



## FINDING OF INQUEST

*An Inquest taken on behalf of our Sovereign Lady the Queen at Adelaide and Berri in the State of South Australia, on the 20<sup>th</sup> day of April 2011, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> days of May 2011 and the 23<sup>rd</sup> day of January 2012, by the Coroner's Court of the said State, constituted of Anthony Ernest Schapel, Deputy State Coroner, into the death of Robyn Eileen Hayward and Edwin Raymond Durance.*

*The said Court finds that Robyn Eileen Hayward aged 45 years, late of Lot 525 Bassham Road, Barmera, South Australia died at Barmera, South Australia on the 27<sup>th</sup> day of February 2009 as a result of a gunshot wound to the head.*

*The said Court finds that Edwin Raymond Durance aged 62 years, late of Lot 525 Bassham Road, Barmera, South Australia died at Barmera, South Australia on the 27<sup>th</sup> day of February 2009 as a result of a gunshot wound to the left chest.*

*The said Court finds that the circumstances of their deaths were as follows:*

### **1. Preliminary findings and recommendation**

- 1.1. These are the Court's findings in relation to concurrently conducted Inquests into the cause and circumstances of the deaths of Robyn Eileen Hayward, 45 years, and Edwin Raymond Durance, 62 years. Both deceased died as the result of gunshot wounds. Ms Hayward and Mr Durance were recently estranged domestic partners. Ms Hayward was shot by Mr Durance in premises that Ms Hayward was occupying near Barmera. Ms Hayward died of a head wound at the scene. There is evidence that there was an element of premeditation about the killing. Mr Durance remained on the premises following the shooting. As it so happened, police had earlier that morning been alerted to the possibility that there might be trouble at the premises and they arrived not long after the shooting. Ultimately police with conspicuous courage

entered the house in the hope of rescuing Ms Hayward who was thought possibly still to be alive and in the course of this attempt an officer shot and killed Mr Durance in circumstances that I will later describe. Mr Durance also died at the scene. I say at the outset of these findings that in the Court's opinion there is no evidence of any unlawful conduct on the part of any police officer in respect of the death of Mr Durance.

- 1.2. At the conclusion of the evidence in this Inquest I delivered preliminary findings as well as a formal recommendation of the Court. I indicated that I would deliver my unabridged findings and recommendations at a later date. I now deliver those findings and recommendations.
- 1.3. The preliminary findings that I initially delivered shall form part of these findings. Those preliminary findings were as follows:

In these Inquests evidence was heard that on 27 February 2009 the deceased, Robyn Eileen Hayward, was shot to death by her partner, Edwin Raymond Durance. Mr Durance was then shot by a member of South Australia Police (SAPOL). He died as a result of his injuries. I have completed taking the evidence in the inquest. However, final addresses have yet to be completed. Nevertheless, the basic facts and circumstances surrounding the two deaths, insofar as it is necessary to mention them here, are clear and are not in dispute.

The two deceased had been cohabiting in a de facto relationship in premises near Barmera. On the evening of 4 January 2009 an incident had occurred at that premises in which Mr Durance assaulted Ms Hayward with a fireplace poker. That evening Mr Durance was arrested by police and was charged with having assaulted Ms Hayward. He was released on bail. A risk assessment conducted by local police had revealed that Ms Hayward should be considered to be at high risk of further domestic abuse.

Contrary to bail conditions that were designed to prohibit Mr Durance from approaching Ms Hayward or attending at the domestic premises where Ms Hayward remained, Mr Durance attended at that premises on the morning of 27 February 2009. He was in possession of a .22 rifle and he used this to shoot and kill Ms Hayward.

I shall in due course deliver my formal findings and recommendations on a day to be fixed. However, counsel assisting me in this Inquest has made a submission that I should consider making a certain recommendation at the outset. It is firstly necessary for me to say something of the context in which counsel's submission is made. According to the affidavit of Assistant Commissioner Anthony Harrison of SAPOL, in 2007 SAPOL commenced new procedures with respect to policing domestic violence. In mid 2007 Cabinet approved the trial of the Family Safety Framework (the Framework) which is a model that utilises an integrated service response to high risk cases of domestic violence focussing on the safety of women and children and the accountability of offenders. The Framework strategic overview was tendered to the Inquest as an

annexure to Assistant Commissioner Harrison's affidavit. In the strategic overview there is an introductory description of the Framework in the following terms:

**'FAMILY SAFETY FRAMEWORK**

The Family Safety Framework (the Framework) will work towards better safety outcomes for the whole family by providing guidelines for each region and organisation about strategies to enhance the safety of women, children and young people through integrated service responses. While the Framework has been developed within a victim/perpetrator construct, importantly it recognises that situations where violence against women and children occur can involve:

- A continuum of victimisation
- Victims as perpetrators
- Victimisation across generations
- The increasing escalation of violence

This Framework articulates a commonality of approach and practice across services for cases assessed as high risk, that positions the immediate safety of women, children and young people as critical at all times. The commonality of approach and practice involves agreement about:

- definition of risk/s,
- what constitutes breaches to the safety of women, children and young people, and
- how these breaches of safety will be managed by services.

Whilst the Framework is designed to support high risk cases the evaluation of the Framework in South Wales indicates that there is also improvement in services to victims overall.'

According to the affidavit of Assistant Commissioner Harrison, the Framework has been, and will continue to be, implemented on a region by region basis within the whole of the State of South Australia. I understand that the regions in which the Framework is to be implemented correspond with SAPOL's Local Service Areas (LSA). The Framework has been implemented already in a number of LSAs. On 29 November 2010 the Commissioner of Police gave approval for SAPOL to support a rollout of the Family Safety meeting process, envisaged as an integral part of the Framework, to Eastern Adelaide LSA and Sturt LSA in early 2011. In addition, following discussion with the Assistant Commissioner, Southern Operations Service, the Limestone Coast LSA has been selected and approved as the next country site for implementation, with an anticipated commencement of Family Safety meetings in July 2011.

The Riverland region of South Australia in which populous towns such as Barmera, Berri, Renmark and Loxton are situated, forms part of what is known as the Murray Mallee SAPOL LSA. While the implementation of the Framework is envisaged in principle to be implemented in the Murray Mallee LSA in due course, as currently advised there is no immediate plan to do so.

Counsel assisting has submitted that I should make an immediate recommendation that the implementation of the Framework within the Murray Mallee LSA be commenced forthwith. I have given very careful consideration to this submission. The Framework

appears to be a document that in large part has significant SAPOL input, but it is obvious from the document itself that there are a number of other Government and non-Government departments and entities that are also participants in the Framework and whose services would need to be drawn upon in order to secure its implementation and operation.

Having regard to the fact that there is little doubt that this Framework will in due course be implemented in the Murray Mallee LSA, and that there is an identifiable need for it to be so implemented, it would appear to be desirable, if not necessary, for the Framework to be implemented in this particular region as soon as possible. However, I am mindful of the fact that there are a number of other entities that would be affected by any coronial recommendation designed to accelerate the process of implementation. In addition, there may well be resource implications if I were to do so. For example, it might be considered difficult for resources that an entity might have already devoted to some other aspect of its operations to be prematurely and unexpectedly diverted to the implementation of the Framework.

However, in all of the circumstances I accede to counsel's submission. It seems to me that in the light of the incidents to which this Inquest relates, it would be appropriate to make a recommendation that the Framework be implemented within the Murray Mallee SAPOL LSA at the first available opportunity, consistent with affected and involved entities being able to bring the necessary resources to bear on its implementation. I recommend accordingly.'

## **2. The cause of Ms Hayward's death**

- 2.1. Ms Hayward suffered a gunshot wound to her head. She died at the scene. It is not known with complete certainty whether there was any significant period of survival after she suffered the gunshot wound. By the time emergency services personnel attended to Ms Hayward it is clear that she was already deceased.
- 2.2. A post-mortem examination was conducted in respect of Ms Hayward by Dr Karen Heath who is a forensic pathologist at Forensic Science South Australia. Dr Heath provided a report verified by affidavit<sup>1</sup>. In her report she expresses the cause of Ms Hayward's death to be gunshot wound to the head. I find that to have been the cause of her death. The weapon used was a .22 calibre rifle. The single projectile passed through the entire skull. A deformed fragment was located beneath the skin on the right side of the head. The brain was referred to SA Pathology for formal neuropathological examination<sup>2</sup>. The examination showed no evidence of hypoxic ischaemic damage and no other changes of relevance. The absence of these histological changes in the brain indicated that death occurred within, at most, 35

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<sup>1</sup> Exhibits C6 and C6a

<sup>2</sup> Exhibits C11a and C11b

minutes of the sustaining of the injury, and possibly within a shorter time period. Thus there may have been some period of survival prior to actual death.

- 2.3. As well as the gunshot injury, Ms Hayward had a 5cm x 1cm poorly defined bruise on the left forearm, a 3mm x 2mm superficial abrasion to the left cheek, a 15mm x 9mm parchmented superficial abrasion to the left of the midline of the back and a 20mm x 10mm superficial abrasion above the right buttock.
- 2.4. Analysis of a specimen of blood obtained at autopsy showed a blood alcohol concentration on 0.037% which is a relatively low concentration. No other common drugs were detected. In any event, there is no evidence to suggest that during the fatal occurrence Ms Hayward's own behaviour had any influence upon the incident.

### **3. The cause of Mr Durance's death**

- 3.1. Mr Durance's post-mortem examination was also conducted by Dr Karen Heath.
- 3.2. Mr Durance had been shot by a police officer with a .223 calibre rifle. Mr Durance had suffered two distinct gunshot wounds, one to the head and one to the left chest. Dr Heath formed the opinion that Mr Durance's death was due to the gunshot wound to the left chest, the head injury not being a necessarily lethal injury, although it could have resulted in unconsciousness. Mr Durance died at the scene. When examined by paramedics, no sign of life was evident.
- 3.3. The gunshot wound to Mr Durance's chest involved an entry wound located on the anterior aspect of the left shoulder. The wound track passed from left to right, slightly downwards and slightly backwards. The projectile penetrated the chest cavity and resulted in a left haemopneumothorax with 850mls of liquid and clotted blood identified within the left pleural cavity. There was a 75mm x 50mm defect in the pleural surface of the lateral aspect of the left upper lobe of lung with an 80mm x 70mm x 40mm cavity of lacerated lung tissue in the left upper lobe of the lung. There was a 40mm x 30mm defect in the posterior aspect of the left upper lobe of the lung and corresponding 40mm x 30mm entry and exit wounds through the left lower lobe of the lung. Fragments of projectile were identified within both lobes of the left lung. There was a 30mm x 20mm area of bruising to the left upper back. Subcutaneous dissection of this area revealed two projectile fragments lodged in the subcutaneous tissue. I do not understand there to have been any exit wound as such.

- 3.4. Dr Heath reports that Mr Durance's death would have been due to the combined effects of extensive haemorrhage from the left chest wall and left lung, and hampering of the mechanics of respiration due to extensive laceration of the left lung, left haemopneumothorax and damage to the left chest wall. Given the extent and the severity of the injuries, death would have been rapid. I so find.
- 3.5. It is clear from the post-mortem report that two projectiles struck Mr Durance, one to the head and another to the body. Both wounds were inflicted by gunshots fired by police. The fatal wound was as described to the left chest.
- 3.6. Dr Heath expressed Mr Durance's cause of death as gunshot wound to the left chest<sup>3</sup>. I find that to have been the cause of Mr Durance's death.
- 3.7. Analysis of a specimen of blood obtained at Mr Durance's autopsy showed a blood alcohol concentration of 0.110% which is a relatively moderate level. In addition, a toxic concentration of the antidepressant drug mirtazapine was present in the blood, along with therapeutic concentrations of the sedative drug diazepam and its metabolite, nordiazepam<sup>4</sup>. Dr Heath reports that the concomitant administration of mirtazapine with alcohol and benzodiazepines can cause additive toxicity. In this case, given the circumstances of death and the autopsy findings, drug toxicity was not thought to contribute to death. However, the presence of these medications in the blood may possibly have affected the mental state and behaviour of the deceased, Mr Durance. I note in this regard that historically Mr Durance was said to have had an entrenched alcohol problem. In addition, he had also been diagnosed with clinical depression and anxiety for which he had been prescribed antidepressants and diazepam.

#### **4. Reason for Inquests**

- 4.1. The death of Mr Durance occurred in circumstances in which he was reasonably suspected by police of having shot and injured Ms Hayward in unlawful circumstances. There is no doubt that when police attended at the premises at which that incident had occurred it was within their contemplation that Mr Durance would be apprehended. From the circumstances as will appear, it is also clear that Mr Durance knew, or at least believed, that police would apprehend him. There is also

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<sup>3</sup> Exhibit C6b

<sup>4</sup> Exhibits C7b and C7c

strong reason to believe that Mr Durance, by refusing to present himself outside the premises in which the incident occurred for the purposes of apprehension, was evading apprehension by police. In addition, once police confronted Mr Durance there was a clear attempt on his part to avoid apprehension, either by direct resistance to police attempts to do so or by creating a set of circumstances in which he knew that inevitably he would not be taken alive. Mr Durance's death occurred while he was in the process of being apprehended or, in the alternative, while he was evading apprehension by police. Accordingly, by virtue of the definition of 'death in custody' in section 3 of the Coroners Act 2003 Mr Durance's death was a death in custody. In those circumstances section 21(1)(a) of the Coroners Act 2003 dictated that an Inquest into Mr Durance's death was mandatory.

- 4.2. Although Ms Hayward's death was not a death in custody, and for that reason an Inquest was not mandatory in her case, it was nevertheless considered necessary and desirable that an Inquest be held into her death. In this Inquest I examined issues involving previous alleged domestic violence involving her and Mr Durance in respect of which certain action had been taken by police. I examined in considerable detail the nature of the action that had been undertaken by the authorities in respect of Ms Hayward's safety, whether all relevant police procedures had been followed and whether more rigorous and timely action may in all of the circumstances have prevented Ms Hayward's death or have rendered it less likely. The incidental issue of course is whether if her death had been prevented Mr Durance's death could also have been prevented.
- 4.3. Naturally, I enquired into whether the killing of Mr Durance at the hands of police was justified in all of the circumstances.

## **5. The antecedents of Mr Durance**

- 5.1. Mr Durance was born on 24 June 1946 in Victoria. He is said to have been an alcoholic for much of his adult life. He also suffered from depression and anxiety for which he took medication.
- 5.2. Mr Durance had a criminal history in South Australia, Victoria, Western Australia and New South Wales. He had spent time in prison. Most relevantly he had convictions in May 2006 in South Australia for common assault on a family member.

- 5.3. Mr Durance married at the age of 20 and had one child. The marriage did not survive.
- 5.4. When he was in his 40s Mr Durance met a woman by the name of Elizabeth England through Alcoholics Anonymous. He and Ms England moved from Victoria to Adelaide where they ran a small business. In 1997 Mr Durance and Ms England together purchased a farming property of several acres with a homestead and sheds situated at lot 525 Bassham Road, near Barmera where for some time they grew strawberries. This property, which remained in their joint ownership from that point forward, was the property where both Ms Hayward and Mr Durance were eventually killed. In due course the strawberry business lost its viability. According to a statement taken from Ms England<sup>5</sup>, she and Mr Durance lived together at the Bassham Road premises for some years until their separation. Ms England would then occupy premises at Berri while Mr Durance remained at the Bassham Road property. Thereafter Mr Durance formed a relationship with another woman by the name of Gloria Bailey who for some time resided at the Bassham Road address. Following that, Mr Durance entered into the domestic relationship with the deceased, Ms Hayward. This occurred in the year 2008.
- 5.5. Ms Hayward and her father, Robert Francis Hayward, 65 years of age, both moved into the Bassham Road premises with Mr Durance. Mr Hayward would ultimately witness the shooting of his daughter by Mr Durance on 27 February 2009.
- 5.6. Mr Durance was an alleged serial perpetrator of domestic violence. This occurred in respect of Ms England, Ms Bailey and Ms Hayward. According to Ms England she endured violence at Mr Durance's hands that involved both physical and mental injury. In due course Ms England decided that she had had enough and moved out of the Bassham Road premises. Notwithstanding this, she states that she did not regard herself and Mr Durance as enemies, and indeed states that they maintained contact after she moved out. Ms England moved into accommodation at Berri that was arranged for her through the Riverland Domestic Violence Service. The records of the Riverland Domestic Violence Service dating from 1995 contain many entries regarding alleged domestic violence against Ms England at the hands of Mr Durance that, at times, involved threats on his part to kill her, including one threat in December 1997 that involved a threat to kill her and a threat to then shoot himself. As will be seen, there was at all material times at the Bassham Road property a .22 rifle that,

according to Ms England, Mr Durance had access to if not entire control over. An inference is available, which I draw, that it was this weapon that would ultimately claim the life of Ms Hayward. I will return to the details concerning this weapon and the authorities' knowledge of it in another section.

- 5.7. Police intervention had occurred in respect of the relationship between Ms England and Mr Durance. In June 1997 Ms England applied for a restraining order against Mr Durance that had as its basis allegations of punching by him, the infliction of broken ribs requiring hospitalisation and a threat by him to throw a wooden table at her.
- 5.8. It appears from the statement of Ms England and the statements of Ms Gloria Ann Bailey<sup>6</sup> that between the years 2003 and 2007 both Ms England and Ms Bailey co-resided at the Bassham Road premises and that Mr Durance maintained a sexual relationship with both of them. In 2006 Ms England left the property and moved into domestic violence accommodation. In the same year the relationship between Mr Durance and Ms Bailey also concluded.
- 5.9. According to Ms Bailey's statements she had known Mr Durance for 30 years, having first met him in Melbourne. She describes a history of violence at his hands and alcoholism on his part, as well as controlling behaviour. Together they had a daughter who was born in 1977. There was a long period of separation until at the request of her adult daughter Ms Bailey tracked Mr Durance down to the Bassham Road, Barmera property. By then Mr Durance was living with Ms England. Notwithstanding this, Mr Durance asked Ms Bailey to move to South Australia to his Barmera property, ostensibly to help out with housework. She moved into Bassham Road in mid 2003.
- 5.10. The violence involving Mr Durance and Ms Bailey came to the attention of both the Riverland Domestic Violence Service and the police. In this regard the records of the Riverland Domestic Violence Service span the period from April 2004 to May 2006. The alleged incidents described in those records include both physical and verbal abuse, alleged threats to kill Ms Bailey, attempted intervention against Mr Durance, subsequent denial by Ms Bailey of her situation and declarations of love for Mr Durance. There is also reference to Ms Bailey's knowledge of a firearm hidden on the property, possibly in the shed.

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<sup>5</sup> Exhibit C93 Statement dated 27 February 2009

- 5.11. The involvement of SAPOL in the relationship between Mr Durance and Ms Bailey is reflected in records between October 2005 and March 2006. In fact at one point there was a complaint made by Mr Durance against Ms Bailey involving an alleged refusal on her part to leave the premises. On 26 March 2006 Ms Bailey made a complaint of assault by Mr Durance and an affidavit was prepared by police to that effect. The complaint was that Mr Durance had punched her in the ribs. There is also reference to his drinking. At that point she indicated that she wanted to press charges against Mr Durance. This complaint involved Mr Durance being arrested for the alleged assault that day and then being released on bail with a condition that he not further threaten, harass, assault or intimidate Ms Bailey. However, on the same day, Mr Durance returned to the Bassham Road premises and allegedly assaulted her again. She signed a further affidavit for the police and again indicated that she wanted to press charges against him. Police attended and re-arrested Mr Durance for both the second alleged assault and for breaching the bail conditions that he had been placed on earlier in the day, namely not to threaten, harass, assault or intimidate Ms Bailey. Ultimately Mr Durance pleaded guilty and he was placed on a good behaviour bond.
- 5.12. According to Ms Bailey's statement, towards the end of 2006 there was a further incident in which Mr Durance allegedly punched Ms Bailey in the stomach. In due course she moved out of the premises.

## **6. The relationship between Mr Durance and Ms Hayward**

- 6.1. Mr Durance and Ms Hayward commenced a relationship during 2008. Prior to this Ms Hayward had been in a relationship with another man in Berri. That relationship ended in approximately 2003 or 2004. Following this, Ms Hayward resided in women's shelters. She had then been involved in another relationship that also ended in due course. It appears that Ms Hayward moved into the Bassham Road premises in 2008. According to Ms Hayward's father, Robert Hayward, he and his daughter had been residing at a premises in Berri for approximately one month before they both moved into the Bassham Road, Barmera premises.
- 6.2. The relationship between the two deceased persons is described in some detail by Mr Robert Hayward in his statement. He described Mr Durance as a heavy drinker who would consistently drink significant quantities of beer every day. On the other hand,

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<sup>6</sup> Exhibits C33a, C33b and C33c

his daughter was not a big drinker. Most of the disagreements that took place between his daughter and Mr Durance concerned Mr Durance's drinking. Mr Hayward states that he never saw any of these arguments become violent or physical, consisting for the most part of shouting and arguing<sup>7</sup>. He asserts that he never heard Mr Durance threaten to kill Ms Hayward at any time prior to the day of their deaths.

- 6.3. Mr Hayward makes no mention in his statements about an incident that allegedly occurred on 14 November 2008 in respect of which Ms Hayward is recorded as having made a complaint to police that Mr Durance had gone off his medication and was then very intoxicated at Ms England's place in Berri. It is not certain what Ms Hayward's specific concerns were on this occasion.
- 6.4. In the course of a risk assessment regarding Ms Hayward's risk of violence at the hands of Mr Durance following an incident on 4 January 2009, Ms Hayward would indicate to police that for the past few months Mr Durance had been verbally abusing both herself and her elderly father. She asserted that two to three months previously Mr Durance had tried to strangle her. There does not appear to have been any complaint made to any person about that at the time, nor does there appear to have been any detail imparted to police when this risk assessment took place some two or three months after that alleged event.
- 6.5. On 1 January 2009 Ms Hayward made a complaint to police about Mr Durance's behaviour, as a result of which the police were called to the Bassham Road premises. Mr Durance had allegedly been aggressive and abusive and it is recorded that the Haywards had told police that they were fearful for their safety. Police had noted on their arrival that Mr Durance was obviously intoxicated but had managed to contain his anger. It is also recorded that during this attendance police built up a rapport with Mr Durance in an attempt to find a solution to enable the three of them to remain living together within the same house. To this end Mr Durance apparently agreed to take his medication for depression which he had previously been neglecting to do. Police were satisfied upon leaving that all of the participants in this incident were calm. No action was taken against Mr Durance on that occasion.
- 6.6. A further incident occurred three days later on the evening of 4 January 2009. This incident involved Ms Hayward, her father and Mr Durance. The police attended at

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<sup>7</sup> Exhibit C13b, page 3

the Bassham Road premises that night and arrested Mr Durance. It is understood that from that point onwards Ms Hayward and Mr Durance did not cohabit, although it is believed that there was some further contact between them which was in breach of Mr Durance's bail conditions. I return to this issue in due course.

- 6.7. Ms Hayward made a statement to the police in respect of this incident. The statement was given that night to Constable Catherine Williams and was signed on 7 January 2009<sup>8</sup>. In that statement Ms Hayward asserted that there had been violence since she had moved in with Mr Durance. She claimed that approximately two months prior to 4 January 2009 he had punched her in the ribs. This had happened when Mr Durance had stopped taking his medication and had been drinking heavily. She referred to the earlier incident on 1 January 2009 in which she had called the police because he had been verbally abusive to both her and her father. In respect of the incident of 4 January 2009 she stated that Mr Durance again had been verbally abusive towards both her and her father and had continued abusing them until late into the evening following dinner. Mr Durance had started throwing items from the dining table at her father. When his behaviour escalated she went to the defence of her father and told Mr Durance to leave him alone and not to pick on someone who was defenceless, referring to the fact that Mr Hayward used a walking frame. The reaction of Mr Durance to her intervention was to seize a fire poker and use it as a weapon. Ms Hayward raised her arms in front of her face to protect herself whereupon Mr Durance allegedly hit her with the poker two or three times on the arm. When she turned away he hit her on her back several times with the poker. Her father called the police which prompted Mr Durance to upend the dining table. She indicated in the statement that she was prepared to attend Court in respect of the incident, saying:

'I fear for the safety of myself and dad.'<sup>9</sup>

- 6.8. Constable Williams also completed a formal SAPOL domestic violence risk assessment on the night of 4 January 2009<sup>10</sup>. This proforma document necessitated Ms Hayward's input. I return to this document more fully later, but it was in this document that Ms Hayward is recorded as having said that two to three months prior to this Mr Durance had tried to strangle her. She also indicated that she did not feel safe at home, but did not want to leave her father there along with Mr Durance. It will

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<sup>8</sup> Exhibit C91f

<sup>9</sup> Exhibit C91f

<sup>10</sup> Exhibit C97b (PD438)

be remembered of course that the Bassham Road property belonged to Mr Durance and Ms England. Notwithstanding this, following this incident Ms Hayward and her father continued to reside at this address. With breath taking irony, as part of Mr Durance's bail conditions he and Ms England resided together at the domestic violence accommodation that had originally been provided to Ms England in respect of Mr Durance. Also in the risk assessment document there are various boxes ticked which indicated a current frame of mind on the part of Ms Hayward that involved fear and a desire for her to separate from Mr Durance that was induced by previous threats including to kill or harm, controlling and unpredictable behaviour by Mr Durance and substance abuse by him. The overall risk assessment, calculated on a points basis by reference to affirmative answers provided by the alleged victim, was assessed as high in her case with a score of 97. Anything exceeding 45 points was to be regarded as high. If there is a definition of what constitutes high risk in this context it has eluded me, but I take it that high risk implies a high risk of the repetition of significant violence at the hands of the alleged perpetrator.

- 6.9. Some injuries to Ms Hayward were noted by police that night that included injuries to the arms and back. On Friday 9 January 2009, police took photographs of Ms Hayward<sup>11</sup>. The photographs show bruising to Ms Hayward's arms.
- 6.10. The incident of 4 January 2009 would later be described in one of the statements taken by police from Mr Robert Hayward after his daughter's death. This statement, taken on Tuesday 3 March 2009 and signed and dated the following day<sup>12</sup>, was the only statement ever taken from Mr Hayward that concerned the incident on 4 January 2009. This was notwithstanding the fact that to the knowledge of police investigating that incident Mr Hayward must have witnessed the incident and could have given material information about it in support of any ensuing prosecution following Mr Durance's arrest. I return to the failure of police to take a timely statement from Mr Hayward in respect of the incident on 4 January 2009 in a different context later in these findings. For current purposes it is pertinent to record that Mr Hayward's account of the incident of 4 January 2009, imparted to police for the first time in March, was that Mr Durance had grabbed a fire poker from a stand next to a combustion heater in the lounge room and went to hit Mr Hayward's daughter who put up her arms in front of her head to protect herself. Mr Durance had then struck

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<sup>11</sup> Items SP2, SP3 and SP4 referred to in the statement of Senior Pichl, Exhibit c91a

her arms approximately four times and as she turned away he hit her twice on the back. Mr Hayward described Mr Durance as having struck his daughter 'pretty hard'<sup>13</sup>. Mr Hayward stated to police that the incident had been precipitated by an argument between his daughter and Mr Durance about his drinking.

## 7. **The rifle that was used to kill Ms Hayward**

- 7.1. In her statement<sup>14</sup> Ms Elizabeth England reveals that a .22 rifle that belonged to her father had come into her possession and was brought to the Riverland by her. She did not have a firearms licence and had never used it. The rifle was kept on the Bassham Road property. Ms England asserts that while the rifle remained at the property, she had no idea where it was kept. She believed that Mr Durance had hidden it on the property. She indicates in her statement that she thought he may have buried it somewhere on the farm. Suffice to say, as far as she was concerned Mr Durance exerted total control over the firearm. There is no evidence that Ms England ever informed police about the existence of the firearm.
- 7.2. The rifle was at no time registered to Mr Durance or to any other occupant or former occupant of the Bassham Road premises. In fact, no firearm was registered to him at any material time. I understand that he did not have a firearms licence. There is no evidence that Mr Durance's control over this firearm was known to police. Nor is there evidence that police knew that there was a firearm at the Bassham Road property. However, the existence of this weapon was a matter that was known to, and recorded in the records of, the Riverland Domestic Violence Service.
- 7.3. An entry in the Riverland Domestic Violence Service notes dated 4 August 1995 recorded that Ms England had indicated to them that there was a .22 rifle and that when asked as to whether her partner Mr Durance had access to it, she had indicated that she herself had hidden it at that point in time. An entry dated 12 June 1997 indicates that she had stated that Mr Durance had threatened to kill her. Yet in a record dated 22 September 1997 it is indicated that Ms England had circled an answer 'unknown' in respect of a question whether or not her partner had access to a firearm. I have already indicated that at one point Ms England had asserted to the Riverland Domestic Violence Service that Mr Durance had threatened to kill her and then shoot

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<sup>12</sup> Exhibit C13b

<sup>13</sup> Exhibit C13b, page 4

<sup>14</sup> Exhibit C93

himself. That record is dated 13 December 1997. In another record dated 14 October 1997, which is again a questionnaire, Ms England is recorded as having affirmatively answered that her partner had access to a firearm and that he always threatens her life.

- 7.4. On 29 October 2005 Ms Gloria Bailey is recorded as having indicated to Riverland Domestic Violence Service that Mr Durance had access to a firearm at that time and that it was hidden on the property, possibly in the shed. A record dated 10 March 2006 again suggests that Ms Bailey indicated that Mr Durance did have access to a firearm but at that point in time she had no idea where it was. In her statement dated 24 May 2009 Ms Bailey indicated that when she lived at the Bassham Road property she could remember:

'Ted finding a rifle which I later found out belonged to Liz's father.'<sup>15</sup>

In the same statement Ms Bailey speaks of her seeing a rifle at the property and taking a photograph of Mr Durance with it. There is no evidence that in any of the complaints she made in 2005 and 2006 about Mr Durance, Ms Bailey had ever indicated to police that Mr Durance had access to a firearm, even when in March 2006 Mr Durance was twice charged with assaulting Ms Bailey on the same day.

- 7.5. The statement made by Ms Hayward concerning the incident on 4 January 2009 does not reveal anything about Mr Durance having access to a firearm or of the existence of a firearm on the property<sup>16</sup>. Police who attended the premises in respect of that incident have asserted that before police actually entered the house on this occasion, Ms Hayward was asked whether Mr Durance was in possession of a firearm, to which she had said words to the effect that to her knowledge he was not. The domestic violence risk assessment<sup>17</sup> compiled that same night by Constable Williams in conjunction with Ms Hayward also gives an impression that Ms Hayward had indicated, at least by default in leaving a blank answer to the question as to whether Mr Durance had access to, or was in possession of a weapon and had threatened to use the same, that she did not know of the existence of the firearm. There is a certain element of ambiguity in those questions which may have given rise to an unhelpful answer and a misleading impression, but it is pertinent to observe that in any event there was no indication given to police by Ms Hayward that night that she had any

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<sup>15</sup> Exhibit C33a, page 5

<sup>16</sup> Exhibit C91f

<sup>17</sup> Exhibit C97b (PD438)

knowledge of a firearm on the Bassham Road premises or otherwise in Mr Durance's possession.

- 7.6. In his statement taken on 3 March 2009<sup>18</sup>, that is to say at a time after his daughter's death, Mr Robert Hayward told police that Mr Durance had shown him a .22 calibre rifle that he kept on the Bassham Road property. Mr Hayward described it as a bolt action, single shot rifle with which Mr Durance occasionally used to shoot rabbits. Mr Hayward asserted that Mr Durance kept the rifle in the front seat of an old tray top utility that was parked in an old carport directly across the driveway from the newer carport on the property. Mr Hayward said he had not known where Mr Durance kept the ammunition for the rifle. Mr Hayward asserted that Mr Durance had shown the rifle to him on the one occasion at which time it was lying across the seats of the utility. He said he never saw Mr Durance fire the rifle but occasionally saw the dogs with dead rabbits and assumed that Mr Durance must have shot them. He did not know from where Mr Durance had originally obtained the rifle. In a further statement taken on 25 March 2009<sup>19</sup>, which was also after his daughter's death, he stated that the last time that he would have seen the rifle in Mr Durance's hands was well over 6 months before his daughter's death, at which time it was in the utility in the carport. As to whether his daughter knew of the weapon, Mr Hayward asserted in the same statement that he was sure that his daughter knew that Mr Durance had the rifle. He asserted that over the time he had been living with them he had heard them talking about the weapon and, in particular, they spoke of using it to kill a snake that had been seen on the block. This would have been at least 6 months before his daughter's death. As indicated, all of this information was imparted to police by Mr Robert Hayward after the event of his daughter's death. Although there is no evidence that Ms Robyn Hayward told police of the existence of the weapon on the property, either before or after Mr Durance's arrest in respect of the 4 January 2009 incident, there were means by which police could have established the presence of the weapon at the property at a time prior to her death. If they had taken the trouble to speak to Mr Hayward when investigating the 4 January 2009 incident it is unlikely that he would have kept his knowledge of the presence of the rifle on the property to himself if asked about it. But as I say, no statement was ever taken from Mr Hayward in respect of the 4 January 2009 incident until after Ms Hayward's death.

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<sup>18</sup> Exhibit C13a

<sup>19</sup> Exhibit C13c

- 7.7. It is plain that the rifle was at the Bassham Road property all along and that it was under Mr Durance's control. In the event, on Thursday 26 February, 2009, the day before the shooting, Ms England at the request of Mr Durance went to the Bassham Road property and surreptitiously retrieved the rifle and ammunition for him.
- 7.8. The weapon used to kill Ms Hayward, I find, was in fact the rifle that Ms England had originally possessed and which was brought to the property at Bassham Road during her and Mr Durance's occupancy of it. It was a single shot, bolt action .22 calibre rifle. The weapon did not have any magazine or other storage mechanism for ammunition. This meant that each time the rifle needed to be discharged, the bolt would have to be withdrawn, a live round would have to be manually inserted into the breech and the weapon would then have to be cocked by engaging the bolt. While in the cold light of day this required method of reloading would be obvious to a person familiar with firearms, it would not be something that would necessarily be observed and immediately understood by a person suddenly confronted with and threatened by the weapon.

**8. Mr Durance is arrested in respect of the 4 January 2009 incident**

- 8.1. Senior Constable Simon Pichl of Barmera police responded to the 4 January 2009 incident. He was the only police officer who attended in the first instance. He arrived at the premises at Bassham Road at about 10:30pm and immediately spoke to Ms Hayward who was waiting at the front of the house. The account that Ms Hayward then gave was consistent with what she would say in the formal statement taken later that night by Constable Williams. Senior Constable Pichl made a number of statements in relation to his involvement in this matter<sup>20</sup>. In particular he made a statement as to the events of the night of Sunday 4 January 2009, but the statement was not made by him until the afternoon of Friday 27 February 2009 which was the day of the deaths of Ms Hayward and Mr Durance. In that statement<sup>21</sup> he asserted that at no time was he aware that Mr Durance had access to a firearm, but did not say anything as to whether he had made any enquiry in respect of that issue on or subsequent to 4 January 2009 in connection with the investigation into the incident of that date. However, he later made a statement dated 17 November 2009<sup>22</sup> in which he asserted that on arrival at the Bassham Road property he had in fact enquired of Ms

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<sup>20</sup> Exhibits C91a, C91b and C91c

<sup>21</sup> Exhibit C91a

Hayward whether Mr Durance was in possession of any firearms to which he recalled her saying words to the effect 'no, he doesn't have any to my knowledge'. The same statement asserts that he could not recall whether he had carried out any firearms checks on any SAPOL indices with regard to the ownership or possession of any firearms by Mr Durance, although it is a fact that any such enquiry would have given rise to a negative result in any event. When Senior Constable Pichl gave evidence in the Inquest it became clear that the enquiry that he made of Ms Hayward about Mr Durance possessing a firearm occurred in the context of establishing whether or not Mr Durance, the alleged offender in respect of the incident, was at that particular moment in possession of a firearm. It would be natural for a police officer to make such an enquiry in the circumstances that existed. It is not possible to know now whether the negative answer given to him by Ms Hayward was intended to convey a belief on her part that there was no firearm on the premises as a whole, regardless of whether it was actually physically at that time in Mr Durance's possession. In any event, Ms Hayward's answer at that point could not have in itself established to an appropriate level of satisfaction that there was no firearm generally at Mr Durance's disposal or on the property. Further detailed enquiry would have needed to be made.

- 8.2. Senior Constable Pichl entered the house. Mr Durance was seated in the kitchen/dining area with Mr Robert Hayward. The kitchen table had been tipped on its side and items apparently from the table were strewn on the floor. He noticed the fire poker on the floor as well. Mr Durance, who appeared to be intoxicated, made certain counter allegations against Ms Hayward to the effect that she had done all the damage and had been assaulting him. Although Mr Robert Hayward did not speak at all, he gestured with his hands and head movement towards Pichl to the clear effect that Mr Durance was not telling the truth and that in fact he had been the cause of the incident. That was certainly how Senior Constable Pichl interpreted Mr Hayward's gestures. The obvious conclusion to have been drawn by Senior Constable Pichl from Mr Hayward's gestures was that Mr Hayward knew something of the incident that had taken place earlier in the evening, if he had not actually witnessed it himself. As such, Mr Hayward would have been an important witness in any prosecution that would have ensued in relation to the incident, and yet no statement was taken from Mr Hayward by police at any time prior to the day of his daughter's death. In his evidence at the Inquest, Senior Constable Pichl acknowledged in this context that he

remained at all material times the investigating officer in relation to this incident but had not thought it necessary to obtain a statement from Mr Hayward until after Mr Durance had appeared in Court for the first time and indicated what his plea would be, meaning that if there was to be a plea of guilty it would not be necessary to take a statement from Mr Hayward. As an investigative and prosecutorial strategy this approach was flawed. A person's plea of guilty or otherwise might well depend on the strength of the case against that person, and the strength of the case in the mind of the accused person may well be influenced by the contents of any eye witness statement that the accused is confronted with. As well, the SAPOL Domestic Violence Policing Model identifies the need for officers to *'identify, collect, and record all evidence including independent and credible information that corroborates the event'*<sup>23</sup>. This stipulation recognises the well known difficulty occasioned by the fact that domestic violence can largely occur in isolation and that an initial response may indicate that there are no witnesses other than the victim and offender. In this case there was reason to believe that Ms Hayward's complaint might have the advantage of being corroborated by her father, and a statement should clearly have been taken from that person at the first available opportunity. As it transpired, after the night of 4 January 2009 Senior Constable Pichl attended at the Bassham Road premises on two or three occasions in connection with the investigation of the incident of that night. He took photographs of Ms Hayward on 9 January 2009 at that premises. He also attended at the premises to prevent a breach of the peace if necessary when Mr Durance collected some of his things from the house. He acknowledged in his evidence that there was at least one occasion when Mr Hayward was at the premises. In short there was no shortage of opportunity for Senior Constable Pichl to have taken a statement from Mr Hayward at some stage in connection with this investigation. The failure either that night or subsequently to take a routine statement from a person who was apparently an eye witness to serious domestic violence was an omission which possibly had deeper consequences than simply the fact that a material statement was not made available to prosecuting authorities at an early point in time. I will come to those possible consequences in a moment.

- 8.3. Senior Constable Pichl arrested Mr Durance at the Bassham Road premises. He took Mr Durance to the Berri Police Station where he formed the view that Mr Durance

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<sup>23</sup> Exhibit C90ap, page 16

was quite drunk, albeit not rolling drunk<sup>24</sup>, and was still intoxicated at the time Senior Constable Pichl completed his duties and left the police station. Indeed, Senior Constable Pichl had a very good opportunity to assess Mr Durance's level of intoxication when he interviewed him that night at the Berri Police Station between 11:22pm and 11:58pm. I add here for the sake of completeness that in that interview Mr Durance maintained an unhelpful attitude, saying that he could not understand why he was under arrest as he had not done anything and he refused to acknowledge non-controversial matters such as the fact that Senior Constable Pichl earlier in the evening had informed Mr Durance of his rights on arrest. It was also during this interview that Mr Durance indicated that he wanted to make a phone call to Ms England and was able to provide a telephone number for her.

**9. Mr Durance is released on bail**

- 9.1. Mr Durance was charged in relation to the incident and was released from custody on bail at 1:26am on the morning of Monday 5 January 2009. He was in police custody for between 2 and 3 hours. One of the consequences of granting Mr Durance bail at that point in time was that he would not be brought before the Berri Magistrates Court that morning and in fact would not be scheduled to appear before the Court until 3 March 2009, several weeks ahead. It also meant that there would be no urgency in the preparation of a prosecution file for his Court appearance.
- 9.2. Mr Durance's bail agreement included the following conditions, namely that he would reside at a certain named premises at Berri which to the knowledge of police was the premises occupied by Ms Elizabeth England, that he not approach or communicate, either directly or indirectly, with Ms Robyn Eileen Hayward and that he would not attend at Lot 525 Bassham Road, Barmera SA 5345, although he would later be permitted to go to that address in order to pick up some of his things.
- 9.3. Senior Constable First Class Benjamin Timmins was that night the 'bail authority' for the Berri Police Station. He was also the cell guard. Senior Constable Timmins essentially was the person who had the lawful authority to make, and did in fact make, the decision to release Mr Durance on bail and the decision as to the timing of his release. However, it seems clear from the evidence that Senior Constable Pichl also had some input into the granting of bail. He said in his evidence that as the arresting

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<sup>24</sup> Transcript, page 67

and investigating officer, he had indicated that he had no objection to bail. He denied any suggestion that his lack of opposition to bail was borne out of a desire to avoid having to complete the necessary paperwork for a Court appearance that morning<sup>25</sup>.

- 9.4. The decision by police to grant Mr Durance bail in the early hours of the morning of Monday 5 January 2009 was in all of the circumstances fundamentally wrong for a number of different reasons, not the least of which was that in the circumstances it was contrary to police General Orders governing the processing of domestic violence cases.
- 9.5. It has to be said that as a candidate for bail generally, or as a candidate for bail on the particular conditions upon which he was released, Mr Durance was a poor one, especially having regard to the fact that this was an alleged case of domestic violence and that Mr Durance had a demonstrated propensity for the same. I have already alluded to the fact that in 2006 Mr Durance had been arrested twice in the one day for having assaulted his then partner in a domestic setting, the second of which was allegedly committed in contravention of a condition of the bail agreement imposed in respect of the first assault that he not further threaten, harass, assault or intimidate Ms Bailey. Thus on the morning of 5 January 2009, limited confidence could be placed in Mr Durance's undertaking that he would not attend at Lot 525 Bassham Road, Barmera nor approach or communicate with Ms Hayward. That concern was all the more acute having regard to the fact that Mr Durance was released while still under the influence of alcohol and at a time only a matter of hours after the event in respect of which he had been arrested, an arrest that presumably had as one of its bases the need to prevent a recurrence or continuation of the offence that he had allegedly committed. I make the observation here that a check of Mr Durance's criminal history would have readily revealed the previous assaults on Ms Bailey and the fact that the second assault had been committed in circumstances that contravened his bail in respect of the first.
- 9.6. Although at Inquest Senior Constable Timmins had little or no recollection of having processed Mr Durance's bail application on the morning in question, he acknowledged that he would have been able to establish the criminal history of Mr Durance, including the 2006 matters concerning Ms Bailey, and would have been able

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<sup>25</sup> Transcript, page 97

to unearth the detail in relation to Mr Durance's failure to comply with the condition that he not further threaten, harass, assault or intimidate the victim.

9.7. I have already alluded to the fact that Ms Elizabeth England resided at premises in Berri that had been arranged for her through the local domestic violence authorities when she separated from Mr Durance in 2006. As seen a moment ago, one of the conditions of Mr Durance's bail agreement imposed by police upon his release on the morning of 5 January 2009 was that he reside at that premises. Senior Constable Timmins told the Court that Mr Durance had made a telephone call to Ms England at 11:40pm. This was after Senior Constable Pichl's interview. It was during this telephone conversation that an arrangement was made for Ms England to allow Mr Durance to live at her premises. In fact Ms England came to the Berri Police Station later that night to collect Mr Durance. In her witness statement<sup>26</sup> Ms England asserts that she was not happy that he was to live with her and that she did not want him with her. Regardless of that, it is apparent that she must have agreed to it. Senior Constable Timmins could not recall whether he himself had a conversation with Ms England that night<sup>27</sup>, but he made an entry in police records timed at 12:40am to the effect that he had spoken to Mr Durance about where he was going to live and that the address at which Ms England resided was his preferred accommodation arrangement. Senior Constable Timmins was challenged in cross-examination as to whether he would have spoken to the occupant of the address to which Mr Durance indicated his preference. He said:

'I would've made sure that the occupant had been spoken to and that, yeah, it was okay to bail him to that address.'<sup>28</sup>

Senior Constable Timmins did acknowledge that in establishing whether the occupant was willing to accept a person such as Mr Durance as part of a bail condition, he may have simply relied upon what Mr Durance told him about that. He suggested that he would have preferred to have spoken to the person, Ms England in this case, himself over the telephone. Senior Constable Timmins also acknowledged, as he had to, that it would have been relevant for him to have known that Ms England was occupying accommodation that had been provided in respect of domestic violence, although he said that it would not have been something that he would have routinely enquired

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<sup>26</sup> Exhibit C93, page 2

<sup>27</sup> Transcript, page 110

about. He also said that if he had known the true facts about the origin of this accommodation he would have regarded it as not a suitable place for Mr Durance to be bailed to<sup>29</sup>. Clearly Senior Constable Timmins is correct when he acknowledged the unsuitability of this premises as accommodation at which a bailed person such as Mr Durance would be obliged to reside. One of the relevant considerations in respect of a person being granted bail is whether the person has a suitable place of abode that might tie him to the relevant locality. Essentially, as at the early hours of the morning of 5 January 2009 Mr Durance did not have suitable accommodation that would inspire confidence in his release on bail. In the opinion of the Court, Mr Durance's release on bail was undertaken with undue haste and with insufficient enquiry as to the suitability of his accommodation arrangements. It may well be that if he had been brought to Court the following morning, the unsuitability of that accommodation would have been made apparent by then. Mr Durance's release on bail that morning meant that there was no further consideration given to the suitability of Mr Durance's accommodation from that point forward. This in large part was probably due to the fact that Mr Durance was not obliged to go to Court for several weeks. As will be seen, the fact that he was residing with Ms England, a person over whom he foreseeably may have had some unhealthy influence, may have more readily enabled him to persuade Ms England to go to the Bassham Road property and obtain the .22 rifle that was later used to shoot and kill Ms Hayward. Of course, such a set of circumstances could not wholly have been anticipated in advance, but the fact that Mr Durance was released on bail to reside at premises that were occupied by a person in respect of whom he had committed alleged domestic violence in the past represented a wholly inappropriate state of affairs.

- 9.8. Finally, on the topic of Mr Durance's bail, I have already alluded to the fact that Constable Williams had conducted a risk assessment during the course of that night that had indicated that Ms Hayward was at high risk, and not just marginally so. Neither the domestic violence risk assessment form, known as a PD438, relating to Ms Hayward<sup>30</sup> nor the fact of a high risk assessment outcome was conveyed to Senior Constable Pichl or Senior Constable Timmins prior to Mr Durance being released on

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<sup>28</sup> Transcript, page 139

<sup>29</sup> Transcript, page 141

bail. In due course the actual document was placed in the Berri CIB pigeon hole and then faxed to Senior Constable Pichl at the Barmera Police Station. This took place at about 5am, by which time Mr Durance had been released on bail. Constable Williams, who gave evidence in the Inquest, acknowledged in her evidence that at no stage did she attempt to make contact with Senior Constable Pichl or Senior Constable Timmins in respect of the high risk assessment score. She acknowledged in hindsight that correct procedure would have dictated that she should have done at least that<sup>31</sup>. Constable Williams' role in the investigation concluded with her filing and faxing the PD438 and an accompanying document. She did not take a statement from Ms Hayward's father who was at the premises, and it appears that Mr Hayward was not present at the time Ms Hayward's risk assessment was conducted. Constable Williams acknowledged that if she had been told either that Mr Durance had access to a firearm or that there was a firearm on the property that Mr Durance may have known about, she would have located and seized the firearm<sup>32</sup>. There is no doubt that she would have had lawful authority to do so.

9.9. Constable Williams acknowledged in her evidence that although she did not know whether and when Mr Durance was bailed, she had an expectation that he would get bail<sup>33</sup>. This was based on a number of factors including the seriousness of the assault and a lack of knowledge on her part that he was an alleged recidivist domestic violence offender who had medication and alcohol issues.

9.10. Constable Williams' understanding of her responsibilities at that time was imperfect. She understood that all she was required to do, as far as her risk assessment was concerned, was to forward the information to the CIB and enter the details onto a police incident report. At the time with which this Inquest is concerned, the SAPOL Domestic Violence General Order<sup>34</sup> referred to the obligation to complete and submit a PD438 risk assessment. That document, together with any other relevant accompanying document, had to be filed prior to the end of the relevant police officer's shift. The following obligation pertained in respect of the use of the PD438

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<sup>30</sup> Exhibit C97b, PD438

<sup>31</sup> Transcript, page 248

<sup>32</sup> Transcript, page 263

<sup>33</sup> Transcript, page 267

<sup>34</sup> Exhibit C90ao

risk assessment in the context of the alleged domestic violence perpetrator's application for bail.

*'Arrest-Bail*

The investigating member must discuss with the victim their needs regarding their or their children's safety and reflect these in the bail conditions.

When considering the offenders suitability for bail a member must provide the Bail Authority with:

- any relevant information furnished from the interview with the offender
- relevant information from the **PD438**
- information concerning the safety of the victim and any children
- any relevant offender history (for example, prior involvement in domestic violence incidents)
- any other relevant conditions to be imposed for any proposed bail agreement.

In any case the bail conditions must stipulate that a domestic violence offender is not to return to the family home if the victim and their child/children are residing there. Refer to section 10 of the Bail Act 1985 for further information.'<sup>35</sup>

It is well known that compliance with General Orders is mandatory. This General Order imposed a duty upon Constable Williams to provide Senior Constable Timmins, who was the Berri bail authority, with relevant information from the PD438. It almost goes without saying that a high risk assessment outcome, and in particular one that involved a score that significantly exceeded the basic score for a high risk assessment, was relevant information such as to trigger the need for the document to be provided to the bail authority. Needless to say, if the alleged offender had threatened or inflicted violence on a previous occasion, that would also be relevant. Information about an alleged offender's access to, possession of, or previous threats to use firearms would also be highly relevant. Implicit in this General Order is a concomitant duty imposed upon the bail authority to ensure that relevant information from a risk assessment PD438 document is made available before any decision to grant bail, or to formulate bail conditions if granted, can be made. It is clear that the General Order in this case was not complied with because Constable Williams did not furnish any relevant information from the PD438, nor was it sought by the bail authority Senior Constable Timmins at any time prior to the decision being made to bail Mr Durance. In addition, a proper interpretation of the General Order would mean that bail should not be granted in cases of the arrest of alleged domestic violence perpetrators until such time as either the PD438 is made

available to the bail authority, or that the bail authority is satisfied by other means that there is no relevant information contained within it. Again, this obligation does not appear to have been complied with.

- 9.11. Senior Constable Timmins told me in evidence that he had not seen his responsibilities in the above light. He argued that relevant information from the PD438 would be something to be taken into account, but not 'religiously' so when bailing someone for a domestic violence offence<sup>36</sup>. He did not believe that a failure to receive a PD438 was in and of itself a reason for not granting bail<sup>37</sup>. He asserted that a bail authority could glean sufficient information from the arresting officer to determine whether there was relevant information that might be contained within a PD438. The difficulty with this, however, is that the arresting officer may not be the person who has conducted the risk assessment. That in fact was the case here.
- 9.12. When matters are considered in the round, it is difficult to resist the conclusion that for the reasons that I have identified, particularly the failure to receive and consider information from the PD438, the granting of bail to Mr Durance was conducted with undue haste. In making that comment I have carefully taken into consideration the fact that the default position, as it were, stipulated in section 10 of the Bail Act 1985 is that a bail authority should release an applicant on bail unless having regard to certain stipulated circumstances the bail authority considers that the applicant should not be released on bail. Some of the circumstances that the bail authority may have regard to in refusing bail include the likelihood that the applicant would abscond or offend again, or intimidate or suborn a witness. It is therefore implicit that before a bail authority decides to release an applicant on bail there is a concomitant duty to make due enquiry as to whether or not there are in existence circumstances that ought to preclude the applicant from being released or whether or not there are circumstances that might determine the conditions upon which a person should be released. Thus there would have been nothing unlawful, improper or unfair in delaying consideration of Mr Durance's bail until the PD438 or the information within it became available and proper enquiry had been made about the suitability of his proposed accommodation while on bail. It would have been far more appropriate to have kept Mr Durance in custody overnight and to have brought him before the Berri Magistrates Court in the morning.

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<sup>35</sup> Exhibit C90ao, page 17

<sup>36</sup> Transcript, page 136

<sup>37</sup> Transcript, page 137

9.13. It cannot now be known with certainty whether, if the police had not released Mr Durance on bail in the early hours of that Monday morning, he would not have been released on bail by the Berri Magistrates Court later that morning or, if not then, at some subsequent point in time prior to 27 February 2009, the day of the fatal incident. It thus cannot be known for certain whether by 27 February 2009 Mr Durance may have been at large in any event. However, it is unlikely that the Berri Magistrates Court, if it had been armed with all relevant information, would have released Mr Durance on a bail agreement that obligated him to reside with Ms England. Thus even if Mr Durance had been on bail, one significant element in the sequence of events that culminated in Ms Hayward's slaying may have been altered, namely the influence over, and proximity to, Ms England that enabled him to come into possession of the rifle and ammunition.

**10. The involvement of the authorities after Mr Durance's arrest and release**

10.1. I have already referred to the fact that the PD438 risk assessment was left in the CIB pigeon hole at the Berri Police Station by Constable Williams. It was faxed to the Barmera Police Station where, according to Senior Constable Pichl, it remained in his desk. This is not to say that Senior Constable Pichl as investigating officer had any particular responsibility in respect of that document specifically. Rather, the follow-up of police involvement as far as identification of risk to the alleged victim is concerned primarily became the responsibility of the domestic violence officer and victim contact officer attached to Berri police. The relieving officer in that position at the time was Constable Carmen Miles. Constable Miles was called to give evidence in the Inquest. Constable Miles explained her role as that of establishing and maintaining contact with victims who had reported a crime to police, including both general assault and domestic violence. Her task was to provide the victims with information and support services within the Riverland. She also had a responsibility to liaise with the Riverland Domestic Violence Service, the responsibilities of which I will come to in due course. Constable Miles' other role was to work with CIB Detectives in relation to sexual assault complainants. She explained that her workload was quite significant. She was the only person who at that time held the position of domestic violence officer and victim contact officer in the Riverland.

10.2. Constable Miles told the Court that she took annual leave of three weeks between 15 January 2009 and 5 February 2009. No other officer relieved her during that period.

On 9 January 2009 Constable Miles' first involvement in Ms Hayward's matter took place. On this occasion she attempted to telephone Ms Hayward at the number of her premises but the call could not be connected. She also rang her mobile phone number. There was no answer so she left a message introducing herself and stating that the reason for her call was to check on her welfare. She asked that Ms Hayward return the call. On the same day Constable Miles received a call from the local area coordinator of the Victim Support Service Incorporated in relation to Ms Hayward in which information was sought relating to Mr Durance's bail conditions, about which Ms Hayward herself had apparently been vague.

- 10.3. On 10 January 2009 Constable Miles sought the PD438 risk assessment that had been raised in respect of Ms Hayward's matter. She received it on 13 January. She unsuccessfully attempted to contact Ms Hayward by phone on 10 January. Ms Hayward's mobile phone rang out and so she was unable to leave a message. She made a further unsuccessful attempt to phone Ms Hayward on her mobile phone on 11 January and left another message. Ms Hayward did not return her calls. Constable Miles made no further attempt to contact Ms Hayward before she went on leave and made no further attempt when she returned from leave. As no other officer acted in Constable Miles' capacity while on leave, no further attempted communication took place.
- 10.4. The SAPOL Domestic Violence General Order contained a section concerning action that was to be taken by police following a domestic violence incident. I refer here to the section entitled 'Family Violence Investigation Section (FVIS)'. I understood that Constable Miles was in effect acting as that entity as far as the Riverland area was concerned. The General Order stipulated that all domestic violence incidents would be referred to FVIS. This in fact did occur in this particular case. The role of the FVIS is set out in the General Order:

'The role of the FVIS is to ensure consistent, coordinated professional performance which incorporates a problem solving approach in the investigation, multidisciplinary response and case management of child abuse and criminal neglect and family violence/domestic violence. Together, FVIS members provide a 'whole of family response' to ensure the safety of victims and children are paramount and offenders are held accountable for their violence.'<sup>38</sup>

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<sup>38</sup> Exhibit C90ao

10.5. The duties of the family violence officer were set out as follows:

**'Receipt of the initial documentation**

A Family violence officer will:

- receive the Domestic Violence PIRs, summary action lists and statements
- review the PD438 and PD437 submitted with the PIRs ensuring these forms have been completed and are correct
- review the response by the member(s) who initially responded to the incident
- provide feedback to the member(s) who initially responded to the incident.

**Review of risk assessment**

A Family violence officer will:

- review the risk assessment score submitted by the member(s) responding to the initial domestic violence incident
- establish how the victim can be contacted safely and ensure other members are aware of this information
- make personal contact (either by telephone or in person) with the victim and obtain the victim's point of view about the level of risk to them and to any of their children
- endorse the PD439 as either agreeing with or disagreeing with the initial risk assessment score
- if a difference occurs in the severity of the risk assessment score, enter the rationale for that difference in the space provided
- validate or otherwise provide feedback regarding the patrol response to their supervisor.'<sup>39</sup>

The role also included the establishment of an individualised family safety plan for the victim that was designed amongst other things to reduce the risk of further harm and to provide factual information for any risk identification factors and assessment processes. In this regard there was a particular responsibility imposed upon the family violence officer in circumstances where there was a 'high risk' domestic violence incident. In those circumstances there was an obligation for further documentation to be completed. The documents in question were a PD440 and a PD441. It will be remembered that Constable Williams' original risk assessment conducted on the night of the incident had given rise to a high risk score. The duties set out in the General Order as described were thus enlivened. These two documents, PD440 and PD441, were in addition to the PD439 already referred to above. As it transpired, these three documents were not at any stage completed in respect of Ms Hayward's matter.

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<sup>39</sup> Exhibit C90ao

- 10.6. The three proforma documents were tendered to the Inquest<sup>40</sup>. The PD439 consists of a document that essentially re-evaluates the question of risk to the victim and imposed upon the family violence officer an obligation to assess whether the officer agreed with the original risk assessment. It also obligated the officer to indicate within the document their own assessment of risk. The document had to be vetted by a vetting supervisor. The PD440 was a document entitled 'FVIS - Domestic Violence Risk Management Plan' consisting of four pages, which again had to be vetted by a vetting supervisor. The plan contained sections that were designed to remove, avoid and reduce risk. It covered such matters as home security, the victim's awareness of any relevant bail conditions, including the victim's own views on bail, and specifically enquired as to whether the offender had been breaching any bail conditions and if so what action would be taken. The PD441 amounted to the domestic violence safety plan. It also dealt with questions of home security, escape routes, means of communication, alteration of work patterns and so on.
- 10.7. The failure to complete these documents constituted a lack of compliance with police General Orders. No person in any supervisory or investigatory capacity in the Riverland approached Constable Miles to follow through with this documentation.
- 10.8. It is clear from the General Order and the nature of the documentation itself that the completion of the documentation would require active participation on the part of the alleged victim, if not from other persons associated with the alleged victim. Of particular note is a section within the document PD440 that enquires whether the offender has been breaching any bail conditions. That kind of information might only be known to the victim such as when an attempt is made by the alleged perpetrator of domestic violence to contact the victim in contravention of a term of the bail agreement. It will be noted in this regard that there was a relevant term in Mr Durance's bail agreement. This section of the document involved an important enquiry because if an offender was thus revealed to be in breach of a bail agreement, appropriate action designed to protect the victim could be taken against that person, even to the point of making an application to the Court for bail to be revoked. Naturally, of course, the accuracy of any such enquiry might depend upon the full cooperation and veracity of the victim. Although Ms Hayward did not return calls, there is no reason to suppose that she did so out of a desire not to co-operate with

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<sup>40</sup> Exhibit C59g

police or even out of indifference. As will be seen in the next section, Ms Hayward did not resist contact with the local domestic violence service. In communications with that service she at one point alluded to a desire and expectation to meet Constable Miles whom she must have known was endeavouring to contact her. A conclusion is available that had police persisted in trying to contact Ms Hayward in the ensuing weeks following the early attempts by Constable Miles to contact her, they would ultimately have succeeded. In any case, there appears to have been a lack of due persistence, especially when it is borne in mind that police General Orders imposed mandatory obligations as set out above. There is no reason to believe that Ms Hayward would have flat out refused to cooperate with police.

- 10.9. None of the documentation from PD439 to PD441 specifically enquires as to a risk that might be posed by the alleged perpetrator's access to, or possession of, a firearm, although I note that this is a matter that was intended to be covered in the original PD438.

**11. The involvement of other domestic violence services in Ms Hayward's case**

- 11.1. Operating within the Riverland region at the time with which this Inquest was concerned was the Riverland Domestic Violence Service, now known as the Murray-Mallee Adelaide Hills Domestic Violence Service. There was also a local Victim Support Service. Following the arrest of Mr Durance in early January 2009 both of these entities were involved in the matter of Ms Hayward.
- 11.2. As I understood the evidence, the Riverland Domestic Violence Service was a non-government entity but which received funding from government sources. The entity provided supported accommodation for women and children experiencing domestic violence. Also as part of its function, the entity conducted risk assessments of sorts that included enquiries being made of alleged victims of domestic violence in respect of access to, or possession of, firearms by the alleged perpetrator.
- 11.3. The Victim Support Service's responsibilities included the support of alleged victims of crime through the Court's system.
- 11.4. Ms Ele Wilde, who has been the Manger of the Riverland Domestic Violence Service for 18 years, gave evidence in the Inquest. She described the contact that Ms Hayward had with her service following Mr Durance's arrest in respect of the incident

on 4 January 2009. She also described the contact that the Service had experienced with Ms England and Ms Bailey prior to that. I have already discussed in another section of this finding the information that the Riverland Domestic Violence Service possessed in respect of the existence, or possible existence, of a firearm on the Bassham Road property. This information had made its way into the files of the Riverland Domestic Violence Service in the context of their dealings with Ms England and Ms Bailey. Ms Wilde gave evidence to the effect that the information concerning a perpetrator's access or possession of a firearm would normally have been provided to police at the time such information is received by the Service. Ms Wilde in this context gave me also to understand that this probably would have taken place in the cases of Ms England and Ms Bailey. Despite this, there is no evidence that the information was ever passed on to police. Certainly there is no documentary evidence to that effect. Specifically when Mr Durance was prosecuted in 2006 in respect of assaults on Ms Bailey, there is no evidence that Mr Durance's access to a firearm ever came to the attention of police from any source that there was a firearm on the Bassham Road property. I have not seen any documentary evidence to that effect.

- 11.5. The first contact that Ms Hayward had with the Riverland Domestic Violence Service in respect of Mr Durance occurred on 6 January 2009. On this occasion arrangements were put in train regarding alternative accommodation for Ms Hayward, bearing in mind that Ms Hayward and her father were occupying Mr Durance's property. These arrangements would never come to fruition with the result that she remained at all times accommodated at the Bassham Road property and that Mr Durance was accommodated with Ms England. The contact of 6 January took place over the phone. There was further contact on 9 January 2009 concerning the accommodation application. Ms Wilde suggested that the caseworker on that particular occasion may, during the telephone contact, have suspected that Mr Durance was present with Ms Hayward at the time. This in fact would have been in contravention of Mr Durance's conditions of bail, but there does not appear to have been a level of suspicion or concern that might have triggered notification of police.
- 11.6. There was further contact with Ms Hayward on 13 January 2009 on which day Ms Hayward and her father came to the office. There was some discussion on this occasion about Ms Hayward's income and accommodation. Also on this occasion it

is recorded that Ms Hayward stated that she did not know what to do about the relationship, and implied that Mr Durance's behaviour was satisfactory when he took his medication. Ms Wilde suggested that on this occasion it appears that advice was tendered to Ms Hayward about the 'cycle of violence' and the possibility that Mr Durance might endeavour to lure Ms Hayward back into the relationship. On this occasion it is recorded that Ms Hayward stated that she was expecting to catch up with the police officer, Constable Miles, the following day which would have been 14 January 2009. In the event there was no such contact on that day, or any other day, with Constable Miles. It will be remembered that Constable Miles went on leave on 15 January 2009 and that her duties were not assigned to anyone else.

- 11.7. Thereafter there was some communication, or attempted communication, with Ms Hayward in early February 2009 concerning accommodation.
- 11.8. The issue of Ms Hayward's perceived risk and her safety and any discussion concerning those issues was not something that was documented by the Service in any great detail, or at all. A proforma document was created<sup>41</sup> on 6 January 2009 that enquires into personal information. In respect of the alleged perpetrator, the document has provision for an enquiry as to whether the alleged perpetrator has issues surrounding the use of drugs or alcohol and whether that person was known to police and if so in respect of the types of offending. The document specifically enquires in these terms:

'Access to a gun: Y / N / Not sure'

In this instance the space is left blank. None of the options are circled. Ms Wilde suggested that this may have signified that Ms Hayward was unaware of whether Mr Durance had access to a gun. This might be said to be consistent with what Ms Hayward had said to police immediately following the incident on 4 January 2009, but it will be remembered that her father would ultimately say that she was in fact aware of the existence of a firearm on the property. The fact that the question on this proforma document is essentially unanswered is also consistent with the possibility that the question simply was not put to Ms Hayward. It is impossible now to determine which scenario might have been the case. One would have thought that if

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<sup>41</sup> Exhibit C103, pages 8-9

Ms Hayward had signified that she did not know whether he had access to a gun or not, the option of 'Not sure' would have been highlighted.

- 11.9. Ms Wilde suggested in her evidence that at that time it was part of their Service's practice to talk about safety planning with the alleged victim of domestic violence, but that such an issue has taken on a greater intensity of discussion since these events. It is not clear to me what may have been discussed about Ms Hayward's safety with the Riverland Domestic Violence Service in January or February 2009 except to the extent that efforts were no doubt being made to accommodate Ms Hayward away from Mr Durance's environment. As well, Ms Wilde suggested that there probably would have been some encouragement to Ms Hayward not to have any contact with Mr Durance having regard to his bail conditions and the fact that an attempt might be made by Mr Durance, as an alleged perpetrator of domestic violence, to 'talk their way back into the relationship'<sup>42</sup>. As far as any risk assessment of a particular client is concerned, Ms Wilde told me that:

'We did that on the run in those days.'<sup>43</sup>

Nowadays, a risk assessment form is filled in with respect to each client, a welcome innovation.

- 11.10. There does not appear to have been any meaningful or effective communication between police and the Riverland Domestic Violence Service in any context relating to Ms Hayward, including in respect of the woman's safety and risk. In particular, the fact that the Riverland Domestic Violence Service had information about the presence of a firearm on the Bassham Road property that had come into its possession in the context of past domestic violence complaints made by other women against Mr Durance was not discussed with police. None of this information was married up with Ms Hayward's complaint and the risk that the existence of this firearm may have posed to Ms Hayward was at no time considered. Ms Wilde told me that the Riverland Domestic Violence Service does not maintain a dossier or other type of file in respect of an individual alleged serial domestic violence perpetrator such as Mr Durance. If they had done so, the likelihood of meaningful consideration being given to the risk the firearm at Bassham Road might pose would more readily have been considered in the context of Ms Hayward's complaint. Ms Wilde told me that if it

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<sup>42</sup> Transcript, page 219

<sup>43</sup> Transcript, page 219

was appreciated at the time that there was possibly a firearm in the possession of the perpetrator, then they would have contacted the police. The same would apply if they had formed the belief that the alleged perpetrator was in breach of bail conditions by his contacting the alleged victim.

**12. The failure to take a statement from Mr Robert Hayward and its possible consequences**

- 12.1. There were two important pieces of information ultimately revealed in Mr Hayward's statement taken after his daughter's death. This information was relevant to the type of action police might have taken in respect of Ms Hayward's safety had they known about it. The first piece of information I have already alluded to, namely Ms Hayward's belief that Mr Durance had a .22 calibre rifle at his disposal on the property at Bassham Road. Mr Hayward does not in his statement say in terms that the rifle remained on the property after Mr Durance's arrest, but other evidence suggests that it must have been there. It was at the property the day before the shooting as Ms England went there and obtained it at Mr Durance's request. There is no reason to suppose that the presence of the rifle on the property would not have been revealed by Mr Hayward if a timely statement had been taken from him as part of the investigation into the incident of 4 January 2009. Although it is possible that Mr Hayward may not have volunteered that information unless asked, one would have thought that in a case of domestic violence the presence or otherwise of a firearm on a relevant property would be a fundamental subject of enquiry of any person who had a connection with that property. I note in this regard that the document PD438, which is the risk assessment document compiled with the input of the alleged domestic violence victim, poses the following question:

'Offender has access/possession of weapon/firearms and has used/threatened to use them?'

This double-barrelled question addressed firstly whether or not the offender has access to, or possession of, a firearm and secondly whether the offender has used or threatened to use it. To my mind these questions are both highly relevant and ought to be posed separately as the answers may well be different. In any event it would seem to be an integral part of any risk assessment that a person in Mr Hayward's position, having apparently witnessed the alleged domestic violence event to the

knowledge of police, and living as he did on the property at which the alleged victim would be accommodated, would be asked those questions as well.

- 12.2. The investigating police officer, Senior Constable Pichl, said during the course of his evidence that a firearm registration check ought routinely be conducted in respect of an alleged domestic violence perpetrator<sup>44</sup> and that if someone in the position of Mr Hayward had indicated to police that he knew of the existence of a firearm at a relevant premises that Senior Constable Pichl would have attended the premises and searched for it<sup>45</sup> and have done everything in his power to try and locate it<sup>46</sup>. Constable Williams, who took the statement from Ms Hayward and conducted the risk assessment in respect of the incident on 4 January 2009, told the Court in her evidence that if she had been told either that Mr Durance had access to a firearm or that there was a firearm on the property that Mr Durance knew about, she would have seized the firearm<sup>47</sup>.
- 12.3. In short, all necessary means to establish whether or not there was a firearm on the property should have been employed. This should have included an enquiry of all occupants of the premises. It is not being wise after the event to say that this should be a fundamental requirement in any domestic violence investigation. In this particular case the presence of the firearm should have been established and it should have been seized. There is no reason to believe that Mr Durance had access to any other firearm. It was the weapon that existed on the Bassham Road property that was ultimately used by Mr Durance to kill Ms Hayward. Had Mr Durance not had access to that weapon, the outcome may well have been altered for both him and Ms Hayward.
- 12.4. The other aspect of Mr Hayward's statement made after the killing of his daughter was the revelation that after Mr Durance's arrest, Mr Durance came back out to the Bassham Road property on about three or four occasions and spent the night there at least once, possibly twice. Mr Hayward reported that there had been an occasion when he walked past his daughter's bedroom to go to the toilet and saw his daughter in bed with Mr Durance. He said that Mr Durance and his daughter seemed to 'get along okay' during these visits. Indeed, Mr Hayward suggests that an element of

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<sup>44</sup> Transcript, page 91

<sup>45</sup> Transcript, page 93

<sup>46</sup> Transcript, page 94

<sup>47</sup> Transcript, page 263

normality had returned to their domestic circumstances, notwithstanding the fact that Mr Durance was on bail and not meant to be there as part of his bail conditions. Mr Hayward gives the impression that Mr Durance was at the premises with his daughter's permission because he could not recall his daughter suggesting that Mr Durance should not be there, or that she had remarked that it was in contravention of his bail that he be there. According to Mr Hayward the final time Mr Durance came to the property was about a week prior to the shooting. All of this information would have been relevant to the possible police action in respect of a matter such as this. Notwithstanding any connivance on Ms Hayward's part in allowing Mr Durance to approach her and be at the premises, Mr Durance's actions were in clear contravention of the terms of his bail agreement and would have constituted grounds for the revocation of his bail, particularly having regard to the fact that he had a previous instance of breaching a bail agreement in almost identical fashion.

- 12.5. It cannot be known for certain whether Mr Hayward would have imparted that kind of information to police in the giving of any statement prior to his daughter's death. Much may have depended on the timing of the taking of such a statement in relation to Mr Durance's attendances. The fact remains, however, that if Mr Durance's attendances at the Bassham Road premises had been detected, or had otherwise come to the attention of police, his remaining on bail would have been questionable.
- 12.6. Ongoing enquiries of an alleged victim of domestic violence, and of that person's connections, as to whether or not an alleged domestic violence perpetrator is complying with that person's bail conditions should routinely and regularly be made.

### **13. The statement of Ms England regarding the obtaining of the rifle**

- 13.1. On the morning of Friday 27 February 2009 that was signed by Ms England that day Constable Carmen Miles took a statement from Ms Elizabeth England<sup>48</sup>. In that statement Ms England described her relationship with Mr Durance and the fact that he had been staying at her house for a number of weeks and had been sleeping on the couch. According to her he had been drinking heavily throughout that period. She described Mr Durance as having been 'very worked up about the upcoming Court case'. It will be remembered that the case was listed for 3 March 2009. Ms England suggested that Mr Durance had been drinking very heavily and had been continually

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<sup>48</sup> Exhibit C93

talking about the Court case and not eating. He told her that he had not been sleeping. He stated to Ms England that he was not going to attend Court next week because he did not want to go to jail for two years. He was quite depressed and irrational. Ms England states that she also knew that Ms Hayward had been speaking to Mr Durance on the telephone and that he had been out to the farm at Bassham Road.

- 13.2. The following description of events within this section of the finding is taken from Ms England's statement given to police on the day of the shootings. According to that statement, on the morning of Thursday 25 February 2009, which in fact was inaccurate insofar as the Thursday of that week was 26 February 2009, Mr Durance asked Ms England to go to the farm at Bassham Road and to obtain for him the rifle, bullets, a torch and some clothes for Court. He said he did not want to leave the rifle out there at the farm. He told Ms England that the rifle was near the shed on the property, four posts in from the corner of the shed and that the rifle was behind that post and was in a black garbage bag. He told her that the ammunition was in the drawer of a table on the rear verandah. He described what clothing he needed. Mr Durance said that he did not want to go to the farm with Ms England because he did not want to breach his bail conditions. According to Ms England she went to the farm at about 9am and made sure, as best she could, that nobody was home. The rifle was situated as described. According to Ms England the weapon was 'pretty noticeable'. The location of the rifle as described by Ms England was pointed out to me during the Court's site visit at the property and there seemed little doubt that if police had conducted a thorough search of the property following the incident of 4 January 2009 the weapon would have been located. Having retrieved the rifle Ms England obtained a small box of ammunition from the table as described by Mr Durance. She still had a key to get into the house. Although there was music on in the house, she was able to go to the main bedroom undetected and grab some clothes. It is not clear whether or not there was any person actually on the premises at the time.
- 13.3. Ms England returned to her premises in Berri where Mr Durance walked out and removed the items from her vehicle.
- 13.4. That evening Ms Hayward telephoned Ms England's premises asking for Mr Durance who was there at the premises. Ms Hayward told Ms England that she had seen Mr Durance at the farm that night. She asserted that when she was coming out of the shower he was in the doorway of the lounge. Mr Durance had in fact been out that

evening and had come home at some stage with a carton of beer. Ms England's impression was that he was intoxicated. That Ms England was speaking of the events of Thursday 26 February 2009, and not 25 February 2009, is in my view clear from her statement where she speaks of the day being a Thursday. This means that the events as I have described occurred the day prior to the shootings.

- 13.5. According to Ms England, early the following morning at about 6am, being the day of the shootings, Mr Durance walked into Ms England's bedroom holding the rifle in both hands. It was still in the plastic bag. She describes him as 'rabbitting on' about a number of things. He then put the rifle on the bed and went to the toilet. Ms England claims that she then got out of bed and put the rifle behind one of the curtains. It was still in the bag at that stage. Mr Durance then walked back in and immediately noticed that the rifle was no longer to be seen. He stood over her and demanded that she give it back. This took place, she asserts, over a period of about half an hour. At one point Mr Durance stood over her, snarling and saying that if she did not give the rifle to him that he would bash her or that he would knife himself. He eventually found the weapon and then left. Before he left Mr Durance told Ms England that he had written her a note and said that he wanted for her to give him a kiss goodbye. She did not so he left.
- 13.6. Ms England asserts that she was concerned that Mr Durance was going to do something stupid and possibly was going to hurt himself. After some deliberation she rang the police. According to the statement of a Probationary Constable Dunk<sup>49</sup> Ms England told him over the phone that Mr Durance had left her premises with a firearm and ammunition, that he was not thinking rationally and that he was worrying about his imminent court appearance concerning alleged domestic violence against Ms Robyn Hayward. This call was received by police at 7:20am. Police then made a number of unsuccessful attempts to telephone Ms Hayward on both the phone connected to the Bassham Road premises and her mobile phone. Police were then despatched to the premises.
- 13.7. Although Ms England was not called to give evidence at the Inquest, I see no reason not to accord full weight to her admissions, amounting as they do to declarations against her own interests, that on the morning of Thursday 26 February 2009 she obtained the rifle and ammunition at the request of Mr Durance. It would not be

appropriate, and it is not necessary for the purpose of these findings, to make any finding as to whether Ms England had any appreciation of what Mr Durance might do with the weapon when she obtained it and the ammunition.

#### **14. The shooting of Ms Hayward**

- 14.1. Naturally the only description of the shooting of Ms Hayward comes from her father, Mr Robert Hayward. Mr Hayward spoke to a police officer at the scene. This conversation included a description of what had just taken place in the house. This was recorded and a transcript of the conversation was tendered in evidence<sup>50</sup>. As well, Mr Hayward signed two witness statements, one on 3 March 2009<sup>51</sup> and the other on 25 March 2009<sup>52</sup>, dealing with the incident. The first statement appears to have been a brief distillation of what Mr Hayward had said at the scene on the day in question.
- 14.2. The following description of events is taken from Mr Hayward's various statements. Mr Hayward states that Mr Durance arrived at the property at about 7:30am on the day in question. In his statement<sup>53</sup> he said that his daughter usually got up at about 7am and left home for work usually around 7:50am and that she had not left for work at the time of Mr Durance's arrival. Mr Durance entered the kitchen of the premises and was carrying a rifle in one hand and a can of beer in the other. Mr Hayward believes that it was the same rifle that he had seen on the property on previous occasions. Mr Durance put the rifle down on the kitchen table and then took a packet of bullets out of his shorts pocket. He then loaded the rifle with a bullet and sat down at the table, almost missing the chair in the process. Mr Hayward could tell that Mr Durance was drunk in that he was swaying and lurched into the kitchen cupboard as he entered the room. Approximately 10 or 15 minutes later Ms Hayward came into the kitchen whereupon Mr Durance said:

'I'll teach you for dobbing me into the cops.'

As he said this he raised the rifle, pointed it towards Ms Hayward and fired. Mr Hayward thinks that his daughter said words to the effect 'Don't be bloody stupid Ted' before the shot was fired. Mr Hayward said that his daughter then staggered towards the other end of the house and he noticed that she brought her right hand up to the side

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<sup>49</sup> Exhibit C38a

<sup>50</sup> Exhibit C13d

<sup>51</sup> Exhibit C13a

<sup>52</sup> Exhibit C13c

<sup>53</sup> Exhibit C13b

of her head. Mr Durance said 'Don't worry, it's only sparrow shot' and he then reloaded the rifle with another bullet from the packet and kept drinking his beer. At one point Mr Hayward heard a loud bang and deduced that his daughter had collapsed on the floor. At one point he heard some heavy gasping noises. When Mr Hayward suggested he should ring the ambulance, Mr Durance threatened to shoot him. At one point Mr Hayward went down the hallway and saw his daughter on the floor of the bathroom. He could only see her head and shoulders. She was not making any noise and he does not recall seeing any blood.

- 14.3. Approximately 15 minutes later Mr Hayward heard the arrival of police. Mr Hayward believes that he heard Mr Durance at one point threaten to shoot 'the first cop who came into the house'<sup>54</sup>. Mr Durance eventually allowed Mr Hayward to leave the house which Mr Hayward did through the back door. The police were in attendance and they took Mr Hayward into their care and in effect debriefed him about what had just taken place inside the house.
- 14.4. It is pertinent to examine what Mr Hayward told the police at the scene. The conversation with Detective Senior Constable Gardner commenced at 9:07am. Very early in that recorded interview Mr Hayward suggested that there was a possibility that his daughter, who was still in the house, was still alive<sup>55</sup>. He told Senior Constable Gardner that he had not actually seen on his daughter's body any indication of where she had been shot, but that she had staggered off to the bathroom. He told the officer that when he later saw his daughter in the bathroom he could not see any blood. At one point Mr Hayward suggested to police that it might be too late to save his daughter. He said this in the context of discussion with Senior Constable Gardner about the dilemma facing police that they had to balance the need to enter the house to establish the welfare of his daughter and at the same time endeavour to ensure that no other person would be hurt in the process. It is of note that Mr Hayward told the police that he would not be surprised if Mr Durance shot himself because Mr Durance had said to him that morning that he would sooner be dead than get locked up again. He also mentioned that Mr Durance had said that he would shoot the first officer that came through the door<sup>56</sup>.

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<sup>54</sup> Exhibit C13b, page 9

<sup>55</sup> Exhibit C13d, Answer 19

<sup>56</sup> Exhibit C13d, Questions and Answers 372-378

- 14.5. Mr Hayward also told Senior Constable Gardner that he believed the rifle that Mr Durance was in possession of within the house was only a single shot weapon with a bolt action, and that after Mr Durance shot Ms Hayward he had seen Mr Durance reload the rifle<sup>57</sup>. He also described Mr Durance as ‘drunk as hell’<sup>58</sup>.
- 14.6. All of what Mr Hayward told police was relevant to the action that police would reasonably take in respect of the house and Mr Durance. The possibility that Ms Hayward was still alive had not been discounted. While that possibility remained, there was an understandable sense of duty on the part of police to enter the premises in a bid to rescue Ms Hayward if that was at all possible. On the other hand, in the circumstances as they could best be gleaned from Mr Hayward, there was the clear risk of personal harm that this action would pose to police and also to Mr Durance himself should any threat posed by him need to be eliminated by force. All of this was not an inconsiderable dilemma.

## **15. Police action in respect of the fatal incident**

- 15.1. Police arrived at approximately 7:40am. Mr Durance’s vehicle was noted to be present at that time. As seen, Mr Robert Hayward suggested in his statement that Mr Durance had arrived at about 7:30am. He did say that his attention was drawn to the presence of police on the property at a time after Mr Durance had shot his daughter. It is not certain as to the accuracy of Mr Hayward’s estimate that Mr Durance arrived at 7:30am. In any event there is no suggestion that the shooting of Ms Hayward occurred after the arrival of police at the property. Certainly no shot was heard by police that was consistent with the event having taken place after their arrival.
- 15.2. At one point Mr Durance opened the front door of the house and he was asked by police to come out. Mr Durance refused to do so and when asked as to the fate of Ms Hayward, he told them ‘she’s dead’<sup>59</sup>. Although Mr Hayward’s first utterances to police after he was released from the house were to the effect that he thought that his daughter was dead, he had also said to Senior Constable Gardner that he could not be certain about whether his daughter was dead or not. In any event careful consideration was given by police to the question as to whether or not there was a possibility that Ms Hayward could still be alive, even to the point where an enquiry

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<sup>57</sup> Exhibit C13d, Answer 174

<sup>58</sup> Exhibit C13d, Answer 137

<sup>59</sup> Statement of Sergeant Michael Bristow, Exhibit C39a

was made of the Director of the Statewide Retrieval Service, a medical practitioner, who could not discount the possibility Ms Hayward could still be alive.

- 15.3. Superintendent Ian Parrott, who was the Officer in Charge of the Riverland LSA and a Chief Inspector at the time with which this Inquest is concerned, determined that the incident involved a 'high risk' situation as defined in police General Orders in that there was reasonable belief that the behaviour of Mr Durance would place the life of police in jeopardy and that there were reasonable grounds to believe that Mr Durance had already caused injury to Ms Hayward. As per police General Orders, Superintendent Parrott requested the attendance of the Special Tasks and Rescue Group Operations (STAR Group). At 9:15am a number of members of STAR Group, together with a paramedic, left Adelaide by way of helicopter and flew to Barmera. In the meantime a police negotiator was also deployed.
- 15.4. Superintendent Parrott gave evidence during the course of the Inquest. Superintendent Parrott told the Court that STAR Group officers arrived at the scene approximately 2 hours after his initial request for their attendance<sup>60</sup>. Superintendent Parrott told me in evidence that he spoke to Senior Constable Gardner and formed a conclusion that there was a chance that Ms Hayward was still alive. He turned his mind as to whether or not he should direct local police officers, as opposed to the STAR Group from Adelaide, to enter the house, a measure that could have been facilitated at an earlier point in time. But Superintendent Parrott, himself a former member of Star Group, reasoned as follows:

'It was an extremely frustrating part of this incident for me, given my background. But also given my background and training, it was also clear to me that if I sent any of my people into that situation, that they would be at significant risk of being seriously injured or killed. I was not prepared to - as much as I wanted to, I was not prepared to put my local people into that situation, particularly given that I knew very few of them intimately and their capabilities.'<sup>61</sup>

He further explained that although the risk to police officers of any description would be the same, there are ways in which the risk can be mitigated and that the training, equipment and experience of STAR Group officers assists to mitigate the risk. In the opinion of the Court, Superintendent Parrott's decision based upon the reasoning that he explained, was clearly appropriate. In this context it will be remembered that the opinion of the forensic pathologist who conducted the Ms Hayward's post-mortem

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<sup>60</sup> Transcript, page 323

examination was that Ms Hayward would at most have survived a period of 35 minutes from the sustaining of her injury, and have possibly died within a shorter period of time. Therefore, any delay occasioned by deployment of STAR Group would not have altered the outcome. In cross-examination Superintendent Parrott reiterated that given Mr Durance's already demonstrated propensity for violence, he was not prepared to place his local officers' safety at risk. As a former STAR Group member, at one point he considered entering the house himself but concluded that the task was not suitable for any officers other than existing STAR Group members<sup>62</sup>. Although there may have been suitable operational equipment in his local service area, Superintendent Parrott said that the point was not so much concerned with the deployment of equipment, but was more concerned with the level of specialised training of particular police officers. The Court agrees with Superintendent Parrott's analysis of the situation.

15.5. Superintendent Parrott maintained contact with the Officer in Charge of STAR Group, Superintendent Hoadley. Superintendent Hoadley recommended that Assistant Commissioner Bronwyn Killmier authorise an armed force entry into the premises in an effort to secure medical attention for Ms Hayward. At 10:15am Superintendent Hoadley was advised by Assistant Commissioner Killmier that she was authorising an armed force entry on the premises for that purpose.

15.6. At about 10:35am Superintendent Parrott conducted a briefing with the STAR Group members.

## 16. **The armed force entry**

16.1. Five STAR Group officers entered the premises through the rear door. The time was 10:39am. Two of those officers were Brevet Sergeant Peter Heaver and Sergeant Darren Sean Carroll. Both of these officers gave evidence in the Inquest. Both officers were armed with .223 automatic rifles that could be used in the semi-automatic or single shot mode. Both officers also were equipped with hand guns. Their primary weapon in each case was the rifle. They both wore ballistic vests and helmets, but their hands, arms, faces, necks and throats would nevertheless still be exposed.

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<sup>61</sup> Transcript, page 324

<sup>62</sup> Transcript, page 359

16.2. It is pertinent here to describe the nature of the information that the STAR Group officers were in possession of when they entered the house. According to Sergeant Carroll it was believed that Ms Hayward was still inside the house having been shot. It was not known whether she was dead or alive. It was believed that the person responsible for her injury was still inside the house. Sergeant Carroll understood that their mission was to save the life of Ms Hayward. Their plan was to go to the location within the house where Ms Hayward was last seen and that if they encountered Ms Hayward without encountering the offender as well, they would evacuate her from the premises through the same entry point that they themselves had utilised. They would then cordon the premises and take further action from there. As Sergeant Carroll pointed out in his evidence, however, the tactics that were to be employed had to allow for a degree of flexibility having regard to what might be encountered once they entered the premises<sup>63</sup>. Although the plan involved entering the premises in order to locate Ms Hayward, it necessarily involved flooding the entire premises until she was located. Although the information was that Ms Hayward was situated in the house in a position to the east of a corridor that the officers would enter, they were not entirely certain where she may be located and so there was a possibility in Sergeant Carroll's mind that Ms Hayward might be situated towards the western end of the building where the offender was last seen to be, namely in the kitchen. His state of mind is summarised as follows:

'When I had that information I guess that it adds slightly to where you might think there's a higher area of probability, but like I said before I hadn't made any pre-conceived idea of where I'd locate them. My state of mind was that I'm going into that premises and I will keep clearing rooms until I either locate a victim or an offender, and once I either locate a victim or an offender, I will then make my next decision. If I was to locate a victim and the offender hadn't been located, I would protect that victim until we can safely exit her. So if we were to locate her on the laundry floor then we would need to go no further. If I located her deep within the premises and the rest of the premises hadn't been secured, we would need to continue clearing that premises until we can then safely remove her. That was my state of mind, that I will go in and I will keep looking for victims or offenders until I come across one, and when I come across one I will then deal with that situation and make a tactical decision based on that.'<sup>64</sup>

Sergeant Carroll also made the point that there would have been a tactical disadvantage for the whole of the STAR Group team to move to the one location, particularly if the offender was mobile in the premises.

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<sup>63</sup> Transcript, page 414

<sup>64</sup> Transcript, pages 416-417

16.3. Of course the other relevant piece of information that the officers had to take into account was the nature of any weapon that was in the possession of the alleged offender. It was acknowledged in the Inquest that the officers believed that the offender was in possession of a single shot .22 rifle that would require manual reloading. Thus, if the weapon was fired it was understood that once fired some time would be required on the part of the offender to reload and recock the weapon before it could be fired again. It will be appreciated, however, that there is no means by which one could identify by direct sight whether or not such a weapon was loaded with live ammunition. In any event, Sergeant Carroll told me that in effect one would not place total reliance on the intelligence that had been received to that point, namely that it was in fact a single shot rifle<sup>65</sup>. Secondly, even though such a weapon has to be manually reloaded, Sergeant Carroll suggested that a person who was proficient with the firearm could do so in a matter of seconds. In other words, what Sergeant Carroll was effectively saying is that one would not stake one's life on information that may or may not be wholly accurate.

**17. Mr Durance is shot and killed**

17.1. It appears that Mr Durance remained seated at the kitchen table with the rifle in his possession prior to the entry by police. It will be remembered that Mr Hayward told police at the scene that he had seen Mr Durance reload the rifle. There is a possibility that in the meantime Mr Durance may have discharged the weapon for a second time in circumstances that cannot be explained, but it is clear that by the time police encountered him within the building the weapon was loaded. When police entered they deployed a number of devices designed to distract and confuse the offender inside. These consisted of flash stun grenades. These devices give off both sound and flash consisting of nine loud bangs and flashes. If a gun shot occurred during their deployment, its sound would not be readily distinguished from the sounds caused by these devices.

17.2. Brevet Sergeant Heaver proceeded towards the western end of the house while another officer or officers proceeded towards the east end of the house where Ms Hayward was said to be last seen. Brevet Sergeant Heaver moved into a corridor that led towards the kitchen area and he there saw toward the end of the house what he believed was a person situated behind a table. Brevet Sergeant Heaver's view was

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<sup>65</sup> Transcript, page 400

less than ideal because there was a great deal of smoke caused by the distraction devices, and loud reports from those devices were still occurring at that time. Brevet Sergeant Heaver formed the intention to proceed down the corridor towards that person and at that point he felt a major impact on his right hand which caused him to release that hand from his rifle. In fact his hand was rendered useless by that impact. This impact was, I find, caused by a projectile fired by Mr Durance's from the weapon in his possession. Three spent .22 rounds were located in the area, all fired from the .22 rifle in Mr Durance's possession. Although a third shot cannot be accounted for, this does not detract from the notion that Mr Durance fired one of three shots at Brevet Sergeant Heaver. It makes sense that when Brevet Sergeant Heaver sighted Mr Durance, the latter had by then also sighted Brevet Sergeant Heaver. Mr Durance was expecting an armed confrontation with police. There is every reason to suppose that he was true to his word when he said that he would shoot the first police officer who came through the door. He took no steps to flee the premises and took no steps to conceal himself from view. He positioned himself in the premises such that he would very likely see police before they saw him. He waited for the first officer to come into view and he shot at that officer. I add here that if not for the fact that the projectile struck Brevet Sergeant Heaver's hand, it would very likely have struck another exposed and probably more vulnerable part of his body.

- 17.3. It would be established after the event that at some point a shot had been fired from Brevet Sergeant Heaver's rifle. Brevet Sergeant Heaver was unable to recall deliberately firing his weapon. It is possible that he unintentionally discharged his rifle when he was struck by the projectile.
- 17.4. Meanwhile Sergeant Carroll, who had been following Brevet Sergeant Heaver towards the kitchen area, entered the same corridor and he noticed at one point the helmet of Brevet Sergeant Heaver appear to drop. This may well have coincided with a bullet impacting with Brevet Sergeant Heaver's hand. However, Sergeant Carroll did not hear any shot fired at that point, but this would not be surprising having regard to the other loud reports that were occurring within the building at the same time. Sergeant Carroll then looked into the kitchen and dining area of the house and at that time saw Mr Durance seated on the western side of the dining table. At that time they were separated only by a few feet. Mr Durance was leaning on his elbows that were propped on the table. He had a rifle pointed directly at Sergeant Carroll. He was

looking directly at Sergeant Carroll and the barrel of the rifle was approximately 6 inches off the table. Sergeant Carroll said in evidence that Mr Durance had *'his head canted slightly to the right as one would when aiming a firearm'*. Sergeant Carroll formed the belief that he was about to be shot. He took his weapon off safety and fired once without utilising the sighting system. His rifle was set at semi-automatic, single shot. Upon firing that shot Sergeant Carroll did not notice any change in the position of the man who still had the weapon pointed directly at Sergeant Carroll, and the man was still looking directly at him. Sergeant Carroll made an assessment that he had missed with his first shot. He again fired his weapon at the man, still believing that he was about to be shot. Upon firing a second shot again he did not notice any immediate movement in the man's torso. He did not know whether he had hit him or had missed. The position of the man's torso had not changed and the rifle was still pointed directly at Sergeant Carroll. Still believing that he was about to be shot, Sergeant Carroll pulled the trigger again until there was a reaction from Mr Durance's body or from the position of the rifle that might have indicated that he was no longer in danger. When he fired what Sergeant Carroll believes to be the third shot, Mr Durance slumped forward. He describes it in this fashion:

'On the third round I noticed that he slumped slightly forward and slightly down in the chair, and that the rifle slumped or dropped onto the table and he no longer had possession of it in his hands. He appeared to go somewhat flaccid and the rifle had fallen onto the table.'<sup>66</sup>

- 17.5. Mr Durance was fatally wounded. Paramedic attention was administered to him but it was obvious that he had died as a result of a gunshot wound or wounds.
- 17.6. Brevet Sergeant Heaver who is a registered nurse as well as a police officer, despite his own injury was one of the first, if not the first, person to attend to Ms Hayward and it was obvious that she was also deceased.
- 17.7. There is no suggestion other than that both Mr Durance and Ms Hayward were both provided with immediate and appropriate medical attention. Nothing could be done for either of them.
- 17.8. Mr Durance had been struck twice by projectiles fired from a firearm. Aside from Sergeant Carroll's rifle, the only other police weapon that was fired during the incident was that of Brevet Sergeant Heaver. In my view, the possibility that Brevet

Sergeant Heaver's rifle fired either of the shots that struck Mr Durance can be discounted. When Brevet Sergeant Heaver's helmet was noticed by Sergeant Carroll to inexplicably drop, it is likely that this action corresponded with Brevet Sergeant Heaver being hit by the projectile fired from Mr Durance's rifle. Following this, and when Sergeant Carroll himself first sighted Mr Durance, Mr Durance was alive and apparently uninjured and was deliberately aiming his weapon at Sergeant Carroll. It was only after at least two shots that Sergeant Carroll noticed for the first time that Mr Durance had been struck and was injured. It is clear that both shots, including of course the fatal shot, were fired by Sergeant Carroll and I so find.

- 17.9. When Mr Durance's .22 rifle was examined there was a spent cartridge in the breech. There is no evidence that Mr Durance fired his weapon at Sergeant Carroll, but as seen above there is evidence from which a conclusion can be drawn that he fired it at Brevet Sergeant Heaver, striking him in the hand. The spent cartridge found in the breech was likely, and I so find, that belonging to the projectile that had been fired at Brevet Sergeant Heaver. No person saw Mr Durance manually reload his rifle. It is therefore likely, and I so find, that when Sergeant Carroll was first confronted by Mr Durance with the rifle pointed at him, Mr Durance's rifle was not loaded with a live round. There was thus, in reality, no actual danger presented to Sergeant Carroll unless an attempt was then made by Mr Durance to manually reload the rifle, which probably would have been seen by Sergeant Carroll if such an attempt had been made. However, the fact that Mr Durance's rifle was not loaded with a live round and that it presented no danger to Sergeant Carroll was a matter that was not within Sergeant Carroll's knowledge. Sergeant Carroll testified, and I accept his evidence, that he did not appreciate at any point that Mr Durance had earlier fired his weapon at Brevet Sergeant Heaver or that Brevet Sergeant Heaver had been struck by a projectile. Although police intelligence had been to the effect that the rifle in the possession of the offender had been a single shot weapon, and that this fact would have limited the ability of the possessor to reload quickly, there was nothing about Mr Durance or the weapon, or about what had taken place prior to Sergeant Carroll being confronted with it, that would have indicated that there was anything other than a live round in the breech of that weapon. Sergeant Carroll, for the sake of his own safety, could not have acted on any basis other than that Mr Durance's rifle was loaded, cocked and had immediate lethality. In any event, as Sergeant Carroll said in evidence, even if he

had fully appreciated that Mr Durance's rifle had already been fired once with the result of hitting Brevet Sergeant Heaver, the action that he would have taken would have been the same, having regard to the possible unreliability of the intelligence surrounding the firearm and, secondly, to the possibility that prior to himself actually seeing the offender, it could have been reloaded within seconds even allowing for the fact that it was a single shot weapon<sup>67</sup>.

- 17.10. It is evident that the weapons of Brevet Sergeant Heaver and Sergeant Carroll had both been discharged during the course of the incident. One round was fired from Brevet Sergeant Heaver's rifle and four rounds were fired from Sergeant Carroll's rifle. Five spent .223 calibre cartridges were located inside the premises. Four were identified as having been fired from Sergeant Carroll's rifle and one from Brevet Sergeant Heaver's rifle.
- 17.11. There seems little doubt that Sergeant Carroll's weapon was fired on four occasions, not three, each shot having been fired with four individual applications of the trigger. Sergeant Carroll in his evidence could only account for the three shots that I have described. In the agony of the moment it would not be surprising that Sergeant Carroll might not remember a fourth shot. As Sergeant Carroll testified, and I emphasise the importance of this, each of the shots that he fired were fired within a very short time of each other, possibly within a second or two and some within fractions of a second. Although each shot would have required individual applications of the trigger, it is not unreasonable to suppose that Sergeant Carroll has simply forgotten that he pulled the trigger a fourth time. I think this is the probability of the matter and I so find.
- 17.12. Sergeant Carroll told me in evidence that at all times he had the belief that he was about to be shot. The fact that the man had his rifle deliberately aimed in Sergeant Carroll's direction when he first saw him, would render such a belief on Sergeant Carroll's part as being wholly reasonable. I accept his evidence. Sergeant Carroll testified, and I accept this evidence as well, that he did not believe that he had any alternative but to utilise his firearm against the threat he believed was posed by Mr Durance. He would have been unable to retreat because of the press of the officers behind him. It would be unrealistic to have expected him to have attempted to deploy any other device that might have subdued Mr Durance such as the Taser that was

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<sup>67</sup> Transcript, page 400

within Sergeant Carroll's possession. Sergeant Carroll in effect believed that he had to take immediate action against the man whom he thought was about to shoot him and there is nothing that would suggest that such action was unreasonable, excessive or disproportionate to the danger that Sergeant Carroll believed he faced.

- 17.13. As to the question of the protection that Sergeant Carroll's ballistic vest might have afforded, again it would be unrealistic to have expected Sergeant Carroll, for the sake of deploying some other less lethal action against Mr Durance, to take a bullet from Mr Durance's weapon not knowing whether or not the projectile would strike him on an unprotected part of his person.

## **18. Mr Durance's motivation and intent**

- 18.1. I have already referred to what appears to have been an element of premeditation about Mr Durance's behaviour. To my mind it is more than mere coincidence that the killing of Ms Hayward occurred the day following his persuasion of Ms England to obtain the rifle and ammunition from the Bassham Road property. The killing of Ms Hayward occurred on Friday 27 February 2009. Mr Durance was due to appear in Court on the following Tuesday 3 March 2009. Mr Durance appears to have harboured an expectation, or at least a fear, that he would be jailed for his alleged assault upon Ms Hayward. According to Ms England he appeared to be preoccupied with the Court matter, had been drinking heavily and was continually talking about it. It will also be remembered that Mr Durance said to Ms Hayward immediately prior to firing the weapon at her, that he would teach her for dobbing him into the cops. With that he pointed the weapon at her and fired it in what was undoubtedly a deliberate act. That he fired in the direction of her head would point to the fact that he intended to inflict serious and permanent harm upon her. In my view, notwithstanding his state of intoxication, Mr Durance intended to kill Ms Hayward when he pulled the trigger.
- 18.2. As to Mr Durance's intention in relation to himself, there is material to suggest that he did not contemplate his own existence beyond the imminent Court hearing. When he left Ms England's premises on the morning of 27 February 2009 he left written notes to her saying 'Liz I will always have you in my heart. Ted', and 'Better than going to jail, love you Liz'. When he left he told her that he had written the note and wanted her to kiss him goodbye. When Mr Hayward spoke to Senior Constable Gardner shortly after exiting the premises on the day in question, he told Senior Constable

Gardner that Mr Durance had said that he would sooner be dead than get locked up again.

- 18.3. Mr Durance's remaining in the house having shot Ms Hayward and then having allowed Mr Hayward to leave the house unharmed, would suggest that Mr Durance himself had resolved that he would only be taken by force. He must have realised that police would inevitably be compelled to enter the house to capture him and that they would be heavily armed in doing so. He also must have realised that in any violent confrontation between himself and police that involved his use of a firearm, it would culminate in his own shooting.
- 18.4. When Mr Durance shot at Brevet Sergeant Heaver he must have realised that such an action, at the very least, would have provoked some form of significant retaliation. Although he must have realised that his weapon was no longer loaded after he fired at Brevet Sergeant Heaver, he nevertheless took deliberate aim at Sergeant Carroll. In doing so he must have realised that he would be inviting Sergeant Carroll to take whatever action was necessary to defend himself and that that would probably involve himself being shot.
- 18.5. In short, there is good reason to believe that Mr Durance attended at the Bassham Road property that morning with the intention of shooting and killing Ms Hayward and in the knowledge that he would likely die at the hands of police.

## **19. Conclusions**

- 19.1. I make the following findings. Mr Durance was appropriately arrested on the evening of 4 January 2009 in respect of the incident at Bassham Road. He was intoxicated. The decision to release Mr Durance on bail at 1:26am on 5 January 2009 failed to have proper regard to the contents of a risk assessment in relation to Ms Hayward. This omission amounted to a failure to comply with police General Orders. The decision also failed to take into account the fact that in Mr Durance at that time did not have a suitable place of abode insofar as the premises at which he was bailed to reside was domestic violence premises occupied by a former partner in respect of whom there had been a history of domestic violence. In reality, Mr Durance should have been kept in custody and any application for bail should have been considered by a Magistrate at an appropriate time of the day.

- 19.2. It cannot be known with certainty whether or not Mr Durance would ultimately have been placed on bail by a Magistrates Court or whether he would have been kept in custody pending the outcome of any prosecution against him. The fact that Mr Durance had a history of domestic violence and also of failing to adhere to a bail condition in respect of a previous prosecution for the same may have strongly counted against him in any bail application. In any case it was not appropriate for a condition to be imposed as part of a bail agreement that Mr Durance reside with Ms England. Ultimately, it was Mr Durance's influence over Ms England that enabled him to take possession of the rifle that had been secreted on the premises at Bassham Road.
- 19.3. The failure to take a witness statement from Mr Robert Hayward in respect of the incident of 4 January 2009 at the first available opportunity was a significant omission. A statement from a material witness such as Mr Hayward ought to have been regarded as an integral part of any investigation into that incident. In my view it is more probable than not that if a statement had been taken from Mr Robert Hayward, the presence of the firearm at the Bassham Road property would have been established and the necessary action would have been taken to locate and seize it.
- 19.4. I find that the .22 calibre firearm that had been situated at the Bassham Road premises was the firearm that was used by Mr Durance to kill Ms Hayward.
- 19.5. I further find that Ms England retrieved the firearm from the Bassham Road property at the request of Mr Durance and that Mr Durance was able to take possession of the firearm on the morning of 27 February 2009 for that reason.
- 19.6. I am satisfied that police were unaware of the existence of the rifle at the Bassham Road premises, or that Mr Durance had access to a firearm. There was material in the possession of the Riverland Domestic Violence Service that suggested a strong possibility that there was a firearm at the Bassham Road property, but unfortunately no person appears to have considered that information in the context of Ms Hayward's current complaint against Mr Durance. This material was not shared by the Riverland Domestic Violence Service with police as there was little or no meaningful communication between the Riverland Domestic Violence Service and police about Ms Hayward's situation.
- 19.7. There is no evidence that Mr Durance had access to any firearm other than the .22 rifle situated at the Bassham Road premises. To my mind it is unlikely that he did

have such access having regard to the fact that he had to make the request of Ms England to retrieve it from the Bassham Road premises.

- 19.8. It is not certain what the outcome for Ms Hayward may have been if the presence of the rifle at the property had been identified, and if the rifle had been seized by police. As a matter of certainty, Mr Durance would not have had access to that particular firearm on 27 February 2009. Whether he would have secured another firearm, or have devised some other means of harming Ms Hayward, cannot be known. All that can be said is that if the presence of the firearm at Bassham Road had been understood, and it had been seized, Ms Hayward's death by that means at least may have been prevented.
- 19.9. There was inadequate communication by police with Ms Hayward in the weeks following Mr Durance's arrest. In particular, police General Orders were not complied with insofar as important risk assessment measures were not conducted with respect to Ms Hayward. Ms Hayward did not help herself in this regard in that she did not return phone calls made to her by police, but there was nevertheless a lack of appropriate persistence in endeavouring to contact Ms Hayward for these purposes.
- 19.10. The PD438 risk assessment conducted in respect of Ms Hayward following the incident of 4 January 2009 revealed that Ms Hayward was at high risk, meaning at high risk of further domestic violence at the hands of the alleged perpetrator, Mr Durance. The subsequent failure to comply with police General Orders insofar as no further risk assessment was at any time conducted in respect of Ms Hayward meant that there was nothing undertaken to ameliorate that risk beyond the original imposition of the bail conditions that I have described to the effect that Mr Durance not approach or communicate either directly or indirectly with Ms Hayward or attend at the Bassham Road premises. In the event, Mr Durance failed to comply with those conditions. Although there is no evidence that police were aware that Mr Durance was in breach of his bail conditions, no opportunity was taken by police to establish whether or not Mr Durance was complying with his bail conditions as no further enquiry was made of Ms Hayward about that subject; nor was any statement taken from Mr Hayward who had personal knowledge of the fact that Mr Durance was in breach of his bail conditions. That said, it is difficult to determine what level of candour would have been displayed by either Ms Hayward or her father if any such

enquiry had been made and what information would have been willingly imparted to police by either Ms Hayward or her father in this regard.

- 19.11. I find that when Mr Durance attended the Bassham Road premises early in the morning of 27 February 2009 he had an intention to seriously harm or kill Ms Hayward. Mr Durance was concerned about the outcome of the pending prosecution against him in respect of alleged violence against Ms Hayward and was determined that he would not be imprisoned for it. I think it is more likely than not that he actually intended to kill Ms Hayward.
- 19.12. I find that when Mr Durance remained within the premises after he had shot Ms Hayward, he well knew that police would endeavour to enter the premises, at the very least for the purposes of apprehending him, and there would inevitably be a violent confrontation between him and police.
- 19.13. I find that police were clearly justified in entering the premises at the time that they did, believing that there was still a possibility that Ms Hayward could be rescued alive. The fact that Ms Hayward had probably already died by that time is not relevant in my view. Police had no means to establish whether or not that was the case.
- 19.14. I find that shortly after police entered the premises, Mr Durance who was seated at the kitchen table, deliberately fired the .22 rifle at Brevet Sergeant Peter Heaver, thereby striking him with a projectile to Brevet Sergeant Heaver's right hand. Brevet Sergeant Heaver's own rifle discharged in circumstances that are not entirely certain, but probably as a result of his being struck by the projectile fired by Mr Durance. In any event I am satisfied that Brevet Sergeant Heaver's rifle was not responsible for either of Mr Durance's gunshot wounds.
- 19.15. Sergeant Darren Sean Carroll was unaware of the fact that Mr Durance had shot at and struck Brevet Sergeant Heaver. When Sergeant Carroll first observed Mr Durance the latter was still sitting at the kitchen table. I find that at that point Mr Durance was taking aim at Sergeant Carroll and that this was obvious to Sergeant Carroll. At that point I find that the .22 rifle in Mr Durance's possession was not loaded with a live round, but that the spent round in respect of the projectile that he had fired at Brevet Sergeant Heaver was still in the breech. Sergeant Carroll was not to know, and did not know, that the rifle that Mr Durance was pointing at him was not

loaded with a live round. Sergeant Carroll was entitled to act on the basis that a loaded and cocked firearm was being pointed and aimed at him with an intention that it be fired at him.

- 19.16. I find that Sergeant Carroll fired four individual shots at Mr Durance that were accompanied by four distinct applications of the trigger of his rifle. I find that Sergeant Carroll intended that the projectiles would strike Mr Durance and at least seriously disable him. I find that Sergeant Carroll's intention and purpose was to prevent Mr Durance from shooting Sergeant Carroll. I find that two of the projectiles fired by Sergeant Carroll struck Mr Durance, one to the side of the head and the second to his chest. The wound to the chest was the fatal wound.
- 19.17. I find that Sergeant Carroll genuinely believed that his conduct in deliberately firing his weapon at Mr Durance on four occasions was necessary and reasonable in his own self defence. In this regard I find that Sergeant Carroll genuinely and reasonably believed that Mr Durance was intending to shoot him.
- 19.18. I also find that Sergeant Carroll's conduct in deliberately firing at Mr Durance on four occasions was, having regard to Sergeant Carroll's genuine and reasonable belief that he himself was about to be shot, reasonably proportionate to the threat that Sergeant Carroll genuinely and reasonably believed to exist in respect of his own safety.
- 19.19. I find that Sergeant Carroll, quite apart from his own subjective state of mind, in reality had no alternative but to fire the four shots at Mr Durance.

## **20. Recommendations**

- 20.1. Pursuant to Section 25(2) of the Coroners Act 2003 I am empowered to make recommendations that in the opinion of the Court might prevent, or reduce the likelihood of, a recurrence of an event similar to the event that was the subject of the Inquest.
- 20.2. I have already referred to the issue of the implementation of the Family Safety Framework within the Murray Mallee LSA. I understand that this measure has now been implemented in the Murray Mallee LSA. Clearly there is a need for such a Framework to exist within all LSAs in the State.

20.3. In his evidence before the inquest Superintendent Parrott outlined measures that prior to the introduction of the Family Safety Framework had already been adopted within the Murray Mallee LSA in respect of domestic violence policing that includes the establishment of a daily Tactical Co-ordination Group meeting that at a high level reviews all recent crime and incidents within the local service area, especially domestic violence which is posted as a specific agenda item for each meeting. At the meeting any risk assessment score is noted and information about what action has been taken to date and the type of action that ought to be planned from that point forward is discussed at the meeting. There has also been the establishment of a weekly meeting between SAPOL domestic violence officers and domestic violence service staff and regular telephone contact between the two entities has also been established. The Victim Support Service has been co-opted into the process as well. A Domestic Violence Advisory Group has also been established and this entity has been meeting on a monthly or two-monthly basis and it involves a broader range of agencies. Further training of officers has also taken place. I have been satisfied by the evidence of Superintendent Parrott and that of Assistant Commissioner Harrison that the SAPOL response to this matter has been exemplary.

20.4. The Intervention Orders (Prevention of Abuse) Act 2009 came into effect on 9 December 2011. The long title legislation describes itself as ‘an Act to provide for intervention orders and associated problem gambling and tenancy orders in cases of domestic and non-domestic abuse: and for other purposes’. The stated objects of the Act<sup>68</sup> include:

(a) to assist in preventing domestic and non-domestic abuse, and the exposure of children to the effects of domestic and non-domestic abuse, by providing for -

(i) the issuing of intervention orders by police and the Court; and

....

and

(b) to provide special police powers of arrest, detention and search in connection with issuing, serving and enforcing intervention orders; and

(c) to further protect persons suffering or witnessing domestic or non-domestic abuse by -

(i) providing for special arrangements for witnesses in proceedings under this Act;

...

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<sup>68</sup> Section 5

Grounds for issuing an intervention order under the Act exist<sup>69</sup> where:

- (a) it is reasonable to suspect that the defendant will, without intervention, commit an act of abuse against a person; and
- (b) the issuing of the order is appropriate in the circumstances.

It is apparent from this legislation that an intervention order might be imposed not only generally but also in cases where an alleged perpetrator of domestic abuse has been charged with a criminal offence such as was the case with Mr Durance in respect of Ms Hayward. An intervention order, as contemplated within this legislation, would have been particularly useful in the Durance / Hayward case because one of the mandatory terms of an intervention order<sup>70</sup> is that any firearm in the possession of the defendant and any licence or permit held by the defendant authorising possession of a firearm must be surrendered to the Registrar of Firearms (the “firearms terms”). In addition, while an intervention order remains in force against a defendant, any licence or permit held by the defendant authorising possession of a firearm is suspended and the defendant is also disqualified from holding or obtaining a licence or permit authorising possession of a firearm. Under this legislation, police have certain powers that enable them to search for weapons and to enter any premises or vehicle where a weapon is suspected to be, and to take possession of the weapon. Although under the Firearms Act 1977 it would have been in any case unlawful for Mr Durance to have possessed the .22 firearm without a licence, there was no specific obligation imposed upon him under the terms of his bail to surrender any firearm that was in his possession or under his control. While the firearm remained at the Bassham Road premises and while Mr Durance by virtue of the conditions of his bail was prohibited from attending at those premises, it would be unrealistic to suggest that he had lost all control over the firearm. It may well have been the case that he was the only person who knew exactly where it was. One would have thought that when a person has been arrested for an offence involving domestic abuse, such as an assault on a family member, that the making of an intervention order under the new legislation would be routine. Certainly the firearms terms that are automatically built into an intervention order should be imposed as a condition in any bail agreement that relates to an offence involving domestic violence.

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<sup>69</sup> Section 6

<sup>70</sup> Section 14

20.5. I make the following recommendations which for the purpose of section 25(5) of the Coroners Act 2003 are made in the matters of both Hayward and Durance. I direct the recommendations to the attention of the Attorney-General, the Minister for Communities and Social Inclusion, the Minister for the Status of Women and the Commissioner of Police:

- 1) That the Bail Act 1985 be amended to preclude the granting of bail in cases of alleged domestic violence, such as assault on a family member, by any bail authority other than a Court;
- 2) That all cases of alleged domestic violence, such as an assault on a family member, be in any event brought before a Magistrates Court within 48 hours of the arrest of the alleged perpetrator;
- 3) That the Bail Act 1985 be amended so as to require in any bail agreement in cases of alleged domestic violence, such as assault on a family member, a condition in the same terms as the 'firearms term' as set out in the Intervention Orders (Prevention of Abuse) Act 2009;
- 4) That the Commissioner of Police cause applications for intervention orders pursuant to the Intervention Orders (Prevention of Abuse) Act 2009 to be routinely made in all cases where a person has been arrested for or charged with an offence involving domestic violence;
- 5) That the Commissioner of Police cause to be established a body of intelligence in respect of serial or repeat domestic violence perpetrators that would include information in relation to individual perpetrators that is readily accessible to officers, (a) as to perpetrators' propensity to possess and use firearms, (b) their propensity to breach conditions of bail, (c) their history of drug and alcohol abuse, (d) their criminal history including details as to past offences involving violence and ancillary reports regarding their past behaviour, (e) any other relevant information;
- 6) That the Commissioner of Police cause to be reinforced among members the need to include as part of any investigation of alleged domestic violence the taking of statements from all relevant witnesses at the earliest opportunity;
- 7) That the Commissioner of Police cause to be reinforced among members the need to consider on an ongoing basis the possibility that the alleged perpetrator of

domestic violence may have access to a firearm and the need to make proper and due enquiry as to the alleged perpetrator's access to a firearm;

- 8) That the Commissioner of Police cause to be reinforced among members the need to enquire of the alleged victim of domestic violence on an ongoing basis as to whether or not the alleged perpetrator is complying with conditions of bail or with an intervention order;
- 9) That the Commissioner of Police consider whether in cases of domestic violence that involve an assessment of high risk of repeated violence to the victim, surveillance should be conducted in relation to the activities of the alleged perpetrator with a view to establishing whether or not the alleged perpetrator is complying with conditions of bail or with an intervention order;
- 10) That domestic violence services and agencies throughout South Australia be encouraged to routinely divulge to SAPOL any information in the possession of the service or agency to the effect that the alleged perpetrator of domestic violence may have possession of or access to a firearm;
- 11) That domestic violence services and agencies throughout South Australia be encouraged to maintain individual records in relation to serial or repeat domestic violence perpetrators;
- 12) That domestic violence services and agencies throughout South Australia be encouraged to inform SAPOL of suspicions of breach of bail agreements and intervention orders by alleged perpetrators of domestic violence;
- 13) That domestic violence services and agencies throughout South Australia be encouraged to make repeated enquiry of alleged domestic violence victims as to whether or not the alleged perpetrator is complying with conditions of bail or with an intervention order;

*Key Words: Domestic Violence; Death in Custody; Homicide*

*In witness whereof the said Coroner has hereunto set and subscribed his hand and*

*Seal the 23<sup>rd</sup> day of January, 2011.*

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*Deputy State Coroner*