



IN THE CORONERS COURT
OF VICTORIA
AT MELBOURNE

IN THE MATTER OF THE INQUEST INTO THE DEATHS OF

VIVEK BHATIA	COR 2023 6165
VIHAAN BHATIA	COR 2023 6167
JATIN KUMAR	COR 2023 6166
PRATIBHA SHARMA	COR 2023 6164
ANVI SILWAL	COR 2023 6161

**RULING ON APPLICATION MADE BY WILLIAM SWALE
PURSUANT TO SECTION 57 OF THE *CORONERS ACT 2008* (VIC)**

BACKGROUND AND PROCEDURAL HISTORY

1. This is a ruling on the Application made by Mr William Swale (**‘Mr Swale’**) to be excused from giving evidence on the grounds of self-incrimination pursuant to section 57 of the *Coroners Act 2008* (**‘the Act’**) at the inquest into the deaths of Vivek Bhatia, Vihaan Bhatia, Jatin Kumar, Pratibha Sharma and Anvi Silwal.
2. Vivek, Vihaan, Jatin, Pratibha and Anvi died on Sunday 5 November 2023 when the vehicle driven by Mr Swale failed to follow the right-hand bend of Albert Street and collided with people sitting at picnic tables on the grass reserve outside the Royal Daylesford Hotel, Daylesford.
3. Mr Swale had, that afternoon, travelled to Daylesford from Clunes, where he had been attending the clay shooting Field & Game National Championship Carnival hosted at the Clunes Field and Game grounds. Mr Swale is a long-term type 1 diabetic and, at the time of the collision, at around 6:07pm, was suffering from a severe hypoglycaemic episode. Attending paramedics conducted a blood sugar level test on Mr Swale which returned a ‘Lo’ result indicative of a level of less than 1.1 mmol/L¹. Mr Swale responded to dextrose administered intravenously and was transferred to the Ballarat Base Hospital.

¹ Statement of Michael Barker dated 14 February 2024, Coronial Brief (CB), Vol 2, 57-1

4. The deaths of Vivek, Vihaan, Jatin, Pratibha and Anvi, were reported to the Coroner as they fell within the definition of reportable deaths in the Act. Reportable deaths as defined in section 4 of the Act include deaths that are unexpected, unnatural or violent or from accident or injury.
5. Following the collision, on 11 December 2023, Mr Swale was charged with five counts of culpable driving causing death, two counts of negligently causing serious injury and seven counts of reckless conduct endangering life, all of which are indictable offences under the *Crimes Act 1958* (Vic)². He had previously been interviewed by police on 7 November 2025, where he had given a ‘no comment’ interview. After being charged, Mr Swale was remanded in custody but granted bail on 15 December 2023.
6. While the criminal investigation and proceedings were active, the coronial investigation was held in abeyance. The Coroners Court of Victoria (**‘the Court’**) has a practice of suspending an investigation when criminal matters are on foot in order to avoid prejudicing the criminal matter.
7. The criminal charges came before the Ballarat Magistrates Court at a committal hearing commencing on 16 September 2024. A number of witnesses gave evidence; however, Mr Swale maintained his right to silence and did not give evidence. On 19 September 2024 the magistrate discharged all the charges pursuant to section 141(4)(a) of the *Criminal Procedure Act 2009* (Vic) finding that there was not sufficient evidence to support a conviction of any indictable offence.³ The magistrate found that there was insufficient evidence that Mr Swale’s driving from 5:36pm onwards (the time at which the prosecution framed its case as the relevant driving period) was a conscious and voluntary act, a necessary element for making out the charges laid.
8. Subsequently, the Director of Public Prosecutions (**‘DPP’**) determined not to directly indict Mr Swale on the charges.
9. The *Policy of the Director of Public Prosecutions for Victoria*, considers Prosecutorial Discretion and provides that the criteria for a prosecution to proceed is (i) if there is a reasonable prospect of conviction; and (ii) a prosecution is in the public interest.

² Sections 318, 24 and 22 respectively of *Crimes Act 1958* (Vic).

³ Committal Transcript *The Police v William Herbert Swale*, 19 September 2024, pages 287 to 289, CB, Vol 5, 86-29 to 86-30.

10. The policy further provides that, without limiting the DPP's discretion, in the usual course a direct indictment may be filed after an accused has been discharged at committal **only** if:
- the magistrate made an error in discharging the accused; *and*
 - the criteria governing the decision to prosecute are satisfied; *and*
 - there has not been an unreasonable delay between the discharge and the decision to directly indict.⁴ (emphasis added)
11. In this case, the Office of Public Prosecutions ('OPP') issued a media statement indicating its position not to directly indict on 1 November 2024 as follows:

On 19 September 2024, the Magistrates' Court found that there was insufficient evidence to commit Mr Swale to stand trial.

Two medical experts gave evidence at the committal that they could not rule out that Mr Swale, a long-term type 1 diabetic, was suffering a severe hypoglycaemic episode that commenced before the relevant driving leading to the collision. The implication of this evidence was that it was possible Mr Swale was so impaired throughout the relevant period as to be incapable of acting consciously.

The experts' evidence on this point effectively deprived the Crown case of reasonable prospects of success.

Consideration has been given to directly indicting Mr Swale on the charges filed. Having now conducted a review of the Crown case the decision has been made that a direct indictment will not be filed.

This decision has been conveyed and explained to the victims and victims' families. We understand that this is not the outcome they were hoping for and acknowledge that they have been profoundly affected by this event.

*We extend our sympathies to all who have been impacted by this terrible incident.*⁵

12. Following this, the coronial investigation resumed and, in addition to the material obtained by the Major Collision Investigation Unit for the purposes of the criminal investigation, further statements and reports were obtained by the Court.
13. In addition, two Directions Hearings were held. At a Directions Hearing on 5 August 2025, I confirmed the decision to proceed to an inquest, with the inquest being listed to commence on 10 March 2026 for nine days. Prior to the subsequent directions hearing on 5 December 2025, a draft scope of inquest, canvassing the proposed areas to be examined at the inquest, was provided to the interested parties.

⁴ Policy of the Director of Public Prosecutions for Victoria, <https://www.opp.vic.gov.au/wp-content/uploads/2023/09/DPP-Policy-21-September-2023.pdf>, accessed on 5 January 2026.

⁵ <https://www.opp.vic.gov.au/media-statement-decision-not-to-directly-indict-william-swale/> accessed on 5 January 2026.

14. As part of the Court's further investigation, on 26 June 2025, Mr Swale was served a *Form 4* notice to provide a statement pursuant to Section 42 of the Act, and Regulation 15 of the *Coroners Regulations 2019* in relation to a number of matters.⁶ On 10 July 2025, Mr Swale's legal representative advised the Court that Mr Swale declined to comply with the Form 4 notice, relying on section 50 of the Act. Section 50 provides that it is a *reasonable excuse* for a person to refuse or fail to give information if the giving of the information would tend to incriminate the person.
15. On 12 November 2025, Mr Swale was summoned under section 55(2)(a) of the Act to attend before the Court to give evidence at the inquest. On 28 November 2025, Mr Swale's legal representative advised the court that he would object to giving evidence at the inquest under section 57 of the Act.
16. I determined to address the objection prior to any evidence being led at the inquest. The inquest was therefore listed to commence on 16 December 2025 for Mr Swale to formally make the objection, for the procedure set out in section 57 to be followed and to hear submissions in relation to the Application for Mr Swale to be excused from giving evidence.
17. Prior to the hearing, written submissions were filed on behalf of Mr Swale on 9 December 2025 and by Counsel Assisting on 15 December 2025.
18. Following the Directions Hearing on 5 December 2025, the inquest scope was amended and distributed to the interested parties on 10 December 2025. The broad areas covered by the inquest scope are:
 - (1). the circumstances leading up to and on 5 November 2023 including Mr Swale's type 1 diabetes management up to and including 5 November 2023 and his movement and conduct on 5 November 2023
 - (2). Safe driving by type 1 diabetic persons
 - (3). Outdoor dining on footpaths and open public spaces adjacent to roads and applicable regulation and risk assessments and mitigation strategies.

⁶ Form 4 Prepared Statement required to be given to the Coroner dated 25 June 2025, CB 55-1 to 55-4.

19. In particular in relation to Mr Swale's application, scope item 1 (which had not been amended from its original wording) provides as follows:

1. Examination of the circumstances leading up to and on Sunday 5 November 2023 including William Swale's:

(a). Type 1 diabetes and blood glucose management and control in the period leading up to 5 November 2023; and

(b). Conduct at Clunes Field & Game, driving from Clunes to Daylesford and after arriving in Daylesford approximately 5.17pm on 5 November 2023; and

(c). Conduct proximate to the collision outside the Daylesford Hotel approximately 6.07pm on 5 November 2023; and

(d). Type 1 diabetes management on 5 November 2023 including but not limited to:

a. physical health and general wellbeing;

b. food/drink consumed;

c. insulin administration;

d. blood glucose readings taken;

e. alarms generated by Libre 2 continuous glucose monitoring device.

(e). Conduct on 5 November 2023 and whether it was consistent with safe driving practices

20. On 16 December 2025, Mr Swale was called and, after being affirmed, objected to giving evidence relying on Section 57. I indicated to Mr Swale that I was satisfied that he had 'reasonable grounds' for his objection to give evidence pursuant to section 57(2), namely that the evidence may tend to prove that he has committed an offence against or arising under an Australian law and made a determination to that effect. Having so determined, I informed Mr Swale of the required matters in section 57(3) of the Act. Mr Swale further stated he objected to giving evidence even under the protection of a certificate under section 57.

21. Following this, oral submissions, supplementing the written submissions, were made by Counsel for Mr Swale and Counsel Assisting in relation to the Application.

LEGISLATIVE FRAMEWORK AND RELEVANT LAW

22. Section 57 of the Act states as follows:

57 Privilege in respect of self-incrimination in other proceedings

- (1) This section applies if a witness objects to giving evidence, or evidence on a particular matter, at an inquest on the ground that the evidence may tend to prove that the witness—
 - (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or*
 - (b) is liable to a civil penalty under an Australian law or a law of a foreign country.**
- (2) The coroner must determine whether or not there are reasonable grounds for the objection.*
- (3) If the coroner determines that there are reasonable grounds for the objection, the coroner is to inform the witness—
 - (a) that the witness need not give the evidence unless required by the coroner to do so under subsection (4); and*
 - (b) that the coroner will give a certificate under this section if—
 - (i) the witness willingly gives the evidence without being required to do so under subsection (4); or*
 - (ii) the witness gives the evidence after being required to do so under subsection (4); and**
 - (c) of the effect of such a certificate.**
- (4) The coroner may require the witness to give evidence if the coroner is satisfied that—
 - (a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and*
 - (b) the interests of justice require that the witness give the evidence.**
- (5) If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the coroner must cause the witness to be given a certificate under this section in respect of the evidence.*
- (6) The coroner is also to cause a witness to be given a certificate under this section if—
 - (a) the objection has been overruled; and*
 - (b) after the evidence has been given, the coroner finds that there were reasonable grounds for the objection.**

- (7) *In any proceeding in a court or before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence—*
- (a) *evidence given by a person in respect of which a certificate under this section has been given; and*
- (b) *any information, document or thing obtained as a direct or indirect consequence of the person having given evidence—*
- cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.*
- (8) *Subsection (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.*

23. Section 57 of the Act sets out the process by which a witness may object to ‘giving evidence, or evidence on a particular matter’ at an Inquest on the ground that the evidence tends to incriminate that witness. It is in substantially similar terms to section 128 of the *Evidence Act 2008* (Vic) (**‘Evidence Act’**) and serves a similar purpose for coronial proceedings.⁷
24. Section 57(4) of the Act authorises the abrogation of the long-standing common law privilege against self-incrimination, which has been described as the ‘*first principle of our law that nobody shall be called upon to contribute to his or her own conviction*’.⁸
25. Section 57 of the Act owes its origin to a report by the Law Reform Committee of the Victorian Parliament which examined the predecessor statute, the *Coroners Act 1985* (Vic). In making the recommendation to include a provision such as section 57, the Law Reform Committee Report observed, relevantly:⁹

- (a) *In many cases...abrogation of the privilege is justified in order for a coroner to establish the facts surrounding a person’s death and to make recommendations to prevent future deaths and injuries;*
- (b) *A number of statutory provisions are required in order to ensure that a witness is encouraged to give a full and frank disclosure of the circumstances surrounding a death;*

⁷ *Coroners Act 2008* (Vic) s 62(3).

⁸ *Re O’Callaghan* (1899) 24 VLR 957, 967 (Madden CJ).

⁹ See Law Reform Committee, Parliament of Victoria, *Coroners Act 1985* (Parliamentary Paper No 229, Session 2003-06) 287.

(c) A witness should be entitled to give self-incriminating evidence without fear that it will later be tendered at a federal or state criminal trial or civil proceeding;

(d) [a] certificate...has the advantage of encouraging reluctant witnesses because they would be provided with tangible proof that particular evidence given at an inquest may not be tendered at later proceedings.

26. Under section 57, it is for the person raising the objection to testifying to identify the ‘reasonable grounds’ for their objection. This obliges the person to demonstrate that the evidence may tend to prove that the person has committed an offence against, or arising under, or is liable to a civil penalty under, an Australian law: section 57(1) of the Act.
27. Once the objection is made, the Court must then determine whether there are reasonable grounds for the objection: section 57(2).
28. If the Court is satisfied that reasonable grounds for the objection exist, the Court must inform the person that he or she need not give evidence unless the Court requires them to do so under section 57(4), and that the Court will provide a certificate if the person willingly gives evidence without being required to do so, or gives evidence after being required to do so, and must explain the effect of the certificate: section 57(3).
29. I am satisfied that the requirements of section 57(3) were complied with at the hearing on 16 December 2025.
30. A coroner may require the person to give evidence if the coroner ‘*is satisfied that the interests of justice require*’ that the person gives evidence: section 57(4)(b).¹⁰

INTERESTS OF JUSTICE – RELEVANT LEGAL PRINCIPLES

31. In determining whether the interests of justice require Mr Swale to give evidence, I must undertake a balancing exercise of a number of relevant and sometimes competing factors.
32. In the case of *X7 v Australian Crime Commission*,¹¹ a witness who had been arrested and charged with a Commonwealth indictable offence objected to being examined under the *Australian Crime Commission Act 2002* (Cth). Hayne and Bell JJ (with whom Kiefel J agreed) referred to the accusatorial process being radically altered by compelling a witness

¹⁰ The requirement in section 57(4)(a) of the Act is not presently relevant.

¹¹ (2013) 248 CLR 92 (‘X7’).

to give evidence, noting that requiring answers to be given about the subject matter of criminal charges prejudices the accused in their defence, regardless of the answer, as even if it cannot be “used in any way at the trial, any admission made in the examination will hinder, even prevent, the accused from challenging at trial that aspect of the prosecution case...”¹²

33. In *Rich v Attorney General (NSW)*¹³, the NSW Court of Appeal dealt with section 61 of the *Coroners Act 2009* (NSW), which is in similar terms to section 57. Justice Leeming (with whom Chief Justice Bathurst and President Beasley agreed), said “...the premise of section 61 is that a person is forced to give evidence, contrary to a well-founded claim of privilege, and with the benefit of the inevitably imperfect protection of the certificate”.¹⁴
34. Justice Leeming went on to say that the provision required the prejudice to the witness to be “...weighed in the balance of the interests of justice favouring obtaining the evidence. The premise of the section is that a witness is exposed to risk, in which case, section 61(4) obliges the coroner to undertake an evaluative assessment of the interests of justice.”¹⁵
35. Justice Leeming also noted that the phrase ‘interests of justice’ is to be given the widest possible import, being undefined in the Act. The content of the phrase is determined by reference to the context in which it is used in any particular circumstance.¹⁶
36. The jurisdiction of the Coroners Court is inquisitorial; it is neither accusatorial nor adversarial.¹⁷ A coroner is empowered to investigate deaths falling within the jurisdiction of the Court, and in doing so, to make findings under section 67 of the Act which includes the circumstances in which the death occurred. Section 67 provides as follows:

67 Findings of coroner investigating a death

- (1) *A coroner investigating a death must find, if possible—*
 - (a) *the identity of the deceased; and*
 - (b) *the cause of death; and*
 - (c) *... the circumstances in which the death occurred;...*
- (2) *...*
- (3) *A coroner may comment on any matter connected with the death, including matters relating to public health and safety or the administration of justice.*

¹² X7 at [71]

¹³ [2013] NSWCA 419 (*‘Rich’*)

¹⁴ *Rich* at [38]

¹⁵ *Rich* at [39]

¹⁶ *Rich* at [18] and [19]

¹⁷ *Priest v West (in his capacity as Deputy State Coroner of Victoria) and Another* [2012] VSCA 327 per Maxwell P and Harper JA at [4] per Tate JA at [167]-[172]

37. The requirement that findings must be made ‘if possible’ underscores that it is for a coroner to ‘*pursue all reasonable lines of inquiry*’¹⁸ and to discover all they can about the circumstances surrounding the death.¹⁹
38. The purpose of a coronial investigation is to establish the facts, not to cast blame or determine criminal or civil liability. Section 69 of the Act expressly prohibits a coroner from including in a finding or a comment, any statement that a person is or may be guilty of an offence. However, I do note that pursuant to section 49 of the Act, if a Coroner forms a belief that an indictable offence ‘may have been committed in connection with [a] death’, they must through the principal registrar, notify the Director of Public Prosecutions.
39. Section 72 of the Act provides that a coroner may make recommendations to a Minister, public statutory authority, or entity, on any matter connected with a death being investigated including in relation to public health and safety or the administration of justice.²⁰ This important power underpins the preventative function to be discharged by the Court.²¹
40. In exercising powers under the Act, a coroner is obliged to have regard, as far as possible, to certain objectives, including relevantly “...the desirability of promoting public health and safety and the administration of justice”²².
41. Given that the legislation significantly limits the well-established common law privilege against self-incrimination, a high bar needs to be reached when balancing the interests of justice.²³
42. In the Victorian Court of Appeal decision of *Kontis v Coroners Court of Victoria*²⁴ (*Kontis*) the chairman and facility manager and director of nursing of St Basil’s Home for the Aged objected to giving evidence at an inquest into the deaths of 50 residents which occurred during the covid-19 pandemic. Their objections related to the risk of potential criminal prosecution for potential workplace breaches, being offences under the *Occupational Health and Safety Act 2004* (Vic). McLeish and Walker JJA and J Forrest AJA canvassed some of the relevant authorities including *Rich* and *X7* and distilled some of the relevant principles to be applied when considering whether the interests of justice require the evidence to be

¹⁸ *Priest v West* per Maxwell P and Harper JA at [4].

¹⁹ *Priest v West* per Tate JA at [167] citing Victorian Parliament Law Reform Committee, Coroner Act 1985; Final Report (September 2006), Parliamentary Paper No 229 of Session 2003-06 at 251

²⁰ Section 72 of the Act.

²¹ Section 1 (c) of the Act.

²² Section 8(f) of the Act.

²³ *Gedeon v The Queen* [2013] NSWCCA 257 at [286]

²⁴ [2022] VSCA 274 (*Kontis*)

given. The Court of Appeal accepted, as was held by Besanko J in *Roberts Smith v Fairfax Media Publications Pty Ltd [No 28] (Roberts-Smith)*²⁵, that the court is to be satisfied that the interests of justice *require* that the witness give the evidence, which is a high standard and higher than that the interests of justice *favour* that the witness gives the evidence (my emphasis).²⁶

43. In *Kontis*, the Court of Appeal noted that the scope of the duty to investigate under section 67(1) cannot be treated as circumscribing the meaning and operation of section 57(4)(b). Section 67(1) is part of the context in which section 57(4)(b) is to be construed and applied.²⁷
44. Further, the Court held that the interests of justice is not confined to the inquest process but requires a broader consideration including the wider interests of, and the prejudice to, the witness.²⁸
45. The interests of justice in the circumstances of this case includes consideration of the risk posed to Mr Swale in providing evidence that may incriminate him, the evidence given forming the basis of a direct indictment, the incomplete protection provided by a certificate and the forensic advantage to prosecutors. An important consideration is the significance of altering the accusatorial of justice²⁹ I am also to have regard to the scope and purpose of the Act and a coroner's powers and functions. This includes making findings with respect to matters in section 67 of the Act.³⁰ Related to this is the preventative function of the Court. I am to undertake an evaluative assessment of all these matters.³¹

The Applicant's Submissions

46. With reference to the matters to be examined as part of the proposed inquest scope, it was submitted that evidence given by Mr Swale about such matters *may tend to prove* that he committed an offence against an Australian law thereby giving him reasonable grounds to object to giving evidence. It was put that Mr Swale was not required to explain how evidence given by him might bring about an incriminating effect. It was sufficient that all these areas of examination together establish that his evidence may tend to prove, not will prove, that he committed an offence against an Australian law.³²

²⁵ [2022] FCA 115 ('*Roberts-Smith*') dealing with the equivalent provision section 128(4)(b) in the *Evidence Act 1995* (Cth)

²⁶ *Roberts-Smith* [31]

²⁷ *Kontis* [66]

²⁸ *Kontis* [67]-[72] and [75]-[76]

²⁹ *Kontis* [71]

³⁰ *Kontis*, [68]

³¹ *Rich* at [39]

³² Written submissions on behalf of the Applicant dated 9 December 2025 at [10.4] and [11] with reference to the case authority of *Deputy Commissioner of Taxation v Shi* (2021) 273 CLR 235 at [29]– [30]

47. As I determined at the hearing on 16 December 2025 that Mr Swale had ‘reasonable grounds’ for his objection, no further submissions were made in relation to this aspect at the hearing on 16 December 2025 and does not need to be further addressed.
48. It was submitted that Mr Swale ‘does not want to refuse to help with this coronial investigation’ but his objection is to give effect to the privilege against self-incrimination, a privilege that is fundamental to the accusatorial criminal justice system as stated by the High Court in the case of *X7*³³ and which is treasured by tradition and central to the administration of criminal justice.³⁴
49. Further, it was submitted that as stated by Cole JA in *Hartmann v Commissioner of Police*³⁵ a liberal interpretation should “...be given to the protective provisions in a statute purporting to protect a person from the consequences of the abrogation of the protection against self-incrimination.”³⁶
50. The submissions made on behalf of Mr Swale as to whether the interests of justice require that the evidence be given included:
 - (a). New criminal proceedings could be commenced in the future at any time notwithstanding that the OPP has indicated that a direct indictment would not be filed, including by way of a media release.³⁷ Section 3 of the *Criminal Procedure Act 2009* (Vic) provides that a direct indictment can include an indictment filed against an accused who *has not been committed for trial* in respect of the offence charged in the indictment or a related offence. The legislation does not place time limits on when a direct indictment may be filed³⁸ and the filing of a direct indictment commences a criminal proceeding³⁹.

³³ Written submissions on behalf of the Applicant dated 9 December 2025 at [7] citing *X7* (2013) 248 CLR 92 per Justices Hayne and Bell (with whom Justice Kiefel agreed) at paragraphs 101, 102 and 105,

³⁴ Written submissions on behalf of the Applicant dated 9 December 2025 at [10.1] citing the case authorities of *R&M v Independent Broad-based Anti-Corruption Commissioner* (2015) 47 VR 148 [34] (Priest, Beach and Kaye JJA) and *Alfarsi (a Pseudonym) v The Queen* [2021] VSCA 283 [33] (Prest and Kaye JJA and Lasry AJA) and Inquest Transcript dated 16 December 2025 T-5

³⁵ 1997 91 A Crim 141 at 147, Written submissions on behalf of the Applicant dated 9 December 2025 at [10.2]

³⁶ *Ibid*, at 147, Written submissions on behalf of the Applicant dated 9 December 2025 at [10.2]

³⁷ Written submissions on behalf of the Applicant dated 9 December 2025 at [5] and Inquest Transcript dated 16 December 2025 T-6.

³⁸ Section 159 *Criminal Procedure Act 2009* (Vic)

³⁹ Section 5 and 161 *Criminal Procedure Act 2009* (Vic), Written submissions on behalf of the Applicant dated 9 December 2025 at [5].

- (b). One potential basis upon which the DPP may change their position in relation to direct indictment was the evidence that Mr Swale may give at the inquest.⁴⁰ Mr Swale’s discharge at committal was closely tied to the way the prosecution had framed its case, with the relevant period being the last episode of driving commencing at 5:36pm on 5 November 2023.⁴¹ The expert evidence in respect to that time was that it was not possible to “...establish beyond reasonable doubt that [Mr Swale] was performing a conscious and voluntary act from 5:36 pm onwards when [Mr Swale] drove his vehicle”.⁴² That the evidence considered in the committal was so confined meant that questions as to Mr Swale’s conduct earlier in the day and his management of his type 1 diabetes, as now encompassed by inquest scope item 1, were not taken into account in the prosecution case. Should Mr Swale now answer questions as set out in inquest scope 1, it would be open to the DPP to “...change position and its course...to consider framing the case against Mr Swale in a different way”.⁴³
- (c). The prospect of a direct indictment in the future was not a remote or speculative possibility nor was this a situation where “...every aspect of potential liability has been sorted out...where everything has been exhausted and explained...”⁴⁴
- (d). It was not necessary for there to be a criminal proceeding on foot for the objection to be upheld⁴⁵ as was the case in *Villan v State of Victoria (Villan)*⁴⁶.
- (e). The risk to Mr Swale was not limited to the prospect of a direct indictment. Requiring Mr Swale to answer questions relating to item 1 of the inquest scope could also prejudice him in his defence of any charges should another criminal proceeding be commenced as described by the High Court in *X7*.⁴⁷
- (f). A certificate provided under section 57 would not provide complete protection.⁴⁸

⁴⁰ Inquest Transcript dated 16 December 2025 T-6

⁴¹ Inquest Transcript dated 16 December 2025 T-7

⁴² Inquest Transcript dated 16 December 2025 T-7

⁴³ Inquest Transcript dated 16 December 2025 T-8

⁴⁴ Inquest Transcript dated 16 December 2025 T-8 and 9

⁴⁵ Written submissions on behalf of the Applicant dated 9 December 2025 at [10.3]

⁴⁶ [2021] VSC 354 [26]

⁴⁷ *X7* at [71] per Hayne and Bell JJ (with whom Kiefel agreed), Written submissions on behalf of the Applicant dated 9 December 2025 at [10.5].

⁴⁸ Reliance was placed on the case authorities of *X7*, *Villan*, *Lucciano v The Queen* 2021 287 A Crim R 529 paragraph 23 to 40 McLeish, Niall and T Forrest JJ A).

- (g). There should be no *prima facie* presumption that a witness will be required to give evidence because of the protection of a certificate.⁴⁹
- (h). The probative value of any evidence given by Mr Swale's evidence is limited. Mr Swale is unable to give evidence about the immediate cause of death given his own severely hypoglycemic condition at the time and there is ample other available evidence about this. Otherwise, there was expert evidence available as to issues around diabetes control and monitoring and steps needed to avoid a repeat tragedy and the "...more general systemic issues".⁵⁰
- (i). There is available evidence from Mr Swale's treating endocrinologist, Dr Matthew Cohen about Mr Swale's blood glucose levels on 5 November 2023 and there was material in the coronial brief as to what Mr Swale had eaten and whether low blood glucose level alarms were received.⁵¹
- (j). The seriousness of the potential charges that Mr Swale could face was a relevant factor to be distinguished from those that arose in the case of *Kontis*.⁵² Counsel for Mr Swale noted that such offences were limited to penalties or fines⁵³ in contrast to the serious indictable offences which Mr Swale may face.

51. Finally, it was submitted that should Mr Swale be required to give evidence, he should be given a Certificate under section 57.⁵⁴

Submissions by Counsel Assisting

52. Counsel Assisting submitted that Mr Swale should not be excused from giving evidence but should be required to do so with the protection of a certificate granted under section 57.

⁴⁹ Written submissions on behalf of the Applicant dated 9 December 2025 at [10.6] citing *Inspector Carmody v Tsougranis* [2002] NSWIRC Comm 282 [26]-30] (Hayden J)

⁵⁰ Inquest Transcript dated 16 December 2025 T-9

⁵¹ Inquest Transcript dated 16 December 2025 T-19

⁵² Coroners Court of Victoria, In the matter of an Inquest into the Deaths of residents of St Basil's Home for the Aged: Ruling on Applications by Kon Kontis and Vicky Kos under section 57 of the Coroners Act 2008 (Vic) COR 2020 4101, 22 December 2021 (*Kontis CCOV*), *Kontis and Kos v Coroners Court of Victoria* [2022] VSC 422 (*Kontis VSC*), *Kontis v Coroners Court of Victoria* [2022] VSCA 274 (*Kontis*)

⁵³ Inquest Transcript dated 16 December 2025 T-17

⁵⁴ Written submissions on behalf of the Applicant dated 9 December 2025 at [13] and Inquest Transcript dated 16 December 2025 T-10

53. A number of provisions of the Act were referred to as being of relevance including⁵⁵:
- (a). Section 1 which sets out the purpose of the Act which is to provide for the investigation of certain deaths and fires and to “...contribute to the reduction of the number of preventable deaths and fires through the findings of the investigation of deaths and fires, and the making of recommendations, by coroners”.
 - (b). Section 66 which provides for the rights of interested parties, including Mr Swale, to make submissions as to relevant witnesses and with the Court’s permission to examine and cross examine them and make submissions.
 - (c). Section 67 in relation to the findings that a coroner is to make and the comments which may be made in connection with the death being investigated.
 - (d). Section 69 which provides that a coroner must not include in a finding or comment in his statement that a person is, or may be, guilty of an offence.
 - (e). Section 72 in relation to the making of recommendations.
54. Counsel Assisting noted that the case law in relation to section 57(4) and whether the interests of justice require that a witness give evidence was comprehensively reviewed by the Supreme Court in the decision of *Kontis and Kos v Coroners Court of Victoria (Kontis VSC)*⁵⁶ and by the Court of Appeal in *Kontis v Coroners Court of Victoria (Kontis)*.⁵⁷
55. It was noted that a number of principles emerged in relation to the interests of justice test that the court is to apply as follows⁵⁸:
- (a). The question under section 57(4)(b) is whether the interests of justice *require* the applicant to give evidence.
 - (b). Whether the interests of justice require that evidence be given is a higher standard than that the interests of justice favour that the witness give evidence.⁵⁹

⁵⁵ Written submissions of Counsel Assisting dated 15 December 2025 at [4]-[13]

⁵⁶ *Kontis and Kos v Coroners Court of Victoria* [2022] VSC 422 (*Kontis VSC*)

⁵⁷ *Kontis v Coroners Court of Victoria* [2022] VSCA 274 (*Kontis*), Written submissions of Counsel Assisting dated 15 December 2025 at [19]

⁵⁸ Written submissions of Counsel Assisting dated 15 December 2025 at [22]

⁵⁹ *Kontis* [81], Inquest Transcript dated 16 December 2025 T-11

- (c). The interests of justice was to be understood having regard to the scope and purpose of the Act, and the Coroner's function and powers conferred by the Act, which include section 67.⁶⁰
- (d). The interests of justice is not confined to the interests of justice to be served by the inquest process but goes further and includes the wider interest of, and prejudice to, the Applicant.⁶¹
- (e). The coroner is required to weigh up these considerations bearing on the interests of justice.⁶² It is an evaluative assessment.⁶³

56. Counsel Assisting proceeded to address the matters to be balanced in favour of and against Mr Swale's Application as bearing on the question of whether the interests of justice require the evidence to be given as follows:

- (a). While there remains a chance that Mr Swale could still be directly indicted, the DPP policy only permits criminal charges to be pursued if there is a realistic prospect of conviction. The evidence from the two expert witnesses at the committal proceeding was that Mr Swale was not acting voluntarily or consciously at the time of the driving that caused the deaths, and this provides Mr Swale with a complete defence to any charges. There is therefore a strong body of evidence that Mr Swale has not committed a criminal offence. Furthermore, the OPP has taken the "unusual step" of releasing a press release indicating it would not be directly indicting noting that the evidence has "*...effectively deprived the crown case of reasonable prospects of success.*"⁶⁴
- (b). Unlike other cases where it was not known if the applicant would face criminal charges, Mr Swale has already faced criminal charges which have been discharged, and the OPP has indicated it would not pursue the case.⁶⁵

⁶⁰ *Kontis* [68], Inquest Transcript dated 16 December 2025 T-11

⁶¹ *Kontis* [67]-[72]; [75]-[76]

⁶² *Kontis* [72]

⁶³ *Rich v Attorney General* (NSW) [2013] NSWCA 419

⁶⁴ Written submissions of Counsel Assisting dated 15 December 2025 at [23(b)]

⁶⁵ Written submissions of Counsel Assisting dated 15 December 2025 at [23c] and Inquest Transcript dated 16 December 2025 T-15 where Counsel Assisting noted the analogous case of *Rich v Attorney General* (NSW) [2013] NSWCA 419 where the Director of Public Prosecutions decided not to prosecute on the basis that there were no reasonable prospect of conviction following referral by the State Coroner to the Director of Public Prosecutions under the provisions of the *Coroners Act* 2009 (NSW). At the resumption of the coronial process following that decision, the witness declined to give evidence relying on the equivalent provisions in the *Coroners Act* 2009 (NSW).

- (c). Requiring Mr Swale to answer questions relating to item 1 of the inquest scope may prejudice him in defending any future criminal charges. It was acknowledged while that a section 57 certificate would ameliorate that position it could not provide complete protection.⁶⁶
- (d). A section 57 certificate protected a person against evidence given being used against them.⁶⁷ It was acknowledged that Mr Swale’s evidence might lead to the DPP making “...particular enquiries...”, however as only Mr Swale could give evidence about those matters, and he would retain his right to silence and not be able to be cross examined in any criminal proceeding, it would not change the prosecution case significantly. In circumstances where the DPP cannot obtain the evidence any other way, a certificate under s 57(5) protects Mr Swale “...quite significantly.”⁶⁸
- (e). A differently framed prosecution case may be pursued in the future. However, the framing of the case was carefully considered and decided upon by the prosecution at the time of the committal. Further, a differently framed case was an option following discharge through direct indictment, however, after a review taking some six weeks (based on the timing of the press release), the DPP chose not to pursue that option.⁶⁹
- (f). Considerable information is absent from the Coronial Brief which impacts the requirement under section 67 that a Coroner must, if possible, find the circumstances of the deaths that occurred. Much of that information is in the sole knowledge of Mr Swale.⁷⁰
- (g). While Mr Swale’s evidence would not assist in relation to findings to be made under section 67(1)(b) as to cause of death, the ability to make findings as to the circumstances of the death under section 67(1)(c) would be “frustrated” by the lack of evidence from Mr Swale as to the matters set out in the inquest scope item 1 including the food and drink consumed, insulin administration, blood glucose readings and the alarms generated on the continuous glucose monitoring device which “...are all squarely within [Mr Swale’s] knowledge and only [Mr Swale’s] knowledge..”. The probative value of Mr Swale’s evidence on these matters was said to be high.⁷¹

⁶⁶ Written submissions of Counsel Assisting dated 15 December 2025 at [23d] citing XY at [71] and [124]

⁶⁷ Inquest Transcript dated 16 December 2025 T-14

⁶⁸ Inquest Transcript dated 16 December 2025 T-15

⁶⁹ Inquest Transcript dated 16 December 2025 T-13 and 14

⁷⁰ Written submissions of Counsel Assisting dated 15 December 2025 at [23(a)]

⁷¹ Inquest Transcript dated 16 December 2025 T-12

- (h). Relatedly, the ability of a coroner to make recommendations to prevent such a tragedy occurring again can “..only be properly informed by knowing about the circumstances in detail..” otherwise any recommendations would be “...particularly general...” and “...have no value...”.⁷²
- (i). The objection may be revisited by me during the hearing and as the evidence is received.⁷³

CONSIDERATION

The significance of the evidence for findings and recommendations

- 57. It is clear and was agreed by Counsel for Mr Swale and Counsel Assisting that any evidence Mr Swale gives would not assist as to the immediate cause of death and there is other evidence available to make findings under section 67(1)(b).
- 58. However, the same cannot be said as to findings in relation to the circumstances in which the deaths occurred under section 67(1)(c). I consider Mr Swale’s evidence to be of critical importance to the findings I am to make as to circumstances, any comment pursuant to section 67(3) and the making of recommendations pursuant to section 72. The matters that go to the circumstances in which the deaths occurred include those encompassed in inquest scope item 1 and evidence as to those matters can predominately only be provided by Mr Swale.
- 59. Counsel for Mr Swale urged that Mr Swale’s blood sugar levels on the day can be obtained from his treating endocrinologist, Dr Cohen and other sources (presumably the continuous glucose monitor readings and alarms sent) and that there is expert evidence available to draw upon in respect to how a patient with type 1 diabetes comes to be in a severe hypoglycemic state and how such a state should be avoided. However, even counsel for Mr Swale referred to these as “general systemic issues”.
- 60. To this day, Mr Swale has not provided a fulsome account as to the events of 5 November 2023 and his actions or diabetic management.

⁷² Inquest Transcript dated 16 December 2025 T-12

⁷³ Written submissions of Counsel Assisting dated 15 December 2025 at [24]

Whether there are other means for obtaining the evidence/Other evidence that the witness has provided

61. There is some available evidence on the coronial brief about the events of 5 November 2023 including:

- (a). Mr Swale's exchange with paramedic Annie Fowler immediately after the collision and the administration of dextrose while Mr Swale remained in his vehicle as captured on the body worn camera of Senior Constable Barber.

Mr Swale told Paramedic Fowler that he smelt food at Clunes where they were catering, and he went with two others to get something to eat. He took insulin but there was no food, so he came to Daylesford and went into "that place"/ "cheese and wine merchants" but they were booked out and closing soon. There is reference to someone jump starting the car, parking it and leaving it running and "that's the last thing I remember..."⁷⁴

The context in which this account was provided needs to be borne in mind. While it is the most contemporaneous account as to the relevant events by Mr Swale, it should also be recognised that Mr Swale had just come out of a precarious hypoglycaemic state following a catastrophic collision.

- (b). Ballarat Base Hospital medical records references

Medical and endocrinology registrar, Dr Luis Pena noted on 7 November 2023 that Mr Swale reported having a Shaper- pie for lunch at 12:00 and that he had a sudden loss of consciousness while driving with no red flags or warning signs.⁷⁵

Notes from a medical review by Dr Rodrigo and Kampman on 8 November 2023 refer to Mr Swale not recalling anything from the accident and remembering waking up in the car with ambulance injecting him with glucose.⁷⁶

The records also include entries by diabetes educator, Jane McIntyre relating to a discussion on 8 November 2023 with Mr Swale.⁷⁷ Ms McIntyre also provided a statement which is included in the coronial brief.⁷⁸

⁷⁴ Coronal Brief, Volume 1, Body Worn Camera of Senior Constable Barber, Tab 52-60 to 52-62.

⁷⁵ Coronal Brief, Ballarat Base Hospital records, Tab 65-109

⁷⁶ Coronal Brief, Ballarat Base Hospital records, Tab 65-123

⁷⁷ Coronal Brief, Ballarat Base Hospital records, Tab 65-126 ff

⁷⁸ Coronal Brief, Statement of Jane McIntyre, Tab 61-1

- (c). The information treating endocrinologist, Dr Cohen noted at the first consult with Mr Swale following the collision on 20 November 2023, 15 days after the collision.

Dr Cohen's notes refer to Mr Swale eating lunch at Clunes at approximately 12:30pm with 6 to 7 units of NovoRapid insulin and at 4pm taking 9 units of NovoRapid expecting to eat but no food being available on arrival at the cafeteria. He then describes the drive to Daylesford and a scan at 5:15pm showing blood glucose of 3.5 but that Mr Swale could not recall this or any low alarm ringing or the accident.

62. These versions provide some information about what occurred on 5 November 2023 and Mr Swale's actions and knowledge. However, they are limited, incomplete, inconsistent and untested. There is no statement from Mr Swale and, as noted earlier, there is no other account from Mr Swale given in any other forum from which the relevant circumstances can be drawn. While Paramedic Fowler, Senior Constable Barber, Dr Pena, Ms McIntyre and Dr Cohen can be called to give evidence about their interactions with Mr Swale and the information he provided to them, such evidence may not progress the position much further. Otherwise, there is no other witness who can give evidence as to many aspects of inquest scope item 1 and no other witness from Clunes has emerged in relation to presenting for food that had run out with Mr Swale. There is a witness who states that barbeque food was available at Clunes until 3pm with the canteen closing at around 4pm on 5 November 2023.⁷⁹
63. Mr Swale travelled alone from Clunes and there is no RACV record of a call or of his vehicle being jump started.⁸⁰ While in Daylesford, Mr Swale was also alone with limited evidence relating to his going to Winespeake Deli at 5:21pm and leaving a short time later.⁸¹

Probative value of Mr Swale's evidence

64. Numerous questions remain unanswered. These relate to how it is that Mr Swale was able to become severely hypoglycemic notwithstanding and in the context of continuous glucose monitoring, what food was available and where and why it was that Mr Swale did not eat, if that was the case and the administration of insulin prior to a planned meal which it is suggested did not materialise. The time that food was eaten is of critical importance in understanding what occurred that day in terms of Mr Swale further administering insulin to himself with a view to eating. Questions further remain as to continuous glucose monitoring

⁷⁹ CB, Vol 1, Statement of Simon Barker, 18A

⁸⁰ CB, Vol 1, Statement of Kim Bell, 18B

⁸¹ CB, Vol 1, Statement of Martin Hinck, 19-3

and how this interacts with technology and Bluetooth. While others can give evidence about these interactions, only Mr Swale can tell the inquest what, if any, low glucose alarm he received, what, if any, symptoms he was experiencing and about the manual blood glucose reading at 5:17pm and his actions thereafter. I consider Mr Swale's evidence to be relevant and probative.

65. Without Mr Swale's evidence, findings as to circumstances remain significantly incomplete and mean that the opportunity to make recommendations to prevent such an occurrence from happening again that are anything more than general is limited. In turn such general recommendations risk being ineffectual from a prevention perspective.

The character and nature of the deaths under investigation

66. The importance of making findings and recommendations, if possible, in this case is underscored by the significant public interest in understanding the facts and circumstances leading to the deaths of five people and the making of recommendations aimed at preventing or reducing the risk of similar events occurring in the future.

The nature and extent of the risk and prejudice to the applicant

67. I accept that there is prejudice to Mr Swale's position that arises in two ways:
- (a). prejudice that Mr Swale may face charges by way of direct indictment, including on a differently framed case than that presented at the committal proceedings, based on evidence given by Mr Swale at the inquest.
 - (b). Mr Swale will be prejudiced in his defence in any proceedings so brought as a result of the forensic advantage that the prosecution will derive from the evidence at inquest.
68. I accept that requiring Mr Swale to give evidence alters the accusatorial process as described by the High Court in *X7*⁸² by compelling Mr Swale to provide an account which he would otherwise not be compelled to provide in the criminal process and creating an account which would otherwise not exist. This needs to be weighed up as part of the evaluative assessment and balancing process.

⁸² (2013) 248 CLR 92

69. In relation to the risk of future proceedings, I accept, as Counsel Assisting put it, that the protection provided by a certificate is significant but, as put by Mr Swale's Counsel and agreed by Counsel Assisting, is not complete. The effect of the certificate is to preclude future use against Mr Swale of any evidence given by Mr Swale and any information, document or thing obtained as a direct or indirect consequence of that evidence.⁸³
70. However, I accept that it is possible that derivative use may be made of the evidence, equipping the prosecution to build a case against Mr Swale.⁸⁴ Should this occur, as noted by Justice Keogh in *Villan*, Mr Swale's forensic choices will be restricted and he "...would not be free at any criminal trial to put the prosecution to its proof on every fact or matter, and may be forced to call evidence himself".⁸⁵
71. I also accept Counsel for Mr Swale's submission that this is not a case of the criminal matters being exhausted and complete and that, if evidence emerged about Mr Swale's conduct and decision making earlier than 5:36pm, this may form the basis of a direct indictment. However, this case can also be distinguished from cases such as *Kontis* and *Villan* where no criminal charges had been laid and the prospect of which remained unknown.
72. While the criminal case here may be said not to have been fully exhausted, it has been comprehensively and vigorously put through the test of a committal proceeding and been found to be wanting. True it is, that this was on the basis of a period of driving commencing at 5:36pm, but this time frame was chosen by the prosecution after consideration of the elements required to make out the offences with which Mr Swale was charged. I consider the prospect of the prosecution deriving evidence to prosecute a differently framed case against Mr Swale as relatively low.
73. I consider the prospect that any evidence given by Mr Swale altering the DPP's obviously carefully considered position on direct indictment, which was conveyed to the families of the deceased and to those injured, and confirmed in a public press release, to be low. While the prospect may be low, I do accept that any direct indictment would relate to serious indictable offences carrying significant terms of imprisonment as was the case in *Rich* and *Villan*.⁸⁶

⁸³ Section 57(7) of the Act

⁸⁴ In the case of *Villan*, Justice Keogh referred to *Lucciano [2021] VSCA 12* where the Court recognized that the evidence in a civil trial could be used to craft evidence in a criminal trial and that there was a "real risk of prejudice in defence of the criminal trial because the circumstances relevant to both proceedings were substantially identical, and the civil trial was a dress rehearsal for the later criminal trial.

⁸⁵ *Villan* at [27]

⁸⁶ In *Villan*, no charges had been laid but there was evidence to suggest that a report would be made to the police in respect to allegations of child sexual abuse and an investigation likely as a consequence of which Justice Keogh concluded there was a 'real prospect' of the witness being charged with very serious offences with the risk of significant period of imprisonment if found guilty such that it was not in the interests of justice to require the witness to give evidence.

CONCLUSION

74. Having weighed up the considerations bearing on the interests of justice, I have taken into account the probative value and the significance of the evidence that Mr Swale could give at the inquest for the findings I am to make as to the circumstances of the deaths and to enable me to make comments and recommendations to discharge my preventative function. I have considered the public interest in doing so in this matter involving the deaths of five people who were pedestrians engaging in off road activities. I have weighed this against the potential prejudice to Mr Swale and the incomplete protection of a certificate which leaves open the possibility of future criminal proceedings for serious indictable offences but one that I consider to be low given that any evidence Mr Swale gives at the inquest cannot be directly or indirectly used in any future proceeding. Furthermore, while Mr Swale's defence may be prejudiced by the evidence he gives at the inquest, he will retain his right to silence in any criminal matter in respect to matters that essentially only he can give evidence about.
75. For the reasons set out above, I am satisfied that the interests of justice require Mr Swale to give evidence in this inquest and direct Mr Swale to give evidence.
76. Having made that determination and ruled accordingly, I will provide Mr Swale with a certificate pursuant to section 57 of the Act.

Signature:



DIMITRA DUBROW
CORONER
Date: 28 January 2026