IN THE CORONERS COURT
OF VICTORIA
AT MELBOURNE

Court Reference: 3158 / 2009

RULING ON APPLICATION TO VACATE SUPPRESSION ORDERS

I, JUDGE IAN L GRAY, State Coroner, in respect of the investigation into the:
death of Margaret Burton make the following ruling:

Background

1. On 6 March 2013, I signed non-publication (suppression) orders in respect of two documents:-
   - 'Consolidated responses to reviews of offenders charged with murder', dated May 2012, by Corrections Victoria Strategy and Forecasting Branch (the Response Document);
   - 'Review of Parolee re-offending by way of murder', dated 2 September 2011 by Professor James Ogloff and Office of Correctional Services Review, (the Ogloff/OCSR document).
2. The orders were made pursuant to s.73(2) of the *Coroners Act 2008*.
3. The suppression of the documents was the subject of submissions at a Directions Hearing on 1 March 2013. At that hearing, I referred to being able to "review the orders later if I need to.." and making the order to, "create a secure position".[1] The orders articulated on 1 March 2013 also cover the Sentencing Advisory Council (SAC) Review of the Victorian Adult Parole System, which was in fact published in 2012, and therefore excluded from my signed order dated 6 March 2013.
4. The Herald and Weekly Times Ltd (HWT) has applied to lift the Suppression Orders. The Department of Justice (DoJ) opposed the application. Three families to whom I gave leave to appear at the Burton inquest supported the application.

The documents

5. There are two documents in question: the first is titled "Consolidated Responses to Reviews of offenders charged with murder" (Response Document). It was prepared by the Strategy and

[1] Transcript of Directions Hearing, page 6.24

Forecasting Branch of Corrections Victoria. It is dated 11 May 2012. At the foot of the front page of the document are the words "Final Restricted Release", and at the foot of each page the words "Restricted Release, Security in Confidence". (None of these expressions were referred to in the submissions on the application to lift the Suppression Order).

6. The second document is titled "Review of parolee re-offending by way of murder". The authors are Professor James Ogloff and the Office of Correctional Services Review (OCSR). It is dated 2 September 2011. At the foot of each page are the words "Staff in Confidence".

7. At the inquest Mr Rod Wise, Deputy Commissioner Operations, Corrections Victoria (CV) gave evidence relating to the intended purpose and use of the documents and claimed public interest immunity in respect of them. I will refer later to his evidence.

The Response Document

8. The introduction to the Response Document refers to reviews commissioned in response to "concerns raised in the media in relation to the management of parolees, in particular offenders alleged to have committed murder between 1 July 2008 and 17 November 2010". It describes the reviews as:

   - A state-wide intensive case management audit of existing violent offenders on parole (otherwise referred to in the document as an internal audit/case management review).
   - A review of eleven offenders alleged to have committed murder whilst under the supervision of Community Correctional Services (CCS), conducted by Professor James Ogloff and the OCSR.
   - A Victorian Police review of four persons who came to the attention of police between the time they commenced parole and were arrested for murder.
   - A fourth report on the John Coombs case was also reviewed although this is not strictly relevant for my purposes.

9. The introduction sets out the eight "key themes" identified in the reviews and referred to the fact that in addition to the reviews the Attorney General requested the Sentencing Advisory Council (SAC) to review the legislation and statutory framework relating to adult parole in Victoria. That report was published on 23 March 2012.

10. The second last paragraph of the introduction to the Response Document states: "In January 2012 the State Coroner, Judge Jennifer Coate, advised that she was soon to commence hearings into a number of matters relating to cases that were likely to have been addressed by the four reviews. The Coroner's Registrar subsequently requested a "written summary of [the] inquires" by 30 March 2012 (unless an extension is granted). Following discussions with the Commissioner, CV, the Coroner granted an extension to 11 May 2012.

11. The last paragraph states: "This Report consolidates information relating to the background and context of each of the reviews."

12. I infer that the Response Document dated 11 May 2012 is the response to the then State Coroner's request. In any event, it was provided to the Court and incorporated in the inquest brief in this inquest.

13. The Response Document:

    a. contains a very useful summary of the various reviews. For each review, it outlines the terms of reference, key findings, outcomes and recommendations;

    b. under the heading "Consolidated Action Plan", sets out the governance structure for the management of actions resulting from recommendations and process for validating those actions;

    c. under the heading "Key Themes", deals in summary with issues identified under the eight key themes:-

        - Communication, information and intelligence sharing
        - Assessment and identification of risk
        - Case allocation and CCS Supervision
        - Governance arrangements and senior oversight
        - Offending behaviour programs and other treatment intervention
        - Actively managing order compliance and reporting to APB (with particular focus on drug testing
        - Strengthening operating guidelines and staff training
        - Family violence and intervention orders.

14. The most important of the key themes in this inquest was Risk Assessment (VISAT). The Response Document lists six "primary issues" identified by the reviews on this topic.

15. Recommendations are set out under each Key Theme. Attachment 1 to the response document lists each recommendation flowing from the four reviews.

16. The Response Document does not deal explicitly with individual offenders (except Mr Coombs), or case details. It does not reveal confidential personal details of prisoners or parolees. It does not reveal internal CV or parole system processes or procedures, which could be properly described as highly sensitive from a security point of view.

17. A total of 66 recommendations were made as a result of the combined reviews.

18. Mr Wise gave evidence that as of 12 November 2012, 49 of those recommendations had been fully implemented, and 17 partly implemented. Before the close of evidence in the Inquest, he updated that data with his undated supplementary statement tendered on Friday 1 August 2013 as exhibit 22, which stated that as of that date, 56 of those recommendations had now been fully implemented, and only 10 remained partly implemented

19. On the same day, he also provided Exhibit 22 , being his list of 31 recommendations from the Consolidated Action Plan which had been implemented by CV thus far.

The Ogloff/OCSR Review of parolee re-offending by way of murder

20. This document is itself covered in part by the review contained within the Response Document. It contains a preamble, an executive summary, a summary of recommendations, an introduction, a background, terms of reference and a description of issues excluded from the review. It sets out the qualifications of the reviewers, the work of the OCSR, the review methodology and a description of the operation of the parole system in Victoria. Having done a detailed analysis of the cases of eleven individuals, it then deals with "Trends emerging from the case study analysis". The document then consists of a combination of individual analyses and general commentary. The individuals are de-identified although it has been put to me and I accept that some, if not all, would be identifiable by those with sufficient corroborative information. The more general commentary throughout the document deals with "emerging themes", issues and recommendations, and is in parallel terms to those of the overarching Response Document. Again, a key aspect of the document relates to the risk

assessment issue under the heading "The Use and validity of the VISAT". This issue and the family violence issue are relevant to this inquest.

21. Ultimately I have reached the conclusion that information identifying, or potentially identifying, specific prisoners or parolees, or public servants should not be released. The more general parts of the report in my opinion should be released, and it is appropriate for the recommendations (also covered by the Response Document) be released.

The Legal Argument

22. s.73(2) of the *Coroners Act 2008* provides:-

> *A coroner must order that a report about any documents, material or evidence provided to the coroner as part of an investigation or inquest into a death or fire is not to be published if the coroner reasonably believes that publication would –*
>
> *(a) be likely to prejudice the fair trial of a person; or*
>
> *(b) be contrary to the public interest.*

24. The central question is what is the "public interest" in this case. HWT contends that "open justice" is the relevant and paramount public interest. The DoJ contends that the relevant public interest is the protection of certain high level government documents from public release under the doctrine of Public Interest Immunity (PII).

25. I accept that s.130 of the *Evidence Act 2008* applies (strictly by analogy, since the HWT application to lift the suppression order was made in anticipation of the tender of those documents, which tender would then, by virtue of section 58 of the *Coroners Act*, then apply s.130 of the *Evidence Act* to the documents) in determining where the public interest lies in this case. By reference to s.130, the question is whether the public interest in admitting into evidence information or a document that relates to matters of State is out weighed by the public interest in preserving secrecy or confidentially in relation to the information in the document. The section deals with admitting documents into evidence. Both documents in question are in the inquest brief but not yet formally admitted into evidence.

26. s.115 of the *Coroners Act 2008* provides:-

> 115 Access to documents
>
> (1) Unless otherwise ordered by the coroner, the principal registrar must provide-

(a) the senior next of kin of a decease person with any reports given to a coroner as result of a medical examination performed on the deceased;

(b) an interested party with a copy of the inquest brief.

(2) A coroner may also release a document to-

(e) any person if the coroner is satisfied that the release is in the public interest;

27. The question in the case then is:

a. whether the Suppression Orders should be maintained because the public interest lies with suppression on the grounds of PII; or

b. whether the orders should be lifted because the public interest lies in release of the documents to serve the principle of open justice.

28. Counsel for HWT, Mr Quill (and for DoJ, Mr Brown) canvassed the authorities thoroughly. Mr Brown relied on Mr Wise's evidence as to the purpose and use of the documents.

29. Mr Wise gave the only oral evidence on the issue and was un-contradicted. I accept his evidence.

30. In his statement (Exhibit 18) Mr Wise referred (at paragraph 10) to additions to the Deputy Commissioner's Instructions (DCI's) and said "these additions to the instructions were made following recommendations from reviews into the management of serious violent offenders on parole (the recommendations). In his statement (at paragraph 12) he said "the recommendations are subject to ongoing review and are ongoing working documents over which public interest immunity is claimed".

31. Public interest in the issue of murders committed by parolees, and parole generally, is high. It is fair to say that it is a matter of intense current interest in Victoria.

32. There is a competing public interest in maintaining a system in which senior advisors to government are able to give "frank and fearless" advice and do not feel constrained or stultified in doing so because they believe the documents or reports they write, or the recommendations they make to Cabinet or to other levels of government, will be released to the public. These are the two competing public interests. In the *Tatts* case[2], a claim of immunity was made over Cabinet documents in the context of civil litigation discovery. The plaintiff sought to inspect the defendant's discovered documents. The documents were the

[2] *Tatts Group Limited v State of Victoria* [2013] VSC 301.

subject of a PII claim relating to a class of documents described as "Cabinet documents". This description covered documents:

a. submitted to and considered by Cabinet or a Cabinet committee;

b. revealing the decisions of Cabinet or a Cabinet committee;

c. prepared by a department for the purposes of assisting in the deliberations of Cabinet or a Cabinet committee;

d. brought into existence for the purpose of preparing submissions to Cabinet or a Cabinet committee; or

e. which recorded the proceedings of Cabinet.

33. In addition, other documents were claimed under the same immunity on the basis that they included sensitive and high level advice between senior public servants and other public servants and Ministers regarding formulation of government policy and/or the briefings and submissions to Ministers or Cabinet.

34. By reference to Mr Wise's evidence, the claim made in this case would fall under one or more of those categories – where documents have been prepared for Cabinet and where they have been prepared for the purposes of high level policy advice.

35. In relation to the Response Document, Mr Wise said "part of it" has been given to Cabinet. He did not specify which part. He also said the document has been used to prepare submissions to Cabinet. In relation to the Ogloff/OCSR document he was not sure whether it had gone to Cabinet or been used for a Cabinet purpose but did say the Department (I presume CV within the DoJ) used it for policy development.

36. In light of the authorities (reviewed thoroughly by Sifris J at [27] – [36] of the *Tatts case*), the evidence of Mr Wise as to the purpose and use of the documents leads me to conclude that the DoJ is entitled at least *prima face* to claim PII in respect of them.

37. However that is not the end of the analysis. Section 130(4) of the *Evidence Act 2008* provides:

> *Without limiting the circumstances in which information or a document may be taken for the purposed of subsection (1) to relate to matters of state, the information or document is taken for the purposes of that subsection to relate to matters of state if adducing it as evidence would -....*

(f) prejudice the proper functioning of the government of the Commonwealth or a State.

37. Would such prejudice occur if I lifted the Suppression Order? On that point Mr Wise's evidence was, in essence that the government depended on unconstrained advice from its public servants in developing policy; that it is undesirable for public servants to be inhibited from contributing to that policy development, and that without confidentiality "we'd get worse policy..." "..not good policy". Interestingly there was no evidence that any public servant has in fact felt constrained, inhibited or stultified in giving high level policy advice or preparing documents for Cabinet or other use as a result of the publication of the SAC report (which deals with parole issues, including risk assessment issues in detail, although from a different perspective and without case specific details).

38. In the language of s.130 (4), I am not satisfied that releasing the Response Document and the Ogloff/OCSR document (other than redacted parts),"would prejudice the proper functioning" of the Victorian Government.

39. In my opinion, the content, structure and the way they are written, make it highly improbable that a public servant would be constrained in the future from giving high level policy advice on the issues covered in the documents, if they are released. More importantly, the public interest in the issues covered in the documents is very high and the release of the documents to the public is likely to have a positive affect. It would have the potential to reassure the public that as a result of the reviews of parolee murders, a number of important steps have been taken by relevant authorities to enhance public safety by making changes to aspects of the correctional services system applicable to parolees. I have referred earlier to the number of recommendations already implemented. It seems axiomatic to me that it is in the "public interest" for the public to know about the measures taken to implement the recommendations. In this context, I note Ms Brennan's submission on the positive affects on effected families of being able to read the documents.

40. The public interest in release of the documents clearly, not narrowly, outweighs the public interest in maintaining the Suppression Orders. The open justice principle should prevail. However, I will remove the references to the individual case in the Response Document and the individual identifying information in the Ogloff/OCSR document, which in my view could identify individual parolees or prisoners.

41. Pursuant to s.73(2) of the *Coroners Act 2008*, I am not satisfied that maintenance of the Suppression Orders is in the public interest, in other words that publication of the documents

(other than the redacted parts) would not be contrary to the public interest. Put in the positive, I am satisfied that it is in the public interest for the documents to be released (apart from the redacted parts).

42. On the day I publish my reasons, I will hear the parties on the precise terms of the order and the appropriateness of any stay.

Signature:

Judge Ian Gray
State Coroner
Date: **13 August 2013**