



**CORONER'S COURT  
OF NEW SOUTH WALES**

**Inquest:** Inquest into the death of Xavier Burke

**Hearing dates:** 24 to 27 June 2019 at Port Macquarie

**Date of findings:** 25 July 2019

**Place of findings:** Coroner's Court of New South Wales, Lidcombe

**Findings of:** Magistrate Derek Lee, Deputy State Coroner

**Catchwords:** CORONIAL LAW – police pursuit, Safe Driving Policy, role of involved police, whether need to apprehend outweighed by risk to community, use of non-police vehicles in road block, use of smart push-to-talk function, advice to relatives

**File number:** 2017/43731

**Representation:** Ms J Davidson, Counsel Assisting, instructed by Ms J Hoy (Crown Solicitor's Office)

Mr B Haverfield for NSW Commissioner of Police

Mr P Madden for Senior Constable R Davison

Mr H White for Sergeant D Goddard

**Findings:** I find that Xavier Burke died on 10 July 2017 at Macksville NSW 2447. The cause of Xavier's death was multiple injuries. Xavier died when a vehicle that he was driving, and which was being pursued by a police vehicle in the course of a police operation, crossed to the incorrect side of the road and collided with a B-double.

**Recommendations:**

To the NSW Commissioner of Police:

1. I recommend that consideration be given to providing further training to Communications Operators to ensure that appropriate enquiries are made of involved police to clearly identify the offence that a person has committed, or attempted to commit, which has caused a pursuit to be initiated.
2. I recommend that consideration be given to making clear in Part 7 of the Safe Driving Policy that all escorts are “involved officers” for the purposes of section 7-2-5.
3. I recommend that consideration be given to providing clarification during standard police driver training that all escorts are “involved officers” for the purposes of section 7-2-5.
4. I recommend that consideration be given to any measure that can be taken to make the smart push-to-talk function on police radios more broadly available, and to communicate to police officers the availability of that function.
5. I recommend that consideration be given to amending section 7-6-2 of the Safe Driving Policy to include [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
6. I recommend that consideration be given to explicitly addressing the use of non-police vehicles (including heavy vehicles) as a road block during a pursuit, either in the Safe Driving Policy, or in another appropriate policy document or guideline, or by an appropriate direction to police officers.
7. I recommend that consideration be given to including in the standard police driver training an instruction regarding the use of non-police vehicles (including heavy vehicles) by police officers as a road block during a pursuit.

**Non-publication orders:** Pursuant to section 74(1)(b) of the *Coroners Act 2009*, I direct that the following material is not to be published:

1. With reference to **Exhibit 1**, that there be no publication of the following, including as referred to in the oral evidence:

- Transcript of Directed Interview with Detective Sergeant Damian Goddard (**Tab 8**)
  - Answer to question 38;
  - Answer to question 228, line two from the twelfth word until the end of the answer;
  - Answers to questions 252 and 253.
  
- Transcript of Directed Interview with Senior Constable Robert Davison (**Tab 9**)
  - Answer to question 27;
  - Answers to questions 154, 186 and 187.
  
- Statement of Inspector Brendan Gorman (**Tab 10**)
  - Page 2 - paragraphs 9, 11 and 12;
  - Page 3 - paragraph 15, ninth line from tenth word, until the end of the sentence eleventh line;
  - Page 3 - paragraph 15, thirteenth line from the first word until the twelfth word;
  - Page 4 - paragraph 17, second line from the fourteenth word until the sixteenth word;
  - Page 4 - paragraph 17, third line, from the ninth word until the eleventh word on line fifth line;
  - Page 5 - paragraph 20, line two from the fifth word until the nineteenth word on line five;
  - Page 6 - paragraph 25, line two from the fifteenth word until the fifth word on line six.
  
- Statement of Senior Constable Grant Osborne (**Tab 11**)
  - Page 1 - paragraph 3, line four from the tenth word until the end of the paragraph;
  - Page 4 - paragraph 21, eleventh line from the third word until the end of the paragraph.
  
- Interview with Senior Constable Peter Shelton (**Tab 14**)
  - Answer to question 124, line one from the fifth word until fourteenth word;
  - Answer to question 124, line two from the ninth word until end of answer.
  
- Statement of Sergeant David Stevens (**Tab 15**)
  - Page 2 - paragraph 5, all six dot points following “include” in line three;
  - Page 2 - paragraph 5, all seven dot points following “include” in line thirteen;
  - Page 3 - paragraph 8, line fifteen from the fourth word until the end of the paragraph;

- Page 4 - line one, from the thirteenth word until the end of the paragraph on line four;
  - Page 4 - paragraph 13, line seven from the sixth word until the thirteenth word on line nine.
- **Statement of Duty Operations Inspector Paul Smith (Tab 16)**
    - Page 3 - paragraph 11, all four dot points following “information” in line two;
    - Page 3 - paragraph 12, line one, twelfth word;
- **VKG Newcastle Supervisor Debrief Form (Tab 18)**
    - “Pursuit details” section - Line 5, word 1 until and including the end of the three check boxes
    - “Primary vehicle” section - References to vehicle categories
    - “Secondary vehicle” section - References to vehicle categories
- **VKG recording of pursuit transcript (Tab 19)**
    - Page 6 - line 14, words 2 – 10 inclusive
- **Report of Sergeant Kris Cooper (Tab 27A)**
    - Page 2 - paragraph 18, line six from the seventh word until the end of the paragraph on line seven;
    - Pages 3-4 - paragraph 26, line five from the first word until the last word of the line eight on page 4 (ie. from 7-2-2 until page 22);
    - Page 4 - paragraph 27, line two from the ninth word until the end of the paragraph;
    - Page 4 - paragraph 28, lines two and three;
    - Page 9 - paragraph 60;
    - Page 10- paragraph 61, lines 8 – 10 inclusive;
    - Page 10 - paragraph 62, all four dot points in paragraph 11;
    - Page 10 - paragraph 62, paragraph 12, line 1, twelfth word;
    - Page 10 - paragraph 64, paragraph 25 from line two from the eleventh word until the eleventh word on line five.
- **NSW Police Force Safe Driving Policy, Version 8.2 – July 2016 (Tab 27B)**
    - Page ii “Vehicle categories”, lines 1 – 5;
    - Page iii Line 1;
    - Pages 18-19 Paragraphs 5-1-4 to 5-1-8;
    - Page 19 In paragraph 5-4-2 – line 2 from the word “the” up to and including the word “riding”;
    - Page 19 Paragraph 5-4-4;
    - Page 20 Paragraphs 6-2-4 and 6-2-6;
    - Page 20 In paragraph 6-3, all the words in dot point 3;
    - Page 22 In paragraph 7-1-4 – line 3, from the second word “A” until the end of line 4;
    - Page 22 Paragraphs 7-1-5 and 7-1-6;
    - Page 22 Paragraph 7-2-2;
    - Page 23 Paragraphs 7-2-4, 7-2-8, 7-2-10 and 7-2-13;

- Page 23 Paragraphs 7-4-1 and 7-4-2;
- Page 24-25 In paragraph 7-5-1 “Drivers and Escorts”, subsections (e) & (j) and dot points 4 –11 inclusive and dot point 15;
- Page 28 Paragraphs 7-6-2, 7-6-3, 7-6-5, 7-6-6, 7-6-7, 7-6-8 and 7-6-9;
- Page 30 Paragraph 8-2 “Code Blue” - all the words in dot point 3;
- Page 30 Paragraph 8-2 “Code Red” – all words in dot points three and four;
- Page 30 Paragraph 8-5-1;
- Page 31 Paragraph 8-6-2;
- Page 34 Definition of “re-initiation”, second and third paragraphs of definition;
- Page 34 Definition of “terminate”, all the words from “A pursuit is not” to the end of the page;
- Page 37 Eleventh line under “C”;
- Pages 39 – 40 Re Duty Officer / Supervisor Pursuit Debrief Form:
  - All references to Category 1, 2, 3 or 4 vehicles;
  - “Police Vehicle and Occupant Details” - all material contained in the shaded box on the right hand side of the document, except Paragraph 1 and 5;
  - “Supervisor Details” – Paragraph 2 of the material contained in the shaded box on the right hand side of the document;
  - “Road Spikes” - Paragraph 1 of the material contained in the shaded box on the right hand side of the document.
- NSW Police Force Safe Driving Policy, Version 8.3 (December 2017) (**Tab 27C**)
  - Page ii “Vehicle categories”, lines 1 – 5;
  - Page iii Line 1;
  - Pages 18-19 Paragraphs 5-1-4 to 5-1-8 up to and including the end of the first full paragraph after the last dot point;
  - Page 19 In paragraph 5-4-2 – line 2 from the word “the” up to and including the word “riding”;
  - Page 19 Paragraph 5-4-4;
  - Page 21 Paragraphs 6-2-4 and 6-2-6;
  - Page 21 In paragraph 6-3, all the words in dot point 3;
  - Page 23 In paragraph 7-1-4 – line 3, from the second word “A” until the end of line 4;
  - Page 23 Paragraphs 7-1-5 and 7-1-6;
  - Page 23 Paragraph 7-2-2;
  - Page 24 Paragraphs 7-2-4, 7-2-8, 7-2-10 and 7-2-13;
  - Page 24 Paragraphs 7-4-1 and 7-4-2;
  - Page 25-26 In paragraph 7-5-1 “Drivers and Escorts”, subsections (e) & (j) and dot points 4 –11 inclusive and dot point 15;
  - Page 29 Paragraphs 7-6-2, 7-6-3, 7-6-5, 7-6-6, 7-6-7, 7-6-8 and 7-6-9;
  - Page 31 Paragraph 8-2 “Code Blue” - all the words in dot point 3;
  - Page 31 Paragraph 8-2 “Code Red” – all words in dot points three and four;
  - Page 31 Paragraph 8-5-1;
  - Page 32 Paragraph 8-6-2;
  - Page 35 Definition of “re-initiation”, second and third paragraphs of definition;

- Page 35 Definition of “terminate”, all the words from “A pursuit is not” to the end of the page;
- Page 38 Eleventh line under “C”;
- Pages 40 – 41 Re Duty Officer / Supervisor Pursuit Debrief Form:
  - All references to Category 1, 2, 3 or 4 vehicles;
  - “Police Vehicle and Occupant Details” - all material contained in the shaded box on the right hand side of the document, except Paragraph 1 and 5;
  - “Supervisor Details” – Paragraph 2 of the material contained in the shaded box on the right hand side of the document;
  - “Road Spikes” - Paragraph 1 of the material contained in the shaded box on the right hand side of the document.

2. That there be no publication of the names or any other information which may identify [REDACTED]

[REDACTED] or [REDACTED].

3. That there be no publication of the contents of **Exhibit 2**.

4. That there be no publication of the contents of **Exhibit 3**.

## Table of Contents

|     |   |    |
|-----|---|----|
| 1.  | Introduction .....  | 1  |
| 2.  | Why was an inquest held? .....  | 1  |
| 3.  | Xavier's life .....   | 1  |
| 4.  | What happened on 9 and 10 February 2017? .....  | 2  |
| 5.  | What was the cause of Xavier's death? .....   | 9  |
| 6.  | What issues did the inquest examine? .....  | 9  |
| 7.  | Did Sergeant Goddard and Senior Constable Davison comply with the Safe Driving Policy? .....          | 10 |
| 8.  | Were the actions of the officers monitoring the pursuit in compliance with the Safe Driving Policy? . | 21 |
| 9.  | Should other options have been considered or employed? .....  | 25 |
| 10. | Why were road spikes not available in the Macksville area? .....                                      | 29 |
| 11. | Was the information provided to Xavier's parents adequate and appropriate? .....                      | 30 |
| 12. | Findings .....  | 32 |
| 13. | Epilogue .....  | 33 |

## **1. Introduction**

- 1.1 In the early hours of the morning on 10 February 2017 Xavier Burke was fatally injured when the vehicle that he was driving collided with a B-double. The collision occurred just north of the bridge at Macksville, after the vehicle that Xavier had been driving had been pursued by a police vehicle for almost 30 minutes and over a distance of approximately 60 kilometres.
- 1.2 Xavier was driving his father's vehicle, which he had taken from the family home some hours earlier. Xavier was only 15 years old at the time, alone in the vehicle that he was driving, and had never received any driving lessons.

## **2. Why was an inquest held?**

- 2.1 Under the *Coroners Act 2009 (the Act)* a Coroner has the responsibility to investigate all reportable deaths. This investigation is conducted primarily so that a Coroner can answer questions that they are required to answer pursuant to the Act, namely: the identity of the person who died, when and where they died, and what was the cause and the manner of that person's death. All reportable deaths must be reported to a Coroner or to a police officer.
- 2.2 Due to the circumstances surrounding Xavier's death, he was regarded as having died in the course of a police operation. This meant that, according to the relevant section of the Act which applied at the time<sup>1</sup>, an inquest into Xavier's death was mandatory. Inquests are mandatory for these types of deaths to ensure that there is an independent and transparent investigation of the circumstances of the death, and the relevant conduct of any involved police officers. Such an investigation serves to provide assurance to the community at large that the wide powers bestowed on police officers have been exercised in an appropriate manner and with due consideration to the safety of those who might be adversely affected by the use of such powers.
- 2.3 Inquests have a forward-thinking, preventative focus. At the end of many inquests Coroners often exercise a power, provided for by section 82 of the Act, to make recommendations. These recommendations are made, usually, to government and non-government organisations, in order to seek to address systemic issues that are highlighted and examined during the course of an inquest. Recommendations in relation to any matter connected with a person's death may be made if a Coroner considers them to be necessary or desirable.

## **3. Xavier's life**

- 3.1 Inquests and the coronial process are as much about life as they are about death. A coronial system exists because we, as a community, recognise the fragility of human life and value enormously the preciousness of it. Recognising the impact that a death of a person has, and continues to have, on the family and loved ones of that person can only serve to strengthen the resolve we share as a community to strive to reduce the risk of preventable deaths in the future.
- 3.2 Understanding the impact that the death of a person has had on their family only comes from knowing something of that person's life and how the loss of that life has affected those who loved

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<sup>1</sup> *Coroners Act 2009*, section 23(1)(c) (since amended).



that person the most. Therefore it is extremely important to recognise and acknowledge Xavier's important life. It is hoped that the brief words below do so in a meaningful and respectful way.

- 3.3 Xavier was born on 21 August 2001. He was the only son of John and Marina Burke and had a younger sister. At the time of his death, Xavier was a Year 10 student at Melville High School in Kempsey, where he was peer leader for his year and in the top academic class. Xavier was also a gifted sportsman, having played in the State high school softball championships. By all accounts Xavier had a close circle of friends and was popular and well-liked.
- 3.4 From a young age Xavier had a fascination with cars. He spoke often of them and was well-known to be looking forward to obtaining his licence. Xavier also had a love of music and had shown considerable aptitude as a talented pianist.
- 3.5 There can be no doubt that Xavier is deeply missed by his parents, sister, family, and friends. It is most distressing to know that Xavier was lost at such a young age, with his potential still unfulfilled, and in such tragic circumstances.

#### **4. What happened on 9 and 10 February 2017?**

- 4.1 On the morning of 9 February 2017 Xavier spoke to his friends, [REDACTED] and [REDACTED], about taking his father's white 2002 dual cab Ford Courier 4WD utility (**the Courier**), with registration BC-38-CB, out for a joyride later that evening. Xavier's father had only bought the Courier recently. At the time, Xavier did not hold a driver's licence and had never received any formal driving lessons. During the day Xavier and his friends formulated a plan which involved Xavier waiting until his parents were asleep, taking the keys to the Courier, and then rolling it down the driveway of his home so that it could be driven away without waking his parents. Xavier and his friends had previously made similar plans to go out on joyrides on earlier occasions
- 4.2 At 9:59pm a member of the public reported to police that they had witnessed a white 4WD utility smash through a locked gate at a truck yard near 33 Bloomfield Street, South Kempsey. A broadcast was made over police radio (also known as **VKG**) for any available police to attend the location. At the time Senior Constable Grant Osborn and Constable Aaron Wilson, were conducting patrols in a marked police vehicle with call sign Kempsey 22 (**WK22**). They acknowledged the job and proceeded to Bloomfield Street. Initial enquiries suggested that the stolen vehicle was believed to be a white dual cab Nissan Navara with registration BR-75-GN. At 11:02pm a VKG broadcast was made indicating that unconfirmed information suggested that the stolen vehicle was in fact a white Toyota Hilux (**the Hilux**).
- 4.3 Sergeant Damien Goddard and Senior Constable Robert Davison were on duty at Kempsey police station during the evening. Upon hearing the VKG broadcast in relation to the Hilux, Sergeant Goddard decided to conduct a patrol of the Crescent Head area. This was because he was aware that there had been a number of recent break and enter offences committed recently around Crescent Head, as it was known to be popular with tourists who often left their property unsecured, and because another police highway patrol car was already patrolling the Kempsey area. As a result, the area was often targeted by offenders seeking to commit property-related offences. Sergeant Goddard asked Senior Constable Davison to accompany him on the patrol and they left Kempsey police station in a marked Holden Commodore with call sign West Kempsey 13 (**WK13**). Sergeant

Goddard and Senior Constable Davison patrolled the Crescent Head area up until around midnight, encountering little traffic and finding nothing of relevance. They returned to Kempsey police station and attended to paperwork.

- 4.4 After leaving Bloomfield Street Senior Constable Osborn and Constable Wilson attended to two further jobs both relating to vehicle fires which had appeared to have been deliberately lit, and then abandoned, by unknown persons. The first job was at 12:32am in Kemp Street, West Kempsey whilst the second job was at 1:18am in Armidale Road, Greenhill.
- 4.5 According to the plan which had been formulated earlier in the day, Xavier left his home in Kundabung sometime after about 11:30pm. He drove the Courier to the home of [REDACTED] in South Kempsey, where [REDACTED] and [REDACTED] were waiting. After picking up his two friends, Xavier drove to Frederickton to pick up [REDACTED] girlfriend, [REDACTED]. During the journey to Frederickton Xavier told his friends that if he was pulled over by the police that *“he would tell everyone to get out and he would just try and get away from them like, escape the police chase”*.<sup>2</sup> After picking up [REDACTED] the group drove back to South Kempsey. Once there, [REDACTED] called another friend, [REDACTED], in an attempt to make arrangements to pick him up. However, there was no answer and so the group continued to Pipers Creek and picked up [REDACTED].
- 4.6 At this time, Xavier was still driving the Courier, with [REDACTED] in the front passenger seat, and [REDACTED], [REDACTED] and [REDACTED] seated in the rear seat. At about 1:00am the group attempted to pick up another friend. After being unable to do so the group left and drove to a quarry located west of Kempsey at the intersection of Gowings Hill Road and Pipers Creek Road. After arriving, all of the youths got out of the Courier and walked around the quarry for an unknown period of time. Whilst doing so they observed some lights near where the Courier had been parked. After waiting for about 10 minutes the group made their way back to the Courier, and saw that the lights had gone. They then drove back towards South Kempsey.
- 4.7 It appears that a member of the public saw Xavier and his friends at the quarry and made a report of the sighting to the police to Kempsey police station, which was received by Senior Constable Davison. Upon hearing the report Sergeant Goddard decided to investigate it, believing that it may be connected to the report of the stolen Hilux. Sergeant Goddard again asked Senior Constable Davison to accompany him. They left Kempsey police station in WK13 and advised VKG at about 1:23am: *“...we’re just making our way out to, uh, the quarry at 501 Gowings Hill Road at Dondingalong and just had a call at the station, uh, at Fort Lakes of the Hilux act, acting suss. It might be the one from earlier”*.<sup>3</sup> At the time he left the station Sergeant Goddard was wearing Body Worn Video (**BWV**) recording equipment.
- 4.8 The following exchange then took place between the VKG despatcher and Sergeant Goddard:

**VKG despatcher:** *Copy that. And, um, before I create the job, you’re going out there, Kempsey 13, there are four POI’s out there? What were they doing?*

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<sup>2</sup> Exhibit 1, Tab 33, Q/A 137-138.

<sup>3</sup> Exhibit 1, Tab 19, page 149.

**Sergeant Goddard:** *Yeah...a white Hilux just acting suspicious. It's possibly the stolen Hilux from earlier tonight.*<sup>4</sup>

4.9 As a result the following job was created on the police Computer Aided Despatch (CAD) system: "4 POI'S ACTSUS IN A WHITE TOYOTA HILUX POSSIBLY STOLEN FROM EARLIER TONIGHT".<sup>5</sup>

4.10 A short time later the following exchange took place over VKG:

**VKG despatcher:** *I only got to the channel at 1 o'clock this morning. Um, I don't know anything about any stolen white Toyota Hilux. Have you got a rego?*

**Sergeant Goddard:** *Yeah the rego is Bravo-Romeo-7-5-Golf-November and it was stolen about, uh, 9 o'clock tonight.*<sup>6</sup>

4.11 Senior Constable Osborn and Constable Wilson heard the broadcast and informed VKG that they were going to make their way to Gowings Hill Road from the west with the intention of intercepting the Hilux. Meanwhile, WK13 made its way to Gowings Hill Road where Sergeant Goddard and Senior Constable Davison saw the Courier travelling east in the opposite direction. Sergeant Goddard estimated that the Courier was travelling well over the designated 80 kilometre per hour speed limit at time. He activated his BWV, performed a u-turn and commenced following after the Courier along Gowings Hill Road.

4.12 The Courier continued along Gowings Hill Road, and then turned into Middleton Street when the warning lights of WK13 were activated. The Courier proceeded along Middleton Street and turned right onto West Street. After travelling a short distance, the Courier pulled over and all the occupants, except for Xavier, exited the vehicle and began to quickly walk away. WK13 also pulled over. Senior Constable Davison exited the police vehicle and began following after the young persons, telling them to stop.

4.13 Moments later, the Courier began to drive away. Sergeant Goddard called out for Senior Constable Davison to return to the police vehicle. When Senior Constable Davison did so, Sergeant Goddard also drove off, following after the Courier. He advised VKG at 1:35am that a pursuit had commenced and provided the registration details of the Courier as being BC-38-CB. A pursuit was initiated and the lights and sirens of WK13 were activated. WK13 followed after the Courier along West Street before it turned onto South Street and then Macleay Valley Way. As the pursuit crossed Middleton Street, the VKG despatcher sought clarification in relation to the two registration details that had been provided (BR-75-GN and BC-38-CB). WK13 confirmed that it was in pursuit of registration BC-38-CB. The following exchange then occurred:

**VKG despatcher:** *Copy that. What was the original offence?*

**Sergeant Goddard:** *Uh, this is relating to kids acting suss. Um, and we've just sort of just come in.*<sup>7</sup>

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<sup>4</sup> Exhibit 1, Tab 19, page 149.

<sup>5</sup> Exhibit 1, Tab 21.

<sup>6</sup> Exhibit 1, Tab 19, page 150.

<sup>7</sup> Exhibit 1, Tab 19, page 151.

- 4.14 The pursuit continued through East Kempsey where, prior to crossing the Kempsey bridge, the Courier briefly crossed to the incorrect side of the road. This prompted the following broadcast to VKG: “...he’s just travelled...incorrect side of the road, uh, back on correct side. Zero traffic...Speed is 1-2-0 in a 50 zone, 0 traffic”.<sup>8</sup> Following this, the pursuit continued to head north towards Frederickton.
- 4.15 Senior Constable Davison could not tell how fast the Courier was travelling but knew that it was over the speed limit. He saw no other traffic on the road as the pursuit entered Frederickton. At this point Senior Constable Davison saw the Courier briefly cross to the incorrect side of the road as it negotiated a sharp left-hand turn, before returning to its own lane. This was conveyed to VKG as follows: “He just crossed on the incorrect side of the roadway again, um, in Frederickton. He’s slowed down. His speed’s now 1-1-0 in the 50 zone. Still zero traffic. He’s back on the correct side of the road now”.<sup>9</sup>
- 4.16 WK13 also advised VKG that there were “two heads on board”<sup>10</sup> and that the weather was fine with zero traffic. The VKG despatcher made a broadcast that the pursuit was waiting for an available highway patrol vehicle that was equipped with tyre deflation devices (commonly referred to as **spikes**) on board, as WK13 advised that they were not equipped with spikes (although this was actually incorrect as WK13 was so equipped).
- 4.17 As the pursuit continued along Macleay Valley Way approaching Christmas Creek just outside of Frederickton, the following exchange occurred:
- VKG despatcher:** *Just confirming Bravo-Charlie-3-8-Charlie Bravo. And uh...*
- Sergeant Goddard:** *That’s correct, radio. White Hilux.*
- VKG despatcher:** *White Toyota Hilux. Yeah I got here that it’s a 2002 white Ford Courier to a John Bourke [sic] of 286 Silo Road Kundabung.*<sup>11</sup>
- 4.18 Shortly afterwards, the VKG despatcher enquired over VKG with a number of other police vehicles (with call signs Mid North Coast 10, Port Macquarie 14, and Coffs Clarence 10) as to whether any suitable officer was able to monitor the pursuit. Chief Inspector Brendan Gorman was the operational Duty Officer for the Coffs/Clarence Local Area Command (**LAC**) and was attending to another matter in the Woolgoolga area in Coffs Clarence 10 (**Coffs 10**), some 140 kilometres from the location of the pursuit. He heard the request from the VKG despatcher for an officer to monitor the pursuit and so acknowledged the broadcast. However, it appears that this was initially overlooked as WK13 continued to provide information regarding the pursuit. Notwithstanding, Chief Inspector Gorman commenced to travel south at speed along the Pacific Highway towards the pursuit.
- 4.19 As the pursuit proceeded along Macleay Valley Way, WK13 advised that the Courier was travelling at an approximate speed of 140 kilometres per hour in a 100 kilometres per hour zone, and then a 110 kilometres per hour in a 50 kilometres per hour zone. WK13 also advised that the Courier briefly

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<sup>8</sup> Exhibit 1, Tab 19, page 151.

<sup>9</sup> Exhibit 1, Tab 19, page 153.

<sup>10</sup> Exhibit 1, Tab 19, page 151.

<sup>11</sup> Exhibit 1, Tab 19, page 152.

crossed to the incorrect side of the road in Frederickton and again as the pursuit approached the Pacific Highway at about 1:42am.

- 4.20 At about 1:45am VKG again broadcast that they were standing by for any vehicle north of the pursuit with spikes on board. Chief Inspector Gorman made a request over police radio for any Traffic and Highway Patrol vehicles in the Coffs/Clarence LAC to respond, with the intention for vehicles north of the pursuit to deploy road spikes. However, there was no answer to this call. Instead, Chief Inspector Gorman indicated that his vehicle contained road spikes but that he was still some distance north of the pursuit.
- 4.21 Shortly after passing through Frederickton the Courier made its way onto the Pacific Highway, still headed northbound, and still followed by WK13. Once the pursuit reached the Pacific Highway, Sergeant Goddard handed the radio handset in WK13 to Senior Constable Davison who started providing information to VKG. At about 1:47am, WK13 advised VKG that the pursuit had passed "*the occasional truck*"<sup>12</sup> and had passed a total of about five B-double trucks also travelling northbound. Whilst travelling along the Pacific Highway, WK13 maintained visual contact with the Courier, and was approximately four seconds behind it.
- 4.22 As the pursuit headed north, Sergeant Goddard estimated that the Courier was travelling between 140 and 150 kilometres per hour (in a 110 kilometres per hour zone). Sergeant Goddard also noted that the Courier was driving within its lane and that the driver did not appear to be driving erratically.
- 4.23 Senior Constable Peter Shelton was rostered to work general duties at Nambucca Heads between 3:30pm on 9 February 2017 and 1:30am on 10 February 2017. Shortly before finishing his shift, Senior Constable Shelton heard the broadcasts over VKG regarding the pursuit and the request for available vehicles equipped with spikes. Senior Constable Shelton called Macksville police station to enquire if his offsider was still there but was informed he had gone home for the night. Instead, Senior Constable Shelton decided to recall himself to duty and proceeded to travel from Nambucca Heads to Macksville in a vehicle with call sign Nambucca Heads 29 (NH29), a fully marked Toyota Hilux police truck with a pod.
- 4.24 As the pursuit approached the Clybucca rest area Senior Constable Shelton made this broadcast: "*Mate, I've knocked off but I just qued [sic] it back up if, uh, [WK13] wants me to start making my way back down there to, uh, there's no spikes here anyway. There [sic] only in the boss's truck and nobody's trained, well, I'm not trained*".<sup>13</sup> This was a reference to the fact that although Senior Constable Shelton had previously been trained in the deployment of spikes his accreditation had since lapsed.
- 4.25 Senior Constable Shelton made his way south with the warning lights of NH29 activated, and stopped at a set of roadworks in North Macksville. There, he spoke to some road workers and asked them to stop northbound traffic, in the hope that the Courier would get caught in an area called Wrights Corner, where there was a wire centre divider. After doing so, he made this broadcast: "*...just for your information, mate, about, uh, 6 to 7 ks north of Macksville, there's road works. There's, uh, just*

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<sup>12</sup> Exhibit 1, Tab 19, page 156.

<sup>13</sup> Exhibit 1, Tab 19, page 156.

*past the blokes they got, they got the, um, traffic lights there doing night road works. Just asked them to stop all northbound traffic so hopefully there's no...congestion up the...if he keeps comin'".*<sup>14</sup>

- 4.26 After proceeding through the roadworks, Senior Constable Shelton drove south over the Macksville bridge. He pulled up beside a B-double truck which was stopped in the northbound lane on the southern side of the bridge. Senior Constable Shelton informed the driver of the truck that there was a pursuit approaching and asked the driver if he could wait there and stop a southbound truck. Senior Constable Shelton said, *"Mate, if you see the, if you see the lights and sirens coming again, just move onto the bridge so we can block him in"*.<sup>15</sup>
- 4.27 The truck driver agreed to do so and Senior Constable Shelton proceeded south through Macksville. As he did so, he made a request over police radio to be informed when the pursuit proceeded past the Scotts Head turnoff at Warrell Creek. He then advised: *"...just had a quick chat between truckies on the Macksville bridge there, um, one guy heading northbound is going to stop on the bridge and he's going to stop the southbound bloke on the bridge so he won't be goin' north of Macksville"*.<sup>16</sup>
- 4.28 At a point just after Eungai Rail, and just before Macksville, the pursuit encountered some roadwork, causing the Courier to slow to a speed of about 40 kilometres per hour as it got caught behind a truck. However, the Courier soon overtook the truck, increased its speed to 110 kilometres per hour, and proceeded towards Macksville.
- 4.29 At a point somewhere before Warrell Creek the Pacific Highway reverted from a dual lane carriageway to a single lane carriageway and became what Senior Constable Davison described as *"bendy"* with *"a few winds in the road"*.<sup>17</sup> At this point, Senior Constable Davison saw the Courier [REDACTED]<sup>18</sup>, although he could not recall whether the Courier crossed any unbroken line road markings in order to do so.
- 4.30 As this was occurring, Senior Constable Shelton saw the Courier drive past in the opposite direction, followed a few seconds later by WK13. Senior Constable Shelton performed a u-turn and followed after both vehicles. When he reached the Macksville bridge he saw the truck still in the same location, stopped south of the bridge.
- 4.31 Sergeant Goddard later lost sight of the Courier at some point on the approach to Macksville. However, when he arrived at the Macksville bridge he saw that there was a B-double parked at the northbound entrance to the bridge with two other vehicles parked behind it, but no vehicles in the southbound lane. Sergeant Goddard saw the Courier cross to the incorrect side of the road, and travel over a rise before it went out of sight. WK13 followed over the bridge and slowed down in order to determine whether the Courier may have made a left turn towards Bowraville. At this time, Sergeant Goddard lost sight of the Courier for about 30 to 60 seconds. Around this time Sergeant Goddard made the following broadcast: *"...we're just entering Macksville now. So it's 130 over 50 now radio. We've backed off and he's overtaken another truck. He's heading towards the, um,*

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<sup>14</sup> Exhibit 1, Tab 19, page 159.

<sup>15</sup> Exhibit 1, Tab 14, Q/A 60.

<sup>16</sup> Exhibit 1, Tab 19, page 160.

<sup>17</sup> Exhibit 1, Tab 8, Q/A 153.

<sup>18</sup> Exhibit 1, Tab 8, Q/A 154.

*Macksville bridge. He's just gone on to the Macksville Bridge. We're about 500 metres ride [sic]. The trucks didn't work on the bridge. He's continuing northbound".*<sup>19</sup>

- 4.32 From the northern side of the Macksville bridge, the road curves sharply to the right, just after a turnoff towards Bowraville. The road then continues in a generally straight line along an east-west alignment. At the time roadwork was being performed on a new freeway overpass which intersected above the road, just past Newee Creek, and about two kilometres north of the Macksville bridge. As part of the roadworks a temporary diversion in the road had been constructed, requiring motorists to follow the road to the right and then curve left to re-join the road.
- 4.33 After deciding to continue past Macksville bridge, WK13 travelled along a sweeping right hand bend. Sergeant Goddard saw some tail lights in the distance and assumed that it was the Courier. At this time Sergeant Goddard estimated that whilst WK13 was still attempting to catch up to the Courier it was at least "*a couple of hundred metres*" behind the Courier and described it as "*a fair gap*".<sup>20</sup>
- 4.34 Damien Moylan was driving a Western Star 4800 FXB B-double, federal registration VV-13-JX. At 9:00pm on 9 February 2017 he left the Lytton depot with two trailers loaded with timber, heading south towards Melbourne. As he travelled through Nambucca Heads sometime between 1:30am and 2:00am Mr Moylan saw a police vehicle ahead of him turn on its warning devices and accelerate away. At about the same time Mr Moylan heard on his UHF radio other truck drivers reporting that police were pursuing a vehicle travelling north on the Pacific Highway. Mr Moylan heard some of the other drivers comment that that the pursued vehicle was "*driving like a fucking maniac*"<sup>21</sup> and that some drivers were talking about slowing down on the Macksville bridge so that the highway could be blocked.
- 4.35 By this time Mr Moylan was only a few kilometres north of the Macksville bridge. Having heard the comments made over the radio, and being aware that he was approaching roadworks, he slowed his speed down to 60 kilometres per hour.
- 4.36 As Mr Moylan entered the roadworks he saw the Courier being followed by WK13 along a sweeping left hand bend. Mr Moylan described WK13 as being "*a fair distance back from [the Courier] and holding the same distance*".<sup>22</sup> As the Courier took the bend, at a point where it was underneath the overpass that was being built, Mr Moylan saw it cross the centre line into his lane. Mr Moylan believed that the Courier would correct itself and drive past. However, to be careful, Mr Moylan moved the prime mover into the left of his lane. Instead, the Courier did not brake or slow down and remained on the incorrect side of the road. Mr Moylan continued to move his vehicle further left to the point where if he continued to do so it would have left the road. Moments later the Courier collided head on with the front of the B-double.
- 4.37 The collision caused catastrophic damage to the front of the Courier and significant damage to the front of the prime mover. WK13 and NH29 arrived on the scene a short time later. The respective police officers exited their vehicles and checked on the welfare of the drivers of the Courier and the B-double. It became apparent upon inspection of the cabin of the Courier, and the damage that it

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<sup>19</sup> Exhibit 1, Tab 19, page 161.

<sup>20</sup> Exhibit 1, Tab 8, Q/A 172-173.

<sup>21</sup> Exhibit 1, Tab 30 at [19].

<sup>22</sup> Exhibit 1, Tab 30 at [22].

had sustained, that the driver and any passengers had sustained non-survivable injuries. A call was subsequently made for NSW Fire and Rescue to attend the scene.

- 4.38 After arriving at the collision site, Chief Inspector Gorman made arrangements to secure and log the scene, and contacted the Duty Operations Inspector, the Local Area Commander and the Crash Investigation Unit. He also made arrangements for Sergeant Goddard and Senior Constable Davison to be breath tested, which returned negative results. As the incident was deemed to be a critical incident (involving the death of a person in the course of a police operation) arrangements were subsequently made for the matter to be investigated in accordance with NSW Police Force critical incident protocols.
- 4.39 A blood sample was later taken from Mr Moylan and analysed. Concentrations of pseudoephedrine (a decongestant) and chlorpheniramine (an antihistamine) were detected in therapeutic concentrations, along with a concentration of modafinil. Mr Moylan later told police that he had taken two tablets of Demazin for hayfever with his evening meal and then again at about 9:00pm. It is accepted that the ingestion of Demazin accounts for the presence of the pseudoephedrine and chlorpheniramine. Expert opinion was sought from Dr Judith Perl, a clinical forensic pharmacologist, who explained that pseudoephedrine and modafinil have no impairing effects on psychomotor skills at therapeutic doses. Dr Perl also noted that whilst chlorpheniramine has sedative effects, not all users experience sedation when ingesting a therapeutic dose. Ultimately, Dr Perl opined that it was highly unlikely that Mr Moylan's driving ability would have been impaired at the time of the conclusion.

## **5. What was the cause of Xavier's death?**

- 5.1 Xavier was later taken to the Department of Forensic Medicine at Newcastle where a postmortem examination was performed by Professor Tim Lyons on 14 February 2017. The examination revealed that Xavier had sustained a massive head injury, bilateral haemopneumothorax, pelvic fracture, right femoral shaft fracture, and left tibia and fibula fractures. In an autopsy report dated 3 March 2017 Professor Lyons opined that *"the nature of these injuries was that they would have immediately led to death"*.<sup>23</sup> Professor Lyons ultimately concluded that the cause of death was multiple injuries.

## **6. What issues did the inquest examine?**

- 6.1 Prior to the inquest a list of issues for consideration at the inquest was circulated to the interested parties. That list included the following:
- (a) Was the conduct of Sergeant Damien Goddard and Senior Constable Robert Davison in initiating and continuing a pursuit of Xavier in compliance with the NSW Police Force Safe Driving Policy?
  - (b) Were the actions of the officers monitoring the pursuit – i.e. Newcastle VKG Supervisor, Sergeant David Stevens, Duty Operations Inspector Paul Smith and a Duty Officer from the Coffs Clarence Command, Inspector Brendan Gorman – in compliance with the SDP?

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<sup>23</sup> Exhibit 1, Tab 5, page 3.



- (c) Even if the Safe Driving Policy was followed, does a review of the circumstances of this case suggest that options other than the pursuit should have been considered or employed (e.g. road spikes, or termination of the pursuit)?
- (d) Why were road spikes not available in the Macksville area and should they be?
- (e) Was the information provided to Xavier's parents in their two telephone calls to Kempsey Police Station (sometime after 2:00am on 10 February 2017) adequate and appropriate?

6.2 Each of these issues is considered in further detail below.

## **7. Did Sergeant Goddard and Senior Constable Davison comply with the Safe Driving Policy?**

7.1 The NSW Police Force Safe Driving Policy (**the Policy**) governs the conduct, role and responsibilities of police officers involved in the pursuit of a civilian vehicle. Following Xavier's death, Sergeant Kris Cooper of the Traffic and Policy Section of the NSW Police Force Traffic & Highway Patrol Command, conducted an internal police review to determine if the Policy had been complied with. Part 7 of Version 8.2 of the Policy (published in July 2016 and which was in force at the time of Xavier's death) defines a pursuit in this way:

*PURSUIT: A pursuit, regardless of speed, commences at the time you decide to pursue a vehicle that has ignored a direction to stop.*

*It is an attempt by a police officer to stop and apprehend the occupant(s) of a moving vehicle, regardless of speed or distance, when the driver of the other vehicle is attempting to avoid apprehension or appears to be ignoring police attempts to stop them.*

*A pursuit is deemed to continue if you FOLLOW the offending vehicle or continue to attempt to remain in contact with the offending vehicle, whether or not your police vehicle is displaying warning lights or sounding a siren.*

7.2 There is no dispute that at the time WK13 commenced following after the Courier, after the four young persons had exited it, a pursuit as defined by the Policy commenced. The pursuit continued up until the point that the collision between the Courier and the B-double occurred.

### ***Was there a reasonable basis to believe that an offence had been committed and that the driver of the Courier was attempting to evade apprehension?***

7.3 Consideration of whether Sergeant Goddard and Senior Constable Davison complied with the Policy focused on a number of specific aspects of it, namely sections 7-2-1 and 7-2-9.

7.4 Section 7-2-9 of the Policy provides:

*When engaging in a pursuit, you should ensure that there is reasonable cause to believe that the person being pursued has committed, or has attempted to commit, an offence and the offender is attempting to evade apprehension.*

- 7.5 After hearing the initial broadcast at about 10:00pm of the Hilux stolen from Bloomfield Street Sergeant Goddard left Kempsey police station to conduct a patrol of the Crescent Head area. After patrolling the area without success, Sergeant Goddard returned to Kempsey police station. He subsequently heard another VKG broadcast made at 1:30am. In his broadcast he made reference to four persons of interest acting suspiciously and that the vehicle sighted was possibly the Hilux which had been stolen at about 10:00pm earlier that evening.
- 7.6 In evidence Sergeant Goddard said that before he left the police station he knew that the vehicle sighted at the quarry was a white 4 door dual cab Toyota Hilux and that he had taken down the vehicle's registration details (BR-75-GN ) on a Post-it note which he stuck on the inside of WK13. Shortly after the pursuit commenced at about 1:35am, Sergeant Goddard advised VKG that the registration of the vehicle that he was pursuing was BC-38-CB. As the pursuit reached the intersection of Middleton Street and Macleay Valley Way the VKG despatcher sought clarification of the registration of the pursued vehicle, given that two different registration details had been provided by Sergeant Goddard up to that point in time. Sergeant Goddard confirmed over VKG that WK13 was in pursuit of a vehicle with registration BC-38-CB. In evidence Senior Constable Davison indicated that upon WK13 performing a u-turn and following after the Courier on Middleton Street he immediately recognised that the Courier's registration did not match that of the Hilux, prompting him to broadcast to VKG, "*Disregard, wrong vehicle*".<sup>24</sup> By this, Senior Constable Davison sought to convey to VKG that the vehicle which WK13 was following was not the same vehicle reported stolen from Bloomfield Street.
- 7.7 It is clear from the above, that a short time after the pursuit commenced, and before the pursuit reached East Kempsey and crossed the Kempsey bridge, Sergeant Goddard was in possession of information which suggested, on its face, that the Courier was not the vehicle which had been stolen from Bloomfield Street. This is because the registration details of the Courier were clearly different to that of the Hilux. Further, at a point where the pursuit was between Kempsey and Frederickton, the VKG despatcher again sought confirmation of the registration details of the Courier. When these details were again confirmed by Sergeant Goddard to be BC-38-CB, the VKG despatcher indicated that the registration details were matched to a 2002 Ford Courier. This again meant that at this point, Sergeant Goddard was in possession of information which further suggested that the Courier was not the vehicle which had been stolen from Bloomfield Street.
- 7.8 Given the above, the question which arises is upon what basis did Sergeant Goddard have reasonable cause to believe that the driver of the Courier had committed, or attempted to commit, a criminal offence, as required by section 7-2-9 of the Policy? In evidence, Sergeant Goddard made reference to the following factors which he was aware of from his general policing experience and from his specific policing experience in the area, and which he took into account in forming such a belief:
- (a) that there was a high crime rate in Kempsey and that some of these crimes related to breaking into, and entering, property, and vehicle theft;
  - (b) that it was not unusual for the owner of a vehicle which had been stolen during the night to not be aware of the theft until the following morning and, consequently, no stolen vehicle report would be made until the morning;

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<sup>24</sup> Exhibit 1, Tab 19, page 150.

- (c) the fact that earlier in the evening two reports had been made of vehicles which had been set alight and abandoned, and that offenders were likely to target a particular area and commit a number of offences in that area;
- (d) the fact that there had been a report of four persons acting suspiciously at the quarry which was *“in the middle of nowhere”*;
- (e) that the location where the four young persons exited the Courier was in an area where many known offenders lived, with Sergeant Goddard being aware of a specific pair of known offenders consisting of a father and son whose family, Sergeant Goddard believed, lived somewhere along Middleton Street;
- (f) the fact that the Courier was a dual cab utility which matched the description of the stolen Hilux; and
- (g) after being informed by VKG that the Courier was registered to an address in Kundabung, the fact that the Courier was driving north, away from the registered address.

7.9 In evidence Sergeant Goddard was asked why he thought the driver of the Courier sped away. He provided two answers with his first referring to a belief that the driver was an adult who had been working with young persons to commit offences, and that there was stolen property still inside the vehicle; and with his second answer relating to his belief that the Courier was stolen.

7.10 Examination of the VKG transcript reveals that although Sergeant Goddard made reference to his belief that the vehicle sighted at the quarry might be the stolen Hilux, no reference was made to any belief that the driver (or occupants) of the Courier might have been involved in a break and enter offence, as Sergeant Goddard indicated in evidence. After the pursuit commenced, Sergeant Goddard had a second opportunity to indicate that this was his belief when the VKG despatcher posed the question, *“What was the original offence?”*. Again Sergeant Goddard made no reference to any break and enter offence (or any vehicle offence, for that matter) and instead replied, *“This is relating to kids acting suss”*. Sergeant Goddard had a third opportunity to indicate his belief when Chief Inspector Gorman made an enquiry about the original offence. When asked to repeat the original offence, Sergeant Goddard replied, *“Uh, failed to stop. He’s stopped the car, let three kids out then took off on us”*.<sup>25</sup> By this stage the pursuit was about six kilometres away from Macksville.

7.11 Sergeant Goddard also explained in evidence that he was unaware of what a Courier looked like, believing that it was a type of delivery van, and not a utility. This evidence is corroborated by the BWV recording which captures Sergeant Goddard asking Senior Constable Davison, *“Does that look like a Ford Courier to you?”*<sup>26</sup>, moments after the VKG despatcher broadcast the registration BC-38-CB was matched to a Ford Courier as the pursuit approached Frederickton. However, in evidence Sergeant Goddard agreed that he could see the registration of the Courier and that he could see what type of vehicle it was, namely a dual cab utility. He agreed in evidence that it was possible that the vehicle was not in fact a Toyota and when asked if it was possible for him to see that it was not a Hilux, he said that his focus was on the registration and the description of the vehicle.

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<sup>25</sup> Exhibit 1, Tab 19, page 160.

<sup>26</sup> Exhibit 1, Tab 47, page 3.

7.12 Further, as the pursuit approached the Clybucca rest area, Senior Constable Davison commented, *"It's a Ford so it's not that Hilux"*.<sup>27</sup> This comment provides evidence that by this point Senior Constable Davison had confirmed in his own mind (if any further confirmation was needed) that the vehicle that WK13 was pursuing was not the one reported as stolen from Bloomfield Street. Like Sergeant Goddard, in evidence Senior Constable Davison said that he believed that the Courier had been stolen when the pursuit commenced. He said that he based this belief on the earlier reports relating to the stolen Hilux and two burnt out vehicles, despite acknowledging that there was no direct information connecting the Courier with either matter. However, Senior Constable Davison sought to explain that in his experience it was common for police to locate burnt out vehicles which were only reported as being stolen by their owners the next morning, although he was unable to say how commonly or frequently these incidents occurred. Despite Senior Constable making his comment which was of critical importance to consideration of section 7-2-9 of the Policy, it did not elicit any response from Sergeant Goddard.

7.13 **Conclusion:** The evidence establishes that from an early point in the pursuit, and before the pursuit had reached Macleay Valley Way Sergeant Goddard was in possession of information, by virtue of two conflicting registration details, which indicated that the vehicle that he was pursuing was not the stolen Hilux. The evidence also establishes that before the pursuit reached Frederickton, further information provided over VKG confirmed this fact. This meant that by this point, there was no reasonable basis for Sergeant Goddard to conclude that the vehicle he was pursuing was in fact the vehicle which had been stolen from Bloomfield Street.

7.14 In order for Sergeant Goddard to form a belief that the vehicle that he was following had in fact been stolen, he would have had to reason that it was (a) an entirely different vehicle to the Hilux (but one which, notwithstanding, matched the description and colour of the Hilux), or (b) the Hilux but that it had different registration plates affixed to it. However, there was no direct evidence available to allow Sergeant Goddard to form a reasonable belief in relation to the particular vehicle being an entirely different one to the Hilux, and yet also being stolen. Instead, his belief was formed based on a number of general factors related to his general policing experience, and specific policing experience in the area, and police reports relating to other alleged criminal activity earlier in the evening. There was, however, no direct evidence connecting the vehicle which was being pursued to the earlier reports of criminal activity. More relevantly, there was no evidence to allow a conclusion to be reached as the precise nature of any offence that might have been committed other than to make a general assumption that it similarly related to property theft. Equally there was no direct evidence to allow Sergeant Goddard form a reasonable belief that the different registration plates had been affixed to the Hilux. Again, this belief was based on the same factors relating to the first belief described above.

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<sup>27</sup> Exhibit 1, Tab 47, page 6.

7.15 It is evident from a reading of the VKG transcript that when the question as to what was the original offence was posed to Sergeant Goddard he had difficulty articulating a consistent response. Sergeant Goddard's first response made reference to the possible stolen Hilux. However his second and third response related only to "kids acting suss" and the Courier failing to stop, with no specific mention made of vehicle theft, property offences, or any other offence. These responses are consistent with the information available to Sergeant Goddard from VKG and also from his own observations. In other words, whilst Sergeant Goddard may have initially had a reasonable basis to believe that the Courier was in fact the vehicle stolen from Bloomfield Street (or was possibly a separate stolen vehicle), as the pursuit continued the possibility of such a belief remaining reasonably open to Sergeant Goddard gradually diminished. By the time the pursuit reached the Clybucca rest area, and upon hearing Senior Constable Davison comment that the Courier was not the stolen Hilux, this fact should have been abundantly clear. Further enquires of the kind later made by Chief Inspector Gorman as to the history of the Courier, and information about its owner, were required at this point in time. These enquiries were not made by either Sergeant Goddard or Senior Constable Davison.

7.16 It also became evident in the course of Sergeant Goddard's evidence that there appeared to be some conflation of the dual requirements of section 7-2-9 of the Policy. That is, the fact that the Courier had initially failed to stop was taken to be a justification both for the fact that an offence had been committed, and that the driver was attempting to avoid apprehension. Whilst the mere fact of a pursuit permits a conclusion to be drawn that the person being pursued is attempting to avoid apprehension, this raises a potentially difficulty in the sense that pursuit may become its own justification. It is for this reason that clarification of the offence which gives rise to the first requirement of section 7-2-9 is of critical importance.

7.17 The variation in responses provided by Sergeant Goddard highlights another issue, namely that despite the VKG operator (known as Communications Operators pursuant to the Policy) seeking to confirm the originating offence so as to comply with section 7-2-9 of the Policy, that offence was not clearly articulated. Therefore, having regard to the above, the following recommendation is necessary.

7.18 **Recommendation 1:** I recommend to the NSW Commissioner of Police that consideration be given to providing further training to Communications Operators to ensure that appropriate enquiries are made of involved police to clearly identify the offence that a person has committed, or attempted to commit, which has caused a pursuit to be initiated.

***Did the need to pursue outweigh the degree of risk?***

7.19 Section 7-2-1 of the Policy provides:

*The decision to initiate and/or continue a pursuit requires weighing the need to immediately apprehend the offender, against the degree of risk to the community and police as a result of the pursuit.*

7.20 Section 7-2-2 further relevantly provides:

[REDACTED]

[REDACTED]

7.21 Finally, Section 7-2-5 provides:

*During any pursuit activity all involved police must continually re-assess the pursuit within the framework set out at paragraph 7-2-2.*

7.22 The above provisions of the Policy required Sergeant Goddard and Senior Constable Davison to take into consideration a number of factors in making, in essence, a continuous risk assessment for as long as the pursuit continued. In other words, they needed to assess whether the risk (and potential risk) that that the pursuit posed to the driver of the Courier, themselves and other involved police officers, and members of the community outweighed the need to continue the pursuit in order to immediately apprehend the driver of the Courier. [REDACTED]. Each factor relevant to this risk assessment process is considered individually below.

[REDACTED]

7.23 During the pursuit, the Courier [REDACTED]:

- (a) Shortly after turning from South Street onto Macleay Valley Way, and just before Crescent Head Road. In evidence Sergeant Goddard explained that it appeared to him that the driver of the Courier was attempting to [REDACTED] and that he (Sergeant Goddard) did not consider this to be unusual behaviour for the driver of a pursued vehicle. Sergeant Goddard agreed that the Courier was travelling 120 kilometres per hour in a 60 kilometre per hour residential area, but explained that there was no traffic or persons in the vicinity.
- (b) Whilst travelling along Macleay Valley Way in Frederickton, just before the Great North Road. Again Sergeant Goddard said that the driver of the Courier [REDACTED].
- (c) Near a roundabout along Macleay Valley Way, outside of Frederickton, that leads to an onramp to the Pacific Highway. Again Sergeant Goddard said that it appeared that the driver [REDACTED].

7.24 Sergeant Goddard explained, "... [REDACTED] have any issues, but I mean, when we started, you know, getting in the case, he was driving fine. Like, it wasn't, wasn't erratic or anything like that".<sup>28</sup>

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<sup>28</sup> Exhibit 1, Tab 8, Q/A 228-229.

7.25

[REDACTED]  
[REDACTED]  
[REDACTED]. There is no evidence to suggest that the manoeuvre was associated with any loss of control or [REDACTED]

[REDACTED]

7.26 Data collected following the pursuit established that, in total, the pursuit lasted 29 minutes 18 seconds, travelled a distance of 59.5 kilometres, and that WK13 travelled at an average speed of 121.84 kilometres per hour. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]:

(a) [REDACTED]  
[REDACTED];

(b) [REDACTED]  
[REDACTED];

(c) [REDACTED]  
[REDACTED];

(d) [REDACTED]  
[REDACTED];

(e) [REDACTED]  
[REDACTED];

(f) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED];

(g) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED];

(h) [REDACTED]  
[REDACTED];

- (i) [REDACTED];
- (j) [REDACTED];
- (k) [REDACTED];
- (l) [REDACTED].

7.27 [REDACTED]

7.28 Senior Constable Davison also gave consideration to the [REDACTED]. [REDACTED] He explained that the roadway was “*dual carriage so there wasn’t much traffic...wasn’t a threat of danger at that stage, there’s pretty good road there...the traffic was light, maybe the odd occasional truck*”.<sup>29</sup>

[REDACTED]

7.29 Whilst on the Pacific Highway approaching the Clybucca rest area, Sergeant Goddard saw what he thought was a flash from the cabin of the Courier. In evidence Sergeant Goddard said that he was unsure if it was the flash from a mobile phone or other personal electronic device, or whether it might have been the reflection from the headlights of WK13 off the rear view mirror of the Courier. However, the contemporaneous recording from the BWV reveals that seeing the flash caused Sergeant Goddard to remark, “*I think old mate was filming that*”<sup>30</sup>, indicating that his belief at the time was that the driver of the Courier was using a mobile phone (or other personal electronic device) whilst driving. In evidence Sergeant Goddard agreed that as a general matter, a person is not permitted to use a device for filming whilst driving a vehicle. [REDACTED]

7.30 Subsequent investigation revealed, from Xavier’s friends and from an examination of the Courier following the collision, that Xavier was in possession of an iPod Touch and wifi modem in the Courier

<sup>29</sup> Exhibit 1, Tab 8, Q/A 138-141.

<sup>30</sup> Exhibit 1, Tab 47, page 6.



and was posting messages to his friends on social media during the pursuit. It appears that this occurred at about the time that Sergeant Goddard made his comment in relation to filming.

7.31 As the pursuit approached the Clybucca rest area, Sergeant Goddard remarked to Senior Constable Davison, “He can’t drive”<sup>31</sup>, referring to the driver of the Courier. In evidence when asked what he meant by this Sergeant Goddard sought to explain that it was simply a flippant comment. [REDACTED]

[REDACTED]

[REDACTED], Sergeant Goddard then said that he could not recall what he meant at the time. However, he agreed with Counsel Assisting that the situation he was in at the time was not the one where flippant comments ought to have been made. It was suggested that [REDACTED]. However, Sergeant Goddard rejected this suggestion.

7.32 During his interview, Senior Constable Davison was asked whether, at any time during the pursuit, he formed the opinion that it was dangerous and should be stopped. He answered, [REDACTED]

[REDACTED]

7.33 [REDACTED], Senior Constable Davison said in evidence that he did not consider that the pursuit ought to be terminated, nor did he discuss any aspect of his assessment of the [REDACTED] or the possibility of pursuit termination with Sergeant Goddard. In evidence Senior Constable Davison was asked what he considered his role, as the escort, to be during the pursuit. He explained that his role was to be an observer and to call the pursuit to VKG so that Sergeant Goddard could concentrate on driving. When asked if he considered his role to involve some communication with Sergeant Goddard about what he was observing, Senior Constable Davison expressed some degree of ambivalence. Further, he acknowledged that any assessment which he might have performed pursuant to sections 7-2-2 and 7-2-5 of the Policy was not communicated to Sergeant Goddard.

7.34 In evidence Sergeant Goddard was asked whether he recalled [REDACTED]  
[REDACTED] Sergeant Goddard said that he had no such recollection.

7.35 Finally, apart from the observations made by the two pursuing police officers, there is also evidence from an independent witness. Robert Bradford was driving home from Coffs Harbour and

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<sup>31</sup> Exhibit 1, Tab 47, page 6.  
<sup>32</sup> Exhibit 1, Tab 9, Q/A 186.

approached the Macksville bridge at about 2:00am. Just before driving onto the bridge he saw the Courier overtake another vehicle and “fly past [him] at high speed”.<sup>33</sup> The manner that the Courier was being driven prompted Mr Bradford to make a social media post the following day which read: “...last night from Coffs Harbour coming over the Macksville bridge at about 2 o'clock idiot [sic] nearly wipes me out on bridge overtaking a truck...”.<sup>34</sup>

7.36 **Conclusion:** It was submitted by counsel for both Sergeant Goddard and Senior Constable Davison that each factor relevant to the assessment which both police officers were required to perform during the pursuit should be examined not in isolation but, rather, in context. On behalf of Senior Constable Davison it was submitted that part of that context involves a consideration that policing is a dangerous and unpredictable job. On behalf of Sergeant Goddard it was submitted that he brought his considerable policing experiencing, including his involvement in more than 100 previous pursuits, to bear in the risk assessment he was required to perform.

7.37 However, when that type of contextual evaluation is performed the conclusion that must be reached is that the combination of factors relevant to the assessment which Sergeant Goddard and Senior Constable Davison were required to perform meant that the pursuit ought to have been terminated. The point of termination was at least by the time that the pursuit reached Warrell Creek and certainly by the time that the pursuit crossed over the Macksville bridge.

7.38 A number of factors are relevant to this assessment:

(a) By the time the pursuit reached Warrell Creek it was evident that the [REDACTED]  
[REDACTED]  
[REDACTED]

(b) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

(c) Sergeant Goddard’s explanation that his comment of, “He can’t drive” was only a flippant remark cannot be reconciled against the position he took in his evidence where he sought to emphasise that he was performing a considered assessment and that the pursuit that he was involved in was not the occasion for such remarks to be made. On this basis, the conclusion that should be drawn is that Sergeant Goddard’s comment [REDACTED]  
[REDACTED].

<sup>33</sup> Exhibit 1, Tab 29 at [5].

<sup>34</sup> Exhibit 1, Tab 29 at [6].

(d) Given the contemporaneity of Sergeant's Goddard comment in relation to filming, it should also be concluded that Sergeant Goddard believed that the driver of the Courier was using an electronic device of some kind whilst driving.

(e) [REDACTED]

(f) The fact that both Sergeant Goddard and Senior Constable Davison were aware [REDACTED]

(g) Sergeant Goddard explained in evidence that he expected Inspector Gorman to be available with the spikes around the Macksville area even though he was provided with no confirmation regarding this.

7.39 Having regard to the totality of factors set out above, the conclusion which ought to have been reached was that by the time the pursuit proceeded through Warrell Creek [REDACTED]. This is particularly so in light of the fact, as noted above, that the originating offence had not by that time been clearly articulated and that there was diminishing information to allow for a reasonable belief that the Courier had been stolen. On this basis the pursuit ought to have been terminated.

7.40 In addition to the above, by the time the pursuit proceeded past the Macksville bridge it would have been evident to the pursuing officers that the planned blocking of the Macksville bridge, in the hope that it would force the Courier to stop and possibly allow police to engage the driver in a foot pursuit, had been unsuccessful. Further, apart from termination the only remaining viable option left at that time for resolution of the pursuit was a vague plan relating to the deployment of spikes north of Nambucca Heads, a distance of at least 20 kilometres away, by Chief Inspector Gorman (discussed further below). This additional information should only have served to reinforce the conclusion that the pursuit ought to have been terminated by this point.

7.41 One further matter which arises is the fact that, as noted above, Senior Constable Davison seems not to have appreciated that as an escort, his role was more than that of a mere observer. As an involved officer he clearly was required to perform the same process of continual assessment that Sergeant Goddard was required to perform. For this reason the following the following recommendations are necessary.

7.42 **Recommendation 2:** I recommend to the NSW Commissioner of Police that consideration be given to making clear in Part 7 of the Safe Driving Policy that all escorts are "involved officers" for the purposes of section 7-2-5.

7.43 **Recommendation 3:** I recommend to the NSW Commissioner of Police that consideration be given to providing clarification during standard police driver training that all escorts are "involved officers" for the purposes of section 7-2-5.

- 8. Were the actions of the officers monitoring the pursuit in compliance with the Safe Driving Policy?**
- 8.1 Section 7-5-4 of the Policy sets out the command structure for a pursuit response. It identifies the Duty Operations Inspector (**DOI**), VKG Shift Coordinator, and the Duty Officer/Supervisor as being part of this structure. Further, sections 7-5-6 (for the DOI and VKG Shift Coordinator) and 7-5-7 (for the Duty Officer/Supervisor) provide for specific duties for the officers performing such pursuit monitoring. In the case of Xavier's pursuit the monitoring roles were fulfilled by the following officers:
- (a) Duty Operations Inspector: Chief Inspector Paul Smith;
  - (b) VKG Shift Coordinator: Sergeant David Stevens; and
  - (c) Duty Officer/ Supervisor: Chief Inspector Brendan Gorman.
- 8.2 Section 7-5-6 of the Policy required Chief Inspector Smith and Sergeant Stevens to perform a number of duties including monitoring the pursuit to ensure that the most appropriate driver and vehicles were used, and consider the need to approve and assign additional backup and support vehicles. Section 7-5-7 of the Policy required Chief Inspector Gorman to obtain the offence that was reported as the cause of the pursuit, and to monitor the pursuit and make determinations as to whether it should continue based on local knowledge of the area, the actual or potential danger, and knowledge of the attitude and ability of the police driver engaged in the pursuit. Further, both section 7-5-6 and 7-5-7 required the monitoring officers to terminate the pursuit in accordance with section 7-6 of the policy, which governs termination of the pursuit, if the criteria provide by that section were met.
- 8.3 During the pursuit the VKG dispatcher made attempts to enquire whether the Duty Officer at Mid North Coast and Port Macquarie were available to monitor the pursuit. When it became apparent that these officers were unavailable to monitor the pursuit, Sergeant Goddard suggested that Chief Inspector Gorman might be available. A subsequent enquiry made by the VKG dispatcher resulted in Chief Inspector Gorman performing the Duty Officer monitoring role.
- 8.4 When Chief Inspector Gorman began monitoring the pursuit he was in Woogoolga attending to another job, some 140 kilometres from Kempsey. In evidence Chief Inspector Gorman explained that he had some familiarity with Macleay Valley Way as he knew it to be the old Pacific Highway. Chief Inspector Gorman also said that he knew the area around Warrell Creek and knew that there were road works north of Warrell Creek but did not know the extent of them and so the area from Warrell Creek to Nambucca Heads was less familiar to him.
- 8.5 Chief Inspector Gorman said that he was aware that some of the roads between Nambucca Heads and Kempsey were subject to roadworks at the time. However, he explained that he was not aware of the extent of the roadworks, or the impact that they had on the road. Being also unfamiliar with the local area, Chief Inspector Gorman asked how close the pursuit was to the nearest town. He was informed that the pursuit was 18 kilometres from Macksville and that it was nearing the turn off to Stuarts Point.
- 8.6 It is clear that after he commenced monitoring the pursuit, Chief Inspector Gorman sought information over VKG to ensure that Section 7-2-9 of the Policy was complied with. As the pursuit

passed Eungai Rail, Chief Inspector Gorman enquired over VKG, “*What’s he wanted for?*”<sup>35</sup>, referring to the driver of the Courier. Due to other radio communication that was occurring at the time, Chief Inspector Gorman was not provided with a response to his enquiry. Sometime later, when the pursuit was near Albert Drive and about six kilometres from Macksville, Chief Inspector Gorman made a second attempt to ascertain the initiating offence by asking over VKG, “*Coffs Clarence 10...the original offence*”. This prompted the VKG despatcher to enquire, “*Kempsey 13, can you repeat the original offence*”. The response provided by Sergeant Goddard was, “*Uh, failed to stop. He’s stopped the car, let three kids out then took off on us*”.<sup>36</sup> This in turn prompted Chief Inspector Gorman to ask, “*What’s the history on the vehicle with, uh, history and links to the driver, the owner?*”.<sup>37</sup> The VKG despatcher advised that there was “*nothing on the vehicle checks*”<sup>38</sup>, meaning that it was not associated with any criminal activity, and that checks were being conducted to determine whether anything adverse was known about the owner of the Courier. At this time a broadcast was made by Kempsey 22 indicating that they would attempt to contact the vehicle owner in order to determine if the Courier was, in fact, stolen.

8.7 In evidence, Chief Inspector Gorman agreed that if it had been thought that the Courier had been stolen he expected to be told that. He agreed that such a belief was never communicated to him and that the only offence referred to in response to his direct request to identify the original offence was a failure to stop. In evidence, Chief Inspector Gorman said that despite this he still took into account other pieces of information that he was aware of, namely that it was not unusual for a stolen car to not be reported as being stolen by its owners until the following morning, that the Courier matched the description of the stolen Hilux, and that the fact that a pursuit was taking place suggested that the driver had a “*guilty mind*”.

8.8 After becoming aware that the attempted block on Macksville Bridge was unsuccessful, Chief Inspector Gorman said in evidence that he formed the view that the pursuit should be terminated in accordance with section 7-6 of the Policy. It should be noted that this was the first occasion that Chief Inspector Gorman expressed this view, with no reference being made to it in his statement made on 10 February 2017. Chief Inspector Gorman explained that he was of the view that the pursuit should have been terminated because [REDACTED], when the following factors were taken into account:

- (a) [REDACTED]
- (b) [REDACTED]
- (c) [REDACTED]  
[REDACTED]
- (d) [REDACTED]  
[REDACTED]  
[REDACTED]

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<sup>35</sup> Exhibit 1, Tab 19, page 158.  
<sup>36</sup> Exhibit 1, Tab 19, page 160.  
<sup>37</sup> Exhibit 1, Tab 19, page 160.  
<sup>38</sup> Exhibit 1, Tab 19, page 160.

8.9 Despite forming this view about termination of the pursuit, Chief Inspector Gorman did not make any VKG broadcast. This is because at that particular time the VKG despatcher was making several broadcasts in relation to two unrelated incidents occurring in the Grafton area that required local police involvement. Chief Inspector Gorman explained in evidence that he used his radio in an attempt to broadcast a direction to terminate the pursuit but was unable to do so because of the radio traffic that was occurring at the time.

8.10 Some police radios are equipped with what is known as a smart push-to-talk function. Using this function requires a double press of a radio button to allow a user to override radio communication that may be occurring at the time in order to broadcast an urgent communication. On the available evidence it is unclear whether the radio fitted to the vehicle that Chief Inspector Gorman was driving was capable of performing the push-to-talk function. The evidence established that at the relevant time police vehicles could have been equipped with radios from two different manufacturers, one of which featured the smart push-to-talk function, and one of which did not. However, Chief Inspector Gorman explained that he whilst at the time he believed that such a capacity was available to police radios in general, he did not attempt to use the function for several reasons: given the stressful situation that he was in he did not think to use it, he had never attempted to use the function before, and he was therefore not in the habit of doing so.

8.11 **Conclusion:** Chief Inspector Gorman reached a view at critical point that the pursuit should be terminated. This was a view that was reasonably open to him on the information that was available to him at the time, and pursuant to his role as the Duty Officer monitoring the pursuit. It is evident that if a Duty Officer performing such a role reaches such a view, then the need to communicate this view immediately is of paramount importance. This is because if the view is reached that the pursued driver, pursuing police officers and members of the public are placed at unnecessary risk, any communication regarding termination of the pursuit should be conveyed immediately so as to minimise that risk.

8.12 In the circumstances of this pursuit, the view that Chief Inspector Gorman reached unfortunately coincided with a time when there were other communications broadcast over VKG which prevented Chief Inspector Gorman from making a broadcast to terminate the pursuit. Although a function existed on some police radio models at that time which allowed for an urgent communication to override other active broadcasts, it is unclear on the available evidence whether the radio which Chief Inspector Gorman was using was capable of this function. Even if it was capable, the evidence establishes that Chief Inspector Gorman would most likely not have used the function as it was one which he did not routinely use. It is therefore necessary to make the following recommendation below.

8.13 It should be noted that even if Chief Inspector Gorman was able to utilise the smart push-to-talk function, and had done so, it is not possible to know whether termination of the pursuit at that point in time would have had any impact on [REDACTED] or altered the eventual outcome in any way. This is because of the short space of time between Chief Inspector Gorman reaching the view that he did and the actual collision, and the fact that at about the time that Chief Inspector Gorman reached his view WK13 had momentarily lost sight of the Courier, meaning that it was unlikely that Xavier could also see WK13 (had he checked his rear vision mirrors) at the time.

8.14 **Recommendation 4:** I recommend to the NSW Commissioner of Police that consideration be given to any measure that can be taken to make the smart push-to-talk function on police radios more broadly available, and to communicate to police officers the availability of that function.

8.15 Sergeant David Stevens was the VKG Shift Coordinator on 10 February 2017. He was notified over police radio that a pursuit had commenced and began monitoring it. He said that at the start of the pursuit he understood that the initial offence related to a failure by the Courier to stop, and that there was a possibility of criminal offences due to the fact that persons had decamped from the vehicle and there were reports of suspicious activity in the area where they decamped.

8.16 Sergeant Stevens explained that at no time during the pursuit did he consider that any danger to the occupants of the Courier, the pursuing officers, or the public outweighed the need for the offenders to be immediately apprehended. He explained that this was *“primarily based on the fact that there was very little traffic on the road at this time and the majority of the pursuit was on dual carriageway”*.<sup>39</sup> Further, Sergeant Stevens took into account [REDACTED]. In evidence, Sergeant Stevens said that he also gave consideration to the following matters:

- (a) [REDACTED]
- (b) [REDACTED]
- (c) [REDACTED]
- (d) [REDACTED]

8.17 Sergeant Stevens explained that in his view there was a need to immediately apprehend the occupant(s) of the Courier on the basis that an assumption could fairly be made that they had been involved in some kind of criminal activity and there was therefore a need to prevent the commission of possible further offences. Sergeant Stevens also noted that there was a possibility that the Courier contained stolen property, or that the Courier itself had been stolen, but not yet reported as such by its owner. Sergeant Stevens agreed that checks performed during the pursuit revealed that no report had been made that the Courier was stolen, but explained that whilst this was one consideration, another consideration which he took into account was the fact that the young persons had decamped from it in South Kempsey. Ultimately Sergeant Stevens said that he did not consider that the degree of risk to the community and the police as a result of the pursuit outweighed the need to immediately apprehend the alleged offender(s).

8.18 Section 7-5-5 of the Policy requires that the DOI is to be advised of a pursuit where it has continued for more than five minutes. In this case, the pursuit had been ongoing for approximately 15 minutes before Sergeant Stevens asked Sergeant Peter Jeans to notify the DOI at the time, Chief Inspector Paul Smith. Sergeant Stevens said that this was the first opportunity that he had to notify Chief Inspector Smith due to the fact that he was unable to leave the position where he was monitoring

<sup>39</sup> Exhibit 1, Tab 15 at [9].

the pursuit. He explained that at the time the cordless phone in the VKG Operations Newcastle, which would have allowed him to call Chief Inspector Smith directly from the position he had occupied next the VKG despatcher's terminal, was broken. However, the evidence establishes that this situation has since been corrected and that a cordless phone is now available so that such notification calls to the DOI can be made without delay.

- 8.19 As the pursuit continued Sergeant Stevens asked the despatcher to make requests for Highway Patrol vehicles, and General Duties vehicles equipped with road spikes, to assist. However, information received indicated that there were no such vehicles in the vicinity able to assist. Sergeant Stevens also made a request for a Duty Officer or alternate supervisor who may be able to monitor the pursuit and was advised that no Duty Officer was rostered on at the time for the Mid North Coast LAC.
- 8.20 Chief Inspector Smith described the role of the DOI in a pursuit as being one of a safety net. He explained that as he was approximately 400 kilometres away from the pursuit in Sydney at the time his task was to put together, what he described as a "word picture" in his mind. He said that he was not familiar with the section of the Pacific Highway where the pursuit was taking place. However, he did not consider this to necessarily make his role more difficult as he explained that he was reliant on the quality of information provided.

8.21 **Conclusion:** The actions of the senior officers monitoring the pursuit were in compliance with the Policy. Each of the three monitoring officers gave appropriate and careful attention to the factors which were required to be considered in the assessment process required by the Policy regarding continuation of the pursuit. The evidence establishes that whilst each officer was monitoring the pursuit remotely and was therefore primarily dependent on the information provided over VKG, the clarity of information provided did not create any instances of non-compliance with the Policy.

8.22 Although the DOI on duty at the time was not notified of the pursuit after it had continued for more than five minutes, as the Policy required, a notification was eventually made. The evidence establishes that the delayed notification was not due to any oversight by the VKG despatcher or Sergeant Stevens but rather due to the unavailability of a phone which allowed Sergeant Stevens to remain at the VKG terminal where he was monitoring the pursuit whilst still being able to make a notification call to Chief Inspector Smith. This technological deficiency has since been corrected so as to mitigate the possibility of any delayed notification occurring again. Importantly in the present case, there is no evidence to suggest the delay in notification of about ten minutes adversely affected the conduct of the pursuit in any way. During this time the pursuit was still being actively monitored by two other senior officers.

## 9. Should other options have been considered or employed?

- 9.1 The evidence establishes that there were four options available for the pursuit to be resolved:
- (a) The driver of the Courier to voluntarily stop the vehicle, or be forced to do so by lack of petrol, and then surrender or attempt to flee;
  - (b) For the pursuit to be terminated in accordance with section 7-6 of the Policy;



(c) For road spikes to be used; and

(d) For a blockade to be used on the Macksville bridge.

9.2 The evidence establishes that at the relevant time the only spikes available were in WK13, in Chief Inspector Gorman's vehicle and in the supervisor's vehicle at Nambucca Heads. Given that WK13 was pursuing the Courier, there was no opportunity for spikes to be deployed from that vehicle. In evidence Chief Inspector Gorman explained that as he travelled south he began to formulate a plan as to where the spikes in his vehicle could be deployed. It should be noted that although Chief Inspector Gorman had previously been accredited in the deployment of spikes, he was not aware that his accreditation had expired at the time of the pursuit. As he was unfamiliar with the Pacific Highway north of the pursuit, he considered that a location on the dual carriageway north of Nambucca Heads would be suitable as it contained long stretches of straight road where spikes could be deployed safely to reduce the risk to other road users. It should be noted that although Chief Inspector Gorman explained that this was a plan which he formulated in his own mind as he travelled south, it was never conveyed over VKG. When asked in evidence if he gave any consideration to the time that it would take to reach the location and deploy the spikes, Chief Inspector Gorman said that it remained a viable plan in his mind.

9.3 Senior Constable Shelton had previously been trained in the deployment of spikes but was aware that his accreditation had expired some six to eight months prior to February 2017. At the time he was aware that spikes were located in the supervisor's vehicle and said in evidence that he "*seriously considered*" using that vehicle and "*cop the backlash later*". However he eventually decided against this course of action, meaning that the only police officer able to deploy spikes was Chief Inspector Gorman.

9.4 **Conclusion:** Appropriate enquiries were made over VKG to identify police vehicles which were equipped with spikes and police officers who were trained and possessing current accreditation to deploy them. The enquiries revealed that only Chief Inspector Gorman was in a suitably equipped vehicle and believed himself to be capable of deploying the spikes. Although Chief Inspector Gorman had formulated a plan to deploy the spikes in an area north of Nambucca heads, this plan was not actively discussed over VKG. At the relevant time it appears that attention was instead concentrated on the plan to attempt to use trucks to block the Macksville bridge.

9.5 The proposed area of deployment was at least 15 kilometres from Macksville. Further, as the pursuit passed through Macksville Chief Inspector Gorman had reached the vicinity of Urunga, some 30 kilometres to the north. Given these factors it would appear that the option of using the spikes was not a viable one. The proposed plan for deployment had not been actively considered by any police officer other than Chief Inspector Gorman, no significant steps had been taken towards its implementation other than Chief Inspector travelling south towards the pursuit, and it was uncertain whether Chief Inspector Gorman would even reach the proposed area of deployment in time.

9.6 At 1:59am Senior Constable Shelton broadcast over VKG that he had been in contact with truck drivers in the vicinity and requested that they park on the Macksville bridge. In evidence Senior Constable Shelton said that he had not previously been aware of trucks ever being used to block a pursuit, and had never personally employed that tactic before. In evidence Senior Constable Shelton said that he did consider whether the plan posed a danger to the truck drivers. However, he explained that he

thought that the approach to the Macksville bridge afforded a good view of the bridge, and that there was adequate distance for the Courier to stop upon the driver sighting the blocked bridge. However, Senior Constable Shelton acknowledged that whilst he was aware that the Courier was travelling at speed on the Pacific Highway, he was unsure at what speed it was travelling on the approach to the Macksville bridge.

9.7 Section 7-5-1 of the Policy provides that [REDACTED]

[REDACTED].<sup>40</sup> The Policy does not envisage any non-police vehicle being used to block a pursued vehicle.

9.8 The use of the trucks to block the Macksville bridge was raised with each of the monitoring officers. In evidence Chief Inspector Gorman agreed that he heard Senior Constable Shelton's broadcast in relation to arranging for trucks to block the Macksville bridge. Chief Inspector Gorman said that he did not want this to happen as he considered it to be what he described as a "dangerous tactic" in the sense of using civilian vehicles to attempt to stop a vehicle travelling at high speed. Although he indicated that he did not want the block to occur, Chief Inspector Gorman explained that he did not communicate this over VKG because at the time it was difficult for him to use his radio whilst driving at speed in an attempt to reach the pursuit.

9.9 Sergeant Stevens explained that he did not instigate the request to block the bridge but said that he

[REDACTED]. Further, Sergeant Stevens explained that because the pursuit had almost reached Macksville by the time Senior Constable Shelton made his broadcast, there was insufficient time to advise any truck driver to not follow this course of action, even if he had wanted to do so. In evidence Sergeant Stevens described the use of the trucks (and any other non-police vehicle) to block a pursued vehicle as being "unconventional" but said that in his view there was nothing within the Policy which suggested that such vehicles could not be so used. He was asked in evidence as to his understanding of the [REDACTED]

[REDACTED], Sergeant Stevens indicated that such considerations would always apply.

9.10 When asked about the ability to use non-police vehicles in a road block, Chief Inspector Smith referred to the provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA)*. Section 37 of LEPRA provides:

*(1) For the purposes of this Act, the following are vehicle roadblock powers:*

*(a) the power to establish a roadblock (consisting of any appropriate form of barrier or obstruction preventing or limiting the passage of vehicles) on any specified road, road related area or other public place or school,*

*(b) the power to stop vehicles at a roadblock.*

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<sup>40</sup> Exhibit 1, Tab 27B, page 24.

*(2) A senior police officer may authorise another police officer to exercise any or all of the roadblock powers in respect of any specified vehicle (or class of vehicles) on a road, road related area or other public place or school if the senior police officer suspects on reasonable grounds that:*

- (a) The vehicle (or a vehicle of the specified class of vehicles) is being, or was, or may have been, used in or in connection with the commission of an indictable offence and the exercise of the powers may provide evidence of the commission of the offence, or*
- (b) Circumstances exist on or in the vicinity of that road, road related area, place or school that are likely to give rise to a serious risk to public safety and the exercise of the powers may lessen the risk.*

9.11 Further section 37(3) provides:

*A police officer may exercise vehicle roadblock powers without obtaining authorisation by a senior police officer if the police officer suspects on reasonable grounds that it is necessary to exercise the powers and that the seriousness and urgency of the circumstances required the powers to be exercised without obtaining the authorisation.*

9.12 Section 3 of LEPR defines a senior police officer to be a Police Area Commander, a Police District Commander, a Duty Officer for a police station, or any other police officer of the rank of Inspector or above. It does not appear that the term “*specified vehicle*” is defined anywhere within LEPR.

9.13 Despite monitoring the pursuit, Chief Inspector Smith had no recollection of being told about the plan to block the Macksville bridge. He explained that he may have missed the audio communication at the time the plan was being discussed. In evidence Chief Inspector Smith was asked if the [REDACTED] [REDACTED], and whether, if he had been aware of the plan to block the bridge, he would have done anything. In each instance, Chief Inspector Smith said that he was unable to answer.

9.14 In evidence Sergeant Cooper agreed that the safety considerations which underpin section 7-5-1 of the Policy as it relates to police vehicles applies equally in relation to non-police vehicles. Sergeant Cooper said that he was unfamiliar with non-police vehicles being used by police officers for the purposes of a road block, and expressed the view that such a situation would be unorthodox and highly unusual.

9.15 **Conclusion:** By the time the pursuit passed the Macksville bridge, there appeared to be no remaining, or at least actively considered, viable options to bring the pursuit to a resolution short of termination in accordance with section 7-6 of the Policy, or the driver of the Courier deciding to stop voluntarily or due to some unforeseen factor such as lack of fuel. Apart from Chief Inspector Gorman no other police officer had formed the view that section 7-6 of the Policy had been triggered. There was also no information to suggest that the driver of the Courier was likely to stop, either voluntarily or due to some unforeseen factor. Further, by this time the planned blocking of the Macksville bridge had been unsuccessful and Chief Inspector Gorman’s plan to deploy spikes did not appear to be a viable option or, at least, an option which had been carefully explored.

9.16 Section 7-6-2 of the Policy sets out a [REDACTED].  
[REDACTED]  
[REDACTED]. In the present case, by the time the pursuit passed the Macksville bridge and where any remaining resolution options had either been exhausted or were unlikely to be utilised, consideration ought to have been given to whether the pursuit should have been terminated. It is therefore necessary to make the following recommendation.

9.17 **Recommendation 5:** I recommend to the NSW Commissioner of Police that consideration be given to amending section 7-6-2 of the Safe Driving Policy to include [REDACTED]  
[REDACTED]  
[REDACTED]

9.18 It would appear that section 37 of LEPRA arguably provides for non-police vehicles to be used as part of a roadblock. Section 37 makes reference only to a barrier or obstruction, without identifying what object (such as a vehicle) can be used to form such a barrier or obstruction except to note that it must be of an appropriate form. [REDACTED]. It is evident from the evidence of the monitoring officers that the provisions of both the Policy and LEPRA may be widely interpreted so far as the use of non-police vehicles in a road block during a pursuit is concerned. Given the potential for adverse outcomes to a pursued driver, pursuing police officers and members of the community who may be directly involved in such action such the possibility for such wide interpretation is undesirable. The following recommendations are therefore necessary.

9.19 **Recommendation 6:** I recommend to the NSW Commissioner of Police that consideration be given to explicitly addressing the use of non-police vehicles (including heavy vehicles) as a road block during a pursuit, either in the Safe Driving Policy, or in another appropriate policy document or guideline, or by an appropriate direction to police officers.

9.20 **Recommendation 7:** I recommend to the NSW Commissioner of Police that consideration be given to including in the standard police driver training an instruction regarding the use of non-police vehicles (including heavy vehicles) by police officers as a road block during a pursuit.

## 10. Why were road spikes not available in the Macksville area?

10.1 In evidence Sergeant Cooper was asked if he thought it was surprising that there were no spikes available at the relevant time; he replied that he thought it was problematic. He was asked whether he was aware of any steps made to make spikes more widely available in Macksville and its surrounding areas. He indicated that there are provisions to allow spikes to be fitted to any police vehicle for deployment and that the Mid North Coast command has actively encouraged the certification of officers capable of deploying spikes.

10.2 Sergeant Cooper indicated that the command has about 50 officers certified to deploy spikes, with that number representing approximately one third of the officers within the command. Further, he

explained that, without being able to quote exact numbers, this percentage of certified officers represented an improvement over the figures that existed in February 2017. Finally, Sergeant Cooper indicated that the question of certification remains a matter of discretion for each individual command, and that he was not aware of the issue being problematic within the Mid North Coast command.

**10.3 Conclusion:** At the relevant time it appears that the unavailability of police vehicles equipped with spikes and police officers who were accredited to deploy them was due to the fact that the pursuit was occurring in the very early hours of the morning. There is no evidence to suggest that the unavailability of spikes and suitably trained officers was reflective of any systemic issue. To the contrary the available evidence establishes that since 2017 there has been an increase in the percentage of suitably accredited officers capable of deploying spikes. Further, there is no evidence to suggest that the percentage of accreditation is deficient in any way.

## **11. Was the information provided to Xavier's parents adequate and appropriate?**

11.1 Shortly after the pursuit had passed Albert Drive and was about six kilometres from Macksville, and at about the time that Chief Inspector Gorman asked whether the history of the Courier and the driver had been checked, Constable Wilson broadcast that he (and Senior Constable Osborne) would make efforts to contact the owner of the Courier in order to verify whether it had been stolen. In order to do this, Constable Wilson needed to return to Kempsey police station in order to interrogate electronic police records.

11.2 Upon returning, Senior Constable Renee Bennett (who was on duty at the station at the time) informed them that she was unable to find the Courier's registration details to allow contact to be made with its owner. Constable Wilson explained that, at around the same time, he heard over VKG that Senior Constable Davison had requested the attendance of NSW Fire and Rescue. This led Constable Wilson to assume that there had been a collision of some sort, without knowing any further details.

11.3 Constable Wilson was subsequently able to locate the registration details from the police CAD and subsequently identified the owner as John Burke from Kundabung. Constable Wilson noted that the vehicle had not been reported stolen. After locating a phone number for Mr Burke Constable Wilson called and left a message for Mr Burke to contact Kempsey police station. In evidence Constable Wilson estimated that this occurred sometime between 10 and 20 minutes after he returned to the station. He explained that at that time he had only heard, from the VKG broadcast in the background, the request for NSW Fire and Rescue attendance, and had only made the assumption that there had been a collision. Out of precaution, and in order to rule out the possibility that Mr Burke had been the victim of a home invasion, Constable Wilson decided to drive to Mr Burke's home address.

11.4 After Constable Wilson left the station, Senior Constable Bennett received a call from Mr Burke, who enquired about the location of his vehicle. Mr Burke said that his son Xavier was not at home and that he believed Xavier had taken the vehicle without his knowledge. Senior Constable Bennett explained that the vehicle had been located in South Kempsey with a number of youths occupying it and that she would contact Mr Burke with any further information. Mr Burke said that once Xavier returned home he would bring Xavier into the police station so that police could speak to him about taking the car without his parents' knowledge. At the end of the call Senior Constable Bennett called

Constable Wilson and told him not to attend Mr Burke's address to speak to him. In evidence Constable Wilson explained that Kundabung was approximately 30 kilometres from Kempsey. After receiving Senior Constable Bennett's call it took him about 10 to 15 minutes to drive back, arriving at about 2:25am or 2:30am.

11.5 Constable Wilson returned to Kempsey police station and called Mr Burke who told him that his son, Xavier, and his vehicle were both missing, and asked what was happening. Constable Wilson said that he could only say that the utility had been stopped at South Kempsey and that some persons had decamped from it. In evidence Constable Wilson said that he recalled Mr Burke telling him that Xavier was due at school at 8:00am and that, when Xavier returned home, he would bring Xavier to the police station before school. Constable Wilson indicated in evidence that at the time of this conversation he thought that it was the Courier that was involved in the pursuit and was concerned that it was involved in the collision which he assumed had occurred. However, in evidence Constable Wilson explained that at that time he was unable to obtain any more information about the Courier.

11.6 Shortly after the call ended, Constable Wilson updated the police CAD at 2:32am with this entry: "SPOKE TO VEH OWNER – THE OWNER IS IN KUNDABUNG – THE VEH IS MISSING & HIS SON IS NOT THERE – I'VE RECALLED A VALLEY OFFICER – ANY FURTHER GD'S NEEDED?"<sup>41</sup>

11.7 A short time later, Mr and Mrs Burke called Constable Wilson. He told them that the utility had been seen near the quarry at Dondingalong with four persons inside. Mrs Burke informed Constable Wilson that Xavier had a friend, [REDACTED], who lived in that area and provided the contact details for [REDACTED].

11.8 In evidence, Constable Wilson explained that by the time of this second call he had formed the belief, from what he had heard on VKG, that the driver of the Courier had been fatally injured in the collision. However in evidence he explained that it was not his role to say anything further, and that, in the case of a critical incident it was not policy for him to deliver such information over the phone.

11.9 The NSW Police Handbook relevantly provides:

***Advice to relatives***

...

*Ensure next of kin are advised personally of a death at the first opportunity. Police should only phone next of kin to inform them of the death in exceptional circumstances and with the approval of the senior officer on duty.*

*Additionally, a death should only be notified to the next of kin upon confirmation of the deceased. Where the deceased identity is unconfirmed, police should contact the potential next of kin and explain why they think the deceased is related to them and that there is a requirement to establish the identity of the deceased.*

11.10 At about 7:30am on 10 February 2017 Superintendent Paul Fehon, Chief Inspector Aldridge, and Detective Sergeant Vandermaat attended Mr Burke's home address in Kundabung. After Mr Burke confirmed that he was the owner of the Courier, Superintendent Fehon advised that the Courier had been involved in a collision with a B-double near Macksville. Mr Burke asked if Xavier was in the

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<sup>41</sup> Exhibit 1, Tab 23, page 184.

Courier and Superintendent Fehon advised that police had confirmed that there was one deceased person in the vehicle but unsure of who else was in the vehicle.

11.11 Mrs Burke called at this time and spoke to Superintendent Fehon, asking for information about the location of the accident. Arrangements were made for Mr and Mrs Burke to attend Kempsey police station where they were later told that a police pursuit had occurred earlier that morning and that the Courier had collided with a B-double. Due to the substantial impact damage, police had been unable to determine who was in the Courier but had confirmed that there was one deceased person in the vehicle. Mr and Mrs Burke later attended Macksville Hospital at about 9:30am where they identified Xavier.

11.12 **Conclusion:** Constable Wilson made appropriate enquiries to ascertain the owner of the Courier, and to ensure that the owner had not been the victim of any criminal offence. It is evident that by the time Constable Wilson spoke to Mr Burke the collision had already occurred. However, at that time Constable Wilson was only in possession of unconfirmed information (which he had overheard over VKG) that led him to infer that a collision had occurred. Although Constable Wilson had reached a belief by the time of his second call with Mr Burke that a collision had in fact occurred and that it was likely that the driver of the Courier had been fatally injured it would not have been appropriate to convey this to Mr Burke at the time. This is because Constable Wilson had not had his belief confirmed and, even if he had, the NSW Police Handbook provided that such information should only be conveyed in person except in exceptional circumstances and only with the approval of the senior officer on duty. The evidence does not establish that either situation applied to the events of 10 February 2017.

11.13 Once the details and circumstances of the collision had been confirmed senior police officers took appropriate steps to contact Xavier's parents in person, provide information that was available at the time, and make arrangements for Xavier to be identified.

## 12. Findings

12.1 Before turning to the findings that I am required to make, I would like to acknowledge, and express my gratitude to Ms Joanna Davidson, Counsel Assisting, and her instructing solicitor, Ms Jennifer Hoy of the Crown Solicitor's Office. Their assistance during both the preparation for inquest, and during the inquest itself, has been enormous. I also thank and commend Detective Chief Inspector Neil Stephens and Detective Sergeant David Frith for conducting a thorough, detailed and independent investigation into Xavier's death and for compiling a comprehensive initial brief of evidence. I thank all of them for the sensitivity and empathy that they have shown in what has been a particularly distressing matter.

12.2 The findings I make under section 81(1) of the Act are:

### ***Identity***

The person who died was Xavier Burke.

### ***Date of death***

Xavier died on 10 February 2017.

### ***Place of death***

Xavier died at Macksville NSW 2447.

***Cause of death***

The cause of Xavier's death was multiple injuries.

***Manner of death***

Xavier died when a vehicle that he was driving, and which was being pursued by a police vehicle in the course of a police operation, crossed to the incorrect side of the road and collided with a B-double.

**13. Epilogue**

13.1 At the conclusion of the evidence in the inquest Xavier's parents spoke lovingly about the life of their son, and about their desire for the learnings from the circumstances of Xavier's death being used to prevent the possibility of other, similarly tragic deaths. It is hoped that, that with appropriate consideration being given, the aspiration Xavier's parents can be eventually realised.

13.2 On behalf of the Coroner's Court of NSW and the Assisting team, I offer my deepest heartfelt sympathies, and most respectful condolences to Xavier's parents and sister, the other members of Xavier's family, and Xavier's many friends for their most heartbreaking loss.

13.3 I close this inquest.

Magistrate Derek Lee  
Deputy State Coroner  
25 July 2019  
Coroner's Court of NSW, Lidcombe