fishtail' and move from side to side. This movement worsened and the motorcycle moved into the right lane closest to the median strip. At about that point the fishtailing had become so intense that the rider was thrown off the motorcycle. Mr

¹⁵ Exhibit C9a

¹⁶ Transcript, page 256

¹⁷ Exhibit C40a

Oldfield observed the rider collide with the traffic signpost. In his statement Mr Oldfield estimates that at its fastest the motorcycle was travelling at about 80 to 100 kilometres per hour. He said that the motorcycle 'was flying'¹⁸. He did not see the motorcycle strike the kerb, although he said that it was possible that it did¹⁹.

- 4.6. The accident reconstructionist, Mr Graham England, says in his statement²⁰ that a calculation of the speed of the motorcycle could be determined from the distance it slid along the roadway of Elizabeth Way. Mr England determined that the distance over which the motorcycle actually slid completely on its side was 54.7 metres. He calculates that the speed of the motorcycle at the time it fell to the roadway was between 69 and 87 kilometres per hour. Mr England does not suggest in his statement that the rear wheel of the motorcycle collided with the kerb of the median strip, but I accept the detailed and convincing evidence of Mr Klepacki, an independent witness who was standing in close proximity to the incident, that this indeed did happen and that this was the ultimate cause of Mr McNamara parting company with the motorcycle.
- 4.7. I will, in a slightly different context, describe the observations of Constable Hughes himself in respect of the actual collision.
- 4.8. I am perfectly satisfied that as, and after, Mr McNamara negotiated the left-hand turn from Frobisher Road into Elizabeth Way he rode recklessly and at a speed that was not only inappropriate in the circumstances but which was in excess of the speed limit along Elizabeth Way of 50 kilometres per hour. I find that Mr McNamara's reckless handling of the motorcycle was the reason that he lost control of it. What was motivating Mr McNamara as he turned left into Elizabeth Way and as he proceeded along Elizabeth Way towards his fate was a desire to evade police.
- 4.9. Further, I find that at all material times during Mr McNamara's journey from the commencement of the pursuit at the western end of Oxenham Drive to the location where he struck the signpost, his unrelenting desire was to evade police.

¹⁸ Exhibit C40a, page 3

¹⁹ Transcript, pages 193, 194

²⁰ Exhibit C29a

5. Constable Hughes driving behaviour as the pursuit progressed – was there a termination?

5.1. As to Constable Hughes' driving behaviour as the incident progressed from Oxenham Drive into Frobisher Road, Constable Hughes told me in evidence that when the motorcycle turned left into Frobisher Road he was quite a distance behind it. He suggested that he was probably 70 to 100 metres to the rear at that point²¹. At the point Constable Hughes himself entered Frobisher Road, he estimated that the motorcycle was already greater than three-quarters along the length of Frobisher Road²². While in his evidence Constable Hughes had experienced some difficulty admitting that he had actually pursued Mr McNamara at all, he initially suggested that he had made a decision not to pursue the motorcycle at a point prior to him entering Frobisher Road²³. In whatever way Constable Hughes might himself choose to describe what he did, I find that there was a pursuit and so the question for consideration is whether, and at what point in time, Constable Hughes actually terminated his pursuit. Constable Hughes told me that at one point he had made a communication by radio and had called a 'fail to stop'. It was after that that he had made the decision not to endeavour to stop the motorcyclist. Other evidence of Constable Hughes would suggest that his decision was made just after he entered Frobisher Road when he saw the traffic conditions along that thoroughfare. His decision not to pursue, he said, was based on the following:

'Because I thought at that point he wasn't going to stop and my thoughts his reason for not stopping is there's a high chance it was the same rider that I stopped earlier in the day. It was also a street that wasn't as wide as Oxenham Drive. There were a lot of cars down each side of the road down there so my vision was a lot more restricted than it was on Oxenham Drive. I wouldn't be able to see if someone was going to step out between cars or not. There was a lot of reasons why I had no reason to continue.'²⁴

Constable Hughes initially said that when he terminated on Frobisher Road he slowed the vehicle down to the speed limit and turned off the lights and siren of the vehicle. In respect of his flashing lights, Constable Hughes said that he deactivated them when in the vicinity of the Elizabeth police station just before one enters onto Elizabeth Way²⁵. Initially he said that he deactivated the siren at about the same point. He

²¹ Transcript, page 42

²² Transcript, page 42

²³ Transcript, page 43

²⁴ Transcript, page 49

²⁵ Transcript, page 52

suggested that after he had deactivated the siren along Frobisher Road the siren was never again utilised²⁶. He said that he turned on the lights again at the scene of the accident.

- 5.2. The communication audio that includes Constable Hughes' radio transmissions made during the course of this incident was produced in evidence²⁷. There is also a transcript of what was said. The transmission was played during the course of Constable Hughes' evidence. I have listened to it privately since. The transmission regarding this incident, as far as is relevant for these purposes, is set out as follows:

'Patrol 029 urgent fail to stop.
 Operator All other patrols stand out please. 029 where about please.
 Patrol 029 Elizabeth Way 029 the riders fallen off his bike outside the Elizabeth
 police station can we have ambo's please.'²⁸

The designation of 'Patrol' is a reference to a communication made by Constable Hughes himself. Constable Hughes told me that he made the first communication in which he called the failure to stop as he was approaching the courthouse at the corner of Frobisher Road and Oxenham Drive. He was still on Oxenham Drive at that point²⁹. When one listens to Constable Hughes' first transmission the siren of his vehicle is clearly audible. When Constable Hughes transmits to advise that the rider has fallen from his motorcycle, the siren is again clearly audible. When one listens to the transmission carefully, as I have, a period of approximately 11 seconds elapses between the word 'stop' in Constable Hughes' first transmission and his eventual announcement of the words 'fallen off his bike'. When asked whether the fact that the siren was audible in both of his transmissions accorded with his recollection, Constable Hughes said:

'Yes. I thought I'd turned the sirens off before I made that transmission but obviously I hadn't. I had already slowed the vehicle down by that point though; that's obviously why I hadn't turned the siren off because I was busy talking on the radio.'³⁰

He also said:

'... at no time did I turn the siren back on ...'³¹

²⁶ Transcript, page 52

²⁷ Exhibit C35I

²⁸ Exhibit C34e, page 4

²⁹ Transcript, page 63

³⁰ Transcript, page 63

³¹ Transcript, page 64

In my view it is clear that at the time of the crash the siren of Constable Hughes' vehicle was still on. There is an inherent unlikelihood that Constable Hughes would, once having decided to terminate the pursuit, turn the siren on again having turned it off.

- 5.3. The evidence did vary somewhat as between witness accounts in respect of whether and when Constable Hughes' vehicle had its siren operating. Two police officers, Shane McMahon and Robert Kronitis, were together walking across the north-eastern car park of the shopping centre and were heading towards the rear entrance of the Elizabeth police station when their attention was drawn to the incident. Both officers provided statements to the Inquest³² and gave evidence. Senior Constable First Class McMahon first observed the motorcycle and the unmarked police vehicle when they were on Oxenham Drive. At that point the police vehicle's flashing lights and siren were both operating. The police vehicle was approximately 70 metres to the rear of the motorcycle but the motorcycle appeared to be moving away from the police vehicle. In his statement SC1C McMahon estimates that at that point the motorcycle was travelling at a speed over 100 kilometres per hour and that the police vehicle was travelling at about 80 kilometres per hour. The vehicles disappeared from his view once they were behind the Court complex. Nevertheless, SC1C McMahon could still hear the motorcycle and the police siren. From what he could deduce from his own hearing, the two vehicles proceeded past the front of the courthouse, then past the front of the police station and they then executed a left-hand turn into Elizabeth Way. SC1C McMahon then heard a loud thud and at that point he could no longer hear the motorcycle but could still hear the police siren. Senior Constable McMahon's impression was that the siren was on constantly³³. In cross-examination by Ms Fuller, counsel for Constable Hughes, Senior Constable McMahon admitted to the possibility that the siren had ceased not long before he heard the thud but said:

'I think I would have - if I'd - if the siren had stopped and then we'd heard the thud, I think maybe I would have remembered that, but I certainly don't recall that being the case. But again I'm not precise enough in my memory as to what exactly happened.'³⁴

- 5.4. Brevet Sergeant Kronitis also saw the motorcycle and the unmarked police vehicle for the first time when they were on Oxenham Drive. In his statement he said that the police vehicle was travelling at a high rate of speed but not at a speed that he

³² Exhibits C18a and C19a

³³ Transcript, pages 116 and 117

³⁴ Transcript, page 118

considered to be equivalent to that of the motorcycle. In a later statement³⁵ he speaks of a personal reconstruction of events that he made in January 2006 from which he concluded that the motorcycle had probably been travelling in excess of 110 kilometres per hour and that the police vehicle had been travelling in excess of 80 kilometres per hour. He had heard the siren of the unmarked police vehicle but was not in a position to see whether its lights were flashing. The engine noise of the car suggested that it was 'down shifting'. After he lost sight of the two vehicles behind the courthouse, he heard the motorcycle accelerate north along Frobisher Road. He too heard the loud 'clunk' that was undoubtedly the impact involving Mr McNamara. At the same time, the motorcycle's noise ceased completely. All that he heard after that was the siren of the police vehicle which ceased a few seconds after the 'clunk'. When asked in evidence as to whether he had heard the siren of the police vehicle stop and then restart, he said he could not be sure of that, but reiterated that after he heard the 'clunk' he could still here the police vehicle's siren.

- 5.5. Other witnesses have deposed to having heard the siren. Others say they did not hear a siren at all. There is no witness who claims to have heard the police siren stop and then restart. Constable Hughes himself does not assert that that was the case. In my view it is more probable than not that after Constable Hughes activated the siren of the police vehicle it remained on at all times until after Mr McNamara's collision. This in itself, however, does not necessarily mean that Constable Hughes did not terminate his pursuit at some point. All it means is that if indeed he did terminate the pursuit, he failed to turn off the siren in accordance with the direction contained within the police General Order.
- 5.6. I have already referred to Constable Hughes' own evidence regarding his termination. The rest of the evidence that is relevant to the topic is not universally the same but its preponderance as a whole tends to support Constable Hughes' position that he had terminated, or abandoned the idea of, the pursuit before the crash. In this regard I refer firstly to the evidence of eyewitnesses on Frobisher Road. Brevet Sergeant Gray's statement is that on Frobisher Road the unmarked police vehicle was approximately 100 metres behind the motorcycle when she first observed it. It had both its lights and sirens activated at that point in time. She estimates that the police vehicle was travelling at a slower speed than the motorcycle and at not less than 50

³⁵ Exhibit C18b

kilometres per hour. She estimated the speed of the motorcycle to have been not less than 70 kilometres per hour. In her evidence before me Brevet Sergeant Gray could not say whether the lights of the police vehicle were still on as it took the corner of Frobisher Road and Elizabeth Way. Senior Constable Fielder in her statement also states that on Frobisher Road the unmarked police vehicle was about 100 metres to the rear of the motorcycle when she first observed it. The siren and the emergency lights of the vehicle were operating at that point. Her statement is silent as to whether, when she last observed the vehicle on Frobisher Road, it still had its lights activated. She re-entered the police station and a few moments later when she viewed the accident scene out of a window, the unmarked police vehicle at that point had its lights activated. In her evidence Senior Constable Fielder said that as the police vehicle passed her position on Frobisher Road she did not hear the siren deactivated but that it continued, and the same applied in relation to the lights. She maintained that she had a clear recollection of that fact. She said in her evidence that the lights of the vehicle were still on when she saw it for the last time. Senior Constable Fielder conceded that the police vehicle did not '*fly past*'³⁶ her because she could identify the driver of the vehicle as Constable Hughes. In the event, Senior Constable Fielder conceded in questioning by me that it was possible that after she re-entered the police station, Constable Hughes may have turned off the lights of the police vehicle and turned them back on again after he had arrived at the scene of the crash.

- 5.7. I have already referred to the evidence of Mr Nathan Leonard in another context. Mr Leonard had just been released from the police station and as seen earlier, he was in Frobisher Road. Mr Leonard gave his statement five days after the incident. In his statement he states that he identified the car as a police vehicle because of its flashing lights. He says in his statement that he did not hear a siren but in my view it was undoubtedly on at that point in time. Mr Leonard describes the police vehicle as being approximately 20 metres behind the motorcycle, although it was not travelling as fast as the motorcycle when it went past his position. He estimated that the police vehicle was travelling at about 60 or 70 kilometres per hour. He lost sight of the police vehicle before it turned the corner. In his statement he suggests that when he first saw the motorcycle he believed the rider was trying to get away from the police. His body language was such that he was 'going to get away'³⁷. In his statement Mr

³⁶ Transcript, page 99

³⁷ Exhibit C8a, page 4

Leonard describes the police officer in the vehicle as doing something in respect of the centre of the vehicle as if he was looking at a computer screen or fiddling with switches. Mr Leonard stated that at all times while he had the police vehicle under observation it had its flashing lights on. However, he did not continue to watch the car at all times as it approached the junction with Elizabeth Way. At some point he had walked in the opposite direction. In cross-examination he conceded that the police vehicle may have been at least, and was probably more than, 100 metres away from the motorcycle³⁸.

- 5.8. Mr Aitchison, in his statement, notes that the motorcycle was travelling at about 80 kilometres per hour. He states that at the time the motorcycle was commencing its left-hand turn into Elizabeth Way, the unmarked police vehicle was turning onto Frobisher Road from Oxenham Drive. The siren was still operating. The police vehicle was travelling at about 60 kilometres per hour and it slowed as it travelled from the corner of Frobisher Road towards his position at the front of the police station. Mr Aitchison also observed the driver looking down towards the centre console of his vehicle in a fashion similar to that described by Mr Leonard. At the time that the police vehicle passed his position it was travelling at about 40 to 50 kilometres per hour at the most and it appeared to Mr Aitchison that the driver had 'given up following the motorcycle'³⁹. In a second statement made in January of the following year⁴⁰, Mr Aitchison says that he did not see any flashing lights or red and blue flashing lights on the police vehicle at any time. In his evidence Mr Aitchison said the motorcycle had already turned left into Elizabeth Way before the unmarked police vehicle turned into Frobisher Road and that at no stage was the police vehicle on Frobisher Road when the motorcycle was on Frobisher Road⁴¹. He also said that when the police vehicle entered Frobisher Road it did not have either its lights or its siren on at that time. He believes that the officer must have turned them off as he was approaching the corner⁴². Mr Aitchison was under a definite impression that the police officer behind the wheel of the unmarked vehicle was not in pursuit of anything

³⁸ Transcript, page 244

³⁹ Exhibit C10a, page 3

⁴⁰ Exhibit C10a, Statement provided to police on Monday, 30 January 2006

⁴¹ Transcript, page 265

⁴² Transcript, page 266

at that point. In his evidence he said that as the police vehicle approached his position it was travelling at 30 to 40 kilometres per hour⁴³.

5.9. Mr Aitchison also said that after the motorcycle turned into Elizabeth Way there was a point reached where the sound of the motorcycle suddenly was not there anymore. At that stage the police officer would have been just coming around the corner of Frobisher Road by the courthouse. This would mean that Constable Hughes could not have been in a position to have seen Mr McNamara's accident. It will be seen in the next section of these findings that such a conclusion is simply not available. Mr Aitchison's evidence that while the police vehicle was on Frobisher Road its lights at no stage were on, is inconsistent with the evidence of other witnesses on Frobisher Road. Both Officers Gray and Fielder observed its lights on Frobisher Road. Mr Leonard identified the unmarked vehicle as a police vehicle from its lights. That is the one feature of the vehicle that attracted him to it. He could not recall a siren. In my view, Mr Aitchison is mistaken when he asserts that the motorcycle had already turned off Frobisher Road before the police vehicle turned onto it and, as well, is mistaken when he says that at no point along Frobisher Road did it have its lights and siren on. Mr Aitchison's evidence, however, does not exclude a deactivation of the lights at some point along Frobisher Road itself.

5.10. The evidence of witnesses who were travelling in vehicles along Elizabeth Way also needs to be considered. I have already referred to Messrs Garlick and Wharton who were in a vehicle being driven along Elizabeth Way in a westerly direction. Mr Garlick was driving the vehicle. Mr Garlick saw both the motorcycle and the unmarked Commodore turn left into Elizabeth Way. According to Mr Garlick's statement, the proximity of the Commodore to the motorcyclist was such that at one point the Commodore obscured Mr Garlick's view of the rider as he rolled along the ground having come off the motorcycle. He specifically noticed that at that point the unmarked vehicle did not have any lights on. Nevertheless, he was able to identify it as an unmarked police vehicle due to the fact that he had performed work as a mechanic on similar vehicles. Mr Garlick specifically states that he in fact observed the vehicle's flashing lights actually come on in its rear window. He said:

'I am certain that the red and blue lights did not come on until the police car had come to a complete stop, at about a couple metres west of where the rider initially came off the bike. I believe that the police car was about 5 seconds behind the motorbike.'⁴⁴

⁴³ Transcript, page 267

Mr Garlick said that even before the lights had come on he had said to Mr Wharton words to the effect that he thought the vehicle was a police car and it was when Mr Wharton had asked him how he knew that, that the lights came on for the first time. In cross-examination Mr Garlick said that the police vehicle had almost come to a stop when the lights came on. He said that they were definitely not on when the police vehicle first came around the corner. Mr Garlick said that by the time the motorcyclist came off the motorcycle, the police vehicle had completely executed its turn into Elizabeth Way. However, Mr Garlick stated that he did not think that the unmarked police vehicle was in pursuit of the motorcycle at the time he saw both vehicles. Mr Garlick also thought that the vehicle did not have its siren on at any stage. That view of the matter is contradicted by the police communications recording.

- 5.11. Mr Wharton's statement and his evidence tends to support that of Mr Garlick. In his statement Mr Wharton states that when he first saw the Holden Commodore he did not see any flashing lights operating. He confirms that Mr Garlick said to him that he thought it was a police vehicle. He also states that he actually saw the flashing lights of the vehicle come on. In his evidence he said that he saw the flashing lights only after the vehicle had come to a stop⁴⁵. He did not hear any sirens. He did concede that the only time he really had a proper look at the police vehicle was when it had stopped. In cross-examination Mr Wharton said that he had thought about the matter of the lights quite a lot since these events and that he could not say with 100% certainty whether they had come on or whether they had been on all the time and he had only noticed them on for the first time when he more closely looked at the vehicle⁴⁶.
- 5.12. Mr Oldfield who had been driving a vehicle along Elizabeth Way from the opposite direction said in his statement that when he first observed the unmarked police vehicle it was turning from Frobisher Road onto Elizabeth Way and that he thought at the time that it was a police vehicle because of lights and sirens⁴⁷. In his evidence Mr Oldfield suggested that the lights came on as he came around the corner. He also thought that the siren had come on as he had come around the corner and that prior to that only the motorcycle had been making an audible noise. In cross-examination by

⁴⁴ Exhibit C6a, page 3

⁴⁵ Transcript, page 210

⁴⁶ Transcript, page 216

⁴⁷ Exhibit C40a, page 4

Ms Fuller, counsel for Constable Hughes, Mr Oldfield suggested that he had a distinct recollection of the lights coming on but that he was less certain about the siren coming on. Mr Oldfield suggested that the driver of the unmarked police vehicle would have had a clear view of the rider at the time that the rider collided with the pole. I note that Mr Oldfield made his statement to the police for the first time in August 2009 after he had seen publicity about the Inquest. He said that he had come forward in order to correct an impression that he had gained from media coverage that the police vehicle was very close to the motorcycle when the latter crashed.

- 5.13. As to the question of the flashing lights of the police vehicle being extinguished, to my mind the evidence of Mr Garlick in particular was quite convincing. He was an observant witness who had a reason for remembering that the lights of the unmarked police vehicle were off when he first spotted it and only came on after he spotted it. He said that he saw the lights actually come on for the first time after the police vehicle had negotiated the left-hand turn into Elizabeth Way. Mr Wharton's original statement to the police suggested the same thing, although he was less convincing in his evidence about that. In my view it is likely that at some point prior to the collision Constable Hughes had deactivated the lights of the vehicle. I think it unlikely that this occurred on Oxenham Drive. To my mind it is likely that he did that at some point along Frobisher Road. His actions of being seen to fiddle with controls in the centre of the interior of the vehicle is consistent with him endeavouring to deactivate the lights. For reasons that I have already explained, I do not believe he deactivated the siren at any point in time. Nevertheless, given the observations of witnesses on Frobisher Road and also the impressions of witnesses as to the driving behaviour of Constable Hughes in general, it is my view that at some point along Frobisher Road Constable Hughes terminated the pursuit and deactivated the lights on the vehicle. The termination is consistent with his vehicle travelling at a speed that was seen to be substantially less than that of the motorcycle as it travelled along Frobisher Road and from the fact that it was being driven at a speed at or below the speed limit of 50 kilometres per hour.
- 5.14. I find that at a point along Frobisher Road Constable Hughes terminated the pursuit and deactivated the lights of the vehicle. I find that he reactivated them at, or as he was approaching, the accident scene. I find that the siren of the vehicle remained activated at all times and was only deactivated after the accident.

5.15. Although I find that Constable Hughes did terminate the pursuit, it is clear that he continued to follow the path of the motorcycle notwithstanding. The General Order in operation at the time of these events did not require a pursuing police officer to stop the vehicle. Later versions of the General Order contain such a requirement. It would have been far better if Constable Hughes had brought his police vehicle immediately and completely to a stop when he decided to terminate rather than continue to follow the path of the motorcycle. However, Constable Hughes cannot be criticised for not stopping because at the time it was not a requirement under the relevant General Order.

6. Constable Hughes' proximity to Mr McNamara at the time of the crash

6.1. The signpost with which Mr McNamara collided was approximately 60 metres from the small triangular traffic island situated at the junction of Elizabeth Way and Frobisher Road⁴⁸.

6.2. In his evidence Constable Hughes said that along Frobisher Road he was between 70 and 100 metres behind Mr McNamara at his most proximate. As he entered the slipway from Frobisher Road onto Elizabeth Way he said in his evidence that Mr McNamara was already down. He said that from what he could remember, at that stage he saw that Mr McNamara was on the median strip and that he was already stationary. If that is the case then Mr McNamara must already have impacted with the signpost which was the object that caused his body to come to rest. Constable Hughes said that having reached the junction, he believed that the motorcycle was also stationary when he first saw it⁴⁹. Constable Hughes told me that he did not see what had caused Mr McNamara to come off the motorcycle⁵⁰. Constable Hughes later in his evidence reaffirmed that he did not actually see the accident⁵¹.

6.3. If Constable Hughes did not see the accident take place it would mean that he was probably further back along Frobisher Road at the time of the accident. Visibility of the accident scene is restricted until one is at the junction of Frobisher and Elizabeth Way. Constable Hughes' evidence in this regard is to be contrasted with what he said in two interviews that were conducted during the Commissioner's Inquiry into the

⁴⁸ The distance between the slipway island at the junction of Frobisher Road and the road sign that Mr McNamara collided with has been measured to be 63.6 metres - Exhibit C41, Statement of SC1C Sowle

⁴⁹ Transcript, page 59

⁵⁰ Transcript, page 59

⁵¹ Transcript, page 67

incident. Constable Hughes was first interviewed about the matter on 22 November 2005. The following passage is taken from the transcript of that interview:

'076 Alright. He's obviously turned left from Frobisher into Elizabeth Way.

A Yes.

077 And you've lost sight of him have you or can you still see him.

A No I saw, I could see him, if I did lose sight of him it was only momentarily because I did see him crash, I was at the corner of Frobisher and Elizabeth Way when he's crashed, I was in a slip lane there, there's a little turn left slip-lane at the traffic lights.

078 Yes. So you're, you were in the process of turning onto Elizabeth Way and you saw him crash.

A Yes, yep, yep - I hadn't even entered Elizabeth Way because I was focussed on him, hadn't had the opportunity to look to see if there was anything coming from my right so I wasn't going to enter that road until I knew it was clear but he's crashed and I've obviously remained focussed on that.'⁵²

When that passage of the interview was put to Constable Hughes during the course of his evidence before me he said that he did not see Mr McNamara hit anything but had been aware that he had crashed. He knew this because Mr McNamara was down. What Constable Hughes said in his first interview has to be examined in the light of what he said in his second interview which took place on 20 December 2005⁵³. In that interview the following questions and answers were given:

'0135 Okay. And what did you do as you approached Elizabeth Way travelling along Frobisher.

A I came through the ... slipway area, before I even got on to Elizabeth Way he hit the post.

0136 Did you see the vehicle turning left from Frobisher into Elizabeth Way.

A Yes. Yep.

0137 Can you describe how the motorcycle behaved as it turned left.

A Definitely under load, definitely pushing hard and from what I remember it was the back wheel that hit the kerb first which would suggest to me that he's understeered as he's come through that corner which would be as a direct result of speed and acceleration.'⁵⁴

There was also the following passage in the interview:

⁵² Exhibit C36b, page 9

⁵³ Exhibit C36c

⁵⁴ Exhibit C36c, page 15

'0149 You've indicated that you thought the motorcycle understeered from the back wheel, collided with the centre median strip, can you recall what happened then.

A The bike high sided and dropped and slipped and the rider was flung off the bike and went head first into the pole.

0150 When you say high sided, what do you mean by that.

A Say you're taking a left hand turn like he did and the bike's already going to the left, you ... tyres grab and the bike suddenly flicks violently to the right and launches the rider up and off the bike.

0151 How far would you have been from the motorcycle when you saw this occur.

A I was still on Frobisher Road into the slipway.'⁵⁵

In his evidence Constable Hughes said that he recalled telling the interviewing officer such things as that the motorcycle had been under load as it had turned left from Frobisher Road into Elizabeth Way, that it had been pushing hard and that it was the rear wheel that hit the kerb first. He denied, however, that he had seen any part of the motorcycle hit the kerb at any point. He suggested that what he had described in police interviews had been based on his personal interpretation of the way Mr McNamara had fallen. He agreed, however, that in the second interview he had in effect been confirming that he had seen the motorcyclist come off the motorcycle and acknowledged that he had been able to describe the precise mechanism by which the motorcycle came to be out of control. This naturally begged the question as to why he had said all of what he told interviewing police when he was now saying that he had not seen anything of the sort. It is fair to say that Constable Hughes struggled to answer that question. He denied that he was trying to hide the fact that he had been close enough behind the rider of the motorcycle to see him crash⁵⁶.

6.4. The description given by Constable Hughes in his second interview is remarkably similar to that given by other witnesses. In particular the fact that, or the impression that, the rider had lost control of the motorcycle when the rear wheel struck the kerb of the median strip was observed or shared by other witnesses. The evidence of Messrs Garlick and Oldfield strongly suggested that Constable Hughes was proximate enough to the motorcycle when it crashed to have been in a position to have seen the crash occur. In my view, Constable Hughes' evidence that he did not actually witness the crash has to be rejected. To my mind this denial was borne out of a desire put distance between himself and the motorcycle at the time of the crash. I am in no

⁵⁵ Exhibit C36c, page 17

⁵⁶ Transcript, page 71

doubt that Constable Hughes saw Mr McNamara lose control of the motorcycle and then collide with the signpost. I am also certain that he witnessed that from the approximate position of the slipway from Frobisher Road into Elizabeth Way, a distance of approximately 60 metres.

- 6.5. The significance of that proximity is that, notwithstanding the fact that Constable Hughes terminated the pursuit in the sense that he no longer maintained an intention to intercept Mr McNamara, he nevertheless remained in sufficient proximity to Mr McNamara to engender the belief in the latter's mind that he was still being pursued right up to the moment that he lost control of the motorcycle. Constable Hughes' intention to desist from the pursuit was not effectively communicated to Mr McNamara. It may have been communicated, say, if Constable Hughes had immediately stopped his police vehicle on either Oxenham Drive or Frobisher Road, but he did not choose to do that, and it was not a requirement at the time that he do so, and he was still as close as 60 metres away from Mr McNamara when he crashed.

7. **Was this urgent duty driving and was it appropriate?**

- 7.1. I again refer to what might be described as the definition of urgent duty driving as set out within the operative General Order. Whether police driving was to be so characterised depended on one of two circumstances, namely whether the exemption provided in Rule 305 of the Australian Road Rules needed to be invoked or where the driving was conducted in a manner which, when compared with normal risks, substantially increased the risk of injury to police, the public or suspects, or of damage to property.
- 7.2. The Australian Road Rules contain within them rules and obligations with respect to compliance with speed limits⁵⁷. On Oxenham Drive Constable Hughes was exceeding the speed limit of 20 kilometres per hour by a significant margin. Therefore Constable Hughes needed to invoke the exemption contained within Rule 305 of the Australian Road Rules. This in itself brought Constable Hughes' driving within the definition of urgent duty driving. In addition, having regard to the observations that I have already made in these findings about Constable Hughes' manner of driving on Oxenham Drive in particular, and taking into account the traffic conditions and the risk associated with his driving and those conditions, in my view his driving fell well

⁵⁷ Division 2, Part 3

within the second limb of what might constitute urgent duty driving. This is due to the fact that his manner of driving, when compared with normal risks, substantially increased the risk of injury to members of the public and to Mr McNamara, the object of the urgent duty driving.

- 7.3. At times Constable Hughes appears to have had difficulty in accepting the realities of what his driving had really amounted to. In this regard I observe that when Constable Hughes was first questioned about the matter in the course of the Police Commissioner's Inquiry into the incident, he suggested that his driving was not to be characterised as urgent duty driving⁵⁸. He told me in evidence that he had said that because his interpretation of urgent duty driving did not include a vehicle stop. He said:

'My interpretation at the time was not urgent duty driving didn't come under the banner of vehicle stops, trying to stop a vehicle.'⁵⁹

Constable Hughes was later to concede both in his second interview during the Police Commissioner's Inquiry and in evidence at his trial in the Elizabeth Magistrates Court that he had been in an urgent duty driving situation on Oxenham Drive after all⁶⁰. I observe that when Constable Hughes first asserted that his driving was not urgent duty driving he had not seen and, as far as I know, had not been aware of the existence of the video that showed him chasing Mr McNamara at speeds that exceeded the relevant limit.

- 7.4. I found Constable Hughes' original thought processes as to whether the driving was to be viewed as urgent duty driving, a pursuit or simply a vehicle stop to be perplexing. I regarded as disingenuous any assertion that had been made by him that eschewed the reality that his driving was urgent duty driving and a pursuit. Nobody would suggest that Constable Hughes was not justified in the first instance in directing the rider of the motorcycle, a person whom he more than reasonably suspected of driving without a licence, to pull over. But that is not the entirety of what this was. It was something considerably in excess of a simple traffic stop. There was no question but that Constable Hughes pursued Mr McNamara. He maintained a speed along Oxenham Drive that was not far removed from that achieved by Mr McNamara and did so in the

⁵⁸ Record of Interview between Detective Sergeant Linton and Constable Hughes dated 22 November 2005, Exhibit C36b, A81

⁵⁹ Transcript, page 45

⁶⁰ Transcript, page 47

hope and expectation that Mr McNamara would stop. It is difficult to see how that can be regarded as anything other than a pursuit by any definition.

- 7.5. I find that Constable Hughes's driving was urgent duty driving under both limbs of the definition as set out in the then existing General Order. It was also a pursuit.
- 7.6. This then gives rise to a consideration of whether Constable Hughes' urgent duty driving was proportionate or disproportionate to the circumstances as they existed and whether the urgent duty driving was undertaken, as it must be, in response to an emergency involving obvious danger to human life or when the seriousness of the crime warranted it. Quite apart from the questions of whether and when the pursuit should have been terminated once commenced, there is also the question of whether the pursuit ought to have been commenced in the first place especially in circumstances where Mr McNamara might reasonably in the alternative have been approached later given that the identity of the rider of the motorcycle as being Mr McNamara could have been assumed in all of the circumstances.
- 7.7. I should here say something about the evidence of Constable Hughes on some of these topics. Constable Hughes disputed the proposition that his urgent duty driving was disproportionate to the circumstances. Both Constable Hughes and his counsel argued that it was not merely a case of the rider of the motorcycle being pursued in relation to a suspected offence of riding without the appropriate licence. They argued that once the rider had sped off in the manner that I have described, Constable Hughes was at that point now investigating and endeavouring to prevent the continuation of a much more serious offence of driving at a speed dangerous to the public. Constable Hughes summed up his position in this way:

'He had no licence, that was the initial reason, assuming it was the same person, so the reason for me to stop him initially was to identify him. Then he's continued along there at speed then enters into another offence and hence another reason why to pursue.'⁶¹

Constable Hughes argued that viewed in that light, the manner of his own driving was not disproportionate to the offence that the rider was committing and which Constable Hughes was now investigating. He argued that there was no way that he could

⁶¹ Transcript, page 77

intercept a rider travelling at the speed at which this person was riding unless he himself drove at the same speed⁶².

- 7.8. In my view there are a number of difficulties with these arguments. Although nobody would suggest that it was not appropriate for Constable Hughes to endeavour to pull the motorcyclist over in order to investigate a possible offence of riding without the appropriate licence, the proposition that a failure to stop would in itself justify a pursuit at high speed regardless of the underlying circumstances is simply unsupportable. Constable Hughes himself rightly acknowledged that it would not be appropriate to pursue a vehicle simply because the vehicle had failed to stop when the driver or rider had been directed to do so. Clearly one has to examine the underlying reason for directing the vehicle to stop in the first place in order to determine whether a pursuit that was, but for the exemption, in breach of the Australian Road Rules, or which subjected the public and the pursued person to a heightened risk, was a proportionate response or not. The argument also ignores the legal position that police are, like all members of the public, including the motorist being pursued, prohibited from driving dangerously or without due care and are not lawfully permitted to duplicate the dangerous driving of the target being pursued with dangerous driving of their own. To suggest that the underlying reason for the initial traffic stop can effectively be put to one side would mean that, save and except for those pursuits that were conducted in breach of sections 46 and 45 of the Road Traffic Act which would be unlawful in any event, a pursuit that involved urgent duty driving at speeds that otherwise exceeded the relevant limits and which subjected people to the risk I have described would almost always and invariably be justified. The pursuit would in those circumstances be one that was conducted merely for the sake of it and without any wider public interest to be served. The then current version of the General Order clearly did not countenance such an interpretation. In fact, the General Order itself specifically mandated officers to communicate the *'initial'* reason for the pursuit. This to my mind quite clearly contemplates the underlying reason for the pursuit as being a highly relevant matter. In this regard, Assistant Commissioner Killmier in her evidence before me expressed the view that in any pursuit that would require the intervention of an incident controller, the first piece of information that

⁶² Transcript, page 50

would be considered relevant to an incident controller's assessment of the situation would be the underlying reason for the pursuit⁶³. I accept that evidence.

- 7.9. A second difficulty with Constable Hughes' approach was that in this case the rider's continued high speed along Oxenham Drive was, to a large extent, the product of Constable Hughes' tenacity.
- 7.10. A third difficulty with Constable Hughes' position is that when he pursued the rider of the motorcycle, his own actions magnified the danger to the public in a way that was not commensurate with the underlying need to bring the rider of the motorcycle to book. It meant that there were now two vehicles on Oxenham Drive that were presenting a significant risk to other motorists and to pedestrians. To this Constable Hughes argued that for two reasons his driving was significantly less dangerous than that of the motorcyclist; firstly because the unmarked police vehicle had lights and sirens operating and secondly he had urgent duty driving training. This argument is also to be rejected. One only has to view the videotape of the incident to conclude that Constable Hughes' vehicle presented as great a risk to the public as the motorcycle that he was pursuing.
- 7.11. The final difficulty with Constable Hughes' approach is posed by the stated policy of the General Order as encapsulated in the section of the General Order entitled 'Policy'. It is clear that urgent duty driving may only be undertaken in circumstances that are of a high degree of seriousness. The circumstances that might enliven the need to engage in urgent duty driving are an emergency involving obvious danger to human life or a crime of sufficient seriousness so as to warrant the immediate apprehension of the offender. In this case there was neither an emergency on foot nor a crime that would have justified the immediate apprehension of Mr McNamara. In all probability any police intervention that was required to bring Mr McNamara to justice, either in relation to his driving without a licence or in respect of any driving offence he committed on Oxenham Drive, could safely have been effected later. As to this Constable Hughes asserted in his evidence that the only way that he could establish whether in fact the rider of the motorcycle was Mr McNamara was to stop that rider⁶⁴. However, there was never any doubt about the motorcycle being the same one that Constable Hughes had stopped earlier that day. Moreover, one would also

⁶³ Transcript, pages 173 and 174

⁶⁴ Transcript, page 36

have to consider the obvious point that it was only two hours beforehand that Constable Hughes had identified Mr McNamara as the rider of the motorcycle. This reduced the likelihood of the rider being a person other than McNamara. Constable Hughes nevertheless went on to suggest that Mr McNamara's identity in the Elizabeth incident was only confirmed when he ultimately crashed but that prior to that, when the rider had made the decision not to stop, Constable Hughes had thought that the rider only perhaps may have been Mr McNamara. It was difficult to understand Constable Hughes' evidence about that. If there had been any doubt at all about who the rider of the motorcycle was on Elizabeth Way and Oxenham Drive it was immediately dispelled when in response to Constable Hughes' attempt to pull him over the rider took off at speed along Oxenham Drive. No identifiable person other than Mr McNamara himself had a motive to flee police. The motorcycle was registered and insured and no traffic offences had been committed prior to Constable Hughes' attempt to pull the rider over. The simple deduction available to Constable Hughes was that the rider of the motorcycle was fleeing police because of a matter intrinsic to himself, namely the fact of his being unlicensed and the detection of the same earlier that day. The possibility that the rider was some person other than Mr McNamara was actually quite fanciful and it would only have taken a moment's reflection so to conclude.

- 7.12. Constable Hughes also said in his evidence before me that he had not seen the rider of the motorcycle overtake the bus on the footpath. This also seemed to me to be an unlikely proposition given that Mr McNamara was directly in front of Constable Hughes and was the focus of Constable Hughes' attention. If, as I find, Constable Hughes did see Mr McNamara overtake the bus on the footpath, McNamara's determination could have only reinforced in Constable Hughes' mind the fact that the rider was indeed the man whom he had earlier that day pulled over for not having an appropriate licence. In any case, the issue as to whether or not Constable Hughes saw the motorcycle mount the footpath is moot when it is recognized that the rider clearly was trying to avoid police as evidenced by other behaviour.
- 7.13. In short, Constable Hughes must have realised who the rider was. There was no suggestion that it could have been any person other than Mr McNamara. The rider was therefore McNamara and obviously so and I find that Constable Hughes well understood all of that from the rider's reaction to his attempt to pull him over on

Oxenham Drive. There was no reason for Constable Hughes to suppose that the address that motor registration records attributed to Mr McNamara was false or one at which he did not in fact reside. If there was any doubt about the identity of the rider of the motorcycle, as I pointed out in the Bradford Inquest, Constable Hughes would have had at his disposal the power to compel Mr McNamara as the registered owner of the motorcycle to answer questions on the topic truthfully⁶⁵. The risk of the rider not being Mr McNamara, and the risk of his escaping detection and punishment for a relatively simple offence in my view were outweighed by the need to avoid placing him and the public generally at risk. A reasonable conclusion was available to Constable Hughes that Mr McNamara's apprehension, if that was required, could have been effected later. Accordingly, the pursuit in my view should not have been commenced.

7.14. In my opinion, Constable Hughes' urgent duty driving was not justified under the General Order.

7.15. As to the question of termination, it is clear that at whatever point Constable Hughes ceased pursuing Mr McNamara, his proximity to Mr McNamara at the time the latter lost control of the motorcycle was such as to allow Constable Hughes to witness the event. His proximity was also still influencing Mr McNamara's reckless riding behaviour. The distance between their respective vehicles was only about 60 metres. Constable Hughes still had his siren operating at that time and this in itself was contrary to the required action at the point of termination of a pursuit.

8. The causation of Mr McNamara's death

8.1. That Mr McNamara's own actions were responsible for his death is beyond question. He rode at speeds and in a manner that were reckless. His motivation for doing so is also beyond question in my view. He was undoubtedly still endeavouring to evade police at the time he lost control of his motorcycle. There is no other explanation for his manner of riding which had been totally benign to the point where Constable Hughes directed him to pull over. His purpose in being in the vicinity of the Elizabeth City Centre was a legitimate one, namely to pay the necessary fee to renew his driver's licence. But Mr McNamara clearly could have, and should have, stopped

⁶⁵ Section 38 (as it then was) of the Road Traffic Act 1961 – the equivalent is now section 74AB Summary Offences Act 1953

when he was directed to do so by Constable Hughes. It was his lawful obligation to do so.

- 8.2. One matter that I have considered very carefully is whether Mr McNamara's manner of riding at the time he lost control of the motorcycle was the product of Constable Hughes' pursuit or whether, even if Constable Hughes had not commenced to pursue Mr McNamara's motorcycle, Mr McNamara's manner of riding may have been the same in any event. In this regard I have carefully considered the possibility that Mr McNamara's manner of riding was at all times simply provoked by the direction by Constable Hughes to him to pull over and that Constable Hughes' pursuit had no bearing on his manner of riding.
- 8.3. I have concluded that on a balance of probabilities Constable Hughes' pursuit of Mr McNamara, and its late and uncommunicated termination, was a contributing causative factor in Mr McNamara's losing control of his motorcycle.
- 8.4. The distance covered by Mr McNamara from the location where he was directed to pull over was a distance of approximately 650 metres. To my mind it is inherently unlikely, although not impossible, that Mr McNamara would have maintained such a reckless manner of riding if he had not believed that he was actively being pursued by the police officer who had directed him to stop. If, for example, Constable Hughes had not commenced a pursuit of Mr McNamara at all, it is more likely than not in my opinion that Mr McNamara would have realised that as a fact at some point during the course of that 650 metre journey. It is also highly unlikely in my opinion that Mr McNamara would have ever entertained the belief that the driver of the vehicle that had directed him to pull over would have taken no action to pursue him after Mr McNamara sped off. It is likely that Mr McNamara connected the attempt to pull him over with the earlier incident of that day. It would be naïve to think that Mr McNamara did not understand virtually immediately that it was a police officer who was attempting to stop him. This would have only been confirmed in his mind by the application of the siren and possibly by seeing the flashing lights of the unmarked vehicle. Clearly Mr McNamara identified something about the vehicle that made him react in the way he did.
- 8.5. When one views the video of the 200 metre stretch of Oxenham Drive over which the pursuit began, one readily identifies the determination in Mr McNamara to flee his

pursuer. Even allowing for what might be intrinsic difficulty in identifying with precision the behaviour of traffic behind a motorcycle when one uses its rear vision mirrors, it would have been plainly evident to Mr McNamara on Oxenham Drive that the vehicle that had directed him to pull over in the first place was only a matter of a few seconds behind him and that it was travelling at a speed commensurate with his.

- 8.6. There is no evidence that there would have been anything substantially blocking Mr McNamara's rear view of the pursuing vehicle other than the bus which he overtook on the footpath. Once this manoeuvre was negotiated it would be reasonable to assume that Mr McNamara would have checked to see whether or not the vehicle was going to pursue him. This fact would easily have been established.
- 8.7. There is also of course the matter of Constable Hughes' vehicle's siren. If Mr McNamara was acutely aware of the possibility that the unmarked vehicle would pursue him, and had heard the short blast of the siren to begin with, he would have been listening for the siren. It is pertinent to observe that persons in the vicinity who could not necessarily see the police vehicle, could hear it quite clearly notwithstanding the intervention of buildings. Oxenham Drive is itself a relatively straight stretch of thoroughfare until it reaches the corner of Frobisher Road. To my way of thinking there was ample opportunity for Mr McNamara to have formed the belief that he was being pursued along the entire length of Oxenham Drive until he took the bend into Frobisher Road. Frobisher Road is also a relatively straight thoroughfare. I find that for part of Mr McNamara's journey along Frobisher Road, Constable Hughes' vehicle was also in Frobisher Road. For part of that distance Constable Hughes' flashing lights were operating and his siren was at all times still operating along Frobisher Road. Mr McNamara's hesitation when he reached the junction of Elizabeth Way, as described by one witness, is suggestive of the fact that he still had a belief that Constable Hughes was following him. Hearing the siren of Constable Hughes' vehicle could only have reinforced that impression.
- 8.8. Irrespective of whether and when Constable Hughes' decided to terminate the pursuit, and whether Mr McNamara observed the flashing lights of the vehicle deactivated, there is no reason to suppose that Mr McNamara would have been able to deduce that he was no longer being pursued. In any case it may well be that Constable Hughes still had the lights on when Mr McNamara turned the corner. I do not believe that Mr McNamara's riding behaviour in Elizabeth Way immediately before the crash was

influenced by his proximity to the Elizabeth police station. If it had been, Mr McNamara more logically would have turned right into Elizabeth Way and not left past the side of the station. Moreover, if it were the case that Mr McNamara had formed a belief that he was no longer being pursued, he would more likely have ridden past the station in a manner that did not attract attention.

- 8.9. In the event, I am satisfied that Mr McNamara still believed that he was being pursued by the unmarked police vehicle at the time he lost control of the motorcycle. However, if I am wrong in that last conclusion, I am still satisfied that even if Mr McNamara did not believe he was still being pursued at that particular point, much of his riding behaviour is still attributable to the initial pursuit on Oxenham Drive. In my view it is likely that if there had been no pursuit at all, Mr McNamara's riding behaviour would have been modified for the better by the time he came to enter Elizabeth Way. His death in my view probably would have been avoided if Constable Hughes had not pursued him.

9. **Conclusions**

- 9.1. The following conclusions have been reached on the balance of probabilities. In reaching my conclusions I have had regard to the seriousness of the allegations involved such that I should remind myself that I should not make the following findings lightly or on unconvincing evidence, or to use the expression utilised in **Briginshaw v Briginshaw** (1938) 60 CLR 336, on 'inexact proofs, indefinite testimony, or indirect inferences' – per Dixon J at 361.
- 9.2. I find the following. Constable Hughes directed Mr McNamara to pull over on Oxenham Drive at Elizabeth because he believed that the rider of the motorcycle was riding without the appropriate licence. I find that if Constable Hughes did not immediately realise that the rider was Mr McNamara, the person whom he had pulled over earlier that day, he realised it very soon afterwards and no later than the point when the rider reacted by speeding off along Oxenham Drive in a reckless manner.
- 9.3. I find that Constable Hughes began to pursue Mr McNamara along Oxenham Drive. Both vehicles achieved speeds along Oxenham Drive that were significantly in excess of the speed limit of 20 kilometres per hour for that thoroughfare. Further, I find that Mr McNamara's intention was to evade police in order to avoid detection and

prosecution for an offence of riding without the appropriate licence. I find that Constable Hughes well understood that Mr McNamara was trying to evade him.

- 9.4. I find that Constable Hughes continued to pursue Mr McNamara into Frobisher Road. I also find that Mr McNamara knew that he was being pursued along Frobisher Road.
- 9.5. When Constable Hughes pursued Mr McNamara along Oxenham Drive and into Frobisher Road the flashing lights and siren of the unmarked police vehicle were operating.
- 9.6. I find that at some point along the length of Frobisher Road Constable Hughes terminated his pursuit and at that point slowed his vehicle to a speed approximating the speed limit of 50 kilometres per hour and deactivated the lights on the vehicle. I find that Constable Hughes did not deactivate the siren of the vehicle.
- 9.7. Notwithstanding Constable Hughes' termination of the pursuit, he did not stop and continued to follow the path of Mr McNamara's motorcycle. He did so with the siren of the unmarked police vehicle still operating.
- 9.8. Mr McNamara turned left onto the Elizabeth Way and did so at speed and recklessly. I find that he still believed that he was being pursued by Constable Hughes notwithstanding the latter's termination of the pursuit. In my view Mr McNamara maintained that belief right up to the moment that he lost control of the motorcycle.
- 9.9. I find that Mr McNamara lost control of the motorcycle when his motorcycle under heavy acceleration ventured wide into the right-hand lane of the Elizabeth Way carriageway causing its rear wheel to strike the edge of the median strip. Mr McNamara was travelling at a speed of between 69 and 87 kilometres per hour at the time he lost control of the motorcycle. Mr McNamara slid along the median strip and struck a signpost which resulted in him sustaining fatal injuries.
- 9.10. I find that until the point where Constable Hughes terminated the pursuit, he was engaged in urgent duty driving as contemplated in the operative police General Order. Furthermore, his urgent duty driving amounted to a pursuit of Mr McNamara's motorcycle. In my view the urgent duty driving and the pursuit were not authorised by the General Order for the reasons that I have identified earlier in these findings. In particular I am of the view that the pursuit, particularly in its engagement along

Oxenham Drive, having regard to the speed at and in the manner in which Constable Hughes was driving and to the pursuit's tenacity, was a disproportionate response to Mr McNamara's failure to stop when the underlying reason for Mr McNamara being required to stop is taken into account.

- 9.11. I find that Constable Hughes' termination of the pursuit was ineffectual insofar as it failed to engender any realisation on the part of Mr McNamara that he was no longer being pursued. In any case the termination was not effected in accordance with the General Order because Constable Hughes failed to deactivate the siren on the police vehicle.
- 9.12. I find that Constable Hughes witnessed Mr McNamara's losing control of the motorcycle, his ejection from it and his collision with the signpost. I find that Constable Hughes was at or near the junction of Frobisher Road and Elizabeth Way when he witnessed that. This was a distance of approximately 60 metres.
- 9.13. Mr McNamara's failure to stop when directed to do so was in breach of the law. His death would have been avoided if he had stopped in accordance with that direction. His own reckless riding was the principle causative factor in his death. I also find that Constable Hughes' pursuit of Mr McNamara was a contributing causative factor in Mr McNamara's losing control of his motorcycle and his subsequent death. I believe Mr McNamara's death could have been prevented if Constable Hughes had not pursued him. In my view there were reasonable investigative alternatives open to Constable Hughes other than pursuit and the immediate apprehension of the motorcyclist. The pursuit was, in all of the circumstances, inappropriate.

10. Recommendations

- 10.1. Pursuant to Section 25(2) of the Coroners Act 2003 I am empowered to make recommendations that in the opinion of the Court might prevent, or reduce the likelihood of, a recurrence of an event similar to the event that was the subject of the Inquest.
- 10.2. I have referred earlier in these findings to the matter of Bradford. The Inquest into the death of Mr Bradford also involved a police pursuit of a motorcycle. The incident in which Mr Bradford lost his life occurred in May 2006. Mr McNamara's death occurred on 16 November 2005. In the intervening period the General Order that

governs police urgent duty driving and pursuits was substantially altered. The new General Order came into operation on 1 January 2006. Another version of the General Order came into effect in 2008. I understand that another version, which effectively picks up the Court's recommendations in Bradford, took effect in August of 2009.

- 10.3. There have been a number of substantial alterations to police procedures as they relate to urgent duty driving, high risk driving and pursuits. The most significant innovation is the introduction of an incident controller into an incident involving a pursuit. The incident controller is meant to be a police officer not directly involved in the pursuit. Pursuing police officers are obliged to obey the directions of an incident controller and this would include a direction to terminate a pursuit. I again refer to Assistant Commissioner Killmier's evidence to the effect that one of the most important pieces of information that would immediately be imparted by a pursuing police officer to an incident controller would be the reason for the pursuit. If the incident controller was of the view that in all of the circumstances the reason for the pursuit did not justify the pursuit, then his direction to terminate or not to commence a pursuit would have a mandatory effect. It has been acknowledged in other Inquests, including Bradford and Lawrie-Turner⁶⁶ that the intervention of an incident controller may not always have immediately effective consequences given the short period of time over which a pursuit might take place. In the present case if Constable Hughes had immediately notified an incident controller that he was contemplating commencing a pursuit for a fail to stop, in the light of the underlying reason for the pursuit there could sensibly have only been one direction from an incident controller and that would have been not to pursue.
- 10.4. The question of the reason for the pursuit is also addressed in versions of the General Order that have come into existence since November 2005. The 2006 and 2008 versions now contain a stipulation as follows:

'Generally **pursuits** should not be commenced for minor traffic matters.'

The 2009 version states:

'Police have a duty to protect life and property and this outweighs the need to apprehend suspects, especially when the offences are minor traffic matters or where safer alternatives are available.'

⁶⁶ Inquest 12/2009

The phrase 'minor traffic matters' is not defined and there does not appear to be any guidance as to what might be regarded as a minor traffic matter. In any event the version of the General Order which was in operation as at November 2005 did not even contain the broad stipulations that I have set out above. Ms Fuller, on behalf of Constable Hughes, submitted that the General Order that was in operation at the time of these events gave no guidance as to what a police officer's response should be when faced with a situation where a motorist had simply failed to stop. She also points out in her written submission that the General Order did not provide any guidance as to what type of traffic matters would or would not justify a pursuit. Both of those observations have some validity although I observe that Constable Hughes' actions were not justifiable under the then urgent duty driving General Order simply on the basis of the manifest disproportion of his response. It seems to me that there is still an element of ambiguity in what might be regarded as an appropriate trigger for a pursuit. It would in my view be appropriate for the Commissioner of Police to consider identifying the minor traffic offences that would be considered as inappropriate triggers for a pursuit, either within the General Order itself or in training. The circumstances of this case afford a classic example - it was simply a case of the motorist not having paid the necessary fee to renew his licence.

- 10.5. There are other differences between the General Order that was in operation at the time of these events and subsequent versions of it. I need not refer to all of them. I have already referred to the fact that subsequent versions require an officer, when terminating a pursuit, to bring his vehicle to an immediate stop. This requirement is clearly a desirable innovation.
- 10.6. In the Bradford Inquest I made a number of recommendations that for the most part involved police pursuit of motorcyclists. The evidence in this case and the Bradford case strongly suggest that the practice of pursuing motorcyclists is generally undesirable. However, the Police Commissioner makes the point that it would be not in the public interest to maintain a no pursuit policy in relation to any particular type of vehicle as this would only encourage motorists to fail to stop when directed to do so. There is obvious force in that observation. It is to be acknowledged that inevitably there will be instances where it is in the public interest for motorcyclists to be pursued and that it not possible to identify in advance all of the circumstances where such pursuits might be justified. But it seems also worthwhile observing that

as far as the pursuit of motorcyclists is concerned there would need to be a higher threshold of importance before a pursuit could be justified. The recommendations that I made in Bradford are as follows:

- '(1) That the Commissioner of Police establish a panel to investigate the appropriateness or otherwise of police officers pursuing motorcyclists at high speed.
- (2) That the Commissioner of Police in any event amend the General Order relating to high risk driving by including reference to the circumstances in which it would be considered appropriate and inappropriate for police officers to pursue motorcyclists, by including specific reference to the relevance of the identity of the registered owner of the pursued vehicle in any risk assessment, by making specific reference to existing police powers of investigation that might obviate the necessity for a pursuit and by specifically addressing the situation in which a police pursuit is being conducted by a sole officer in circumstances where an Incident Controller is unable to exert effective control of the incident and there is no secondary pursuit vehicle.
- (3) That the Commissioner of Police cause education programs to be devised in relation to the topics identified in Recommendation (2) herein with a view that the said programs be delivered to all police officers.'

10.7. Following Bradford The Minister for Police tabled a report in Parliament outlining the action and proposed action that had and was to be taken by SAPOL in the light of my recommendations in that matter. The Minister reported that:

'The rationale behind the recommended changes is provided below, followed by a consolidation of the proposed new General Order

- To recognise that there are certain additional dangers associated with a pursuit of a motor cycle, especially at high speed, it is proposed therefore to amend the General order to include at 'Risk Assessments', third dot point, the statement: *'the type of vehicle being pursued eg a motor cycle and the likelihood of reduced safety'*.
- The General Order outlines the significance of an incident controller during a pursuit. That person must take charge of and closely control the pursuit and should have direct radio communication with the pursuing officer while not being an actual participant in the pursuit itself. If an incident controller orders the cessation of a pursuit, the pursuing officer must obey the direction or face disciplinary action. To recognise the importance of having an incident controller in any pursuit, it is proposed to also include at 'Risk Assessments', fourth dot point, the statement: *'non availability of an Incident Controller'*.
- The General Order recognises that there are a number of investigative tools available to investigating police besides stopping the vehicle in order to apprehend those responsible. There are also a number of legislative powers available to investigating officers to assist in determining the identity of the person driving, or the owner of a

vehicle. Consequently, these investigative tools and statutory powers may sometimes obviate the necessity of a pursuit. While current references to these authorities within the General Order are considered appropriate, it is nevertheless proposed that at 'Risk Assessment', the following fifth dot point be included - *'through reasonable inquiry the identity of the driver can be established'*.

- The effectiveness and therefore safety of a pursuit can be restricted if the pursuing officer is the sole occupant and especially in there is no secondary vehicle. This is relevant given the requirement to maintain regular communication with Comcen or Base Radio. It is therefore proposed to include at 'Risk Assessments', at the sixth dot point, immediately after 'the effectiveness of communication', the statement: *'eg pursuit only involves a solo occupant primary vehicle'*
- To assist police in their assessment of a pursuit, at the end of that part of the General Order (Risk Assessments) it is proposed to include the following reference to statutory authorities: *Various statutory authorities exist which may obviate the necessity of a pursuit. For example, in determining whether through reasonable inquiry, the identity of the driver can be ascertained, consideration should be given to utilising section 74AB Summary Offences Act 1953 'Questions as to identity of driver etc. ' A person who refuses or fails without reasonable excuse, to answer questions by a police officer for the purpose of obtaining information that may lead to the identification of the person who was driving, or was the owner of, a vehicle on a particular occasion or time is guilty of an offence'*.

The proposed new General Order, Operational safety - *High risk driving / Risk Assessments*, is provided as follows, with the new inclusions in bold:

Risk Assessments

Before undertaking any driving which is in breach of any road safety rules, an appreciation must take place to consider all risks. The appreciation must be continuously reassessed to ensure risks are always minimised.

Safety is the priority in all situations and a high level of awareness and caution must be exercised. The reason for the high risk driving, based on the known facts, must be assessed against the risk involved.

In making the appreciation, the following risks should be considered:

- *the danger to the lives and safety of police, public and suspect/s*
- *the seriousness of the emergency or offence -*
- ***the type of vehicle being pursued eg motor cycle and likelihood of reduced safety***
- ***non availability of an Incident Controller in a pursuit, whether immediate apprehension is necessary and whether the identity of the driver is known***
- ***through reasonable inquiry the identity of the driver can be established***
- ***the effectiveness of communications eg pursuit only involves a solo occupant primary vehicle***
- *the level of competence, qualification and permit level of the police driver*

- *the capacity, type of police vehicle, type of warning equipment and whether the police vehicle is fitted with 'police pack' equipment*
- *the outcome to be achieved and the effect on the outcome if the arrival of the police vehicle is delayed*
- *the availability of other police assistance and resources*
- *local knowledge of the vehicle occupants, of road features and the surrounding location*
- *the weather, traffic conditions and speed of vehicles*
- *the time and day of the week.*

If the high risk driving is in breach of any road rules not exempt under rule 305 of the Australian Road Rules 1999 or section 110AAAA of the Road Traffic Act 1961 (for example due care), or if at any time, the risk to police, the public, suspect/s or damage to property outweighs the need to continue the driving, it is to cease immediately.

Various statutory authorities exist which may obviate the necessity of a pursuit. For example, in determining whether through reasonable inquiry, the identity of the driver can be ascertained, consideration should be given to utilising section 74AB (Summary Offences Act) 'Questions-as to identity of drivers etc.' A person who refuses or fails without reasonable excuse, to answer questions by a police officer for the purpose of obtaining information that may lead to the identification of the person who was driving, or was the owner of, a vehicle on a particular occasion or time is guilty of an offence.

The Deputy State Coroner made a third recommendation regarding education programs related to the changes suggested in recommendation two:

' ... that the Commissioner of Police cause education programs to be devised in relation to the topics identified in Recommendation (2) herein with a view that the said programs be delivered to all police officers'

As stipulated in General Order, Operational Safety - Training, all operational police are regularly exposed to training associated with high risk driving during their participation in the IMOST program. Proposed changes as outlined in recommendation two are included in a proposed Northern and Southern Operation Circular. Circulation includes the Operational Safety Portfolio and the Operational Safety Unit at the Police Academy who have responsibility for ensuring that changes are included in the IMOST program. Details of changes will also be promulgated to all police officers in the Police Gazette.'

- 10.8. I understand the amendments have been incorporated in the 2009 version of the General Order. In the light of these responses I only propose to make one further recommendation regarding the pursuit of motorcyclists. I recommend that the Commissioner of Police provide guidance to police officers as to the circumstances in which it would be inappropriate to pursue motorcyclists.

11. **Constable Hughes' conviction - police liability to be prosecuted**

- 11.1. Following this incident Constable Hughes was charged with and found guilty of an offence of driving in a manner dangerous to the public contrary to Section 46 of the Road Traffic Act 1961. The conviction was recorded in the Elizabeth Magistrates Court and was confirmed on appeal in the Supreme Court⁶⁷. It is clear from the judgment of Justice White that Constable Hughes' conviction was confined to the circumstances of his driving on Oxenham Drive. It does not relate in any way to his manner of driving on Frobisher Road. In accordance with the prohibition contained in Section 25(3) of the Coroners Act 2003 I make no comment upon the appropriateness or otherwise of any finding that has been made in respect of Constable Hughes' liability under Section 46 of the Road Traffic Act 1961. However, during the Inquest I was asked to make a recommendation that would reduce the exposure of police officers to risk of prosecution for contraventions of sections 46 and 45 of the Road Traffic Act in circumstances where they are acting operationally. Both Ms Fuller, who appeared for and on behalf of Constable Hughes, and Mr Mark Carroll, the President of the Police Association of South Australia, in written submissions urged me to make a recommendation in this regard.
- 11.2. Ms Fuller put it in these terms, namely that I should recommend:

'The enactment of a statutory exemption in enumerated circumstances for police officers executing their duty in the course of a pursuit. A suggested amendment to sections 45 and section 46 of the Road Traffic Act 1961 follows: -

“a police officer on duty and undertaking any driving that is authorised by General Orders lawfully issued by the Commissioner of Police and whose manner of driving complies with those orders will be deemed to be driving in a manner or at a speed that is not dangerous to the public or will be deemed to have not driven the vehicle recklessly”.'

Mr Carroll, in a letter to the Court dated 23 September 2009, puts the Association's position as follows:

'The association does not seek an exemption for police to drive dangerously. To the contrary, the submission of the association is that it is necessary for the Parliament to legislate a different standard for police from that of the general public by which the issue of dangerous driving is to be determined so that the objective test takes into account specific characteristics and legislative duties.'

The Association asks me to make a recommendation supporting that position.

⁶⁷ **Hughes v Police** [2009] 103 SASR 337 per Justice White

- 11.3. Both Ms Fuller and Mr Carroll cite numerous arguments in support of their respective positions. I do not need to recite those arguments. It seems clear, however, that both Ms Fuller and the Police Association of South Australia would seek to utilise Constable Hughes' prosecution and conviction as an example in support of their contentions.
- 11.4. Since the evidence in this Inquest was concluded, I have become aware that the issue of police exposure to prosecution has stimulated debate within the community. I have observed reference in the media to the Government's intention to amend current legislation so as to recognise a distinction between the operational realities of police driving from those of the general public. This measure is said to be necessary in order to provide confidence and protection for police when there is a reasonable risk of prosecution that would arise simply by virtue of the carrying out of their duties. The proposed legislative measures are reported to have been prompted by the **Police v Hughes** prosecution and conviction.
- 11.5. Assistant Commissioner Bronwyn Killmier, who in the course of her testimony in the Inquest spoke for and on behalf of the Commissioner of Police, told me that the Commissioner's view was that he agreed with the outcome in the Hughes prosecution⁶⁸ and that as far as any police exemptions to Sections 45 and 46 of the Road Traffic Act are concerned, SAPOL's position is that there should not be any such exemption and that the position should remain currently as it is⁶⁹. In a written submission provided to the Court in response to the letter of the Police Association to which I have referred, Mr Golding counsel on behalf of the Police Commissioner asserts that the Commissioner would not seek to have any amendments made to Sections 45 and 46 of the Road Traffic Act, but that any reasonable proposal developed for legislative amendment would be considered in the proper manner. Whichever way the Commissioner's view has been put, it appears that the Commissioner is less than enthusiastic about any relaxation of the law regarding dangerous driving insofar as it might provide any exemption in respect of police acting operationally. Rather, the Commissioner would in a given case prefer to leave the matter of prosecution and its appropriateness having regard to the public interest to the discretion of the relevant prosecuting authority. I also observe here that if Ms Fuller's suggested amendment were enacted, it would mean that the law relating to

⁶⁸ Transcript, page 151

⁶⁹ Transcript, page 152

police operational driving would depend upon the contents and effect of the General Order as it existed at any point in time. This would in effect hand the function of law making, insofar as it governs the behaviour of police officers, to the Commissioner of Police. Moreover, a prosecution involving police operational driving behaviour would depend upon curial interpretation of the existing police General Order and not upon an interpretation of the law. It is difficult to see how any of that could be considered desirable.

- 11.6. In any event I unhesitatingly reject Ms Fuller's and Mr Carroll's submissions that I should make the recommendations they argue for. In my view it would be quite inappropriate for this Court to make any recommendation along the lines of that proposed either by Ms Fuller on behalf of Constable Hughes or by Mr Carroll on behalf of the Police Association. It will be remembered that the power of this Court to add recommendations to findings is governed by the legislative framework contained in Section 25 of the Coroners Act 2003. I set out the relevant part of that provision:

'(2) The Court may add to its findings any recommendation that might, in the opinion of the Court, prevent, or reduce the likelihood of, a recurrence of an event similar to the event that was the subject of the inquest.'

- 11.7. Neither Ms Fuller nor Mr Carroll have articulated by what intellectual process this Court could conclude that the recommendation they respectively advocate, in whatever terms it is couched, might prevent or reduce the likelihood of a recurrence of an event similar to the event that was the subject of this Inquest, namely the death of Mr McNamara. There is nothing before me to suggest that Mr McNamara's death may have been prevented or rendered less likely if Constable Hughes, by whatever legislative route, had been able to avoid liability for a conviction for driving in a manner dangerous to the public or, say, if he had known in advance that he would be able to avoid such liability. Nor can there be any suggestion that such a recommendation might prevent a similar occurrence from occurring in the future or even reduce its likelihood of reoccurring. In fact some might seek to argue the contrary.

- 11.8. There is another reason why I would not consider making any such recommendations in the context of this case. Regardless of the intrinsic merit or otherwise of both sides of the debate, the facts of this case provide an exceedingly infirm foundation from

which one could erect an argument that the exposure of police to the risk of prosecution arising out of the carrying out of their ordinary duties ought to be curtailed. I say this because by any measure this example of urgent duty driving was inappropriate and unsupportable against any reasonable standard of behaviour. I have already expressed the view that for multiple reasons this piece of driving did not comply with the police General Order. Quite apart from any criminal liability in respect of which I make no comment, Constable Hughes' driving was a disproportionate response having regard to the circumstances that enlivened his decision to require Mr McNamara to stop, namely the latter's driving without a licence. That being the case, it would be wholly inappropriate for any person to draw on the circumstances of this case to support an argument that the exemptions that police already enjoy in respect of operational driving should be broadened or that the objective standard of what might constitute dangerous or careless driving ought to be modified having regard to police operational requirements and duties. The Hughes case was an exceptional one. The evidence is that his prosecution, arising as it did in the context of the carrying out of a police officer's official duties, was unprecedented. There is no reason to suppose that this prosecution heralds an opening of the floodgates or signifies that police are in any greater danger of being prosecuted in respect of reasonable operational behaviour than they ever were in the past.

- 11.9. In all of the circumstances I decline to make any recommendation either for or against the propositions postulated by Ms Fuller and the Police Association of South Australia.

Key Words: Death in Custody; Motorcycle; Driving Licence

In witness whereof the said Coroner has hereunto set and subscribed his hand and

Seal the 1st day of March, 2010.

Deputy State Coroner