IN THE CORONERS COURT
OF VICTORIA
AT MELBOURNE

Court Reference: 1974/10
1975/10

RULING in the matter of applications under Sections 77(1) and 52(5) of the *Coroners Act 2008* (Vic) concerning the deaths of Steven Tynan and Damian Eyre

Background

1. On 11 October, 1988 members of Victoria Police shot dead Graeme Jensen as they attempted to arrest him at a shopping centre in Narre Warren. Graeme Jensen was a very close friend of Victor Peirce (now deceased).

2. About thirteen hours after Graeme Jensen was shot dead by Victoria Police, around 4:30 am on the morning of 12 October, 1988, a resident of Walsh Street South Yarra reported to Victoria Police that a car was apparently abandoned in the street with the bonnet raised, the driver's door open and the rear passenger side vent window smashed.

3. A few minutes later the call was dispatched to a police car attached to Prahran police station. In that car were Constables Steven Tynan aged 22 and Damian Eyre aged 20. Both young men were ambushed and shot dead as they attended to that vehicle in Walsh Street. Both young men had gone to the scene in the course of their duties as serving members of Victoria Police. The vicious and calculated killing of these young police members has left scars in many places. No doubt, none so deep as in the hearts and minds of their families and their working "family" of Victoria Police members.

4. Shortly after these killings, four men were arrested and charged. Victor Peirce, Peter McEvoy, Anthony Farrell and Trevor Pettingill were charged with the

murders of Constables Tynan and Eyre. (Jason Ryan was also charged but those charges were later withdrawn).

5. Ms Wendy Peirce was the partner of Victor Peirce at this time and had two children to him. Over the next couple of years, Ms Peirce made a number of statements to Victoria Police touching upon these killings and other criminal activities of Victor Peirce. Ms Peirce gave varying accounts both in those statements and later in courtrooms about what she allegedly knew about the involvement of Victor Peirce and others in the killings of Constables Tynan and Eyre.

6. **On 9 November 1988**, Ms Peirce made a hand written statement of 20 pages during an interview with Victoria Police member Jim Conomy at her home. In that statement she stated that on the evening of 10 October, 1988 Victor Peirce had received a threat on his life which caused the family to relocate to a motel room on that night. She stated that she and Victor had stayed together at that motel room and that Victor had remained in the room throughout the whole night. In other words she provided a complete alibi to Victor Peirce for the period during which Constables Tynan and Eyre were killed. Ms Peirce gave considerable detail in this statement about how frightened Victor was of the death threat and about the details of the motel room that they were in and how and why they got to be there.

7. **On 16 July, 1989** Ms Peirce entered the witness protection scheme.

8. **On 18 July, 1989** Ms Peirce made a statement at St Kilda Road police station. In that statement Ms Peirce acknowledged that her statement of November 9, 1988 had some parts in it that were not correct. In particular, Ms Peirce stated that Victor was absent from the motel room "for most of the night until the morning" of 12 October, 1988. In that same statement Ms Peirce went on to explain her reason for making a false statement about Victor's movements that night was her fear of repercussions from both Victor and his violent criminal family. Ms Peirce

put a great deal of detail into that statement about numbers of firearms and ammunition that were always available to Victor, about Victor's deep hatred of police and his strong friendship with Graeme Jensen. Ms Peirce stated that she had provided numerous false alibis for Victor in the past out of fear of him mixed with loyalty. She stated that in her previous statement she had done what Victor had asked of her by providing a false alibi. She stated that she feared Victor would kill her if she did not do this. In this statement Ms Peirce said that Victor left the motel room at about 11.30 that night and did not return until daylight the next morning.

9. Ms Peirce stated that the reason she was making the statement was to make a break from Victor Peirce for her children's sake and to go into witness protection. She stated "I know I have given a false alibi and I believe for once in my life I must tell the truth concerning the events surrounding the events of October 1988." Ms Peirce expressed a wish to tell the truth to endeavour to win the respect of her family, whilst stating her fear for her life from Victor and his family.

10. **On 21 August, 1989** Ms Peirce made another statement to the police whilst still in the witness protection program. In that statement she explained that in or about March of that year, she had been approached by a journalist from Channel 7 to participate in a story about Victor Peirce. Ms Peirce described her participation in the interview both outside Pentridge and at her home. She stated that she participated in this interview proclaiming Victor's innocence because Victor told her to do so.

11. Over the period that Ms Peirce was in witness protection, she made a number of statements about the criminal activities of Victor and his associates and his family. In a number of these statements Ms Peirce gave details of some serious crimes involving Victor and his associates including Peter McEvoy and Graeme Jensen. Ms Peirce identified firearms and photos of various pieces of captured security footage from armed robberies on banks.

12. **On 26 October, 1989**, Ms Peirce participated in a videoed interview with Colin McLaren of Victoria Police. In that interview Ms Peirce confirmed that as at the 16 July 1989 she had come into the witness protection scheme with her three children. She confirmed that she had made a number of statements to the police during the months she had been in witness protection, about Walsh Street and other offences including armed robberies, but that she wanted to add some information to the statements that she had already made. She confirmed how upset they had all been then when they heard the news of the death of Graeme Jensen the night he died. She confirmed her own hatred of police at that time and further confirmed that she had been in a sexual relationship with Graeme Jensen at the time that he was shot and killed by police. She stated that Victor had tears in his eyes from anger the night that Graeme was killed and Ms Peirce said he stated his intention to go out and kill police that night. Ms Peirce went on to state that Victor made a phone call to Peter McEvoy that night in which she heard Victor say that they would kill the police that killed Graeme.

13. She also added onto her previous statement wherein she had confirmed that Victor did not spend the night with her at the motel, that when Victor returned in the morning he told her that they had killed two policemen. She said she asked Victor where, and he stated "South Yarra". She also stated that she asked Victor who did the Walsh Street killings and he said Jedd Houghton, Gary Abdullah, Peter McEvoy and himself.

14. The police asked Ms Peirce why she had not given them this information before. She stated that she was petrified then because she thought she would be charged with murder as an accessory. She stated that now that the committal proceeding was coming up shortly; she wanted to get this information to the police and "off her chest".

15. On **27 October, 1989**, at St Kilda Road police station Ms Peirce participated in a further tape-recorded interview with Detective Inspector John Noonan and Senior Constable Caulfield from the Homicide Squad. Ms Peirce reiterated, in considerable detail, all of the people gathered together the night of 11 October, 1988 when they were made aware of Graeme Jensen's death. She described a scene where everyone was yelling and screaming and stated that there were discussions about going out to kill police that night. She stated that Victor told her he was going out to get a gun and kill the police that killed Graeme.

16. She added in this statement that upon Victor's return to the motel the next morning he told her that they had killed two police and she asked him who he had done it with. In this version of her statement Ms Peirce said it was "Jed and Macca". Later in this long statement of 27 October, in which Ms Peirce is questioned extensively about who else may have been involved, she then said that Victor had told her that it was him and Jed and Abdullah and "that was all".

History of criminal proceedings

17. Committal proceedings on the murder charges against the four men commenced in the Magistrates Court. During those committal proceedings, Ms Peirce was called to give evidence on **8 and 11 December, 1989.**

18. During her sworn evidence at committal she stated that her 9 and 10 November, 1988 statements wherein she had given Victor an alibi were not true. She stated that her 21 August, 1989 statement was partly true and that her October statements as set out above in summary were true.

19. In 1990, following that hearing in the Magistrates' Court, all four defendants were committed for trial on charges of murder.

20. During the pre trial stages, Ms Peirce was called to give evidence in the Supreme Court. On 21 January, 1991, at a *voir dire* (pre trial hearing) prior to empanelment

of the jury, before the Honourable Justice Vincent, Ms Peirce recanted her statements implicating her husband and others in offending involving firearms.

21. She stated that when she was interviewed by the police, firearms were brought into her and she was told by the police what to identify. Contrary to what she had said in her 1989 statements to police, she stated in evidence in the Supreme Court that she had **not** seen guns at her home and she had **not** seen Victor handling guns as she had described in the statements. She also stated that the photographs that she had previously identified, she could **not** identify. She stated that she had been told by police what to say and that is what she did.

22. Justice Vincent gave Ms Peirce a robust caution about her right to remain silent given that she appeared to be possibly exposed to a perjury charge as a result of her evidence in the Supreme Court. Ms Peirce stated that not only did she understand that, but that she had "nothing to hide". She stated to His Honour, "*I am up here to tell the truth because my husband is an innocent man and I can't tell lies and I can't stand this any longer*".[1]

23. His Honour suggested she should obtain some legal advice about her position, which she did. When she returned to the witness box, she stated that she had been told by the police what to write on the photographs identifying Victor at various bank robberies.

24. Ms Peirce was charged with perjury. On November 26, 1992, Ms Peirce was found guilty by a jury in the County Court of one count of perjury. The perjury appears to have arisen out of Ms Peirce's evidence she gave on the *voir dire* at the trial of Messrs Peirce, McEvoy, Farrell and Pettingill in the Supreme Court on 21 January, 1991. On 4 December 1992, in the County Court, Ms Peirce was sentenced to 18 months' imprisonment with a non-parole period of nine months on that count of perjury. During the plea hearing in the wake of that conviction,

His Honour Judge Ross heard evidence from Det Insp John Noonan that he had learned that Ms Peirce had written to the solicitors for Victor stating that she would **not** be giving evidence helpful to the police when the matter came on for trial.[2] As a result, His Honour found that the perjury committed by Ms Peirce was pre-meditated. His Honour found that Ms Peirce committed perjury knowing that the perjured evidence had a material connection with the Walsh Street murder trial and His Honour stated that he found no evidence of remorse from Ms Peirce for this perjury.

25. Further, in his sentencing remarks, His Honour Judge Ross summarised some of the evidence of Det Insp Noonan as to the pre-meditated nature of the perjury. His Honour set out that Det Insp Noonan told Judge Ross, after learning of the information about Ms Peirce's intention **not** to assist police at the trial, stated that he questioned Ms Peirce about this, asking her if she was intending to give evidence at the trial inconsistent with what she had said at committal. Det Insp Noonan's evidence to Judge Ross was Ms Peirce said that was "utter rubbish" and she certainly would not be doing that.

26. The prosecution made a decision not to call Ms Peirce at the Supreme Court murder trial before the jury. On 26 March, 1991, all four accused were found not guilty of the murders by the jury.

History of coronial investigations

27. The deaths of Constables Tynan and Eyre were reported to the coroner as they constitute reportable deaths. As is the usual practice in the coronial jurisdiction, where a death reported to the coroner is a suspected homicide, the primary investigation will be undertaken by the police and the coronial investigation suspended until any criminal proceedings arising from the death are completed. The deaths of Constables Tynan and Eyre had been reported to the Coroner. On

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[1] Transcript of Voir Dire P 249
[2] Sentencing remarks of Judge Ross County Court 4 December 1992

14 November, 1995, having investigated the deaths of Constables Tynan and Eyre without holding an inquest, and in the context of the criminal trial process having been completed, the former State Coroner, His Honour Mr Graeme Johnstone made a Record of Investigation Into Death in respect of each of Constables Tynan and Eyre.[3] His Honour Mr Johnstone made brief findings concerning the identity of the Constables Tynan and Eyre and the circumstances surrounding their deaths.

28. On 17 July, 1996, Frank and Carmel Eyre (the parents of Constable Eyre) and Kevin and Wendy Tynan (the parents of Constable Tynan) wrote to His Honour Mr Johnstone requesting that he conduct an inquest. On 8 August, 1996, His Honour Mr Johnstone wrote to Mr and Mrs Tynan and Mr and Mrs Eyre advising of his decision to refuse their application and of his reasons for that decision.

29. In 1 October, 2005, an article in *The Age* reported an interview with Ms Peirce. (By that time, Victor Peirce had been shot dead in Bay Street, Port Melbourne, on 1 May, 2002.) The article reported, among other things, that Ms Peirce had said that:

    a) "she lied to save her husband from a life in prison";

    b) he "was guilty as charged";

    c) "the murders ... were carried out as a payback after detectives killed [Victor] Peirce's best friend, Graeme Jensen";

    d) "the shooters [were] Jedd Houghton, who was later shot dead by police, and Peter McEvoy"; and

    e) "she had finally decided to tell the truth because she wanted to sever all ties with the underworld".

30. On 3 March, 2006, by way of a written submission, renewed applications were made to His Honour Mr Johnstone, by David Galbally QC and Anthony Thomas of Counsel (instructed by Brown & Co., Solicitors) on behalf of the families of Constables Tynan and Eyre, that there be an inquest. By letter (dated 9 October,

[3] See s 20 of the *Coroners Act 1985* (Vic).

2006), Paul Mullet, the Secretary of the Police Association of Victoria, supported the applications. Reliance was placed principally on the article about Ms Peirce in *The Age* on 1 October, 2005. His Honour Mr Johnstone was also given numerous police statements made by Ms Peirce and extracts of the transcript of Ms Peirce's evidence at the committal hearing in the Magistrates' Court in December 1989 and the trial in the Supreme Court in January 1991. On 7 May, 2007, His Honour Mr Johnstone refused the application for an inquest and published his reasons for that decision.

31. On 5 February, 2010, whilst police were in the course of a search of premises in Lambton, in New South Wales, Peter McEvoy, happened to be present at those premises. The evidence is that Mr McEvoy endeavoured to intervene in the police search of those premises, approached the police conducting the search and began to abuse them. In the course of this exchange, it was alleged by police that Mr McEvoy made statements which amounted to admissions to his involvement in the killing of Constables Tynan and Eyre. These alleged statements became public in the course of criminal proceedings in court in NSW against Mr McEvoy for hindering police during their search of those premises. Mr McEvoy was charged with and convicted of offences of offensive language and hindering police as a result of his behaviour during that search. On 8 June, 2010, he was sentenced to a term of imprisonment. The search had been recorded by police on a video camera.

32. Under cover of a letter of 2 July, 2010 from Victoria Police, I was provided with material relating to this incident, including a DVD recording (audiovisual) of the search and three statements from police officers involved in the search. This material will be discussed in more detail below. At present, it is sufficient to note that, in the course of his abuse of the police, Mr McEvoy made several references to the Walsh Street murders and to Det Insp John Noonan, the senior investigator in the matter. Further, as will be seen below, it has been reported that Mr McEvoy said to the police that day "*the sweetest thing I ever heard was the police officer's last words while he was dying*".

33. On 2 August, 2010,Ms Wendy Peirce made yet another statement to Victoria Police member Detective Sergeant Mark Caulfield taken at Port Melbourne. In this statement, Ms Peirce stated that it is her belief that Victor and Jedd Houghton and Peter McEvoy killed Constables Tynan and Eyre. Contrary to previous statements where she has said that Victor told her he did it, in this statement she stated that she did not think Victor had ever directly admitted doing the killing himself but she stated that they had plenty of conversations where "it is obvious he did". She restated that she gave a false alibi for Victor and restated that she gave truthful evidence at the committal. She stated that she got confused whilst in witness protection and once she got a message from Victor that everything would be alright if she got back with him, that is what she did.

34. At some time subsequent to this August 2010 statement, and contrary to its contents and the contents of the interview published in *The Age* in 2005, it appears that Ms Peirce spoke with a journalist again in or around January 2011 indicating that she would not "swear up" to the statement she made on 2 August, 2010.

35. The above is a very brief outline of the background to the present applications.

The present applications

36. I have before me written applications dated 18 May, 2010 and 6 July, 2010 made pursuant to s 77(1) of the *Coroners Act 2008* (Vic) ("the 2008 Act"), to set aside the findings of His Honour Mr Johnstone, made on 14 November, 1995, concerning the deaths of Constables Tynan and Eyre, as well as written applications bearing the same dates, made pursuant to s 52(5) of the 2008 Act, to conduct an inquest into their deaths.

37. The applications are made by David Galbally QC (instructed by Madgwicks Lawyers) on behalf of the families of Constables Tynan and Eyre, and by Gregory Davies, the Secretary of the Police Association of Victoria.

38. The applications are supported by a letter from Bruce McKenzie, the Assistant Secretary of the Police Association (dated 5 May, 2010), a letter from Mr Galbally (dated 3 May, 2010) and a written submission (the "first submission") by Mr Galbally (undated). Annexed to Mr Galbally's first submission are documents labelled A through to T. They include the material before His Honour Mr Johnstone in 2007. In addition, Mr Galbally supplied internet articles concerning Mr McEvoy's utterances in Lambton on 5 February, 2010.

39. It is upon this material these current applications rely. That is, on the utterances allegedly made by Ms Peirce in recent years and the words allegedly said by Mr McEvoy at Lambton on 5 February, 2010.

40. In his first submission, Mr Galbally has set out some of the history of this matter and summarised the new material concerning Ms Peirce and Mr McEvoy, upon which these applications are based. He goes on to submit that a coronial inquest:

    a) may allow a finding as to the person or persons who may have contributed to the deaths of Constables Tynan and Eyre;

    b) would "provide closure to the families of Constables Tynan and Eyre";

    c) would "provide Wendy Peirce with the opportunity to redress her failure to testify at the Supreme Court trial"; and

    d) would "redress an injustice by providing the community of Victoria, the families of Constables Tynan and Eyre and the investigating police officers an opportunity of publicly addressing the 'new evidence' and bringing final closure to these tragic events".

41. In his letter, Mr McKenzie points out that the information concerning Mr McEvoy's utterances on 5 February, 2010 at Lambton have "upset" the families of

Constables Tynan and Eyre and "has caused significant consternation among [police] members who [are] former colleagues of Constables Tynan and Eyre, together with those … who were part of the lengthy and complex investigation into their murders".

42. Mr Galbally submits that an inquest could be "confined" to the taking of evidence relating to the "new" material now available. Similarly, Mr McKenzie submits that, whilst it would be a matter for me, "this inquest need not be unnecessarily lengthy or complex".

The relevant law

43. Section 77 of the 2008 Act provides as follows:

> **77. Re-opening an investigation**
>
> (1) A person may apply to the Coroners Court for an order that some or all of the findings of a coroner after an investigation (whether or not an inquest has been held) should be set aside.
>
> (2) Subject to subsection (3), the Coroners Court may order that –
>
> (a) some or all of the findings be set aside; and
>
> (b) if the Court considers it appropriate, that the investigation be re-opened.
>
> (3) The Coroners Court may only make an order under subsection (2) if it
>
> is satisfied that –
>
> (a) there are new facts and circumstances; and
>
> (b) it is appropriate to re-open the investigation.

(4) For the purposes of an application made under this section, the Coroners Court must be constituted by the coroner who conducted the original investigation unless –

(a) the coroner who conducted the original investigation no longer holds the office of coroner; or

(b) there are special circumstances.

44. Section 52 of the 2008 Act provides as follows:

52. Inquest into a death

(1) A coroner may hold an inquest into any death that the coroner is investigating.

(2) Subject to subsection (3), a coroner must hold an inquest into a death if the death or cause of death occurred in Victoria and-

(a) the coroner suspects the death was the result of homicide; or

(b) the deceased was, immediately before death, a person placed in custody or care; or

(c) the identity of the deceased is unknown; or

(d) the death occurred in prescribed circumstances.

(3) The coroner is not required to hold an inquest in the circumstances set out in subsection (2) if –

(a) the coroner believes the death probably occurred more than 50 years before the death was reported to the coroner; or

(b) a person has been charged with an indictable offence in respect of the death being investigated by the coroner; or

(c) an interstate coroner has investigated, is investigating, or intends to investigate, the death; or

(d) the death occurred outside Australia.

(4) The circumstances set out in subsection (3) do not limit the powers of a coroner to hold, adjourn or recommence an inquest.

(5) A person may request a coroner to hold an inquest into any death that the coroner is investigating.

(6) Within 3 months of receiving a request under subsection (5), the coroner must, in writing, advise the person who made the request that the coroner has –

(a) decided to hold an inquest; or

(b) decided that an inquest will not be held; or

(c) not made a decision as to whether or not an inquest will be held and that the coroner will advise the person of the decision when the decision has been made.

Original coroner to hear application to re-open unless special circumstances

45. Before turning to the test applicable to the applications, I note the general rule provided by section 77(4) that the coroner who conducted the original investigation must determine the applications. This rule applies unless one of two exceptions are met (see s 77(4) and (b)). His Honour Mr Johnstone is currently experiencing ill health and, whilst he does still hold office as a coroner, I am satisfied that his current state of health constitutes 'special circumstances' within the meaning of s 77(4)(b).

46. Accordingly, the exception provided for by s 77(4)(b) is apposite and, what I have referred to as the general rule, does not apply to the present applications. As the State Coroner, I consider that it is appropriate that I determine the applications.

New facts and circumstances

47. Pursuant to s 77(2), I may order (a) that some or all of the findings made by His Honour Mr Johnstone on 14 November, 1995 be set aside and (b), if I consider it appropriate, that the investigation be re-opened. Pursuant to s 77(3), I may only make an order under s 77(2) if I am satisfied (a) that there are new facts and circumstances and (b) that it is appropriate to re-open the investigation.

Holding an inquest

48. The applications for an inquest are brought under s 52(5). Section 52(1) also gives the power to hold an inquest into any death the coroner is investigating. Both provisions require an investigation to be on foot before an inquest can be held. I read the powers in both s 52(1) and s 52(5) as being subject to the provisions in ss 52(2), (3) and (4). If the investigation were re-opened under s 77, s 52(2)(a), standing alone, would make such an inquest mandatory in this case (because I do suspect that the deaths of Constables Tynan and Eyre were the result of homicide). However, s 52(2) is to be read subject to s 52(3). Section 52(3)(b) provides that the coroner is not required to hold an inquest if "a person has been charged with an indictable offence in respect of the death being investigated by the coroner". It might be said that, on the face of it, the language of s 52(3)(b) appears to be confined to cases where there is a relevant charge still on foot at the time of the investigation or where the charge is laid during the currency of the coronial investigation.[4] If that were correct, then it would appear that, as here, where charges have been laid but determined prior to a coroner's investigation being re-opened, a coroner would be compelled to conduct an inquest if the investigation were re-opened pursuant to s 77. However, in my view, s 52(3)(b) also embraces circumstances such as the present, where persons were charged but those charges have been determined prior to the re-opening of any investigation under s 77, such that an inquest is not mandatory.

[4] That construction of s 52(3)(b) might be thought to be reinforced when regard is had to the terms of s 71 of the 2008 Act

Inquest after criminal trial

49. In *Domaszewicz v The State Coroner* [2004] VSC 528, Ashley J considered the operation of the provisions concerning the holding and re-opening of inquests under the *Coroners Act 1985* (Vic) ("the 1985 Act"). In May 2007, when considering the applications by the families of Constables Tynan and Eyre brought under s 18 of the 1985 Act, His Honour Mr Johnstone relied on some of the remarks of Ashley J in *Domaszewicz* in coming to his decision. The relevant provisions of the 1985 Act are in many respects materially different from those of the 2008 Act. However, despite those differences and making due allowances for them, I consider the remarks of Ashley J to be of assistance in considering the current applications.

50. As in the present case, *Domaszewicz* concerned the question whether an inquest might be held or re-opened after a person had been tried and acquitted of the murder of the deceased. In that case, it was submitted by counsel for the plaintiff that, upon being satisfied of circumstances falling within s 17(3)(a) or (b) of the 1985 Act, in determining whether or not to hold an inquest, a coroner must consider:

(a) whether or not all the relevant public issues relating to the death have been canvassed by the criminal law judicial process;
(b) the probative value to a coroner of any material not admitted in the criminal law judicial process;
(c) the findings that may lawfully be made following an investigation;
(d) the emotional burden that holding an inquest would place on relatives and other participants; and
(e) the efficient use of the resources available to the coronial service.

51. Ashley J considered those submissions and those of the Solicitor-General on the same topics (at [53]-[55]) and opined thus (at [56]):

> In my opinion the discretion vested in a coroner by s 17(3) is not one in respect of which, by the application of relevant principles, particular matters must be considered. I consider that in its exercise a coroner could properly take into account the first, second, fourth and fifth matters which plaintiff's counsel identified; the third matter is more problematic. But the fact that it would be proper for a coroner to take certain matters into account does not convert them into matters which must be taken into account. The discretion, in my opinion, is a broad general one, to be considered in the context that a coroner is empowered to determine that an inquest not be held where otherwise it would be mandatory, criminal proceedings in connection with the death having been brought and concluded.

52. Further, His Honour went on to make the following remarks (at [81]):

- Section 17(3) implicitly contemplates that an inquest may be held notwithstanding trial and acquittal. Such a proceeding may be desirable in a particular case, whether by reason of new facts, or in order to further explore the questions how death occurred and the cause of death, and in that context whether some person other than the acquitted person contributed to the cause of death.
- Section 19(3) give[s] specific protection against a finding that a person has or may have committed an offence.[5]
- Notwithstanding the fifth and sixth matters just mentioned, it ought be expected that rarely will an inquest be held after acquittal. There should be, I consider, the gravest consideration before a coroner embarks upon an inquest

subsequent to acquittal if there is no cogent evidence pointing to an alternative suspect, or no *clearly new and cogent facts or evidence* (my emphasis). Counsel for the plaintiff submitted that the public interest and the interest of the public are not the same thing. I agree with the sentiment inherent in that submission.

Are there new facts and circumstances?

53. As set out above, I may order that some or all of the findings made by His Honour Mr Johnstone on 14 November, 1995 be set aside if I consider it appropriate, that the investigation be re-opened. Further, by reason of s 77(3), I may only make an order under s 77(2) if I am satisfied (a) that there are new facts and circumstances and (b) that it is appropriate to re-open the investigation. This means that for the applications to be successful, I must be satisfied that both elements of the aforementioned test are met in the circumstances of each application. The terms of s 77 together with the comments of Ashley J also suggest that there is discretion to be exercised and that it is a broad one. In my view, the following considerations are amongst those that are proper to consider in exercising that discretion:

a) in considering whether there are new facts and circumstances, I should have regard not only as to whether the facts are "new," but also whether those new facts and circumstances are sufficiently cogent to fit the test set out in *Domaszewicz*. The cogency or otherwise of the new facts and circumstances may also affect the question whether it is appropriate to re-open the investigation;

b) in a case such as the present, where persons have been tried and acquitted of the murders of the Constables Tynan and Eyre, I may have regard to whether or not the new evidence raises issues or suspects not addressed at the trial;

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[5] The equivalent provision in the 2008 Act is s 69.

c) the emotional burden that holding an inquest would place on relatives and other participants;

d) the expressed wishes of the families of Constables Tynan and Eyre, their friends and colleagues and the interests of the community of Victoria generally;

e) the efficient use of the resources available to the Coroners Court may also be a relevant consideration;

f) to adapt the words of Ashley J in *Domaszewicz* to the present case, I should give the gravest consideration before re-opening an investigation with a view to conducting an inquest subsequent to acquittal if there is no cogent evidence pointing to an alternative suspect, or no clearly new and cogent facts or evidence. As Ashley J accepted, the public interest and the interest of the public are not the same thing;

g) finally, the primary purpose of the coronial jurisdiction is not a substitute for the due process of the criminal law.

54. While s 52 is worded differently from s 77, in my opinion, the same or similar considerations may be taken into account in determining whether or not to hold an inquest. I also consider it appropriate to take into account the different primary purposes of the coronial jurisdiction as opposed to the criminal justice process. Finally, following *Domaszewicz* there should be the gravest consideration before determining to conduct an inquest into a death subsequent to an acquittal on a charge of homicide, if there is no cogent evidence pointing to an alternative suspect, or no clearly new and cogent facts or evidence.

The "new" facts relied upon relating to Wendy Peirce

55. The new facts and circumstances concerning Ms Peirce are said to arise from her statements reported in an article in *The Age* on 1 October, 2005 and her statement to police on 2 August, 2010. I shall commence with the 2005 newspaper article. Given that that article was the principal basis for the applications under s 18 of the

1985 Act determined by His Honour Mr Johnstone in May 2007, standing alone, the contents of the article could not be described as "new facts and circumstances" for the purposes of the present applications under s 77 of the 2008 Act or otherwise material that might justify the holding of an inquest pursuant to an application under s 52(5). But, of course, it does not stand alone. In particular, there is now Ms Peirce's statement of 2 August 2010.

56. As set out above, the statement of Ms Peirce of 2 August, 2010 says, among other things, that:

a) it is her belief that the killers of Constables Tynan and Eyre were Victor Peirce, Jedd Houghton and Peter McEvoy;
b) her husband told her that Mr Houghton and Mr McEvoy "did it";
c) her husband never directly admitted doing the killing himself but they had "plenty of conversations where it is obvious he did";
d) the contents of a statement she made to Detective Senior Constable Colin McLaren in October 1989 are true (which is one of the statements on which the 2006 application relied and on which the current applications rely);
e) her evidence at the committal hearing was true;
f) at the *voir dire* in the Supreme Court she "would've said something like the statement wasn't true";
g) she had "changed her mind about telling the truth because [she had] got back with Victor [Peirce] and he was the father of [her] kids"; and
h) after the death of her daughter, she realised that it is "a mother's worst nightmare to lose a child" and she thought "this is the right thing to do".

57. Once this further material was received by the Court, Ms Peirce's statement of 2 August, 2010 (and the DVD and police statements concerning Mr McEvoy's utterances at Lambton on 5 February, 2010) were provided to those representing the Tynan and Eyre families and the Police Association for any further comment

or response. Subsequently, I received a further submission from Mr Galbally (dated 11 July, 2011) (the "second submission"). In that second submission, Mr Galbally:

a) refers to and reiterates both his submission made to the State Coroner in 2006 and his first submission on the current applications;
b) addresses in more detail the evidence concerning Mr McEvoy's utterances at Lambton on 5 February, 2010, by reference to the DVD and the police statements;
c) addresses Ms Peirce's statement of 2 August, 2010; and
d) makes further submissions as to why an inquest is necessary.

58. I also received a report (dated 27 July 2011) from Dr Michael Greenbaum, a psychiatrist, who has been treating Ms Peirce. In his report, Dr Greenbaum:

a) speaks of Ms Peirce's anxiety, panic attack disorder, depression (fed by chronic ongoing grief at the loss of her daughter and her trying to get access to her granddaughter) and her dependence upon benzodiazepine; and
b) opines that, if required to give evidence at an inquest, it is likely that there would be an exacerbation of Ms Peirce's symptoms of anxiety, panic and depression and that she could present with self-harm actions.

59. I have also received a statement (dated 31 August, 2011) from Jana Firestone, a counsellor in the Family and Community Support Services within the Coroners Court. In summary, the statement provides as follows:

a) Ms Firestone has had contact with Ms Peirce since September 2010;
b) Her role initially was to engage with Ms Peirce to request her to provide information to assist in the consideration and determination of the current applications;

c) Ms Firestone canvassed the possibility that Ms Peirce might be required to appear as a witness in the context of the applications. In response, Ms Peirce expressed a sense of hopelessness and level of distress that raised Ms Firestone's concern for Ms Peirce's safety. As a result of those concerns regarding Ms Peirce's mental state, Ms Firestone contacted Dr Greenbaum;

d) When asked to comment on the statement she had provided to police in August 2010, Ms Peirce stated to Ms Firestone that, at the time of that statement, she was extremely confused and distressed after the sudden death of her daughter Katie; she was feeling under pressure about having to give the statement; and did not feel that she was in the right frame of mind at the time, given her extreme state of grief and distress. Ms Peirce also stated to Ms Firestone that, at that time, she was seeking legal custody of Katie's daughter which compounded her distress, anxiety and confusion. While she recalls making the statement, Ms Peirce was unable to recall what information she provided in it and unable therefore to adopt its accuracy;

e) Ms Peirce described every day as a complete blur and that she is unable to function normally at present. She feels unable to leave her house for fear of being harassed by the media and is living in a constant state of grief, distress and anxiety;

f) In her statement, Ms Firestone concluded that it is her belief that, given Ms Peirce's current level of distress and anxiety, she is neither able to retain information nor provide information in a cohesive and consistent manner. Further, she stated that to compel her to attend court in her current state of emotional instability would place her safety at risk from self-harm.

60. The report of Dr Greenbaum and the statement of Ms Firestone were also forwarded to those representing the Tynan and Eyre families and the Police Association for any comment or response. Mr Davies, Secretary of the Police

Association, provided a letter (dated 14 September, 2011) in response. In that letter, Mr Davies:

a) reaffirmed the Police Association's position that a public coronial inquest was necessary;

b) pointed to the evidence of Mr McEvoy's utterances in February 2010 and submitted that it is "arguably corroboration of his involvement in the murders" of Constables Tynan and Eyre and has not been, but should be, tested through a coronial inquiry;

c) pointed to the "public defiant statements" of Ms Peirce "that she will not give evidence" at any coronial inquiry and the evidence of Ms Peirce relating to the movements of Victor Peirce on the evening of the murder which has been previously given to investigating police but has never been tested, and submitted that Ms Peirce should be compelled to give that evidence at a public coronial inquiry;

d) pointed to the Victorian Government's "indicated … intention to amend the laws [relating to] 'double jeopardy' in criminal matters to allow for the laying of similar charges for which a person has been previously acquitted provided that 'fresh' evidence is produced in support of the offence"; and

e) reiterated the interests of the families of Constables Tynan and Eyre, the broader membership of Victoria Police and the public in general in conducting a public coronial inquiry.

61. Under cover of a letter dated 7 October 2011, Madgwicks Lawyers enclosed a further submission (undated) from Mr Galbally in response to Dr Greenbaum's report and Ms Firestone's letter (the "third submission"). In that third submission, after summarising the substance of Dr Greenbaum's report, Ms Firestone's statement and some of the history of Ms Peirce's differing accounts, Mr Galbally made the following points:

a) firstly, he submitted that Ms Peirce's concerns about exposure to the media and concerns about her safety and her levels of anxiety could be diminished by hearing her evidence in a closed court, which, he further submitted, I have the power to order under s 62(1) of the 2008 Act.[6]

b) secondly, he submitted that, even if Ms Peirce did not give evidence, an inquest should still be held, given the statements of Ms Peirce and the evidence in respect of Mr McEvoy's utterances at Lambton in February 2010, material which, he further submitted, would justify a "fresh finding".

Conclusion as to "new" facts relied upon relating to Wendy Peirce

62. When Ms Peirce first spoke to the police in 1988, she did not implicate Victor Peirce in the murders of Constables Tynan and Eyre. Rather, she gave him an *alibi*. Then, after four months in Witness Protection, she did implicate him in the murders and in firearms-related offending, and subsequently confirmed the truth of statements to that effect on her oath at the committal hearing. However, on her oath in the Supreme Court, at the *voir dire* at trial, Ms Peirce recanted evidence implicating her husband and others in firearms-related offending. Doubtless because of that performance and a willingness to repeat it, she was not called in front of the jury for the murder trial. She was subsequently convicted of perjury based on her evidence on that *voir dire*. Now, the applicants seek to rely on a newspaper article of 2005 and another written statement from Ms Peirce of August 2010, in which she states her belief that Victor Peirce was guilty and that she lied to protect him. However, since August 2010 the evidence is that Ms Peirce has told other journalists that she will not "tell" on Victor and she has told

[6] Section 62(1) provides that a coroner holding an inquest is not bound by the rules of evidence and may be informed and conduct an inquest in any manner that the coroner reasonably thinks fit.

Ms Firestone that she does not remember what she said to police in 2010 and was in a state of confusion at the time she made that statement.

63. The report of Dr Greenbaum and the statement of Ms Firestone only add to the view that any evidence Ms Peirce might give about the deaths of Constables Tynan and Eyre could not be described as cogent. The material shows that Ms Peirce is unwell, is not functioning well, appears unable to recall what information she provided in the statement of 2 August, 2010 and appears unable to retain information or provide information in a cohesive and consistent manner.

64. Whilst the written statement of August 2010 is "new" in the sense that it was made since the last consideration of an application for a re-opening of the coroner's inquiry, it is not "new" to the sad and sorry state of the trail of statements and recantations made by Wendy Peirce since 1988. Further, it is followed by another round of contradictory statements reported by journalists and a statement to Ms Firestone that Ms Peirce cannot remember making the 2010 statement and that she was confused and unwell at that time.

65. The remarks attributable to Ms Peirce in the 2005 article and her written statement of August 2010 do not point to any new suspect. Rather, the remarks and the statement point only to those who were suspected of, tried on and acquitted of the murders of Constables Tynan and Eyre. To re-open an investigation and conduct an inquest on evidence that might suggest that one (or more) of those acquitted of the murder of Constables Tynan and Eyre in fact contributed to their deaths is the gravest of steps, as stated by Ashley J, – a step that, in my view, should not be taken in this case on the strength of what *might* be Ms Peirce's recantation of her recantation 20 years ago, in the context of a perjury conviction upon the same set of facts, followed by further public recantations and statements together with evidence that she is now in a state of confusion. In my view, the credit of Ms Peirce is so damaged by her history, it would be against common sense to describe any one position she may state she holds at any given time as sufficiently ***cogent***

to render it "appropriate" to re-open the coronial investigation in accordance with s 77 or to grant an application to hold an inquest under s 52(5).

66. As the report of Dr Greenbaum and the statement of Ms Firestone show, those inquiries have revealed that Ms Peirce is distressed and anxious about the prospect of giving evidence over this matter again, is concerned about the impact further proceedings would have on her remaining children, is not well, and that she is at risk of self-harm. Mr Galbally's suggestion that Ms Peirce might be examined in a closed court in order to diminish her distress was something to which I have given consideration. I have the power to summon a person to give evidence or to order a witness to answer questions not only at an inquest but also to help determine whether to hold an inquest (see ss 55(1)(b), (2)(a) and (c) of the 2008 Act). That power does extend to taking such evidence in a closed court. There are many witnesses involved in this jurisdiction compelled to give evidence who are likely to feel anxious and depressed and fearful about coming to court to give evidence and some who would wish to give evidence in a closed court for those reasons. The reported distress and anxiety of a witness is not a basis to decide not to call that witness. The statements as to the distress and anxiety of Ms Peirce at the prospect of being called to give evidence in coronial proceedings is not the basis upon which I have decided not to call Ms Peirce.

67. Ms Peirce is a person who was prepared to commit perjury on these very matters in the Supreme Court, after being warned by the trial judge and obtaining legal advice. She was found to have demonstrated no remorse for that conduct when being sentenced in the County Court. She has served a gaol sentence for that perjury and continues to change her account of these events depending on who is asking her and when and in what circumstances.

68. Based on these known facts, I have concluded that there is little prospect that any reliable or cogent evidence would be obtained from Ms Peirce, were she compelled to attend court and answer questions, in a closed court or otherwise.

69. As indicated above, in May 2007, His Honour Mr Johnstone declined the families' applications under s 18 of the 1985 Act brought principally in reliance on *The Age* article concerning Ms Peirce on 1 October, 2005. Whilst His Honour Mr Johnstone did not have either the written statement of 2 August, 2010 or the material concerning Mr McEvoy's utterances in Lambton before him, whilst he was applying different tests to different questions under a different version of the Act and whilst I have turned my mind independently to the material before me to the different questions under the different legislative regime now in place, nevertheless, I note that His Honour Mr Johnstone came to similar conclusions about the cogency or otherwise of any evidence that Ms Peirce might give. I see no reason to have any more confidence than His Honour Mr Johnstone did in the cogency of any evidence that Ms Peirce could give.

70. For the reasons set out above, I do not consider that the material disclosed in *The Age* article of 1 October, 2005 or Ms Peirce's written statement of 2 August, 2010 are sufficiently cogent or reliable or indeed 'new' to amount to new facts and circumstances for the purposes of s 77.

The new material relating to Peter McEvoy

71. In media reports provided by Mr Galbally, it was reported that the Local Court at Newcastle heard that Mr McEvoy told arresting police that "the sweetest thing I ever heard was the police officer's last words while he was dying" (*The Age* website, 27 April 2010 at 12:07 p.m.; see also ABC News, 28 April 2010). The evidence concerning Mr McEvoy's alleged utterances is not evidence that was in existence at any time prior to or during the criminal proceedings. Thus, this material may more readily amount to new facts and circumstances within the meaning of s 77(3)(a) of the 2008 Act.

72. However, for reasons that follow, I have concluded that this material does not amount to sufficiently cogent new facts and circumstances and, in any event, that

it would not be appropriate to re-open the investigation or to hold an inquest on the strength of this evidence taken alone or in combination with the evidence concerning Ms Peirce.

73. As I have said, I have sought and now been provided with a good deal of material concerning Mr McEvoy's utterances at the search at Lambton on 5 February, 2010. I have read the three statements from police who attended the search, the summary of facts on the police brief, the transcript of the proceedings before the Local Court and the media articles provided about the matter. I have viewed and listened very closely to the DVD of the search on several occasions.

74. Whilst these words set out above were used in a police summary, and therefore understandably made their way into media reports, the summary appears to have been an amalgam of versions from police statements. As detailed below, there is a good deal of doubt that those precise words were used.

75. Six policemen attended the premises at Lambton on 5 February, 2010. They were in possession of a warrant to search the premises. The six members were Acting Inspector Gallagher, Senior Constable Fuhrer, Senior Constable Thomas, Senior Constable McSpadden and Sergeant Simpson. Three have made statements. I note that Mr McEvoy was not the subject of the police attendance at this address. Mr McEvoy appears to have been sleeping in his car in the driveway of the residence. He was known to the residents of the house, who were the subject of the police attendance. Thus, Mr Mc Evoy just happened to be there at the time of the police attendance and completely unrelated to it.

76. ***Sgt Simpson***: In his statement (dated 25 February, 2010), Sgt Simpson noted that, upon arrival at the address in Lambton on 5 February, 2010, he noticed Mr McEvoy sitting in the rear passenger seat of a car in the driveway and that he "appeared to be affected by some form of drug as he appeared to be sleepy and nodding off" (para. [4]). After the search of the premises commenced, Mr

McEvoy approached. When Mr McEvoy became abusive, Sgt Simpson began to film him. Mr McEvoy then "commenced to speak about the 'Walsh Street Murders'". When he was moved to the rear of the yard, Mr McEvoy said, "**If I've gotta come back for ya you might find out something about 1988 a couple of fuckin jacks in Melbourne might cause you to fuckin speak to me more politely coppa**" (paras [13]-[14]). At the completion of the search warrant, Sgt Simpson could hear Mr McEvoy speaking aggressively to Sen Const Thomas. As he walked to the front of the yard, Sgt Simpson heard Mr McEvoy say, "**I can't wait to put a shot gun to your fucking head, loaded up with solid and watch your fucking head get blown off. There's nothing better than watching a cunt like you die**" (para. [20]).

77. ***Sen Const Thomas***: In his statement (dated 26 February 2010), Sen Const Craig Thomas also noted Mr McEvoy asleep in the rear of the car as they approached (para. [4]). Sen Const Thomas also noted that, after Mr McEvoy approached and started to become abusive, Sgt Simpson panned the video around to record the interaction (para. [6]). After ten minutes, Sen Const Thomas and Sen Const McSpadden finished dealing with Mr McEvoy and went back to the search with Sgt Simpson filming (para. [8]). After the search of the residence was complete, Sen Const Thomas went out to the front of the premises. Sen Const Thomas says that Mr McEvoy was seated on the front veranda of the house and he continued to yell abuse at Sen Const Thomas. Amongst other things, Mr McEvoy said, "You fucking dog. Finished your search idiot. Fucking got nothing on me idiot. **I'll tell you ... the sweetest thing I ever heard was watching a dog like you, last words while he was dying ... I can't wait to put a shotgun to your fucking head loaded up with a solid and watch your fucking head get blown off. There's nothing better than watching a cunt like you die**". Sen Const Thomas said that, during this time, there were two residents standing beside Mr McEvoy and the "level of his voice could be heard beyond the curb edge of the property" (para. [9]). Sen Const Thomas said that, a short time later, Sgt Simpson, Sen Const Fuhrer and the rest of the search team came out to the front of the residence.

Sen Const Thomas says that he then conducted a search of the vehicle and that Mr McEvoy continued to abuse and swear at police (para. [10]).

78. ***Sen Const Fuhrer***: In his statement (dated February 25, 2010), Sen Const Fuhrer also noted Mr McEvoy was in the car and that he appeared to be asleep as they approached (para. [4]). Directly after the video search commenced, Mr McEvoy came to the front door area and created a disturbance and became aggressive. After ten minutes, Sen Const Thomas and Sen Const McSpadden finished dealing with Mr McEvoy and the search was able to continue (paras [5]-[6]). After the search, police moved to search a vehicle in the driveway. Mr McEvoy was present at that search. As they approached the car, Mr McEvoy said, "Anyone seen any dogs". During the search, Mr McEvoy made numerous comments. He referred to an investigation into the "Walsh Street murders" and to two murdered police officers and the investigating police. Sen Const Fuhrer heard Mr McEvoy say, "**One of the sorriest things I ever heard about was a copper begging for his life, sad story**" (para. [7]).

79. Taking those three statements in the absence of the DVD, it is apparent Mr McEvoy has made remarks about "Walsh Street", the murders of the two police officers and the investigation that followed. Neither Sgt Simpson nor Sen Const Fuhrer gives an account of an admission by Mr McEvoy as to involvement in the murders of Constables Tynan and Eyre. Sen Const Thomas says that Mr McEvoy said that "**the sweetest thing I ever heard was watching a dog like you, last words while he was dying**" whereas Sen Const Fuhrer says Mr McEvoy spoke of having "**heard about**" something of that nature. The word "about" might be thought to make all the difference.

The DVD

80. Whilst the camera is not trained on Mr McEvoy at the time, it appears that the remarks attributed to him by Sgt Simpson in paragraph [14] of his statement can be heard clearly on the DVD near the start of the search of the residence.

81. Again, whilst the camera is not trained on Mr McEvoy at the time, it appears that the remarks attributed to him by Sen Const Fuhrer in paragraph [7] of his statement also can be heard clearly on the DVD after the search of the house and during the search of the car – i.e. Mr McEvoy can be heard saying, "One of the sorriest things I ever **heard <u>about</u>** was a copper begging for his life, sad story".

82. It is not apparent from the DVD that Mr McEvoy says what Sen Const Thomas attributes to him at paragraph [9] of his statement – namely, "I'll tell you … the sweetest thing I ever **<u>heard was watching</u>** a dog like you, last words while he was dying".

83. Nor is it apparent from the DVD that Mr McEvoy says what Sen Const Thomas recounts in paragraph [9] of his statement – namely, "I can't wait to put a shotgun to your fucking head loaded up with a solid and watch your fucking head get blown off. There's nothing better than watching a cunt like you die" – or the similar words Sgt Simpson recounts in his statement at paragraph [20].

84. Sen Const Thomas's statement is to the effect that, after the search of the premises was completed and before the search of the car commenced, Mr McEvoy made the remark about "the sweetest thing I ever heard was watching a dog like you, last words while he was dying". However, the DVD shows that, after the search of the premises is completed, Sen Const Thomas, the two occupants of the premises and other police move to the front of the premises to search the car. It is during that search that the remark that Sen Const Fuhrer attributes to Mr McEvoy and records at paragraph [7] of his statement – "One of the sorriest things I ever **heard <u>about</u>** was a copper begging for his life, sad story" – was made, as were various abusive remarks directed at Sen Const Thomas, including references to Det Insp Noonan, Walsh Street, Constables Tynan and Eyre, "dogs", Mr McEvoy's having fought the law and won and the spectre of the law being changed so that acquitted persons might be retried. Later, when the camera operator comes back to the door

of the premises and Sen Const Fuhrer is shown finalising the execution of the search warrant with the two occupants, Mr McEvoy can be heard making abusive remarks but I cannot hear anything of the type that Sen Const Thomas attributes to him.

85. Thus, given that chronology as demonstrated by the DVD, given the similarity of the remarks heard by Sen Const Thomas (at para. [9]) and Sen Const Fuhrer (at para. [7]), given that the remarks heard by Sen Const Fuhrer are the same as those which can be heard on the DVD and given the ease with which one might confuse the precise words uttered in such a torrent of abuse as was being delivered by Mr McEvoy at various stages during the searches, I cannot be satisfied on balance that the precise remarks attributed to Mr McEvoy by Sen Const Thomas – "the sweetest thing I ever heard was watching a dog like you, last words while he was dying" – were uttered. Rather, I think it likely that the utterance Sen Const Thomas witnessed is the same as that which Sen Const Fuhrer witnessed, a version which is supported by a close listening to the actual words recorded on the DVD.

86. I note the observations of Sgt Simpson that when he first sees Mr McEvoy in the rear of his car, he considered that he appeared to be affected by some sort of drug. I also note that upon viewing the DVD of Mr McEvoy's conduct, his behaviour appears to be not only irrational attention seeking, but also an attempt to impress upon the police that they should understand how important and significant it is that they are in the presence of Peter McEvoy of Walsh St notoriety. He was behaving in a very aggressive way with the police and appears to be attempting to goad and intimidate them. Indeed, he is in fact charged with hindering. In colloquial terms Mr McEvoy appears to be "big-noting" himself in the presence of the young suspects the subject of the arrest. In my view, it is equally open to conclude that Mr McEvoy's irrational ranting and foul abuse was his attempt to establish that he was a person of power and importance and that the police should fear him and understand that he was not intimidated by them.

87. The utterances by Mr McEvoy, whatever their precise content and whatever the intention behind them, must be extremely hurtful and infuriating to the families and colleagues of Constables Tynan and Eyre. They were despicable remarks, calculated to offend police, and offensive to all right-thinking members of the community.

88. But I do not consider it is open to find, and in any event, I do not find that this evidence establishes that Mr McEvoy made admissions as to his involvement in or presence at the murders of Constables Tynan and Eyre. I come to this view based on both the doubt over what actual words were said and the circumstances in which they were said.

89. In those circumstances, I am not satisfied that the evidence is sufficiently cogent to amount to new facts and circumstances within the meaning of that term in s 77(3)(a) whether taken alone or in combination with the evidence concerning Ms Peirce.

90. Again, this evidence, like the evidence concerning Ms Peirce, discloses no new suspect. Again, to re-open an investigation on evidence that might suggest that one of those acquitted of the murder of Constables Tynan and Eyre in fact contributed to their deaths is the gravest of steps – a step that, in my view, should not be taken in this case on what must be at best equivocal evidence of an admission by Mr McEvoy.

Proposed removal of double jeopardy principle

91. As indicated above, in his letter of 14 September, 2011, Mr Davies mentioned the Victorian Government's "indicated … intention to amend the laws [relating to] 'double jeopardy' in criminal matters to allow for the laying of similar charges for which a person has been previously acquitted provided that 'fresh' evidence is

produced in support of the offence". Mr Davies did not seek to explain how this fact might be relevant to the applications.

92. Mr Galbally made no equivalent submission.

93. At the time of drafting these reasons, the second reading of the Criminal Procedure Amendment (Double Jeopardy and Other Matters) Bill 2011 had (on 9 November, 2011) just been moved in the Legislative Assembly of the Parliament of Victoria. The Bill contains clauses that, if passed, will remove the principle against double jeopardy and allow the retrial of persons acquitted of certain crimes in certain circumstances, including where there has been an acquittal on a charge of murder and there is "fresh and compelling evidence" in relation to the offence of which the accused was acquitted or the acquittal is "tainted" in the sense that, had it not been for the commission of an administration of justice offence such as perjury by another person, it is more likely than not that the accused would have been convicted at trial.

94. I consider it irrelevant to my consideration of these applications that such legislation is in contemplation or indeed may have been passed into law by the time this decision is handed down. Whether any action is considered or taken under such legislation, if passed in its proposed form, in respect of the acquittals of those persons charged with the murders of Constables Tynan and Eyre will be a matter for the police, the Director of Public Prosecutions and the Court of Appeal.

95. I assume from the existence of the applications by the families of Constables Tynan and Eyre and the Police Association and the submissions in support that the families and the police members connected with the matter, that they are prepared to endure any emotional burden that may come with re-opening the investigation or holding an inquest. I have the deepest regard and sympathy for the interests of the families of Constables Tynan and Eyre, their friends and colleagues and am very mindful of the damage done to the community of Victoria by these deaths.

However, my regard and sympathy for the families of Constable Tynan and Constable Eyre, and a wish to give "answers" to those who seek them, cannot override the requirements of the law to find new and cogent facts and circumstances such that it is appropriate to re-open the investigation. Whilst coronial resources are scarce, that fact would not prevent my re-opening the investigation in this matter if there were new cogent facts and circumstances which made it appropriate to do so.

Conclusion

96. For the reasons given, I do not consider it appropriate, on the evidence before me, whether taken in isolation or in combination, to grant the applications under s 77 or to grant the applications under s 52(5) to hold an inquest. Accordingly, I refuse the applications under s 77 for orders that some or all of the findings made by His Honour Mr Johnstone on 14 November, 1995 regarding the deaths of Constables Tynan and Eyre be set aside or that the investigations into their deaths be re-opened; and I refuse the applications under s 52(5) to hold an inquest.

Signature:

Judge Jennifer Coate
State Coroner
19 December 2011