



IN THE CORONERS COURT
OF VICTORIA
AT MELBOURNE

COR 2020 000259

FINDING INTO DEATH FOLLOWING INQUEST

Form 37 Rule 63(1)

Section 67 of the Coroners Act 2008

Inquest into the Death of Andrew David Berry

Delivered on: 29 July 2024

Delivered at: Southbank, Victoria

Hearing dates: 8 to 12 May 2023, 28 June 2023

Findings of: Coroner Paul Lawrie

Representation: G. Chisholm – Counsel for the family of Andrew Berry
M. Pekevskaja – Counsel for the Chief Commissioner of Police

Counsel Assisting: S. Locke

Keywords: Death in police custody, use of force, OC spray aftercare, transport of arrested person, drug intoxication (methylamphetamine), sympathomimetic syndrome

I, Coroner Paul Lawrie, having investigated the death of Andrew David Berry, and having held an inquest in relation to this death on 8 to 12 May 2023 and 28 June 2023 –

at Southbank, Victoria

find that the identity of the deceased was Andrew David Berry born on 10 August 1978

and the death occurred on 14 January 2020

at Maroondah Hospital, Davey Drive, Ringwood East, Victoria 3135

from:

1a: SYMPATHOMIMETIC SYNDROME

INTRODUCTION

1. At 2.14pm on Tuesday, 14 January 2020, Andrew David Berry was arrested by police as he attempted to break into residential premises in Boronia. He was in a drug affected state and was agitated and aggressive. Police used oleoresin capsicum (OC) spray during the arrest and Mr Berry was handcuffed.
2. Mr Berry was transported in a police divisional van from the scene of the arrest to the Boronia Police Station, departing at 2.40pm. En route, he became unresponsive.
3. At 2.52pm the divisional van arrived at the sallyport of the Boronia Police Station and various police members administered first aid. Mr Berry remained unconscious and appeared hyperthermic. An ambulance was called and arrived at 2.59pm.
4. Mr Berry's temperature was recorded as 43.0°C and his condition continued to deteriorate. As he was being treated by paramedics, he stopped breathing, and his pulse could not be detected. Cardiopulmonary resuscitation was performed and there was a return of spontaneous circulation.

5. At 4.12pm Mr Berry was transported by ambulance to the Maroondah Hospital Emergency Department, arriving at 4.33pm. On arrival he was again in cardiac arrest.
6. Despite further resuscitation efforts Mr Berry could not be saved and he died at 5.49pm.
7. Post-mortem toxicology revealed a blood methylamphetamine concentration of 3.9 mg/L.
8. Mr Berry had been arrested and was in police custody at the time of his death. Section 52(2)(b) of the *Coroners Act 2008* (**the Act**) prescribes that an inquest is mandatory in such circumstances.

CORONIAL INVESTIGATION AND INQUEST

9. Detective Senior Sergeant (Det S/Sgt) Mark Colbert of the Victoria Police Homicide Squad acted as the Coroner's Investigator. Det S/Sgt Colbert coordinated the police investigation culminating in a coronial brief and additional material summing more than 1,100 pages. This included a statement from Mr Berry's mother, Helen Berry, who provided valuable insight into her son's personal history. Statements were also obtained from members of the public who were witness to the events of 14 January 2020.
10. Each of the police members involved: in the arrest of Mr Berry at the residential premises in Boronia; his subsequent transport to the Boronia Police Station; and the delivery of first aid in the sally port of the Boronia Police Station also made a statement.
11. S/Sgt Bernard Jenkins of the Research and Continuous Improvement Unit (Victoria Police – Operational Safety Division) and Acting Superintendent Gerard Cartwright of the Custody Operations and Logistics Unit of Victoria Police provided statements in respect to police policies and procedures applicable to the use of OC products and body worn cameras, and other matters of operational policy.¹

¹ Exhibits 25 and 22 respectively

12. The coronial brief also included expert reports by: Forensic Pathologist, Dr Paul Bedford of the Victorian Institute of Forensic Medicine; Forensic Neuropathologist, Dr Linda Iles; and Toxicologist, Kerryn Crump. A statement sought on behalf Mr Berry’s family from Dr Mark Walby, emergency medicine specialist, was also provided.
13. Kerryn Crump provided a toxicology report dated 6 March 2020 which revealed, *inter alia*, a post-mortem methylamphetamine concentration of 3.9 mg/L in Mr Berry’s blood.² The explanatory notes to the report reveal that, even allowing for the potential effects of post-mortem redistribution of the drug, this is a high concentration of methylamphetamine.
14. Dr Iles provided a neuropathology report dated 20 May 2020 in which she concluded that there was no evidence of traumatic brain injury.³
15. Dr Bedford provided an autopsy report dated 14 August 2020 in which he opined that the cause of death was “sympathomimetic syndrome”⁴. The cause of death was not a matter of contention⁵ and I accept Dr Bedford’s opinion.
16. The scope of the inquest was:
 - (a) The use of force associated with the arrest of Andrew Berry at Chartwell Drive, Wantirna on 14 January 2020.
 - (b) The aftercare provided to Andrew Berry at the scene of the arrest following the use of OC foam by police.
 - (c) The circumstances surrounding the transport of Andrew Berry from the scene of the arrest to Boronia Police Station, including the assessment and monitoring of his state of health prior to transport and whilst in transit.

² Exhibit 4

³ Exhibit 5

⁴ Exhibit 3

⁵ Dr Walby agreed with Dr Bedford’s opinion.

- (d) The use of body worn cameras by police members throughout their interactions with Andrew Berry on 14 January 2020.

17. The following witnesses were called at the inquest:

Sergeant David Meneilly;
Senior Constable Bryce Taylor;
Dr Paul Bedford;
Nigel Buckley;
David Hall (former Victoria Police, Constable);
Senior Constable Jennifer Fletcher;
Sergeant Rhonda Roughley;
Nydia Scott (former Victoria Police, Constable);
Senior Constable Katherine Isherwood;
Acting Superintendent Gerard Cartwright;
Senior Sergeant Bernard Jenkins; and
Dr Andrew Walby.

BACKGROUND

- 18. Mr Berry was born on 10 August 1978 in the United Kingdom. He emigrated to Australia with his parents in 1986 at age 7. His parents divorced in 1989, after which Mr Berry's father returned to live in the United Kingdom. His father subsequently died in a motor vehicle collision in 1992.
- 19. Mr Berry left secondary school in Year 10 (at age 16) and began an apprenticeship as a bricklayer. He was self-employed for approximately 2 years from age 19 before returning to work as an employee for various businesses.
- 20. In 2007, Mr Berry met and married a woman who was a foreign national. According to Mr Berry's mother, the immigration requirements applying to Mr Berry's wife meant that she had to return to her country of origin for 12 months. This situation led to a rapid deterioration in their relationship and the breakdown of their marriage.

21. At about this time Mr Berry began using methylamphetamine after being introduced to the drug by a co-worker. This would lead to a downward spiral of drug use, mental health issues and criminal offending.
22. In 2008, Mr Berry was arrested for a series of armed robberies, thefts, and drug related offences. Although he had been previously convicted and fined for an offence of wilful damage in 1999, the series of crimes in 2008 represented the start of his serious criminal offending. He was sentenced to 5 years and 4 months imprisonment with a non-parole period of 2 years and 8 months.
23. In 2010, Mr Berry was convicted of recklessly causing injury and sentenced to 14 days imprisonment to be served concurrently with his existing sentence. He was released from prison in September 2010.
24. In March 2012, Mr Berry was again imprisoned for 3 months after conviction for multiple counts relating to property damage and theft. In April 2012 he received a concurrent sentence of 1 month for affray.
25. In November 2016, Mr Berry was sentenced to 7 months imprisonment to be served as a Drug Treatment Order pursuant to s.18Z of the *Sentencing Act*.
26. In April 2018, Mr Berry was sentenced to 55 days imprisonment for burglary, theft, assault, and other offences. This was reckoned as time already served after having been in custody on remand – he was placed on a Community Correction Order for 18 months.
27. Mr Berry's last period of imprisonment ended in January 2019 after he was sentenced to 10 days for theft, dealing with the proceeds of crime and committing an indictable offence whilst on bail. This was reckoned as time already served after he had spent 11 days on remand.

28. Otherwise in the period from 2008 to 2019, Mr Berry was convicted of various offences including criminal damage, theft, amphetamine use, reckless conduct endangering serious injury, and driving offences. Various episodes of this type of offending lead to short periods of incarceration. He had violent confrontations with police on multiple occasions with incidents of apparent drug induced psychosis resulting in violent outbursts.
29. In the period leading up to his death, Mr Berry was engaged with a job seeking network and had been looking for employment in various roles involving unskilled labour since 2019.
30. At the time of his death, Mr Berry resided with his mother, Helen Berry, at her home in Ferntree Gully. He lived in a detached bungalow and did not have his own key to the main residence because of his unpredictable behaviour when under the influence of methylamphetamine.
31. There were other criminal proceedings outstanding at the time of Mr Berry's death. On 9 October 2018, he was disturbed leaving a private property in North Melbourne. The occupier noticed his tool cupboard had been opened and confronted Mr Berry who then ran off. When the occupier followed, Mr Berry brandished a large knife and hit the occupier numerous times with a bag. He was arrested at the scene and presented as severely drug affected. He was transported to the Royal Melbourne Hospital for treatment and the resulting charges proceeded by way of summons.
32. On 18 December 2018, Mr Berry was walking along Canterbury Road, St Kilda West, trying the door handles of parked cars. He was seen by members of the Victoria Police Critical Response Team and ran from police when they attempted to arrest him. Mr Berry was caught a short time later but resisted arrest by kicking and thrashing his arms about before he was subdued. He again appeared to be in a drug affected state and he was

transferred to the Alfred Hospital by ambulance, under police escort. He was charged on summons with four counts of resist police.⁶

FINDINGS AS TO CIRCUMSTANCES

I find, under section 67(1) (c) of the *Coroners Act 2008* ('the Act') that the death occurred in the following circumstances –

14 JANUARY 2020 – morning

33. At 9.39am on 14 January 2020, Mr Berry arranged to meet Phoenix Ahuriri near the Southern Cross Railway Station in Melbourne. Ahuriri was staying in a serviced apartment nearby in a complex known as “Aura on Flinders” at 534 Flinders Street, Melbourne.
34. At 10.28am, Mr Berry boarded a train from Ferntree Gully and travelled to the Melbourne central business district, arriving at the Southern Cross Railway Station at 11.17am. He then walked to Aura on Flinders and entered the foyer at 11.35am.
35. According to Phoenix Ahuriri, Mr Berry looked pale, sweaty and jittery. He appeared to be under the influence of methylamphetamines or “coming down” from the drug. Mr Berry asked Ahuriri to obtain methylamphetamine for him, but when Mr Berry was told this was not possible, he became annoyed. Ahuriri then telephoned various associates to try to obtain the drug but could not do so. Mr Berry then spoke of “scoring from someone off the street” and left abruptly, heading towards the Flinders Street Railway Station. The entire interaction with Phoenix Ahuriri lasted only a few minutes.
36. Detective Sgt Colbert has outlined Mr Berry’s movements between leaving Aura on Flinders not long after 11.35am and his subsequent appearance at a podiatry clinic at 535

⁶ The charges arising from the events of 9 October and 18 December 2018 were struck out on 25 February 2020 at the Ringwood Magistrates’ Court.

Boronia Road, Wantirna at 1.45pm. Although Mr Berry's movements during this period cannot be confirmed by CCTV or other similar means, based on available trains and travel times, Detective Sgt Colbert has inferred that Mr Berry walked from Aura on Flinders to Flinders Street Railway Station, a journey of approximately 7 minutes. From there, he caught the next Belgrave Line train departing at 11.47am and arrived at Boronia Railway Station at 12.43am. Then Mr Berry walked for approximately 1 hour (4.5km) along Boronia Road to the podiatry clinic.

37. The inferential reasoning offered by Detective Sgt Colbert is sound and I accept this is the most likely course of events for Mr Berry's journey from the Melbourne central business district to Boronia.
38. I also consider it is likely that Mr Berry obtained and consumed methylamphetamine while he was in the Melbourne central business district, or elsewhere that morning.

Disturbance at the Podiatry Clinic in Boronia

39. At approximately 1.50pm Mr Berry walked into a podiatry clinic at 535 Boronia Road, Boronia. He had no connection to the clinic. He was acting erratically and appeared to be drug affected. He was also carrying a short wooden stick.
40. The receptionist, Rachel Butler, tried to engage with Mr Berry but he did not respond to her questions. He was chewing rapidly and pacing up and down. Ms Butler noticed that Mr Berry's lips appeared "blue-black", as if they were stained with something – she could not tell what it was.
41. Mr Berry appeared "jittery" and threw the stick on the ground between chairs in the waiting room. He then dropped an empty water bottle and picked up the stick. From the waiting room Mr Berry went to walk up a hallway towards the treatment rooms. Ms Butler banged on the door of one of the treatment rooms to summon help from her

colleague, Rainer Maier. At the same time, she was trying to edge Mr Berry towards the front door.

42. At 1.56pm, Ms Butler called 000 Emergency to request police attendance.
43. Mr Maier went to the front door of the clinic where he met Mr Berry, just outside. Mr Maier also saw that Mr Berry was chewing something and his lips appeared to be stained. He described the colour as light blue.
44. Mr Maier repeatedly told Mr Berry, “You need to leave mate. You need to walk away” but Mr Berry kept trying to get past Mr Maier, to get to the front door of the clinic. There was a short conversation consistent with Mr Berry being in a drug affected state:

Mr Berry – *Who are you?*

Mr Maier – *I am the clinic owner.*

Mr Berry – *No you're not.*

45. Mr Berry then tried to push past Mr Maier but was pushed back and Mr Berry asked, “Where’s Mum?” Hoping to persuade Mr Berry to leave, Mr Maier replied, “Your mum’s not here, she has left.”
46. Mr Berry then reached into a small black pouch he was carrying over his shoulder and pulled out something shiny. Mr Maier could not identify the object at that moment and he grabbed Mr Berry’s arms and pushed him into a driveway beside the clinic where Mr Berry stumbled and dropped his wallet and sunglasses. Mr Maier could now see that the shiny object was a teaspoon. At about this time he was joined by his colleague, Steven Garoni, who had come out onto the driveway.
47. Mr Berry picked up a pot plant that was near the front door to the clinic and smashed it on the ground. He took the plant from the pot and threw it over a side fence into a neighbouring property before walking off south across Boronia Road. On the opposite side of the road, approximately 80 meters away, he scaled the rear fence of a residential

property at 7 Chartwell Drive, Wantirna.⁷ Mr Maier could see him walking along something elevated beside the fence and inside the property before he dropped down out of sight.

48. At 2.07pm, Sgt Rhonda Roughley⁸ and Constable David Hall (comprising the unit “Boronia 251”) arrived at the podiatry clinic. Mr Maier gave a brief account of what had happened and provided a description of Mr Berry’s appearance and pointed out the rear fence of the property he had seen Mr Berry climb over. At this time, Constable Bryce Taylor and First Constable Jennifer Fletcher (comprising the unit “Boronia 209”) were also making their way to the area.

Police attendance at 7 Chartwell Drive, Wantirna and arrest of Mr Berry

49. 7 Chartwell Drive, Wantirna is a residential property with the front of the house facing south. It has a front lawn and narrow garden bed along the front wall of the house. A driveway leads down the east side of the premises and the front door to the house is on this side. On the west side there is a narrow strip of land between the front of the house and the side fence – this becomes wider moving towards the rear of the property and includes a side patio enclosed by clear blinds (**the west sideway**). The rear yard is at the north end of the property.
50. Sgt Roughly calculated which property in Chartwell Drive correlated to the rear fence facing Boronia Road that had been pointed out by Mr Maier and drove to number 7. Constable Hall took with him a large cannister of OC foam as he exited the police vehicle and went up the driveway to the front door.

⁷ The rear fence of 7 Chartwell Drive backs on to a narrow reserve running parallel to Boronia Road on its south side.

⁸ Sgt Roughley was the patrol supervisor for the Knox and Maroondah police service areas rostered from 6:00am to 2:00pm.

51. There were two children at home at 7 Chartwell Drive, a 15 year old boy and a 13 year old girl. The young girl answered the doorbell and Hall⁹ described her as “screaming and panicking”. Her brother was calmer and said that he had seen a man in their rear yard and he was trying to get into the house. CCTV recordings¹⁰ covering the rear yard of the property and a side patio show Mr Berry acting in a bizarre manner. He can be seen dragging a round trampoline and pulling it aside. He then retrieves a flat file from a workshop area. He climbs up beside a window at the side of the premises and throws several pot plants over the side fence. He tries to cut his way through the clear blinds enclosing the patio using the flat file. It is at about this time that he is interrupted by the police members moving down the west sideway from both directions.
52. As Hall was at the front door of the house and speaking with the children, he heard the sound of breaking glass. He told the children to run outside and stay at the front of the driveway. Hall entered the house followed by the other three police members. From a living room overlooking the side patio Constable Taylor could see Mr Berry holding a ceramic pot plant above his head and appearing to be in heightened state.
53. Taylor tried to open a sliding door to the patio and also tried a laundry door to the rear yard but both were locked. He then ran back outside via the front door and climbed over a locked gate on the east side of the property and moved into the rear yard. At the same time Fletcher and Hall moved around the front of the house, through a side gate and down the west sideway of the property. Sgt Roughley remained out the front. As the police members confronted Mr Berry from both directions, the arrest was captured on Constable Taylor’s body worn camera (**BWC**). He was however the only one of the police members to activate their BWC at that time or subsequently whilst at the scene.
54. At 2.14pm Taylor and Fletcher commanded Mr Berry to get on the ground and they repeated this instruction several times. Mr Berry put his hands over his head with his

⁹ Ranks omitted from time to time for ease of narrative. When used, each member’s rank is as at the date of events.

¹⁰ Exhibit 34

elbows covering his face and braced himself a hot water unit. Taylor aimed his OC spray and warned Mr Berry that he would be sprayed but he failed to comply, and Taylor then sprayed OC foam directed at his head and face.

55. At about this time First Constable Kate Isherwood and Constable Nydia Scott (comprising the unit "Rowville 302") arrived and assisted with the arrest. At 2.16:43pm, Mr Berry was wrestled to the ground and handcuffed behind his back. At 2.16:51pm he was moved into the recovery position. Shortly after this, Taylor moved away from Mr Berry and went to the front lawn to wash OC off his own arms and face and so his BWC did not capture any further involvement with Mr Berry.
56. I am satisfied that the immediate arrest of Mr Berry was necessary. I am also satisfied that the use of force to effect the arrest was necessary and appropriate. The evidence of the witnesses from the podiatry clinic, the CCTV recordings showing Mr Berry in the rear yard and at the side patio of 7 Chartwell Drive, and the BWC recording of the arrest make it abundantly clear. Mr Berry was clearly behaving in an aggressive, threatening and unpredictable manner. He presented a very real and immediate danger to the public and, most obviously, to the two children inside the premises.
57. Counsel Assisting submitted that the use of OC foam on Mr Berry apparently had little effect and that he continued to struggle with police. This is apparent from the BWC recording and I accept this was the case.

Moving Mr Berry from the west sideway to the front yard

58. After approximately five minutes, Mr Berry was moved from the location where he was initially arrested (in the west sideway) to the front yard. As Hall, Fletcher and Isherwood were escorting him, an upset occurred near a garden bed and front window at the south-west corner of the residence.

59. Nigel Buckley, a neighbour whose property is immediately to the west of 7 Chartwell Drive, was standing nearby and saw four police members struggling with Mr Berry, trying to get him to the front yard. He recalled in his written statement:

The male was still resisting arrest. The police and the perpetrator as an entity tripped over rocks in the garden and fell on the rose bushes. During this struggle the perpetrator then fell with his head hitting the house of my neighbour's house. Some of the Police also fell with him and into the house. This looked accidental.¹¹...

When the male hit his head I heard the thump. It looked like he hit his head on the forehead on the front or side.¹²

60. Mr Buckley stated in evidence that Mr Berry fell to his left and he assumed that he had struck his head somewhere on the left side.¹³ Mr Buckley later saw blood on Mr Berry's head although he could not recall precisely where – he thought it was present on the left side.
61. Constable Hall did not believe Mr Berry had struck his head during the fall into the rose bush¹⁴ although he thought it was possible Mr Berry may have struck his head during the initial arrest in the west sideway.
62. Senior Constable Fletcher rejected the potential for any head strike during Mr Berry's initial arrest.¹⁵ Further, she did not see any head strike during Mr Berry's fall into the rose bushes.¹⁶ Constable Scott also did not recall seeing or hearing any head strike at that point.¹⁷

¹¹ Exhibit 8 at CB165

¹² Exhibit 8 at CB166

¹³ T272

¹⁴ T315

¹⁵ T365

¹⁶ T366, T382

¹⁷ T425

63. Sgt Roughly estimated she was standing approximately the same distance away from the group as Mr Buckley was when the fall occurred. She gave evidence that she had a good view and did not see or hear any head strike.¹⁸
64. The post-mortem examination by Dr Paul Bedford¹⁹ revealed (among other bruises and abrasions to the chest and limbs) the following injuries to the head:
- (a) Left lateral forehead – a cluster of bruises and abrasions covering an area of 65mm x 65mm
 - (b) Lateral aspect of the upper left eyelid – laceration of 15mm
 - (c) Lateral left cheek – an abrasion of 20mm x 7mm;
 - (d) Lower inner aspect of the left outer helix – laceration of 25mm
 - (e) Left posterior parietal region – cluster of abrasions covering an area of 30mm x 30mm.²⁰
65. Reflection of the scalp showed a left parietal bruise of 55mm x 30mm and a left frontal bruise of 30mm x 25mm. However, a neuropathology examination by Dr Linda Iles revealed no evidence of traumatic brain injury²¹ and Dr Bedford confirmed that there was no skull fracture or injury to the brain underlying these bruises to the scalp.²²
66. It is not possible to say which of the external injuries (the areas of bruising and abrasion) to the left side of Mr Berry's head is the result of a head strike as described by Mr Buckley. However, the presence of these superficial injuries and their general location is consistent with Mr Buckley's observations. I note however that they are also consistent with having been sustained during the initial arrest when Mr Berry was struggling with his head on the ground in a small, lowered area next to the hot water service in the west sideway.²³

¹⁸ T493

¹⁹ Forensic Pathologist at the Victorian Institute of Forensic Medicine.

²⁰ Exhibit 3 – Autopsy Report

²¹ Exhibit 5 – Neuropathology Report

²² Exhibit 3 – Autopsy Report

²³ Exhibit 2 at 3:10 elapsed time

67. Although the police members involved in escorting Mr Berry either denied the occurrence of a head strike or did not recall having seen such an event, their entanglement with him at the critical time may well have compromised their awareness of every happening during the upset. Sgt Roughly was not so closely involved as were the other police members but I am not satisfied she necessarily had a clear line of sight at the critical moment.
68. I do not place significant weight on the fact that none of the police members heard any sound attributable to a head strike (as compared with Mr Buckley who did). No doubt there many different noises at the critical time, not the least of which would be multiple voices, the sounds of exertion, and other contacts with the immediate environment.
69. I am satisfied that Mr Berry's head struck the outside wall of the residence during his fall, together with the police members, into the rose bush and garden bed. I am not however satisfied that the contact was particularly forceful, and I am not satisfied it was as forceful as appears to have been perceived by Mr Buckley. In this regard I note that, whichever of the injuries on the left side of Mr Berry's may be attributable to this event, the injuries were superficial.

Aftercare at 7 Chartwell Drive, Wantirna – the front yard

70. Shortly after the fall into the rose bush and garden bed, Mr Berry was moved to the front lawn and restrained on the ground. Aftercare for the effects of exposure to the OC foam (**aftercare**) was administered while Mr Berry remained on the front lawn. This involved rinsing Mr Berry's face and eyes with fresh water from a nearby garden hose, and the process was continued for approximately 5 to 10 minutes.
71. A photo taken by Mr Buckley captures the situation at 2.28pm shortly before the commencement of aftercare²⁴ at which time Mr Berry was being restrained face down on the lawn.

²⁴ Exhibit 9

72. Submissions on behalf of the Chief Commissioner of Police (**CCP submissions**) included an observation that the evidence of the various police members revealed a degree of confusion concerning the obligations to provide aftercare. I agree.

73. The *Victoria Police Oleoresin Capsicum Manual*²⁵ (**OC Manual**) provides under the heading “AFTER-CARE”:

... After-care is to be maintained until symptoms are alleviated and the person is no longer experiencing the effects. Subjects are to be kept under constant observations for at least 45 minutes or until the symptoms are no longer apparent (longer than 45 minutes if required).

74. The *Victoria Police Manual, Operational safety equipment* policy dated 16 December 2019²⁶ (**VPM – Operational Safety Equipment**) also specifies the requirements for aftercare at 6.3 and includes:

*Keep a person **affected** [emphasis added] by OC under constant and direct observation for at least 45 minutes or until the symptoms or effects are no longer apparent (whichever is longer).*

75. The confusion between the police witnesses emerged when they had to consider whether a subject had to be kept under direct observation for 45 minutes, even if their symptoms had disappeared, or whether the requirement for direct observation ended in those circumstances. It is likely the confusion is linked to the word “affected” and the ambiguity of its tense. It is not clear if the word is used in the sense of “presently affected” or “having been affected but no longer affected”. It is important in the context of these events because Mr Berry did not receive aftercare for 45 minutes and was transported in a divisional van within this 45 minute period

76. I accept that aftercare commenced moments after the photograph taken by Mr Buckley at 2.28pm. By the time the video recording started showing the view in the custody pod of the divisional van at 2.39pm, Mr Berry was already in the custody pod. Therefore,

²⁵ Exhibit 27

²⁶ Exhibit 30

allowing some time to move Mr Berry to the divisional van and get him into the custody pod, I conclude that Mr Berry was provided aftercare for between 5 and 10 minutes.

77. The consistent evidence of the police members was that Mr Berry remained resistant and uncooperative while aftercare was being administered. Also, that he appeared not to be suffering any effects of the OC foam and further aftercare did not appear to be necessary.
78. Isherwood and Taylor understood that the requirement to keep a person under observation ceased if they no longer appeared affected by OC spray.²⁷ Fletcher and Scott understood the requirement to remain for 45 minutes or until the symptoms are no longer apparent, whichever is longer.²⁸ Sgt Roughley stated that the required period of observation was at least 45 minutes and also pointed to the confusion between relevant Victoria Police documents.
79. The CCP submissions disagree that the use of the word “affected” is the cause of the confusion and argue that the confusion appeared to relate to a belief by some members that aftercare (that is, active aftercare such as irrigation of the face and eyes) was required for 45 minutes or until the effects of the OC were no longer present, rather than that being an observational period.²⁹
80. Further, the wording of the *VPM – Operational Safety Equipment* and, particularly the phrase “constant and direct observation”, would seem to forbid a person being transported in a custody pod of a divisional van within 45 minutes of exposure to OC, regardless of an absence of symptoms. This is because “direct observation” may suggest observation with a direct line of sight and not observation by remote means, such as CCTV. S/Sgt Jenkins explained that the policy did in fact permit a person to be transported in the custody pod of a divisional van during the required period of observation.³⁰ I accept S/Sgt Jenkin’s evidence that this is within the intent of the policy

²⁷ Isherwood – T531; Taylor – T186;

²⁸ Fletcher – T352; Scott – T394-395

²⁹ CCP submissions at paragraph 46.

³⁰ T616

but, again, it is not clear on its face. I do note however that the *OC Manual* clearly contemplates transport in a divisional van when a person is still within the 45 minute observation period, provided it is necessary to do so because they to behave in a violent or threatening manner.³¹ Paragraph 8.1 of the *OC Manual* provides:

Divisional vans – only transport a sprayed or foamed person in a divisional van during the observation period if:

- *They continue to behave in a violent or threatening manner, which makes:
 - *Any attempt at aftercare dangerous and a possible security risk*
 - *Remaining at the scene a safety risk for the public, police or the sprayed/foamed person. ...**

- *Transportation is for the shortest practical time and distance and only while the reasons for early transportation exist.*

81. Acting Superintendent Cartwright explained that police members were expected to keep persons who had been sprayed with OC under “direct and constant observation for the whole 45 minutes”³² – the implication being that the requirement exists regardless of whether symptoms are no longer present. I accept this to be a proper expression of the intent of the policy but, nonetheless, the evidence of the police members revealed differing interpretations. Whatever the source(s) of the confusion may be, it is abundantly clear that the *OC Manual* and *VPM – Operational Safety Equipment* need to be reviewed so that the aftercare and observation requirements are easily understood and unambiguous.

82. The CCP submissions argue that a recommendation is not required because the fact that a potential ambiguity exists has been accepted and S/Sgt Jenkins has stated that the policy would be looked at by Victoria Police and reviewed to see if clarification was required. The CCP submissions also highlight that neither exposure to OC exposure foam or the manner of the aftercare caused or contributed to Mr Berry’s death. I do not accept that these features of the case negate the need for a recommendation. It is not good enough that operational members are required to grapple with unclear policy statements,

³¹ Exhibit 27

³² T603

especially in such a critical and frequently encountered area of police operations. Accordingly, I consider it necessary to make a recommendation directed toward this problem in the following terms.

Recommendation

That Victoria Police review all policies and manuals that relate to the aftercare of persons who have been subjected to OC foam to ensure clarity in all respects.

Particularly, the relevant policies and manuals should:

- (a) treat separately the concept of “aftercare” as active treatment of the effects of OC foam (for example, irrigation of the face and eyes), and the concept of “observation” of the subject person;
- (b) provide greater clarity of the steps that may be taken when a subject refuses aftercare (or further aftercare) or no longer displays signs or symptoms of OC exposure;
- (c) provide greater clarity regarding the permitted manner in which observation of the subject may be maintained, and for what period of time.

The Decision to Transport to Boronia Police Station

83. The decision to transport Mr Berry from the scene at Chartwell Drive was a central matter of inquiry during the inquest. Key issues within this subject include:

- (a) Mr Berry’s apparent physical condition immediately before he was transported;
- (b) whether Mr Berry ought to have been medically assessed by paramedics prior to being transported;
- (c) whether Mr Berry ought to have been taken to a hospital emergency department rather than the Boronia Police Station; and
- (d) the timing of the decision to transport.

Apparent physical condition during aftercare

84. Sgt Roughly was the most senior police member present at the scene, and the decisions regarding the transport of Mr Berry were ultimately hers. The photograph taken by Mr Buckley at 2.28pm³³ usefully identifies the commencement of aftercare. The start of the CCTV recording from the divisional van³⁴ at 2.39pm shows Mr Berry already in the rear custody pod and represents (at least, approximately) the end of the period when Mr Berry was receiving aftercare. Unfortunately, there is no BWC or CCTV recording, or other photographs depicting activities during this period. I conclude however that the decision to transport Mr Berry to Boronia Police Station was made shortly before he was placed in the divisional van.
85. The CCP submissions contend that none of the police members present were of the view that Mr Berry's presentation constituted a medical emergency. Further, that none of the police members thought Mr Berry was ever unconscious or suffering altered consciousness while he was on the front lawn.
86. Sgt Roughley said that Mr Berry did not appear confused, although he was giving meaningless answers and saying various names that were obviously not his. She believed he was being facetious.³⁵ At no time while Mr Berry was on the front lawn was Sgt Roughley concerned about his medical condition.³⁶
87. Isherwood described Mr Berry (on the front lawn) as "really violent and aggressive". She said Mr Berry was still trying to get up and kicking out. He appeared unaffected by the OC spray and did not show the usual signs of distress such as coughing. At one stage he licked his lips and said "just give me more" – a statement Isherwood understood to be in reference to the OC spray and not the water used for aftercare. Mr Berry remained "uncooperative and violent and threatening". Isherwood did not think it was appropriate

³³ Exhibit 9
³⁴ Exhibit 18
³⁵ T489-490
³⁶ T509

to transport him in a sedan, and that a divisional van was appropriate because of his violent demeanour.³⁷

88. Isherwood was not aware of any injury to Mr Berry and did not recall any graze(s).
89. Taylor stated that he was not aware of Mr Berry having suffered a head strike at any stage while moving from the side of the house to the front lawn. He also did not see any signs of profuse sweating – although he observed that everyone was sweating due to the heat.³⁸ He did not see any signs of blue discolouration on Mr Berry’s face.
90. Taylor thought Mr Berry was drug affected but did not consider him to be unintelligible.³⁹
91. Mr Buckley also described Mr Berry’s demeanour and apparent condition on the front lawn. He had, of course, seen Mr Berry strike his head on the wall at the front of the house and recalled a change in his demeanour at that time.⁴⁰ Mr Buckley thought it was a “pretty heavy hit” and that Mr Berry wasn’t moving as aggressively afterwards but he did not lose consciousness. Later, when Mr Berry was receiving aftercare, Mr Buckley thought he was more relaxed and recalled, “he was still moving ... I don’t think he was being so violent then”.⁴¹
92. Mr Buckley was asked to compare Mr Berry’s demeanour before the head strike and afterwards on the front lawn: he recalled Mr Berry shouting and swearing beforehand and being relatively quiet afterwards. Mr Buckley went on to speculate that Mr Berry may have been concussed (while simultaneously acknowledging that he himself was not a doctor).⁴² I don’t place any weight on the speculation of concussion and note that there is nothing in the forensic pathology to support it, however I accept that Mr Buckley’s speculation in this regard is illustrative of his impression of events.

³⁷ T540
³⁸ T172
³⁹ T241
⁴⁰ T252
⁴¹ T257
⁴² T258

Discolouration of Mr Berry's lips

93. The question whether Mr Berry's lips appeared blue was an issue insofar as it may have indicated a decline in his physical state requiring medical assessment or intervention. There was questioning of Acting Superintendent Cartwright and S/Sgt Jenkins, particularly by Counsel for the family, exploring a suspicion of cyanosis of the lips and the need for medical attention post exposure to OC spray. Ultimately, S/Sgt Jenkins declined to speculate and reiterated that the police members had to make their own assessment based on what was before them.⁴³
94. At the Boronia Police Station, when Mr Berry went into cardiac arrest at 3.28pm, paramedics began CPR and found gastric contents and a blue "foreign body" blocking the upper airway. Suction was used to remove "a blue, stringy, toothpaste-like material". This was said to be difficult to remove and broke apart several times. Further, it appeared to one of the paramedics that the material had been obstructing Mr Berry's upper airway. The material was not retained, and it has not been possible to establish what it was.
95. There were no remnants of the blue material found at autopsy.⁴⁴
96. None of Isherwood, Taylor, Fletcher or Sgt Roughley saw blue discolouration of Mr Berry's lips.⁴⁵ Mr Buckley also did not notice any signs of that nature.⁴⁶
97. Hall did see Mr Berry with blue lips just before he was sprayed with OC at the side of the house. He recalled in his written statement:

*At that point, I noticed that he was extremely agitated and drug-affected, His head ticked a lot, his arms were flailing, his lips were blue and [he] had enlarged pupils to the point that I couldn't see the colour of his eyes.*⁴⁷

⁴³ T662

⁴⁴ T095

⁴⁵ T562, T173, T368 and T496 respectively.

⁴⁶ T270-271

⁴⁷ Exhibit 13. See also T312, 321

98. Hall could not say whether the blue lips indicated to him a medical issue⁴⁸ and he rejected the suggestion that he should have organised immediate medical attention because of this observation.⁴⁹

99. At an earlier stage, during the events at the podiatry clinic, Linda Rumney noticed that Mr Berry had blue lips⁵⁰ and Rachel Butler noticed that they were “blue-black”.⁵¹ Rainer Maier, who was also at the clinic, stated:

*He had blue lips, almost like stained blue lips. His lips were weird, they had like a light blue stain and he was chewing something.*⁵²

100. Having closely examined Taylor’s BWC recording of the arrest⁵³ I have not been able to discern the blue discolouration of Mr Berry’s lips. This is despite the advantage of “freeze frame” and repeated playback.

101. When paramedics attended to Mr Berry in the sallyport of the Boronia Police Station they observed cyanosed lips, but this is consistent with his state of collapse at that time and this later observation does not suggest that his lips would have appeared blue during the events at Chartwell Drive.

102. I accept that Linda Rumney, Rachel Butler, Rainer Maier and Constable Hall did notice a blue discolouration to Mr Berry’s lips, but I am not satisfied that the blue discolouration was particularly prominent by the time police were dealing with Mr Berry at Chartwell Drive. The discolouration was not noticed by the other police members at the scene or by Mr Buckley, and it is not discernible from Taylor’s BWC recording. To suggest the discolouration, such as it may have been apparent, was a sign of oxygen deprivation or some other medical problem is no more than speculation. It is however likely that the blue discolouration was associated with something Mr Berry was chewing.

48 T323

49 T325, 329

50 Exhibit 37 – CB136

51 Exhibit 37 – CB133

52 CB150

53 Exhibit 2

103. It was suggested to Constable Hall during his evidence that he should have told his colleagues of his observations. Ideally, he should have – but this omission must be considered in the context of the events at the time as Mr Berry continued to be uncooperative and resistant with the police during the period of aftercare. Also, Hall’s colleagues were themselves suitably positioned to make observations of Mr Berry.
104. I am not satisfied that the discolouration of Mr Berry’s lips, such as it may have appeared, was a sign that should have prompted a different approach by the police members at the scene following the arrest.

The decision and direction to transport Mr Berry to Boronia Police Station

105. Sgt Roughly stated that she directed the Rowville members (Isherwood and Scott) to take Mr Berry to the Boronia Police Station.⁵⁴ In oral evidence, she explained the necessity for keeping Mr Berry in custody and taking him to the police station.⁵⁵ She also stated that there were no circumstances which caused her to consider that Mr Berry might require medical assistance or be transported to a hospital.⁵⁶
106. There is no doubt that, save for the question whether Mr Berry was medically fit to be taken to the police station, it was necessary and appropriate for the police to have adopted the above course of action. Mr Berry had been arrested for serious offences where he presented a very real threat to the public and the young occupants of 7 Chartwell Drive. He was violent and remained resistant and uncooperative, even after arrest and while aftercare was being administered.
107. It was a hot day and, while the ambient air temperature that afternoon was not established precisely, I accept it was well above 30°C. The high temperature was also a sound reason

⁵⁴ Exhibit 15

⁵⁵ T481, 590

⁵⁶ T483

to transport Mr Berry a short distance to the controlled environment of the police station rather than remain on the front lawn.

The potential for medical assessment/intervention at the scene

108. Dr Andrew Walby, an Emergency Physician at St Vincent's Hospital Melbourne and Portland District Health, provided a report dated 5 May 2023.⁵⁷ Dr Walby agreed with the cause of death as determined by Dr Bedford and opined that police should have called an ambulance to the scene at Chartwell Drive so that Mr Berry could have been medically assessed. He considered that such an assessment may have resulted in treatment at the scene and/or transport to hospital.

109. Dr Walby also explained sympathomimetic syndrome, including its causes and clinical progression. He described the syndrome as:

*... a complex and rapidly escalating collection of clinical features which are initially [caused by] ... a chemical agent which will disrupt the normal [chemical] functioning of the body and, in particular, the brain.*⁵⁸

110. Dr Walby further explained that the very high level of methylamphetamine in Mr Berry's blood was the likely cause, leading to a disruption of the brain's neurotransmitters and overproduction of adrenaline and noradrenaline – thereby compromising homeostasis. Features of the syndrome include: high heart and respiration rates, hyperthermia, dilated pupils, profuse sweating, agitation and combativeness.⁵⁹ The presentation is idiosyncratic and the features may be very variable.

111. His experience from both the Western Hospital (Footscray) and St Vincent's Hospital Melbourne revealed one or more persons each day presenting with features of this type. However, according to Dr Walby, it was much less frequent that a person within this cohort of patients would progress to a complete dysregulation of their homeostatic

⁵⁷ Exhibit 36

⁵⁸ T701

⁵⁹ T703

system. Further, there was no simple antidote for a person suffering sympathomimetic syndrome, and treatment essentially amounted to supportive care.

112. In Dr Walby's opinion, Mr Berry should have been transported from the incident scene directly to a hospital emergency department because of the features he was exhibiting, namely, being drug affected and potentially suffering an acute mental health crisis.⁶⁰ He also stated that paramedics may have been able to administer sedative medication to Mr Berry at the scene to try to control his agitation and combativeness.⁶¹ Later in his evidence, Dr Walby clarified that he was not expressing an absolute opinion concerning transport to a hospital when he said:

*I'm not suggesting that 100 per cent that people who are deemed to be drug affected need to be transported to hospital. What I said was in my experience, that there are a large number of people transported to emergency departments who are demonstrating the features that Mr Berry was demonstrating.*⁶²

113. Dr Walby further clarified that, in his opinion, it would be reasonable in every case where someone is substantially drug affected, for police to seek ambulance assistance because there could be a sudden acute deterioration in their medical condition.⁶³ Earlier in his evidence, Dr Walby explained the sort of intervention by paramedics that may be possible at the scene when a person was combative or irrational. These potential interventions included the administration of intravenous fluids, involving the insertion of an intravenous line, after the administration of an intramuscular sedative.⁶⁴
114. Whilst I accept that such interventions are possible, it is important to bear in mind the significant challenges posed by Mr Berry's behaviour. He was violent and resistant, and the police members were contending with him in an open and hot environment. There were good reasons to want to move him to a more controlled environment, such as a police station, as soon as practicable. There was no evidence concerning the likely

⁶⁰ T711, 713

⁶¹ T731

⁶² T759

⁶³ T767-768

⁶⁴ T745-746

response time of an ambulance on that day and it should not be expected that the police should wait at a scene for what may be an extended period for an ambulance to arrive. If the person arrested is assessed by police as fit for transport and is otherwise ready to be transported to a nearby police station, this should occur. The application of a direction in absolute terms requiring ambulance attendance in all cases where an arrested person is substantially drug affected does not sufficiently take into account the reality of the environment in which emergency services must operate. There must be allowance for the exigencies emerging in each situation and the risk assessments which are able to be performed by the attending police members.

115. I am not satisfied that the police members at Chartwell Drive should have been required, by force of application of a universal approach to drug affected persons, to request ambulance attendance at the scene. Albeit that police are not in a position to form a clinical opinion, as would a paramedic, the ability for police members to utilise their training to assess whether it is safe to transport a person in a police vehicle must be given proper weight.

Potential for apprehension and transport for mental health assessment

116. During examination of Acting Superintendent Cartwright and S/Sgt Jenkins, Counsel for Mr Berry's family introduced the suggestion that Mr Berry's behaviour may have indicated that the police should have had concerns regarding his mental health.⁶⁵ Counsel did not suggest directly that Mr Berry should have been apprehended pursuant to section 351 of the *Mental Health Act 2014*⁶⁶ and taken to a hospital for a mental health assessment but the subject was, nonetheless, opened for the first time in the course of this examination. It had not been suggested to any of the police members at the scene that

⁶⁵ T653-658

⁶⁶ The operative provision at the time in respect of the apprehension of a person for mental health assessment who is believed to be suffering from a mental illness and need to be apprehended to prevent serious and imminent harm to themselves or another. *The Mental Health Act 2014* has since been repealed and replaced by the *Mental Health and Wellbeing Act 2022* and the equivalent provision is found at section 232.

they should have exercised (or considered) their power to apprehend Mr Berry pursuant to the *Mental Health Act*.

117. Dr Walby subsequently gave evidence that there were features of Mr Berry's behaviour which indicated he was potentially having an acute mental health crisis⁶⁷ and this was a further reason he should have been transported directly to a hospital.
118. It is unfortunate that this issue was raised without any of the police members at the scene having been taken to it during their evidence. Police members are not required to exercise clinical judgement in the exercise of this power.⁶⁸ Furthermore, it cannot be expected that a police member should attempt to disentangle multiple behavioural features to form a conclusion that a mental illness may be present and causative of the behaviour of concern, in addition to what are the reasonably apparent effects of drugs.
119. I am not satisfied that the police members at the scene ought to have apprehended Mr Berry pursuant to section 351 of the *Mental Health Act 2014* for transport to a hospital for a mental health assessment.

Mr Berry's apparent physical condition upon entry to the divisional van

120. In his written statement, Mr Buckley described the transition of Mr Berry from the lawn to the Divisional Van as follows:

The male did not respond [to questions from police asking his name] and then they proceeded to pick him up. He was handcuffed at the back. Each member had an arm and a leg. Then they put him in the div van. When they were carrying him he was still resisting arrest. They put him in and his legs were hanging out the back and he refused to do what he was told, which was "move your feet so we can close the door". The police were very polite at this stage.

⁶⁷ T711

⁶⁸ *Mental Health Act 2014* – s351(2)

*The officers pushed his knees down and bent his legs and an officer quickly closed the door. I did not hear the male in the back of the divi van.*⁶⁹

121. In evidence, Mr Buckley said that he saw the police officers lift Mr Berry into the rear of the Divisional Van, face up, with his head towards the front of the vehicle. Also, that the police officers had to manipulate Mr Berry's leg to be able to close the rear door of the custody pod and he did not hear anything further from Mr Berry once the door was closed.⁷⁰
122. Hall recounted in his written statement that he, with Taylor and Fletcher, "scooped" Mr Berry up then took him to the divisional van, and placed him in the back.⁷¹ In evidence, Hall recalled that Mr Berry was still resisting as they tried to close the rear door and he was pushing the door out with his legs to prevent it being closed.⁷²
123. Taylor said in evidence that Mr Berry was slid into the custody pod and stopped talking and shouting, and his legs appeared to lock in an act of passive resistance. He believed Fletcher used a baton to push Mr Berry's foot inside in combination with force ("a smack") to the back of his leg/knee to have the leg bend rather than be locked out straight.⁷³
124. Fletcher described these events in her written statement as follows:

Constable Taylor then lifted the male's left arm and I lifted his right arm and two other members lifted his legs as we walked him towards Rowville 302's divisional van ... We attempted to sit the male facing us, in the rear entry of the Divisional Van as is the procedure. To get him to move himself in the back of the Van ... The male continued to kick out and refused to bend his legs to enable us to close the

⁶⁹ Exhibit 8
⁷⁰ T283-285, also at T260
⁷¹ Exhibit 13
⁷² T306-308
⁷³ T210

*door ... The Rowville 302 members assisted us and with their assistance we were eventually able to get his legs inside and close the back of the Divisional Van.*⁷⁴

125. Fletcher could not recall much beyond this during her oral evidence – she explained that Mr Berry was picked up by his legs and shoulders and slid into the custody pod face up. She further recalled that Mr Berry was still struggling and kicking out. She moved away from the Divisional Van soon after the rear door was closed and did not hear anything from inside.⁷⁵

126. Isherwood provided a detailed account of this stage of events in her written statement:

*... One of the members was saying “Stand up” but he was not assisting at all. We ended up carrying him to the van Members had his upper body and I had his calves and feet. Once we got him to the door of the van he stiffened up on purpose and would not get into the van. He was put into the van head first and he deliberately stiffened his legs up to hold the door ajar and prevent it from shutting. I tried to bend his legs but when that didn’t work I got my baton out and used the training I had been given to put the baton lengthways behind his knee and apply pressure in an attempt to make his knee bend. This was unsuccessful and I noticed that members were getting tired and still struggling to get him into the van. I then used the same baton to apply pressure to his toe nails in an attempt to get him to remove his feet from the door way. This had no effect. I stepped back and two members were able to push him into the back and bend at the waist so he fitted without bending his legs.*⁷⁶

127. Scott’s account in her written statement is equally detailed and consistent in all material respects.⁷⁷

128. Sgt Roughley said in her written statement:

Prior to the door shutting, the male’s actions could be seen as deliberately trying to stop us shut the door however he remained on his side in the back of the van but he wasn’t yelling abuse at that stage, or saying anything. I had no concerns

⁷⁴ Exhibit 14

⁷⁵ T370-372

⁷⁶ Exhibit 19

⁷⁷ Exhibit 16

*for his welfare at that stage. I could see that he was physically trying to obstruct us in getting the divisional van door closed.*⁷⁸

129. I am satisfied that Mr Berry was conscious and still significantly resisting police when he was moved to the divisional van and as he was placed into the custody pod. I am also satisfied that he tried to use his legs to stop the rear door from being closed, although it is likely he was no longer saying anything at this stage.

Choice of vehicle

130. Isherwood and Taylor explained that Mr Berry's behaviour precluded the use of a police sedan for transport to the police station.⁷⁹ Their rationale was based upon the physical risk Mr Berry posed to police members should he act violently whilst in the passenger cabin of an ordinary vehicle.
131. I accept that these concerns were genuine and were a proper basis to require that Mr Berry was transported in a divisional van rather than a police sedan.

Use of BWCs by members at the scene

132. Senior Constable Taylor was the only one of the five police members at the scene who were equipped with a BWC to have activated it. The recording from Taylor's BWC commences 2:12:52pm as he and Fletcher (comprising "Boronia 209") turned their police sedan into Chartwell Drive. The recording finishes 5 minutes and 52 seconds later at 2:18:44pm as Taylor is having his arms rinsed with water in the front yard.⁸⁰
133. The failure of one or more BWCs to be activated for the entire interaction between police and Mr Berry at the scene meant that all events between the arrest in the west sideway

⁷⁸ Exhibit 15

⁷⁹ Isherwood – T537-540; Taylor – T242

⁸⁰ Exhibit 2

and the placement of Mr Berry in the divisional van were not captured on video or audio. This state of affairs gave rise to the fourth item in the scope of the inquest.

134. Taylor agreed that he should have left his BWC running until Mr Berry was in the custody pod of the divisional van. He said in evidence that he turned it off because he thought the camera might be damaged by the water used for his own aftercare.⁸¹ However the recording was stopped after Taylor appears to have finished having water applied to his arms and face, and so his explanation does not fit with what was happening at that moment. I do not however consider this incongruity to be of great consequence. The distinct impression gained from the recording is that Taylor turned off his BWC as an unconsidered action. I am satisfied that the reason he gave in evidence was the likely product of an *ex post facto* rationalisation for what was, in reality, an action he took at the time with little or no thought. The tendency to ascribe a reason for each of one's own actions is common – albeit unhelpful in a forensic setting.
135. Sgt Roughley said in evidence that she believed she had tapped her BWC to start recording but it had not activated. She put this down to “bad use” of the technology and explained that BWCs had only been rolled out at her station some two months earlier.⁸²
136. Constable Scott thought she had activated her BWC when arriving at Chartwell Drive. She described “double tapping” the device to do so. It was only after some time back at Boronia Police Station that she realised she had not activated it.⁸³
137. Constable Isherwood was wearing a BWC and stated that she forgot to turn it on. She further explained that she had first used the equipment in 2019 whilst stationed at East Melbourne.⁸⁴

⁸¹ T204

⁸² T473-474

⁸³ T410

⁸⁴ T526

138. Constable Fletcher said that she forgot to turn on her BWC and explained that she had first been issued with the equipment August or September 2019 – shortly before she arrived at Boronia Police Station.⁸⁵
139. Constable Hall was not wearing a BWC as he had not been issued with one at that time.⁸⁶
140. The policy governing use of BWCs applicable at the time of these events was *Chief Commissioner’s Instruction – CCI 06/19 Body worn camera deployment* which was in operation from 10 December 2019 to 10 December 2020.⁸⁷ Police members were directed to start a BWC recording as follows:

Members should start a BWC recording when:

exercising a legislated or common law power and the recording would assist in collecting evidence, or

- any other occasion when the member believes a recording is necessary;*
- to capture an incident occurring, likely to occur, which has occurred, or that would provide transparency of a public interaction or a police activity.⁸⁸*

141. The current policy dictating when a BWC recording is required is contained in the *Victoria Police Manual – Body Worn Cameras*⁸⁹ at paragraph 3.2. This policy commenced on 10 December 2020. It includes a more extensive list of the situations requiring activation of a BWC and, most significantly, casts the requirement in mandatory terms with the introductory phrase, “A member wearing a BWC **must** start a recording ...” (emphasis added).
142. S/Sgt Jenkins explained that these events occurred during a period when operational police members were getting used to the operation of BWCs adding that “Compliance was a bit hit and miss in the early stages”.⁹⁰ S/Sgt Jenkins further explained that police

⁸⁵ T340
⁸⁶ Exhibit 13
⁸⁷ Exhibit 31
⁸⁸ Exhibit 31 at paragraph 10
⁸⁹ Exhibit 33
⁹⁰ T614

members are now trained to activate their BWC when they receive a job. Compliance checking for appropriate activation of BWCs is carried out at the relevant police station in the first instance. His office (the Research and Continuous Improvement Unit – within the Operational Safety Division) also checked for BWC recordings against Incident Fact Sheets and found that the rate of compliance for activation of BWCs when required was “extremely high”.

143. I accept that the police members at the scene were operating during an early period for the implementation of BWCs and the level of habituation regarding their use was substantially lower than exists now. Furthermore, I note that the policy applicable at the time was cast in non-mandatory language. The mandatory terms of the current policy appear far clearer, and I accept the evidence of S/Sgt Jenkins that the level of compliance with BWC policy is now high.
144. Accordingly, I do not consider it is necessary for any recommendation in respect of Victoria Police policy for the use of BWCs.

Divisional van transport to Boronia Police Station

145. Isherwood and Scott were tasked by Sgt Roughley to transport Mr Berry to the Boronia Police Station. Isherwood was the driver and Scott acted as the observer. Mr Berry was recorded throughout the journey on CCTV which showed the inside of the custody pod from a camera looking forwards and another camera looking rearwards.⁹¹ The live images from the cameras were displayed on a small screen in the cabin of the vehicle.⁹² The journey took approximately 13 minutes.
146. The following events are discernible from the CCTV recording taken from the forward facing camera:

2.39:07pm Recording starts (Mr Berry is already in the custody pod)

⁹¹ Exhibit 18

⁹² Exhibit 21

2.40:30pm Police vehicle starts moving

2.44:26pm Mr Berry's right leg falls away from the transverse bench to the floor of the custody pod – his left shoulder is positioned downwards, and the left side of his face is resting on the bench.

2.49:00pm Signs of shallow breathing remain apparent

2.49:29pm Mr Berry slides to the left side of the custody pod as the vehicle manoeuvres

2.51:00pm Mr Berry slides to the right of the custody pod as the vehicle manoeuvres – his head is positioned at the right corner of the bench with his face down

2.52:30pm Vehicle enters the sallyport at Boronia Police Station

2.53:05pm Custody pod door opened

2.53:25pm Mr Berry is pulled out from the custody pod unconscious

147. Counsel Assisting submitted that it is not possible to identify from the recording the precise moment Mr Berry lost consciousness but further submitted that he had lost consciousness by 2:49:26pm, based on the movements of his body as the vehicle is moving. I accept this to be the case. Mr Berry does appear to still be breathing at this time.

148. Scott stated that immediately after Mr Berry was placed in the custody pod of the divisional van, she turned on the camera(s) for the custody pod, the intercom and the fan. As she sat in the passenger seat, Isherwood directed her to maintain her observations of Mr Berry using words similar to, "I don't want to baby you but keep close observations on him".⁹³ In her written statement, Isherwood also recalled this instruction to Scott in similar terms.⁹⁴

149. The Court had the benefit of a view of a divisional van with the same fit out as the divisional van driven by Isherwood and Scott. The product of the view was summarised in the evidence of Sgt Meneilly, who facilitated the process. It was notable that the

⁹³ Exhibit 16

⁹⁴ Exhibit 19

display screen for the pod cameras (the “screen”) was very small and mounted in a low central position in the cabin. The small screen is crammed among a host of other equipment and controls which are peculiar to the requirements of a police divisional van. It was apparent that the screen would easily be degraded over time from scratches and other wear and tear. Moreover, the images on the already small display were made even smaller by the division of the screen into quarters. Two quarters appeared to be dedicated to unused input channels and the remaining two quarters showed the feeds from the two cameras in the custody pod, one facing forward and one facing rearward. The rearward facing camera did not have a useful field of view to monitor Mr Berry as he was positioned in the custody pod, whereas the forward facing camera did. The end result of this arrangement is that only one quarter of an already small screen displayed a useful image of Mr Berry.

150. Isherwood stated that they stopped the divisional van at the intersection of Amesbury Road and Boronia Road where they both looked more closely at the screen. She recalled in her written statement:

Constable Scott questioned if he was ok and said she wasn't sure he was moving. We both leant in to look more closely at the monitor and I could hear him breathing quite well. Given the short length of time between fighting police then laying still I formed the opinion that he was either pretending or resting in preparation to fight us again when we opened the door.⁹⁵

151. As Isherwood and Scott reached the vicinity of Tormore Road and Boronia Road (approximately one kilometre from the Boronia Police Station) they both agreed that Mr Berry had deteriorated, and Isherwood completed the journey using lights and sirens.
152. It was reasonable at that point for Isherwood and Scott to continue urgently to the police station. They were close to their destination, and there they would be in a controlled environment with immediate support from other police members, including first aid support. There was an option to continue directly to an emergency department, the nearest being Knox Private Hospital approximately four kilometres further on. However,

this does not render the decision to continue to the police station inappropriate or unreasonable.

153. When examining such decisions after the fact it is important to appreciate the time pressure under which the decision maker had to operate, the imperfect information available to them, and the uncertainties of their situation.
154. Both Isherwood and Scott gave evidence to the effect that, by looking at the screen while travelling to Boronia Police Station, they were able to discern whether Mr Berry was breathing. When the recording from the pod camera was played in evidence it proved to be very difficult to see whether Mr Berry was breathing, particularly in the later part of the journey. This difficulty was evident even in the calm of the court room with the benefit of full size monitors.
155. I do not consider it was possible for either Scott or Isherwood to properly determine whether Mr Berry was breathing simply from their view of the screen, particularly when the divisional van was in motion. The image on the screen would have been too small to do so and the noise and distractions in their operating environment would have simply added to the challenge. I do however accept that they genuinely thought they could discern breathing by looking closely enough at the image on the screen. It is very likely that the effects of confirmation bias were at play when Isherwood and Scott looked to see if Mr Berry was breathing – they wanted to see breathing, and so it becomes likely that their interpretation of the image on the screen would be unconsciously distorted in favour of that conclusion.
156. Scott and Isherwood both said that they could hear breath sounds from Mr Berry by increasing the volume of the intercom while the divisional van was stopped.⁹⁶ I accept that they were able to hear breath sounds from Mr Berry by doing this. Furthermore, the fact that they were able to hear such sounds also likely influenced their perception that they could discern breathing from the image on the screen. Ultimately, the fact that Mr Berry was still breathing throughout the journey to the Boronia Police Station is

⁹⁶ Scott – T447; Isherwood – T545

supported by his condition on arrival. The initial assessment by paramedics at 3:14pm confirms he was breathing, albeit that he was also unconscious.⁹⁷

157. The ability of police members crewing a divisional van to monitor a person in the custody pod is critically important. The use of the variable volume intercom is one of the tools used for this purpose and it appears to have been useful in this case. However, the screen for the CCTV images was less useful. The image shown was too small for its intended purpose and this problem is only exacerbated once the noise and movement of a vehicle in motion is added.
158. I understand that the current fit out for divisional vans includes an electronic rear view mirror which is, in fact, a screen for CCTV camera feeds. However, the cameras from the custody pod will still only display in two quarters of the screen once the system automatically settles on its default view. The remaining two quarters are still unused. Although this new screen is a significant improvement on the equipment available to Isherwood and Scott, the potential for further improvement is clear. Accordingly, it is appropriate to make a recommendation in the following terms:

Recommendation

That Victoria Police review the equipment used for remote monitoring of persons in the custody pod of police vehicles to ensure that it provides an image of suitable size and quality to operate as the best possible aid to police members.

Response at Boronia Police Station and following

159. The arrival of the divisional van in the sally port of the Boronia Police Station and the subsequent first aid and resuscitation delivered to Mr Berry are captured on the various BWCs of the attending police members and the CCTV covering the sally port.

160. At 2:53:25pm Mr Berry is pulled out from the custody pod of the divisional van, clearly unconscious. The first aid provided by the various police members was prompt and appropriate. It is apparent that the police members recognised Mr Berry was hyperthermic and their efforts were focussed on reducing his temperature.
161. The first ambulance arrived at 2.59pm and MICA⁹⁸ paramedics arrived at 3.13pm. Mr Berry remained unconscious with a Glasgow Coma Score of 3. His pulse was 140 beats per minute, and he had an unrecordable blood pressure. His temperature was recorded as 43.0°C.
162. Mr Berry's jaw was locked tight and paramedics were unable to use an oropharyngeal airway to support his respiratory effort. He continued to deteriorate, and he was determined to be in cardiac arrest at 3:22pm when cardiopulmonary resuscitation was commenced.
163. At 3.28pm, paramedics managed to gain access to Mr Berry's upper airway and examination revealed an unknown blue material blocking that area. Suction was used to remove the unknown material which was described by one of the paramedics as a "blue stringy toothpaste" like material.
164. A pulse returned at 3.43pm and efforts continued to stabilise Mr Berry.
165. At 4:12pm Mr Berry was loaded into an ambulance and taken to the emergency department of the Maroondah Hospital, where he arrived at 4:33pm. He was in cardiac arrest with a temperature recorded as 41.5°C. Despite efforts to resuscitate and stabilise Mr Berry, he could not be saved and was declared deceased by an emergency department consultant at 5.49pm.
166. I am satisfied that the response by police at the Boronia Police Station was timely and appropriate in the efforts to administer effective first aid to Mr Berry. His most critical

issue appeared to be hyperthermia and the first aid efforts were clearly aimed at this. The call for an ambulance was made in a timely manner.

Alternate outcomes with earlier medical intervention

167. Dr Walby stated that he was unable to determine whether or not earlier attendance by ambulance would have altered the outcome for Mr Berry as his deterioration was rapid, acute and unexpected.⁹⁹ In evidence Dy Walby stated that (for a person suffering dysregulation of their homeostatic system through sympathomimetic syndrome) the sooner medical care is initiated, the higher the chance of survival.¹⁰⁰ He further explained:

... despite efforts to treat patients, they may still continue to deteriorate and may still go into a coma, unconsciousness, and or they may have a cardiac arrest and ... you may get a response to treatment initially but again, they may have further cardiac arrest. ... That's clearly [what] was demonstrated in this particular man.¹⁰¹

168. I accept Dr Walby's evidence in this regard and conclude it is not possible proceed beyond mere speculation when considering what would have been Mr Berry's outcome in any of the counterfactual scenarios explored in this inquest.

⁹⁹ Exhibit 36

¹⁰⁰ T717

¹⁰¹ T716

RECOMMENDATIONS

I make the following recommendation connected with the death to the Chief Commissioner of Victoria Police under section 72(2) of the Act:

Recommendation 1

That Victoria Police review all policies and manuals that relate to the aftercare of persons who have been subjected to OC foam to ensure clarity in all respects. Particularly, the relevant policies and manuals should:

- (a) treat separately the concept of “aftercare” as active treatment of the effects of OC foam (for example, irrigation of the face and eyes), and the concept of “observation” of the subject person;
- (b) provide greater clarity of the steps that may be taken when a subject refuses aftercare (or further aftercare) or no longer displays signs or symptoms of OC exposure;
- (c) provide greater clarity regarding the permitted manner in which observation of the subject may be maintained, and for what period of time.

Recommendation 2

That Victoria Police review the equipment used for remote monitoring of persons in the custody pod of police vehicles to ensure that it provides an image of suitable size and quality to operate as the best possible aid to police members.

Pursuant to section 73(1) of the Act, I order that this finding be published on the Coroners Court of Victoria website in accordance with the rules.

I direct that a copy of this finding be provided to the following:

Helen Berry, Senior Next of Kin
Chief Commissioner of Victoria Police
Ambulance Victoria
Eastern Health

Signature:



Date: 29 July 2024

NOTE: Under section 83 of the *Coroners Act 2008* ('the Act'), a person with sufficient interest in an investigation may appeal to the Trial Division of the Supreme Court against the findings of a coroner in respect of a death after an inquest. An appeal must be made within 6 months after the day on which the determination is made, unless the Supreme Court grants leave to appeal out of time under section 86 of the Act.
