



## FINDING OF INQUEST

*An Inquest taken on behalf of our Sovereign Lady the Queen at Adelaide in the State of South Australia, on the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 9<sup>th</sup> days of April 2019, the 1<sup>st</sup> day of July 2019 and the 15<sup>th</sup> day of May 2020, by the Coroner's Court of the said State, constituted of Anthony Ernest Schapel, Deputy State Coroner, into the death of Crystal Trinh.*

*The said Court finds that Crystal Trinh aged 19 months, late of 43 Haddington Crescent, Mansfield Park, South Australia died at Women's and Children's Hospital, 72 King William Road, North Adelaide, South Australia on the 13<sup>th</sup> day of January 2016 as a result of global cerebral hypoxia due to drowning. The said Court finds that the circumstances of her death were as follows:*

### **1. Introduction and reason for inquest**

- 1.1. Crystal Trinh was aged 19 months when she drowned in a home swimming pool belonging to her aunt and uncle. She drowned after a pool gate was left open.
- 1.2. Crystal's parents were Julie Trinh and Diem Hai Trinh. Their only other child was a boy who was aged four years.
- 1.3. Crystal's aunt, at whose premises she drowned, was Thanh-Thuy Luong, Kathy. Her husband is Boi Luong, Wayne.
- 1.4. Mr and Mrs Luong lived at a house premises in Salisbury Downs. They had two children of their own, one girl aged eight and another girl about one year old.
- 1.5. Mrs Luong was a registered educator with the North Metro Family Day Care Scheme. Her family home was utilised as a family day care facility.

- 1.6. The Luong family acquired the premises at Salisbury Downs in November 2013. The pool was already in place at the time of acquisition. The perimeter of the pool area was partly constituted by walls of the house and partly by fencing. After they acquired the premises Mr and Mrs Luong conducted a number of renovations that involved both the house and the yard at the rear. The renovations in the yard involved the installation of a number of new items including a shed, a large water tank and a large trampoline. The swimming pool fencing was altered, the principal effect of the alterations being that a much greater proportion of the rear yard was included in the fenced off pool area. Whereas the original fencing had formed part of the boundary of the pool area and only the pool area, a wholly new section of fencing was set at right angles to the existing pool fence line such that the pool and that part of the rear yard that accommodated the shed, the water tank and the trampoline were situated in the same area as the pool itself.
- 1.7. The new shed was installed to accommodate garden equipment such as a lawnmower and wheelbarrow. The shed was situated in the far-right hand corner of the backyard.
- 1.8. Neither the pool nor the trampoline were intended to be used in conjunction with family day care activities. I infer that the new fencing configuration was intended to isolate the pool, the shed, the trampoline and the water tank from that part of the backyard that would be accessible for family day care purposes. This new fencing arrangement would have complied with the necessary statutory requirements in respect of pool fencing but for a number of features that I will mention in a moment.
- 1.9. Adjacent to the rear wall of the house was a pool gate that was configured in the usual and acceptable manner. It complied with the necessary requirements in that it self-closed, opened outwards from the pool area and had a latch that was of or greater than 1.5 metres in height. In addition to that single gate there was a set of double gates that formed part of the fencing that branched off at right angles to the original pool fence line. The right-hand gate as one looked at the double gates from the house towards the back of the property was affixed to the ground with a retractable peg. I was told that this part of the double gate arrangement was capable of being opened in either direction, both inwards and outwards. The left-hand side of the double gate could only open in an inward direction, that is to say inwards towards the fenced off area. The two gates could be latched and locked together with a built-in lock for which there was a key. In circumstances I will explain in due course an ordinary bicycle lock would also be affixed to the gates at the location where the two gates joined together. There was a

key for this lock. It would appear that if the bicycle lock was affixed and locked, the double gates could not be opened. Thus there would be two locks for the double gates. This belt and braces arrangement, as it were, could be locked or unlocked as required.

- 1.10. In her oral evidence taken at the inquest Mrs Luong had difficulty explaining the purpose of these gates and why they were so wide because the gates appear to have been wide enough to admit even a motor vehicle. However, although they were not intended to admit a vehicle, gardening items such as tools, the lawnmower and the wheelbarrow could be moved from the shed to the rest of the property through the gates. But she said, *'I never thought of why it was so wide, we just did it'*, an assertion that did not make a lot of sense<sup>1</sup>. One can readily contemplate that the gates were intended to allow the large trampoline to be moved back and forth between the fenced off pool area and the front section of the rear yard. Mrs Luong agreed with counsel assisting, Mr Kalali, that this could have been the reason<sup>2</sup>. In the absence of any other sensible explanation, to my mind the presence of the double gates are likely so explained. Without gates of this width, the trampoline would have needed to be permanently accommodated in the fenced off pool area unless somehow passed over the pool fence or moved through a dismantled section of the fence, no doubt a much less convenient arrangement altogether.
- 1.11. The double gates did not comply with the necessary requirements for swimming pool fencing and gating. In the event I have found that without anyone else on the premises realising, Crystal, before she drowned, entered the pool area through one of the open and unlocked double gates.
- 1.12. The double gates did not comply in a number of respects. The major relevant feature of non-compliance was the fact that the gates did not self-close. From a mechanical perspective I am not certain how a reliable self-closing arrangement could have been put in place. Be that as it may it is clear that the gates did not comply in this respect. The other relevant non-complying feature was the fact that the built-in locking mechanism which was designed to hold the two gates closed together and locked was not of the correct height. The correct height of at least 1.5 metres is designed to prevent small children from manipulating the latch. That said, when the bicycle chain was affixed to the double gates and was locked, it would to all intents and purposes be

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<sup>1</sup> Transcript, page 36

<sup>2</sup> Transcript, page 36

childproof. The difficulty of course with this arrangement was that when the gates or one of them was opened there was no self-closing mechanism to keep them shut.

- 1.13. On the day of Crystal's drowning, what could go wrong with these gates did go wrong. The left-hand gate had been left open, possibly from a gathering at the property the day before. The gate was open when Crystal and her family visited the Luongs the following day.
- 1.14. Like all other drownings in home swimming pools Crystal's death was preventable. There are many tragic aspects to Crystal's death but one of the most tragic is that during a compliance inspection of the pool, the Salisbury Council had identified the defects in respect of the double gates and nothing had been done to rectify them. This case serves as an illustration of the fact that although entities such as local government agencies have functions to perform in relation to the enforcement of swimming pool safety requirements, the primary responsibility for the maintenance of a safe home swimming pool environment rests with the owner of the property on which the pool is situated. As well, the case serves as a reminder that parents and other caregivers have an obligation to ensure that young children are accounted for at all times while they are present on a property on which a swimming pool is situated.
- 1.15. On 18 November 2014 a representative of the Salisbury Council had inspected the swimming pool at Mrs Luong's invitation. At that time Mrs Luong was in the process of applying to the relevant authority for approval to utilise her premises as a family day care centre. As well as the Council inspection there had also been a number of attendances by staff of the Department for Education and Child Development (the Department) which was the entity that could approve or not approve the premises being used as a family day care centre. As part of that Department's inspection of the premises, the pool and its accessories, including the fence, had been inspected.
- 1.16. I will come to the evidence in some detail in a moment, but in spite of these inspections the double pool gates remained as originally installed by the Luongs except that following the Council inspection in November 2014 the removable bicycle lock to which I have referred was added to doubly secure the two gates together. This device had not been present and had not been used in respect of the security of the gates at the time the Council inspected the pool in 2014.

- 1.17. The inquest examined the circumstances in which Crystal had managed to enter the pool undetected by anybody and had consequently drowned. The inquest also examined the circumstances in which this non-compliant set of gates was still in place on the day of Crystal's death.
- 1.18. In short, the inquest examined the issue as to how Crystal's death could and should have been prevented.

## 2. **The circumstances in which Crystal drowned**

- 2.1. It is to be accepted that no person saw Crystal enter the swimming pool or indeed saw her in the water before or at the time of her drowning. It should be noted here that Crystal was located unresponsive in the water adjacent to a large inflatable slide. The slide appears to have been set up at the edge of the pool with the lowest part of the slide protruding into the waters of the pool. Crystal was located by Mrs Luong at the side of the slide that was furthest from the house. Crystal's presence in the pool would have been obscured by the slide unless and until a person proceeded to the side of the slide which was away from the house. This in fact proved to be the manner in which Crystal was located by Mrs Luong.
- 2.2. I did not believe it was necessary to call either Mr or Mrs Trinh to give oral evidence. Mr Trinh provided two statements to the police quite late in the piece on 20 April 2019. Mrs Trinh had provided a statement closer to the event. Notwithstanding the lapse of time before Mr Trinh's statements were taken, I have accepted the salient features of those statements insofar as they shed light on the circumstances in which Crystal met her death in the pool. The reader of Mr Trinh's statements might conclude that certain assertions that he makes with some candour would not necessarily have been in his interests to make. Accordingly, I give those assertions considerable weight. I have also accepted the salient features of Mrs Trinh's statement. I will deal with the content of those statements presently.
- 2.3. Mrs Luong gave oral evidence in the inquest. She described Crystal's mobility. Crystal was able to walk independently without falling over or needing assistance. Mrs Luong agreed that Crystal would have been able to walk the length of the backyard of her property<sup>3</sup>. This meant that Crystal would have been able to walk on her own from the

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<sup>3</sup> Transcript, page 91

house to the double gates and beyond. Had those gates or one of them been open, or even slightly open, I have no doubt that Crystal would have been able to enter the pool area through them. In my view the evidence demonstrates that this is what happened.

- 2.4. The incident occurred on the evening of Monday 11 January 2016. The South Australian Ambulance Service (SAAS) report which is located in the Women's and Children's Hospital notes<sup>4</sup> indicates that SAAS was activated just before 9pm and that paramedics arrived on the scene at 9:01pm. Police arrived at about 9:07pm. It is apparent from the evidence that Crystal had only been missing for a few minutes, but of course for long enough to seal her fate in the pool. Thus the time of the incident which led to her death probably occurred sometime between 8:30pm and 9pm. According to the Australian Government Geoscience Australia website, sunset that day occurred at 8:32pm. I infer that at the time of the incident natural light would have been limited. I do not know what artificial lighting there was at the time of the incident. Nevertheless, in my view it would have been possible for Crystal to have entered the water at a location beyond the inflatable slide without a person who was situated in the pool area closer to the house seeing it.
- 2.5. Mr Trinh's statements indicate that he, his wife, Crystal, his little boy and Mrs Luong's daughter, who was then aged eight years, had been in the pool prior to the incident in question. In due course his wife removed Crystal from the pool area to shower and dress her. This left Mr Trinh in the pool with his boy and Mrs Luong's daughter. Once his wife had finished showering and dressing Crystal, Crystal was brought back outside and was placed near the single pool gate closest to the house. This was the single gate that complied with the relevant requirements. Crystal was placed on the outside of the pool fence, that is to say not within the pool enclosure. Mr Trinh indicates that this gate was closed at all material times. It was not propped open. Mr Trinh indicates that he was in the vicinity of the end of the pool that was closest to the house. He also states that the last time he saw Crystal after she had been placed outside by her mother, she was in the vicinity of the trampoline. He believes that Crystal was holding onto one of the trampoline poles. He was shown photographs taken by investigating police of scenes in the rear yard. If one accepts Mr Trinh's account, Crystal could only have moved to that location by going through the double gates. The trampoline was within the pool enclosure. So for Crystal to have accessed the trampoline, one or both of the

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<sup>4</sup> Exhibit C15

gates must have been open. There is no evidence that any person opened those gates for Crystal to go through. In any event this is inherently unlikely because if anyone wanted to admit Crystal to the pool area, that person would logically have opened the single gate near the house, and near to where her father was, in order to do so. There is no evidence that anyone admitted Crystal to the pool area through the single gate. Indeed, the evidence suggests the contrary.

- 2.6. In his statements Mr Trinh asserts that he believed that when Crystal was in the vicinity of the trampoline she was not actually inside the pool enclosure. I infer that Mr Trinh believes this because he may not have noticed or otherwise appreciated the fact that the trampoline was actually inside the pool enclosure. When asked during the taking of his statement if the double gates across the backyard were open or closed he could not say because he had not checked them. Mr Trinh asserts that he does not know how Crystal accessed the swimming pool area, but he knows that it was not through the single gate closest to the house because it had been kept closed. In addition, he would have seen Crystal if she had entered the pool area through that gate. The last time he saw Crystal he was still at the opposite side of the slide from where Crystal would ultimately be located.
- 2.7. Mrs Trinh's witness statement<sup>5</sup> confirms that after she bathed and dressed Crystal, she placed her outside and ensured that the pool gate near the house was closed. When Mrs Trinh showered she could hear Crystal crying from which she inferred that Crystal had wanted to enter the pool area but could not. Mrs Trinh states that after her shower she emerged from the house. She could not see Crystal and asked her husband where she was.
- 2.8. Mr Trinh confirms that when Mr Trinh's wife emerged from the house she asked where Crystal was. Mr Trinh thought that Crystal must have gone out to the front of the house via a roller door which was open. He and his wife were naturally worried that she had wandered out onto the road. Mr Trinh took his son and Mrs Luong's daughter out of the pool and went out to the front to look for Crystal. He then heard Mrs Luong who had come into the backyard to look for Crystal, yell out. Those at the front of the premises who were looking for Crystal all returned to the backyard where Mrs Luong was already performing CPR on Crystal.

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<sup>5</sup> Exhibit C1b

- 2.9. I have accepted Mr Trinh's assertions as contained in his statements that he had assumed that the side gate next to the house constituted the sole gate access to the pool area. I also accept that because that gate was closed he did not think that Crystal could access the pool by any other means. I have accepted his assertions that the last time he saw Crystal she was in the vicinity of the trampoline.
- 2.10. Mrs Luong gave evidence to the effect that she was inside the house when her husband alerted her to the fact that Crystal was missing. As a result, she went to the pool area where she found Crystal in the pool at a location on the far side of the inflatable slide. She jumped into the pool, retrieved Crystal and commenced CPR. She called out for someone to call an ambulance. I accept all that evidence.
- 2.11. Mrs Luong told the Court that her belief was that the double gates may have been left unlocked and open from the night before when a party had been held in the rear yard of the premises. The party had involved older children using the trampoline in the pool enclosure. It had been accessed by those children through the double gates. I note that this is what Mrs Luong had told investigating detectives on the night in question<sup>6</sup>.
- 2.12. Observations of all police who attended at the premises that night, including specialist crime scene examiners, were that the right-hand gate was pegged into the ground but that the left-hand gate was slightly ajar. Photographs taken by police support this scenario. In the photographs it can be seen that the bicycle lock was situated on a post.
- 2.13. It is highly unlikely that the double gates were unlocked and opened at a time after Crystal was located. It would not have made any sense for ambulance personnel and police to have entered the pool area through the locked double gates especially if they were secured by two locks. Much easier access would have been gained through the single gate near the house. In any event, as I say, I accept Mr Trinh's statement that the last time he saw Crystal she was in the vicinity of the trampoline and for that reason could only have moved to that location through one of the open double gates.
- 2.14. In all of the circumstances I find that Crystal entered the pool enclosure through an open gate, probably being the left-hand gate of the double gates situated at the rear of the backyard. I find that she was last seen by her father in the vicinity of the trampoline. I find that Crystal, unseen and unheard by any other person, either deliberately or

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<sup>6</sup> Statement of Detective Brevet Sergeant Kate Willden, Exhibit C10a at page 9

accidentally entered the waters of the pool in the vicinity of the inflatable slide at its end closest to the rear of the property. After Crystal entered the water she drowned.

- 2.15. Resuscitation was performed by Mrs Luong in the first instance and by SAAS personnel after their arrival. Crystal had no pulse upon the arrival of SAAS. However, paramedics were able to achieve a return of circulation. Crystal was conveyed to the Women's and Children's Hospital. It was established that Crystal had suffered permanent brain damage. She was pronounced life extinct at 5:10pm on 13 January 2016.

**3. The City of Salisbury inspection of the pool**

- 3.1. As indicated earlier the Luong family conducted a number of renovations in relation to the rear yard of the premises, including a reconfiguration of the pool fence in the manner I have described. Mrs Luong was also in the process of seeking to establish the premises as a family day care centre. To this end she contacted the Salisbury Council with a view to seeking an inspection of the pool so that the premises could be regarded as suitable for family day care. Naturally, the safety features of the pool would be a relevant consideration. I accept Mrs Luong's evidence that she had no intention of allowing children who would be participating in family day care to utilise the swimming pool. The swimming pool was for the exclusive use of her family, friends and relatives quite divorced from any family day care usage.
- 3.2. On 18 November 2014 Mr Jackson Ryan attended at the Luong premises. At the time of this inquest Mr Ryan was employed as a building officer with the City of Salisbury (hereafter the Salisbury Council or the Council). He is a Bachelor of Construction Management and Economics. He graduated with that degree in early 2015. As of November 2014 Mr Ryan was a cadet with the Council. In his oral evidence before the Court Mr Ryan explained that a cadet is a trainee building officer who works part-time pending the acquisition of the relevant qualification such as the degree with which Mr Ryan was conferred in 2015. He had been a cadet for approximately a year. In that period he had conducted a number of pool inspections both under the guidance of other officers and also on his own. By November 2014 he was deemed experienced enough to conduct pool inspections alone.

- 3.3. In his oral evidence Mr Ryan explained that the inspection that he conducted in respect of the Luong premises was undertaken within a ‘voluntary scheme’<sup>7</sup>. He explained that the voluntary scheme involved pool owners at their instigation seeking advice from the Council as to whether or not a pool complied with the necessary safety requirements; and identifying the work that would be necessary for the pool to achieve full compliance. There was other evidence that suggested that this voluntary arrangement was not a formal scheme, but was something that this particular Council allowed. This scenario was to be contrasted with a situation where the Council, independently of the pool owners’ approach, would gain information from another source that a pool in the Council area did not comply. Regardless of that distinction, if for whatever reason a pool did not comply with the necessary requirements, clearly that circumstance needed to be rectified and if not, the Council had a duty to see that a direction to a pool owner that was ignored was enforced.
- 3.4. Mr Ryan identified a number of features of this pool that did not comply. He issued Mrs Luong with a copy of the Swimming Pool Inspection Record that described the features of non-compliance of which there were three. One of those of course was the non-compliant double gate arrangement. The inspection record makes it plain that the pool did not comply. A box to that effect was clearly ticked.
- 3.5. None of these three non-compliant features would be rectified prior to the death of Crystal Trinh approximately 14 months after the inspection. Although the inspection record<sup>8</sup> identified the non-complying features, a section in the document designed to specify the date by which the rectification work should be completed was left blank. The notes on the rear of the form made it plain that a failure to comply with a relevant direction could attract a maximum fine of \$15,000.
- 3.6. As well as providing the inspection record to Mrs Luong, Mr Ryan had a discussion with her about the non-complying features of the pool. There is no suggestion that Mrs Luong’s grasp of English was such that she could not have understood the terms of the document, or what Mr Ryan verbally explained to her in terms of rectification requirements. Mrs Luong did not assert any such disadvantage, either at the time of the inspection or when she gave evidence in this Court.

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<sup>7</sup> Transcript, page 235

<sup>8</sup> Exhibit C13, page 69

- 3.7. In his evidence Mr Ryan explained the non-complying features. The first feature that is recorded in the inspection record relates to sliding windows that were situated in a wall of the house which formed part of the perimeter of the pool area. These windows constituted potential entry points from the house to the pool area. Mr Ryan identified that the windows should only have been able to slide open to a maximum of 100mm in order to prevent such entry. However, they were capable of being opened to a greater extent.
- 3.8. The second non-compliant feature identified by Mr Ryan related to the side gate of the premises. This gate in effect constituted another potential point of entry to the pool area. The gate was situated towards the front of the property and was positioned at the end of a narrow path at the side of the house. This side gate formed part of the pool area perimeter because the path leading to it was not segregated from the pool area. This gate was non-compliant in that it did not have self-closing capability and did not have an opening mechanism that was 1.5 metres or higher in height. In her evidence Mrs Luong asserted that this gate was permanently fixed with a padlock that she had never unlocked. The gate had never been opened. However, this would not have rendered the gate compliant.
- 3.9. Mr Ryan also identified all of the non-compliant features of the double gates.
- 3.10. There was divergence in the oral evidence as between Mrs Luong and Mr Ryan in relation to what was discussed between them.
- 3.11. Mr Ryan told the Court that in respect of the windows he told Mrs Luong that they needed to be fixed with a screw so that they would only slide open to a maximum of 100mm. In other words, there needed to be a permanent device that could prevent the window from being slid open to more than 100mm and which could only be removed with a tool. Mr Ryan said that he could not recall Mrs Luong's response to his stated observations of the windows. He could not recall whether she pointed out any other feature of the windows that may have caused them to open only to the required width. It appears that at the time of the inspection and from that point forward, in each of the window tracks there may have been a piece of dowling or a metal rod which may have prevented the windows from being slid beyond 100mm. However, these devices would not have made the windows compliant due to their ease of removal. I accepted Mr Ryan's evidence that the windows did not comply because there was no permanently fixed device that prevented them from being opened beyond 100mm.

Although Mr Ryan's recall of the conversation that he conducted with Mrs Luong as it related to the windows was limited, I accepted his evidence that he told her that they needed to be fixed with a screw.

- 3.12. As far as the gate at the end of the path was concerned Mr Ryan told the Court that he told Mrs Luong that the easiest option that she could choose to render the gate compliant was to fix the top and bottom of the gate with brackets so that it would no longer be openable. In that way the structure would be considered to be a fixed panel instead of a gate. I accepted his evidence as to that conversation.
- 3.13. I now turn to Mr Ryan's evidence about the conversation regarding the double gates. Mr Ryan told the Court that he told Mrs Luong that the gates were non-complying and explained to her why that was the case. He told the Court that Mrs Luong seemed upset by that revelation and tried to explain away this difficulty by saying that the gates were always locked and that nobody could get through them. Mr Ryan told the Court that he explained to Mrs Luong that although it was a good thing that the gates would always be locked, they nevertheless did not comply; and he explained to her options as to how the defects could be rectified. Mrs Luong remained adamant that the gates were always locked and that no-one could get through them. Mr Ryan believed that Mrs Luong fully understood that the gates did not comply because he viewed her continuing and repeated insistence that the gates were always locked as telling<sup>9</sup>.
- 3.14. Mr Ryan told the Court that the only lock on the gate was the built-in lock which joined the two gates together. There was no bicycle lock as far as he could recall. Mrs Luong's evidence was that the lock was not put in place until after the Council inspection. In his evidence Mr Ryan told the Court that in any case the bicycle lock would not have rendered the gates compliant even if they were capable of fastening the two parts of the gate assembly together and even if the bicycle lock was 1.5 metres off the ground, the reason for non-compliance being that the gates did not self-close<sup>10</sup>. Mr Ryan told the Court that he explained to Mrs Luong that as far as self-closing was concerned, the gates needed to function in the same way as the compliant single pool gate near the house. He said:

'I just gave her the option of either fencing off the pool or if she needs the gate there, it needs to operate the same way as her other compliant pool gate.'<sup>11</sup>

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<sup>9</sup> Transcript, pages 252-253

<sup>10</sup> Transcript, page 255

<sup>11</sup> Transcript, page 259

Asked as to what Mrs Luong’s reaction was to that, Mr Ryan said that she would generally retreat to the refrain that she kept the gate locked at all times. He said ‘that was her go-to’<sup>12</sup> position regarding the gates.

3.15. I will come to Mrs Luong’s own evidence about this conversation in a moment, but in his evidence Mr Ryan denied at any time saying to Mrs Luong words to the effect that if she kept the double gates locked she did not have to worry about doing anything else in relation to those gates. He also denied saying to her, as if by way of recommendation only, words to the effect that she could rectify the gates by a self-locking mechanism or by extending the fence but that if she kept the gate locked that was all she had to do<sup>13</sup>.

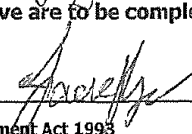
3.16. Mr Ryan told the Court that he experienced no language difficulties with Mrs Luong<sup>14</sup>. Mr Ryan handed the inspection record to her. In her evidence Mrs Luong acknowledged that she received the document.

3.17. The non-compliant features and/or suggested methods of rectification were described in the swimming pool inspection record in the following way:

*The following points have been identified as non-complying and are required to be addressed by the prescribed date below.*

- All windows opening into pool area Maximum opening of 100mm  
 - gate side gate to permanently fixed with brackets  
 - double opening gate to have 1.5m latch open self close or  
 fence off pool completely.

The works detailed above are to be completed by \_\_\_\_\_ Please contact Council on 8406 8358 once complete.

Signed:  Date: 18/11/14

Authorised Officer – Development Act 1993

Although somewhat inelegantly crafted, it is clear enough that there were three distinct non-compliance issues described in the document. The reader can see that the completion date was left blank. This to my mind, however, would not have relieved Mrs Luong of the obligation to rectify the pool in the manner contemplated by this document.

3.18. Mr Ryan was naturally asked about his swimming pool inspection record and the fact that it did not specify the date by which the rectification work had to be completed. He

<sup>12</sup> Transcript, page 260  
<sup>13</sup> Transcript, page 262  
<sup>14</sup> Transcript, page 285

explained that at that time it was common practice not to stipulate a completion date where the inspection was voluntary and had taken place at the invitation of the home occupant as had been the case with the Luong premises. The Council seems to have worked on the assumption that if the occupier instigated the inspection they would be likely to comply with any rectification requirements. Thus no strict timeframe was applied<sup>15</sup>. Naturally the difficulty with a practice such as that was the lack of any follow-up in the event that the occupier did not contact Council to indicate that the work had been undertaken. I was told that Salisbury Council has altered its practices in this regard. That could only be a positive development in my view.

- 3.19. Although a document that demanded that certain work be undertaken while leaving blank a completion date could tend to confuse, in my view there was no confusion as far as the need for this work to be conducted was concerned, either in the mind of Mr Ryan or Mrs Luong.
- 3.20. As indicated earlier, Mrs Luong gave oral evidence. She told the Court that in relation to the windows she showed Mr Ryan a ‘bolt’ that she said stopped the windows from opening more than 100mm. She did not clarify what she meant by a bolt and whether or not that was a fixture that could be removed manually or only with a tool. Ultimately when the pool was inspected by the Council after Crystal’s death there was nothing in place that rendered the windows as compliant. I have accepted Mr Ryan’s evidence that the windows did not comply because they did not feature a device that could only be removed with a tool.
- 3.21. As to the side gate at the end of the pathway at the side of the house that was locked with a padlock, Mrs Luong said that she could not recall any conversation about that particular gate<sup>16</sup>. She could not remember whether the inspector looked at that gate<sup>17</sup>. I accepted Mr Ryan’s evidence that he and Mrs Luong spoke about the gate. I find that Mr Ryan pointed out its defects. His pool inspection record refers to the gate and to what was required to render it compliant.
- 3.22. As to the double gate arrangement, Mrs Luong said that Mr Ryan told her it should be ‘fenced off’<sup>18</sup> and that there should not be a gate there. She believes that she responded

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<sup>15</sup> Transcript, page 263

<sup>16</sup> Transcript, page 49

<sup>17</sup> Transcript, page 48

<sup>18</sup> Transcript, page 51

by saying that she needed the gate there and asked whether it was alright if they kept it locked. To this Mr Ryan had said that as long as ‘*you lock it and as long as no-one can get into it, it should be okay*’<sup>19</sup>. Mrs Luong testified that Mr Ryan’s suggestions for rectification were recommendations<sup>20</sup> only and that he had said that if the gates were kept locked they should be safe<sup>21</sup>. Mrs Luong went so far as to say that Mr Ryan had said ‘*that’s what we recommend, but you don’t have to do it*’<sup>22</sup>. Accordingly, Mrs Luong told the Court that she believed that she did not have to do anything to the gates because she believed that if she kept them locked they would be safe. She acknowledged that the only thing she did following the inspection was to secure the bicycle lock to the gates. She did nothing to the windows and nothing to the side gate<sup>23</sup>.

3.23. In respect of the swimming pool inspection record Mrs Luong said that that she did not remember reading the document. She said, ‘*I probably glanced at it but I don’t remember reading it*’<sup>24</sup>. However, she acknowledged that she retained the document and probably put it away somewhere. She did not show the document to her husband. She asserted that she told her husband that the inspector had been to the property and told him that the gates needed another lock. Following this her husband acquired the bicycle lock.

3.24. In her evidence Mrs Luong was asked in detail about what she would have understood from the inspection record had she read it, particularly in relation to what it said about the double gates. She acknowledged that she would have understood the expression ‘*self-close*’ as requiring the gate to be able to close by itself. She acknowledged that if the gates were left open they would not self-close<sup>25</sup>. As to Mr Ryan’s requirement, ‘*fence off pool completely*’, she would have interpreted that as meaning:

‘If I locked it so no one can get in.’<sup>26</sup>

She said that she would have interpreted it in that way because of what Mr Ryan had said to her, namely that if she kept it locked it should be fine<sup>27</sup>. When challenged about that answer, and in particular whether ‘*fence off pool completely*’ must have meant that

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<sup>19</sup> Transcript, page 51

<sup>20</sup> Transcript, page 52

<sup>21</sup> Transcript, page 52

<sup>22</sup> Transcript, page 52

<sup>23</sup> Transcript, page 54

<sup>24</sup> Transcript, page 55

<sup>25</sup> Transcript, page 58

<sup>26</sup> Transcript, page 59

<sup>27</sup> Transcript, page 59

the double gates should be removed altogether with a rigid fence installed the whole way around, she said:

‘If he told me to ‘Get rid of that gate and put the fence in, and I come back and check on you’ I would have done it. But he didn’t say anything like that. He said ‘recommend’. Recommend lock - okay, so I thought, lock, okay. But if he say ‘I’m not going to give - I can’t approve this, you need to take this down and put a permanent fence on that you can’t get through, or change it, I’ll come and check’ then I would have done it.’<sup>28</sup>

She expanded on that by suggesting that she did not have to fence off the pool completely; that this was only a recommendation. She reverted to her original position that she believed that so long as the gates were locked they would be acceptable. That of course would mean that Mr Ryan had written one thing, but had said something quite different to Mrs Luong.

- 3.25. On 15 January 2016 which was four days after the fatal incident Mr Jeffrey Shillabeer, Principal Building Officer and Mr Alan Taylor, the Manager of Development Services of the Salisbury Council, attended at the Luong premises and inspected the pool area. Mr Shillabeer was called to give oral evidence. He told the Court that the windows still did not comply as the device used to keep a window open to 100mm only was not a permanent arrangement. The device could be removed, allowing the window to be opened fully. Mr Ryan had thus been correct in his original assessment of the window. On 15 January 2016 the side gate was still deadbolted with a padlock. This arrangement did not comply as already seen. In my view it was no different from when Mr Ryan had examined it in November 2014. As far as the double opening gates were concerned, they were as they had been when Mr Ryan examined them, except that there was the addition of the bicycle lock which was affixed to the double gates when observed by Mr Shillabeer. This still did not comply.
- 3.26. The only rectification work that had taken place in respect of all of these non-compliant features since Mr Ryan’s visit was the addition of the bicycle lock to the double gates. To my mind this set of circumstances was telling. There is an intrinsic unlikelihood in the notion that having identified three important aspects of non-compliance, Mr Ryan would at the same time and in respect of all three have given Mrs Luong a false and unwarranted assurance that she did not have to do anything to rectify them. From Mrs Luong’s perspective, it is highly unlikely that she had formed any such belief in

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<sup>28</sup> Transcript, page 59

relation to all three aspects of non-compliance. It was significant that in her evidence she said that she had believed that the windows had complied and that she could not recall anything in relation to the lock on the side gate at the end of the path. She could not have been under any misapprehension as to whether the windows complied. After all, if they had complied Mr Ryan would not have been interested in them and would not have included reference to them in his report. The same applies to the side gate. It was not as if Mrs Luong said in evidence that Mr Ryan had said that although the windows and the side gate did not comply he had also said that she did not have to do anything about them either. But it is obvious and I find that Mrs Luong never did anything to rectify the windows and the side gate when it must have been clear to her that the windows and the side gate did not comply and that she would have to do something about them. Mrs Luong's attitude to the windows and the side gate, and her failure to rectify the same, caused me to doubt anything she said about the double pool gates when what she said conflicted with Mr Ryan's evidence.

- 3.27. I do not believe that at the time the property was inspected by Mr Ryan and subsequently, Mrs Luong was so naïve to think that all of the non-compliant features of the swimming pool could simply be rectified by the addition of a lockable bicycle chain to only one of those features. I accepted Mr Ryan's evidence that Mrs Luong's standard reaction to his observation that the double gates did not comply was to insist that any defect in respect of the double gates could be managed by their being kept locked. I found her persistence in this regard to be revealing. Her persistence was highly consistent with an understanding on her part that the gates did not comply and with a desire on her part not to have to do anything about them.
- 3.28. I have preferred the evidence of Mr Ryan to that of Mrs Luong where their evidence conflicts. To my mind Mrs Luong was disinclined to comply with the directions of Mr Ryan. At the time of the Council inspection she exhibited that disinclination, and did so with some persistence in respect of the double gates. Her general disinclination to comply is reflected in the fact that neither of the other two aspects of non-compliance, namely the windows and the side gate, were ever rectified. I do not believe that Mr Ryan indicated that anything he drew her attention was simply by way of recommendation. I do not believe that Mr Ryan said to Mrs Luong that if she kept the double gates locked this would be acceptable. To my mind it is inherently unlikely that having identified this obviously non-compliant feature, Mr Ryan would have given the occupier of this premises any reassurance that the non-compliant feature could be

overlooked if the gate was kept locked. It would have been obvious to Mr Ryan that the double gates had been installed for a reason, the obvious reason being to allow better access between the pool area and the rest of the rear yard of the premises. No reasonable person in Mr Ryan's position could have relied on any assurance by Mrs Luong that the gates would at all times be kept locked. This is because any reasonable person in his position would have concluded that there was no point in the gates existing if they were always kept locked. There was at the very least a possibility, if not probability, that from time to time the gates would be unlocked and opened, and indeed in the nature of things possibly left open given that they would not self-close. When he gave his evidence to the Court Mr Ryan did not strike me as being an unreasonable individual. He also did not strike me as a person who would be deceived or deflected by glib assurances such as that the gates would always be locked. In my opinion he made it clear to Mrs Luong that the gates did not comply and that they needed to be rectified either by way of ensuring that they self-closed or by removing them and replacing that part of the pool perimeter with a completely rigid fence.

3.29. I have found that Mrs Luong understood that the double gates did not comply and further understood that she was under an obligation to rectify that state of non-compliance by adopting either of the two methods suggested by Mr Ryan.

3.30. That said it would have been far better if Mr Ryan had indicated on the Swimming Pool Inspection Record a date by which the work had to be completed. Furthermore, it is obvious that there should have been follow-up by the Salisbury Council to ascertain whether or not the non-compliant features of this pool had been rectified. The Council could have activated enforcement if it had come to that. It is a fact that if the double gates had been eliminated Crystal's death would have been prevented. The circumstances in which that follow-up did not occur I will return to in due course.

#### **4. The inspections on behalf of the Department of Education and Child Development**

4.1. As indicated earlier, Mrs Luong was planning to use her premises as a family day care centre for small children and that as part of the process of accreditation the premises required inspection by the Department of Education and Child Development. The Department administered early childhood services, and in particular the North Metro Day Care Scheme of which Mrs Luong's premises would be part.

4.2. Although it was not Mrs Luong's intention to permit the pool to be used as part of any family day care arrangement, the Department had to inspect it and satisfy itself that it

complied with the relevant requirements. Clearly the purpose was to ensure that the premises was safe for small children.

- 4.3. It is to be acknowledged that the Department did not have any power to enforce compliance with pool requirements. The available sanction that was within their power to impose would be refusal of accreditation of the premises as a family day care facility.
- 4.4. It is also to be acknowledged that the relevance of the involvement of the Department in efforts to ensure that the Luong's swimming pool was compliant is limited in light of the fact that the child Crystal did not drown while family day care activities were taking place. However, it remains a fact that the Departmental Family Day Care Water Safety Policy required registered educators to protect children from risk associated with water hazards at their home including a duty to ensure that pool fencing and gates installed complied with the relevant requirements<sup>29</sup>. Those requirements as set out in the Australian Standards were fundamentally the same as the requirements that the Salisbury Council were insisting upon, particularly as they would relate to the double gates. Approval was given to the premises to be used as a family day care centre despite non-compliant pool gates. If approval had been refused, or had threatened to be refused, it is conceivable that the gates would have been rectified.
- 4.5. Department employees attended the Luong's premises on a number of occasions.
- 4.6. At the time with which this inquest is concerned Ms Rachel Young was an approvals coordinator with the Department. She had been in that role since 2010. At one time Ms Young herself had been an educator in the family day care scheme. As an approvals coordinator her duties included the attendance at premises to perform assessments of those premises. This was undertaken with a view to ensuring that the premises both inside and outside were safe in the family day care setting. As I understood the evidence, Mrs Luong was intending to establish the family day care facility for a limited period in the first instance before embarking on maternity leave in January 2015. She would then reinstate the facility in the July of that year. I also understand that this was in fact the way things ultimately transpired. In the event this plan necessitated a number of inspections by the Department in 2014 and 2015. At the time with which this inquest is concerned, The Department did not require independent confirmation say from a local Council or any other entity that had competence in pool inspection that a pool that existed at a family day care facility complied with the necessary safety requirements.

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<sup>29</sup> Exhibit C11c, pages 29 and 39

Rather, the Department relied on the inspections conducted by Department employees such as Ms Young. This state of affairs has altered in a manner that I will describe in due course.

- 4.7. Ms Young first attended at the Luong premises on 24 November 2014. This was six days after the inspection by Mr Ryan on behalf of the Salisbury Council. Ms Young told the Court that on this occasion there was little conversation with Mrs Luong regarding the pool as it was empty. Mrs Luong indicated that she would fill the pool when the weather warmed up and that when she returned from her maternity leave she would complete a pool safety checklist.
- 4.8. The Department's family day care Home Visit Record dated 24 November 2014 completed by Ms Young<sup>30</sup> records that she and Mrs Luong discussed the pool in the back garden. A reference to the pool fence is as follows:

‘At present the area is off limits with a pool fence. The area has been checked by the Salisbury Council.’

This is no doubt a reflection of Mrs Luong having told Ms Young that the Salisbury Council had recently inspected the pool and in particular that the pool ‘area’ had been checked by them. There is nothing in this document that in any way elaborates on the features of the pool and whether they complied or not. There is also no reference to what, if anything, the Salisbury Council had observed or had said in respect of the pool at the time of its visit and inspection, nor indeed of what, if anything, Mrs Luong said about that to Ms Young.

- 4.9. Ms Young again visited the property on 8 December 2014 and on 14 July 2015.
- 4.10. In her evidence-in-chief Ms Young described her visits on 24 November 2014 and 14 July 2015 only. She mentioned nothing of the visit that had taken place on 8 December 2014. Ms Young had to be reminded about the December visit when cross-examined by Mr Kalali, counsel assisting, who had identified a record of this visit in a bundle of records from the Department<sup>31</sup>. This record appears to form part of a continuous running sheet. In her cross-examination by Mr Kalali, Ms Young told the Court that she had forgotten about this visit. Nonetheless she acknowledged that she had completed the typewritten entry onto the running sheet. She identified her

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<sup>30</sup> Exhibit C11a, page 60

<sup>31</sup> Exhibit C11b

handwriting in one of the columns that states ‘*Follow-up visit from new premises*’. The typewritten running sheet record is set out as follows:

‘Today I did a brief visit to Kathy’s to see the actions outlined in the HV record from the new premises visit. The actions were:

- Place house plans and procedures at every exit (completed)
- Place swing chair in an area in an inaccessible area (completed)
- Ensure the fence goes all around the pool area and makes it inaccessible to children (completed)
- Ensure the pool fence can be locked (completed)
- Cap the fencing in the outdoor area
- Ensure the required certificates are displayed on the wall (completed)
- Ensure there is safety plugs in all exposed power points (completed)
- Send the coordination unit a copy of the updated parent letter (completed)

All actions have been completed and Kathy has started to work from the new premises. She is going to take leave from the 19th of December for approximately 6 months. She stated that she will at this stage come back at the commencement of the new financial year. I will email her the removal from the register forms today.’<sup>32</sup>

The listed items in that entry are said to have represented the requirements and actions that had been identified at Ms Young’s earlier visit in November 2014. The note as a whole suggests that those listed actions had been completed as at the time of the 8 December 2014 visit and that Mrs Luong had started to work from that premises as a family day care educator. The document suggests that on 24 November 2014 Ms Young had identified two matters regarding the pool fence that required attention. Firstly, there was a need to ensure that the pool fence went around the entirety of the pool area so as to make that area inaccessible to children. Secondly, it appears that Ms Young had identified a need for the pool fence to have lockability. The note suggests that both of those matters had been attended to, or in the phraseology of the document, ‘*completed*’ by 8 December 2014.

- 4.11. When observed by Ms Young on 24 November 2014 the pool fence had been in an identical state to that observed by Mr Ryan earlier in the month. In her evidence Ms Young suggested that she needed to be satisfied that the single gate near the house could be locked. Mrs Luong demonstrated its capability in that regard. It is true that this gate was fitted with a lock. It is possible that the entry of 8 December 2014, namely ‘*ensure the pool fence can be locked (completed)*’ refers to the lockability of the single gate near the house.

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<sup>32</sup> Exhibit C11b, page 97

- 4.12. The question of course was, if the lockability of the single gate had been the only issue, what was meant by Ms Young's insistence that the fence should go completely around the pool area so as to make it inaccessible to children?
- 4.13. This question was never satisfactorily answered at the inquest. In her evidence Ms Young consistently maintained that at none of her visits to the premises did she notice the double gates. This evidence was in stark contrast to that of Mrs Luong. Mrs Luong told the Court that when Ms Young inspected the premises she told Ms Young that the man from the Council had told her that so long as she kept the double gates locked it was fine<sup>33</sup>. Mrs Luong told the Court that she showed Ms Young the double gates, the windows and the gate at the side of the house<sup>34</sup>. With respect to the double gates she asserted that Ms Young said that if they were locked then it should be 'quite okay'<sup>35</sup>. At that time it had the bicycle lock added to the gate. The gate was locked. Mrs Luong in essence told the Court that Ms Young acquiesced in what Mrs Luong allegedly told her about the Council saying that the gates would be fine if locked. Mrs Luong told the Court that Ms Young did not say at any of her visits to the premises that any of the pool fencing needed to be altered<sup>36</sup>.
- 4.14. I observe here as I observed earlier that the record in relation to Ms Young's first visit on 24 November does record that the area had been checked by the Salisbury Council. This information I find came from Mrs Luong. It is most unfortunate that Ms Young did not record anything about what the result of the Salisbury Council check had been, but one inference from her notation that '*the area has been checked by the Salisbury Council*' is that she had an understanding that the Salisbury Council had not found any fault with the gates or that if they had, they had suggested that nothing needed to be done about them. I do not entirely discount the possibility that Mrs Luong told Ms Young that the Salisbury Council had in effect given its imprimatur to the double gates. However, for reasons already mentioned, such an assertion would not of itself have represented a true reflection of what Mrs Luong actually understood.
- 4.15. Mr Ambrose, counsel for Ms Young and the Department, in cross-examination suggested to Mrs Luong that she and Ms Young only conversed about the single gate that was connected to the house. To this Mrs Luong insisted that she and Ms Young

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<sup>33</sup> Transcript, page 53

<sup>34</sup> Transcript, page 61

<sup>35</sup> Transcript, page 61

<sup>36</sup> Transcript, page 67

had examined the double gates. She said that they were both standing in front of the double gates<sup>37</sup>.

4.16. However, Ms Young asserted that no conversation occurred with Mrs Luong about the double gates. Ms Young said that she was simply unaware of their existence, let alone aware of the issue that they presented as far as non-compliance was concerned.

4.17. Ms Young was naturally cross-examined by Mr Kalali about the running sheet concerning the visit of 8 December 2014 and in particular her entries about the requirements that she had listed in respect of the pool fence. It is fair to say that Ms Young's evidence about the entry relating to the visit of 8 December 2014 and in respect of the visit itself was less than helpful. She asserted that she had no recollection even of the visit<sup>38</sup>. She was unable to explain what the reference to ensuring that the fence went all around the pool area meant and what issue about the fence it was intended to address. As far as she was concerned the only issue about the fence was the single gate and its lockability. Even on that issue Ms Young was vague. She said:

‘I don't know, I'm trying to think. Well maybe at that time it wasn't lockable and it was something that she needed to rectify and obviously we then checked again in 2015 which is what I can recall her having to get the key, unlock it, because I keep saying I really have vague memories of the 2014 visit.’<sup>39</sup>

In respect of her reference to the fence, Ms Young said it must have referred to something that she had '*spotted*' on 24 November 2014<sup>40</sup>. She did not share with the Court what it was about the fence that she had spotted.

4.18. As a matter of logic if there had been an issue as to whether the fence went all around the pool area so that it was inaccessible to children, it would mean that there was some feature of the fence that interrupted its continuity around the pool area and which made it accessible to children. That could consist of a complete gap. However, there is no evidence that at any stage there was an actual gap in the fence that was not filled by a gate or gates. The only features of the pool fence that interrupted its continuity around the pool area were the gates. If left open they would allow access by children to the pool area. As to what it was that had been '*completed*' to ensure the fence went all around the pool so as to make it inaccessible to children, this was also a mystery as far

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<sup>37</sup> Transcript, page 96

<sup>38</sup> Transcript, page 193

<sup>39</sup> Transcript, page 194

<sup>40</sup> Transcript, page 195

as Ms Young was concerned. Ms Young was not able to help the Court about what had been completed. Mr Kalali put the following to Ms Young:

‘Q. Isn’t it the case that on 8 December the notes that you’ve made ensure the pool fence can be locked ‘completed’ is reference to the double gates that you call a fence.

A. I don’t believe so, no.’<sup>41</sup>

4.19. I turn to Ms Young’s visit of 14 July 2015. The DECD Family Day Care Home Visit Record of Ms Young’s visit of that day mentions nothing about the state of the pool fence except that it was agreed that Mrs Luong would remove excess items such as life jackets and floor mats from the fence. It is also recorded that it was agreed that she would place a resuscitation sign in the pool area.

4.20. However, in respect of the same visit another document entitled DECD Family Day Care Schemes Educator Premises Risk Assessment & Checklist constitutes a more detailed assessment of the safety of the premises. This document is a proforma document that requires the assessor’s completion. There is a specific section of the document that is devoted to ‘POOLS and WATER’. This document in its proforma part indicates that pool fencing and gates must comply with Australian Standards. The document has a ticked box indicating that there was a pool on the premises and that the person completing the document recognised that fact. There is a risk assessment included within this documentation that also acknowledges the presence of the pool and indicates that the likelihood of harm from it is ‘*almost certain*’, the consequences would be ‘*catastrophic*’ and that the risk level was ‘*extreme*’. These assessments of course are premised on a worst case scenario insofar as the pool would present a very high risk of a catastrophic outcome if the risk was not controlled, mitigated or eliminated. There is nothing unusual about that. The measures that are adopted to achieve such a risk mitigation are naturally the most pertinent consideration. In a section entitled ‘*Control – What has been done to reduce or eliminate the risk?*’, Ms Young recorded as follows:

‘1.2m pool fence with lockable gate. The gate opens outwards. Kathy will not place items on the fence & ensure that items are not placed near the fence.’

It will be noted that this entry refers to one gate only. I infer that this entry relates to the single gate near the house which indeed was lockable and opened outwards in

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<sup>41</sup> Transcript, page 202

accordance with the usual requirement for pool gates. Within this document there is nothing mentioned about the lockable double gates towards the rear of the yard.

- 4.21. A checklist that was devoted to home swimming pool safety was also completed in respect of the July 2015 visit. Certain aspects of the fencing are dealt with in this document including the requirements for the pool fence gate. The document does not give any indication as to whether or not the double gates at the rear of the yard were examined for compliance. It mentions nothing about those gates at all. Suffice it to say the document does not identify any non-complying feature of the fence or gates<sup>42</sup>. Ms Young suggested that even after this third visit she was completely unaware that there had been any other gate or gates apart from the single gate near the house that complied with all requirements.
- 4.22. Thus, documentation relating to the 14 July 2015 visit by Ms Young is consistent with her only having observed the one single gate.
- 4.23. Ms Young told the Court that as far as she was concerned the pool fence had gone all the way in a straight line all the way to the back fence. This had been her understanding throughout. Following Crystal's death Ms Young was asked to pictorially reconstruct her recollection of the rear yard for the purposes of the Department's internal investigation. She drew a diagram that indicated that her recollection was that the fence had gone all the way to the back fence and had not taken the right-hand ninety degree turn that was obviously in place when she visited the premises on those three occasions.
- 4.24. On the 14 July 2015 visit Ms Young had been accompanied by another employee of the family day care program, Ms Tanya Eggleston. Ms Eggleston was called to give oral evidence. Ms Eggleston told the Court that the only gate that Ms Young examined on that date was the single gate closest to the house. Ms Eggleston said that she had no memory of Mrs Luong mentioning anything to Ms Young about Council compliance with respect to the swimming pool fencing<sup>43</sup>. She said that she was almost certain that Ms Young and Mrs Luong did not walk along the pool fencing. Like Ms Young, Ms Eggleston's memory was that the fence went from the house to the rear yard in a straight line, a recollection that was also inaccurate. As to that part of the fence that contained the double gates, that is to say the fence that went off at a right angle, and

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<sup>42</sup> Exhibit C11a, page 102

<sup>43</sup> Transcript, page 411

whether that was present on the day Ms Eggleston attended, she said '*not to my memory, no*'<sup>44</sup>. Again, that was incorrect insofar as that part of the fence was in place on that day. Even when Ms Eggleston was asked to examine a photograph of the pool fencing as it had existed, and whether the photograph altered her recollection as to the configuration of the pool fencing when she was present, she said '*no, it doesn't*'<sup>45</sup>. Ms Eggleston insisted that her memory was that the fence ran straight back to the rear of the yard. She said that her belief was that there was simply a dirt space where the double gates were situated, that there was a trampoline against the back fence<sup>46</sup> and that there was no fence between the house and where the trampoline was situated. That asserted recollection is also demonstrably incorrect.

4.25. Finally on this issue I should add that Ms Young said in her evidence that if she had noticed the double gates, had noted that they would not self-close, had noted that the built-in lock was less than 1.5 metres from the ground and that the gates led into the pool area, she would have approached her manager for advice. The existence of a bicycle lock and/or assurances from Mrs Luong that the Council had indicated that as long as the gates were locked everything was fine, would not have swayed her from the task of approaching her manager and seeking clarification in relation to the issue as to whether the gates were acceptable or not. She said she would not have endorsed the Council's response by herself indicating that as long as the gates were locked everything was fine because she said '*I would never have said that. I find that very hard to think that I'd say that*'<sup>47</sup>.

4.26. Ms Kathryn Van Schaik is a scheme manager for family day care within the Department. Ms Van Schaik was called to give oral evidence. Ms Van Schaik was responsible for the day to day operational management of day care schemes in the northern part of the State. She had responsibility for supervision of employees within the scheme, such as Ms Young. In her oral evidence before the Court Ms Van Schaik said that in respect of the double gates that were situated at the Luong premises, she would have entertained a number of concerns had she known about them. She told the Court that the gates were of concern due to the absence of any self-closing mechanism<sup>48</sup>. In infer that had Ms Van Schaik been made aware of the deficiencies of this pool

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<sup>44</sup> Transcript, page 412

<sup>45</sup> Transcript, page 412

<sup>46</sup> Transcript, page 412

<sup>47</sup> Transcript, page 185

<sup>48</sup> Transcript, pages 302-304

perimeter the Luong premises would not have been regarded as suitable for family day care and Mrs Luong's registration as an educator in the scheme would not have been approved. In the event, according to Ms Van Schaik, Mrs Luong's registration was suspended subsequent to Crystal Trinh's death<sup>49</sup>.

## 5. Summary and findings

5.1. To summarise the evidence relating to the inspections by the Salisbury Council and the Department, Mr Ryan from the Council identified a number of non-complying features of the swimming pool including the double gates. He drew the attention of those non-complying features to Mrs Luong. Mrs Luong asserts that Mr Ryan drew the non-complying features of the double gates to her attention but told her that what needed to be done in terms of rectification was by way of recommendation only and that if Mrs Luong kept the gates locked then that would be acceptable. Mr Ryan denies that he said any such thing to Mrs Luong. He issued Mrs Luong with a document that set out the three matters in respect of which the pool perimeter did not comply, including the reference to the double gates with indications as to how the double gates could be made compliant. Mrs Luong asserts that in her interactions with Ms Young of the Department she indicated the double gates to Ms Young and told her that the Salisbury Council had advised that if she kept the gates locked that would be acceptable. Mrs Luong asserts that Ms Young indicated to her that if that was the Council's advice then the gates would be acceptable for the Department's purposes. Ms Young who attended the premises on a number of occasions, and Ms Eggleston who attended the premises on one of those occasions, both say that that were unaware of the existence of the double gates. Ms Young asserts that she did not say to Mrs Luong that the gates would be acceptable and asserts that if she had noted the non-complying features of the gates she would have raised the matter with her manager.

5.2. For reasons already indicated, I find that Mr Ryan did not give any indication to Mrs Luong that the gates would be acceptable if they were kept locked. I find that Mrs Luong understood that she had an obligation to rectify the gates in one of the methods suggested by Mr Ryan. In light of my clear preference of Mr Ryan's evidence to that of Mrs Luong, I find that I am unable to rely on Mrs Luong's evidence where it conflicts with that of Ms Young. In particular, I find that I am unable to rely on

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<sup>49</sup> Transcript, page 306

Mrs Luong's evidence that she told Ms Young that the Council had told her that the double gates would be acceptable if kept locked and that Ms Young acquiesced in that assurance. I do not believe that the Council said any such thing or that Mrs Luong had any such understanding. Thus in considering the performance of Ms Young in assessing the premises and its safety I have removed Mrs Luong's evidence of her interaction with Ms Young from my consideration.

- 5.3. It is to be acknowledged that there is an intrinsic difficulty about Ms Young's assertions that she did not notice the non-complying double gates at some point during her multiple inspections of the premises. It would be a surprising issue for her to have overlooked given that she was there to identify such non-compliant features and that she had no less than three opportunities to do so. She said herself that she would have regarded the non-complying features of the gates as significant enough to have raised the issue with her manager. It is not as if she was oblivious to the need for the pool fence to comply with the necessary requirements or was heedless to the issue that double gates such as these might pose as a possible obstruction to family day care accreditation. I am also troubled by Ms Young's entry in the running sheet dated 8 December 2014 to the effect that at the visit in November she had identified a need to ensure that the fence went all around the pool area so as to make it inaccessible to children and that as of her visit on 8 December 2014 the necessary action had been completed, an entry that is consistent with Ms Young having identified a feature of the pool fence that gave it an incomplete character. The only feature of the pool fence that we know about in that regard is the set of double gates.
- 5.4. In making findings of fact in relation to the issue as to whether Ms Young observed the double gates and acquiesced in their being retained subject to them being locked, the difficulty is that I have not been able to rely on evidence of Mrs Luong where it conflicts with that of Ms Young. I was not satisfied that the conversation that she said occurred with Ms Young did occur. Having considered the matter carefully and at length I am unable to find on the balance of probabilities that Ms Young observed the double gates and in effect did nothing about them. In short, I am not able to make any finding about what Ms Young observed or did not observe about the double gates.
- 5.5. All that can be said is that for whatever reason Ms Young did not draw the non-compliant double gates to anyone's attention when on a proper analysis it was part of

her job to have done so. As a result, the Department approved the premises as a family day care facility and the double gates would thus remain as they had always been.

**6. The lack of follow-up by the Salisbury Council**

- 6.1. In his evidence Mr Ryan accepted that he should have completed the section of the inspection record that provided for a completion date for the work that was required to render the pool compliant. Mr Ryan said that rather than leaving the completion date blank being reflective of any Council policy, he described it as a general practice<sup>50</sup>.
- 6.2. In any event Mr Ryan told the Court, and I accept his evidence in this regard, that it was his impression that Mrs Luong was aware of what she needed to do and that she would do it<sup>51</sup>.
- 6.3. Mr Ryan said that no senior colleague had reviewed his work in respect of the inspection. He did not follow-up the inspection himself.
- 6.4. Mr Ryan also explained that following Crystal's death the Salisbury Council conducted an audit of all other outstanding pool inspections in respect of which no time limit on compliance had been imposed. The Council identified that there were many such outstanding inspections.
- 6.5. I have already referred to Mr Shillabeer. Mr Shillabeer gave some detailed evidence about Council procedures regarding inspections and compliance enforcement in respect of pools. I was satisfied that the Salisbury Council could have initiated enforcement processes in respect of Mrs Luong's pool had it followed up Mr Ryan's inspection.
- 6.6. Asked as to whether he was aware of a policy or general practice adopted by inspectors not to enter completion dates where non-complying pools had voluntarily been disclosed to Council, Mr Shillabeer said that while there was no general practice or Council policy per se, there was a practice where some inspectors did not enter completion dates. He said:

‘At that point in time, no I wasn't aware of any practice. I think it was probably an odd inspection for someone to put their hand up and say ‘Please inspect my property for compliance’ and then maybe not follow it through or contact council afterwards. I thought that was different to the normal inspection that an officer would undertake. Our process

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<sup>50</sup> Transcript, page 293

<sup>51</sup> Transcript, page 294

today is to treat everything exactly the same and place a date in it and put into an electronic management system.’<sup>52</sup>

- 6.7. Mr Shillabeer gave evidence in some detail about the procedures in respect of processing inspection records where there was non-compliance. He spoke of the documentation being placed in a folder. He explained as follows:

‘Given the number of inspections that were being undertaken for pools during that period of time, I believe the inspection had just been - had been pushed back. It was in a pile, I understand, within the, you know, the - for that suburb and then the surrounding suburbs. They went by, you know, sort of Salisbury North, Salisbury Downs, Paralowie. They went through sort of by sections and obviously the officers haven’t gotten back to reinspecting it.’<sup>53</sup>

Mr Shillabeer acknowledged that there had been no method of tracking or prioritising cases. Suffice it to say, at the time with which this inquest is concerned the Council’s processes were rudimentary, ad hoc, unsophisticated and less than reliable in terms of whether or not a non-compliant pool would ever be followed through for rectification and re-inspection. As a measure of this, when asked as to how the Council would have known that even if a completion date had been stipulated and as to whether it had gone by, Mr Ryan said ‘*I’m not 100% sure*’<sup>54</sup>.

- 6.8. Mr Shillabeer was asked this question by me:

‘Q. I mean if someone before 11 January 2016 had come across Mr Ryan’s document, noted that the inspection had occurred in November of 2014, noted that there was no completion date filled in and established that the occupier had not phoned back, what should have happened.

A. I believe a subsequent inspection should have happened.’<sup>55</sup>

- 6.9. Interestingly, Mr Shillabeer told the Court that even if Mr Ryan had placed a completion date on the document, there still may not have been any follow-up by 11 January 2016. When asked as to whether the absence of a completion date therefore may not have made any difference to the outcome in this case, Mr Shillabeer said ‘*possibly not*’<sup>56</sup>.

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<sup>52</sup> Transcript, page 360

<sup>53</sup> Transcript, page 365

<sup>54</sup> Transcript, page 367

<sup>55</sup> Transcript, page 367

<sup>56</sup> Transcript, page 371

- 6.10. Mr Shillabeer described newer procedures that the Salisbury Council has adopted since 2016 that have included computerisation of records that by way of email would alert a relevant officer of the Council to the fact that a completion date had passed. As well, the original inspector of the property would be expected to execute the follow-up. Mr Shillabeer asserted that at the time with which this inquest was concerned there would have been no personal obligation on Mr Ryan to have followed up his original inspection.
- 6.11. Mr Alan Taylor was called to give oral evidence. Mr Taylor was employed by the Salisbury Council as Manager of Development Services from approximately 2006 to late in January 2016. Mr Taylor also gave oral evidence about Council procedures. I do not need to go into minute detail in respect of his evidence, but it was clear to me from his evidence and that of Mr Shillabeer, and it is not in any sense disputed, that at the time with which this inquest is concerned the Council had an obligation to act where it came into knowledge of a pool's non-compliance. Mr Taylor agreed with that proposition and said:

‘In the sense of a follow-up inspection or a follow-up call or something of that nature. There was obviously a factor of degree in there, in which case, you give people time to undertake the works, ask them to contact you and let you know, but then the next step would be the council initiating action.’<sup>57</sup>

He agreed that Council could not lawfully ignore a continued and persistent instance of non-compliance and that it would have to act<sup>58</sup>. Mr Taylor also agreed that not only could non-compliance not be lawfully ignored, it would have to be followed up in some way or another<sup>59</sup>. In particular, Mr Taylor said that in respect of the Luong swimming pool and Council becoming aware on 18 November 2014 that it did not comply, the legal obligation was for Council to conduct a follow-up inspection. He said:

‘In this case, there’s no doubt, so how do they know when they have to do it, and there was no contact to tell us any of the works had been completed, and from what I understand, there was no council- initiated follow-up inspection.’<sup>60</sup>

Mr Taylor was of the view that the inspection record relating to that premises had not been completed properly because there was no completion date written on it<sup>61</sup>.

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<sup>57</sup> Transcript, page 466

<sup>58</sup> Transcript, page 466

<sup>59</sup> Transcript, page 467

<sup>60</sup> Transcript, page 468

<sup>61</sup> Transcript, page 470

6.12. In my view the lack of any follow-up of the Luong pool was an egregious oversight.

**7. The affidavit of John Ivor Harry**

7.1. Mr Harry is the Chief Executive Officer of the City of Salisbury Council. Mr Harry provided an affidavit that explained the Council's current system for ensuring that non-compliant pools in the Council area are identified, processed and followed up and enforced.

7.2. The system that he described is entitled Pathway. The system as he described it is a far cry from, and a recognisable improvement on, the system that involved simply putting pieces of paper in a folder and hoping that someone will see them again. The software is capable of listing swimming pool safety barrier inspections that Council officers can use to directly access inspection records. As well, it can enable the active monitoring of the status of outstanding swimming pool inspections. There are other functions.

7.3. The Pathway system deals with a number of inspection scenarios. The only scenario that this inquest is concerned with is where the Council have, through an inspection, identified non-compliant features of a pool, in particular in relation to pool barriers and fencing. The system appears to have as its basis the need for the building officer who is tasked to perform an inspection to follow through on that inspection and not rely on another officer taking up that task. If a swimming pool is non-compliant a follow-up action is retasked to the building officer and the property remains in that person's digital task list. The inspection tasks are listed by date and the swimming pools that have exceeded the established completion dates are highlighted as actionable within Pathway. The building officer is then tasked with re-inspecting or contacting the property owner to establish any valid reason for the delay and to reassess the issue accordingly. Pathway acts as an inspection management system and drives building officers' awareness including that pertaining to any required follow-up inspection.

7.4. The affidavit of Mr Harry also deals with some enforcement issues. As part of the relevant strategy, a property owner is made aware of a non-compliance and is provided with an opportunity to rectify the situation with an agreed timeframe. I understand that the whole system is dependent upon avoiding open-ended timeframes for completion or rectification such as was the case with the document that was provided by Mr Ryan to Mrs Luong.

7.5. The affidavit of Mr Harry also refers to the State Government of South Australia having proposed reforms with respect to providing a more uniform standard by which Councils in South Australia will facilitate inspection requests and conduct building inspections including of swimming pools. This is a measure that I had contemplated making the subject of recommendation. It seems to me that there are many lessons to be learnt from this inquest and that the Salisbury Council in particular has taken steps to ensure that the lessons learnt have been put into practical applications. There is a strong case for saying that the other Councils and local government bodies should follow suit.

## **8. Alterations in Departmental practices since Crystal's death**

8.1. I have already referred to the evidence of Ms Van Schaik, the scheme manager for family day care within the Department. Ms Van Schaik gave oral evidence concerning changes that have been undertaken within the Department in respect of accreditation of premises for family day care and in relation to registration of educators. Ms Van Schaik told the Court that since Crystal's death it is now a requirement for the Department's purposes that any premises that will be used for family day care purposes and which has a pool will require a certificate from an approved authority to the effect that the pool complies with the relevant safety requirements, and comply as if the pool was a new pool<sup>62</sup>. She told the Court that the certificate might come from a Council or from an approved pool inspection entity. In addition, the Department officers responsible for inspection of premises still are required to complete pool safety checklists and to continue to engage with educators about their responsibilities in respect of water hazards and their prevention and mitigation<sup>63</sup>. I have already referred to the fact that at the time with which this inquest is concerned the Department did not request any such certification.

8.2. Ms Van Schaik also gave evidence about the fact that pool inspections are now conducted with better notation practices and with the taking of photographs.

8.3. Accordingly, in my view it has not been necessary for this Court to make any recommendations in respect of action that might have needed to be taken by the Department for Education.

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<sup>62</sup> Transcript, page 310

<sup>63</sup> Transcript, page 338

## **9. Conclusions**

9.1. There were a number of opportunities to have prevented Crystal Trinh's death including:

1. If the double gates had been replaced with rigid fencing or, if feasible, had been fitted with a reliable self-closing and self-latching mechanism, Crystal could not have accessed the pool area.
2. If Mr Ryan of the Council had specified a completion date for the rectification of the double gates it is possible that Mrs Luong would have felt under greater pressure to have attended to the work that was required to render the gates as compliant.
3. If the Council had proper and reliable systems in place to ensure that pool inspections that had identified non-compliant features were followed up, the non-compliant features of this pool would have been followed up and greater pressure would have been placed on Mrs Luong to attend to the necessary work.
4. If the Council had followed up its identification of the non-compliant features of the double gates, had insisted on rectification and had activated enforcement if necessary, it is likely that the non-compliant features of the double gates would have been rectified.
5. If Department officers in assessing whether the pool and its appurtenances complied with the necessary safety requirements for accreditation as a family day care facility had drawn to the attention of the relevant accrediting officer or officers the fact that the double gates were non-compliant and that the relevant accrediting officer or officers had insisted on rectification prior to accreditation, the Luong premises could not have been accredited as a family day care facility and Mrs Luong could not have been registered as an educator. However, it cannot be known with certainty whether Mrs Luong would have persisted in her application for accreditation and registration. What can be said is that in order for her to have persisted in her applications she would have needed to attend to the necessary rectification work in respect of the double gates.
6. If the Department had insisted on sighting evidence from the Council as to whether or not the pool had passed the Council pool inspection, the non-compliant features

of the double gates would have been made known to the Department and Mrs Luong's application would have been managed in light of those facts.

**10. Recommendations**

- 10.1. Pursuant to section 25(2) of the Coroner's 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. The following recommendations are directed to the attention of the Chief Executive Officers of all Local Government bodies in South Australia and to the Board of Directors of the Local Government Association of South Australia.
- 10.3. The Court makes the following recommendations:
1. That these findings be made available to the Chief Executive Officers of all Local Government bodies in South Australia and to the Board of Directors of the Local Government Association of South Australia. I so direct.
  2. That the steps taken by the City of Salisbury in relation to remedial measures following the death of Crystal Trinh be drawn to the attention of Chief Executive Officers of all Local Government bodies and to the Board of Directors of the Local Government Association of South Australia. In particular the affidavit of Mr John Ivor Harry should be made available to those entities. I so direct.

*Key Words: Child; Drowning; Hypoxia*

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

*Seal the 15<sup>th</sup> day of May, 2020.*

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*Deputy State Coroner*