

TRANSCRIPT OF PROCEEDINGS
UNCLASSIFIED

AUSTRALIAN DEFENCE FORCE

AUSTRALIAN ARMY, VICTORIA BARRACKS, NSW

INQUIRY INTO THE DEATH OF
PTE JACOB BRUCE KOVCO

PRESIDING:

GPCAPT W COOK, President
COL M CHARLES, Board Member
MR J O'SULLIVAN, Board Member

COL M GRIFFIN, Senior Counsel Assisting
MAJ E JOLLY, Counsel Assisting
MAJ J HYDE, Counsel Assisting
MAJ A BELKIN, Counsel Assisting

LTCOL P WILKINSON, representing Soldier 2
LTCOL B GREEN, representing Soldier 14
LTCOL T BERKLEY, representing Next of Kin
LTCOL F HOLLES, representing PTE Kovco's Parents
COL L YOUNG, representing PTE Kovco

0936 TUESDAY 19 SEPTEMBER 2006
DAY 37

The transcript has been checked and cleared for operational security issues.

TRANSCRIPT VERIFICATION

I hereby certify that the following transcript was made from the sound recording of the above stated case and is true and correct

Signed.....  Date19/09/06.....(President)

Signed.....  Date 19/09/06.....(Recorder)

Signed.....  Date 19/09/06.....(Transcriber)

Signed.....  Date 19/09/06.....(Transcriber)

5 PRESIDENT: Any housekeeping matters, Colonel, before we hear from LTCOL Holles?

COL GRIFFIN: No, I have nothing to raise, sir.

10 PRESIDENT: Thank you. LTCOL Holles.

15 LTCOL HOLLES: Thank you, sir. Sir, I would submit that in relation to the death of PTE Kovco there are three facts, and three facts only, which have been established by this Inquiry, either on the civil or the criminal standard. But because it is an administrative inquiry I will address myself to the civil standard only. The first of those facts is that PTE Kovco died. The second of those facts is the round that killed him came from a pistol issued to him. The third fact is that it happened in room 8 within the SECDET accommodation.

20 Apart from those three facts, there is nothing else which can be established to the requisite civil standard of proof. The reason for that is a combination of circumstances, the expert opinion proffered by a number of people called before the Inquiry and what might be most charitably characterised as confuting testimony from those who were eyewitnesses or around the scene at the time that PTE Kovco received his fatal injury.

25 What I would seek to do in the course of this address is cover three substantial areas. The first area I wish to cover relates to the persons who were present, either in the room, proximate to the room or in and around room 8 at the time the fatal shot was fired. The next area I wish to cover are the actions of the Military Police and the effect they had upon the investigation. Lastly, I wish to cover the testimony of the experts, either as to the forensic circumstances of PTE Kovco's death or his emotional/mental state at the time.

35 Learned Counsel Assisting yesterday in his charge to the Board spoke about the way in which the evidence of various witnesses ought to be received. With great respect, he said, quite correctly, that is, the answers provided by witnesses rather than the questions asked which provide the basis upon which a Board may make its findings. Indeed that applies for any tribunal of fact. It is equally true that a Board needs to take into account the demeanour of a witness and the way they answered questions, the way they behaved when they were giving their evidence. It is equally true that an untruth, whether deliberate or made for some other reason, doesn't become the truth by repetition.

5 There are a number of what, I would submit, are troubling aspects about the evidence of the soldiers in the room, that is PTE Johnson and PTE Shore. There are a number of very troubling aspects about the evidence of PTE Carr. PTE Johnson's evidence about the moments surrounding the time when the shot was fired are essentially that he was sitting on the bed, using his laptop computer and, as I understand stand his evidence, it was five to 10 seconds before he realised what was going on. He described the noise of the weapon discharging as "being like a firecracker".

10 Some three weeks ago this Thursday, various numbers of persons in this room attended the range practise component of the Qualification Course on the 9 mm SLP. You will recall, President and Members, that there was another range practise involving 9 mm pistols going on some 35 to 40 metres away from where our practise was being conducted. You will recall that the noise of the rounds discharging at that practise effectively drowned out the instructor's instructions to those persons on the range and the practise was suspended because of the noise from some 35 to 40 metres away. Yet PTE Johnson says it sounded like a firecracker and he didn't bother looking up for some five to 10 seconds.

25 PTE Shore says that he "heard a noise like a cap gun" and again only looked up to see PTE Kovco falling to the ground. Neither of those soldiers say they saw what happened. There was a suggestion made in their statements as to what might have happened. I am unclear whether that came from the Military Police or out of their own mouths. But certainly it is no more than that, a suggestion as to what occurred. The reality is that their sworn testimony is that they did not see what happened.

30 The evidence against PTE Kovco's safe use of the 9 mm pistol comes essentially from PTE Carr, Soldier 14. True it is that two of the NCOs appear to have reprimanded him some days earlier, those reprimands are undocumented and seem at variance with all of the other statements which talk about his expertise in weapon handling. And there is no nexus between what is alleged in those observation by the two NCOs and any subsequent conduct by PTE Kovco.

40 I would submit that the evidence of PTE Carr would trouble you. I would submit it would trouble you greatly. Speculation as to what is behind it or why it is the way that it is, is within the confines of this Inquiry, probably unhelpful and I don't proffer any hypotheses. However, one needs to look a the facts as the evidence has disclosed them in the Inquiry. PTE Carr says that he saw PTE Kovco "silent cocking" his weapon and told him to stop and he did.

5 He was adamant that he was silent cocking his 9 mm pistol. Unshaken in
cross-examination. He stuck to his story. Despite being shown he video,
showing that what he said he saw could not happen, he stuck to his story.
10 His sworn testimony was the last time he saw PTE Kovco alive was when
PTE Kovco ran ahead and held the door closed as they were exiting back
to the accommodation at about 1500 on the afternoon of 21 April this
year. The CCTV of course shows a very different reality, that is Carr
following Kovco in Indian file through the building on the way back to the
accommodation.

15 I would invite you also to consider Carr's answers to the questions I asked
of him on 29 August in relation to conversations he had with other
soldiers as to what they were going to tell the Military Police. He
nominates both Johnson and Shore as being present at those
conversations. His memory appeared to fail on nominating who else was
there. He shifted his position considerably as to the time frame at which
that conversation took place. I don't intend to speculate on why he might
have done that.

20 However, the first version is that happened before being interviewed by
the Military Police and then he moved the time to after the Military Police
interviews. You will also recall the differences between the statement
provided to the Military Police and that provided to his then Counsel
25 Representing. I do note that there was an explanation proffered for that at
the time.

30 The versions given by those three soldiers would, I respectfully submit,
trouble the Board. There are inconsistencies, there are matters of deep
concern in their evidence and in the way it's been presented. I would
submit that little or no reliance could be placed upon it. I would submit
especially that PTE Carr's evidence as to the possible failure by
PTE Kovco to clear his pistol about 1500 just cannot be accepted or relied
upon.

35 Equally troubling with PTE Carr is his explanation for his DNA on the
pistol. Perhaps the most troubling aspect of all is the fact that his is the
predominant DNA on the slide. The Board, as did I and a number of other
persons in this room, have their memory refreshed, if it needed refreshing,
40 about what an integral part in the operation of the 9 mm pistol SLP the
slide is. The fact that it is PTE Carr's DNA on the slide, the grip, as I
understand it, to a lesser extent the magazine, the butt plate and the
trigger, absent any explanation is of considerable concern.

45 And it must affect the issue of his credibility, especially when one looks at

the evidence from Ms Franco from the division of analytical laboratories as to the likelihood of there being a transfer of DNA from a secondary source, especially when even PTE Carr does not suggest that PTE Kovco had his pistol out on the afternoon of 21 April when they were in that particular location together. The absence of any credible explanation for the presence of the DNA on the pistol is, I would submit, a matter of concern and must go to the issue of PTE Carr's credibility and the weight given to his evidence in this Inquiry.

I would like to turn, perhaps briefly, to the evidence which it has been suggested supports a theory of suicide in this case. The problem with such a theory is twofold.

PRESIDENT: I'm going to stop you there and ask the question - I think the Board has come to a certain view about the word "suicide".

LTCOL HOLLES: May it please you.

PRESIDENT: I don't think the word "suicide" figures in our reasoning whatsoever.

LTCOL HOLLES: In that case, sir, I'll move on. If it's not going to be an issue, then I shan't - - -

PRESIDENT: I think that's a fair comment.

LTCOL HOLLES: Thank you. The second leg of the submission I was about to make relates to the evidence of Detective Inspector Hoffman and in my respectful submission it is still relevant. It has been referred to by my learned friend Counsel Assisting, as has the evidence of Detective Sergeant Snow. Detective Inspector Hoffman gave a statement to the Board, and adopting what my learned friend Counsel Assisting said yesterday, it is his answers that are the most instructive and helpful. The final question that I asked him is this:

The reality is, is it not, Detective Inspector Hoffman, that you don't know what happened in that room?

The room I was referring to was of course room 8. Detective Inspector Hoffman answered:

That is correct.

So what I would suggest is that in the ultimate Detective Inspector Hoffman's evidence does not assist the Board at all.

I'd invite you to consider his evidence as to stovepiping, slack hand grip, et cetera, as the evidence of Detective Sergeant Snow likewise talks about those phenomena. They are not conclusive in my respectful submission ultimately of any particular scenario over another. Just pardon me for one moment, sir.

PRESIDENT: Certainly.

LTCOL HOLLES: I now wish to address you, Mr President and Members, on the Military Police. I think you could accept it as a matter of judicial notice that there have been a number of inquiries in the military justice system over the last decade or so in each of which the actions of the Military Police have been commented upon or reported upon unfavourably. On each occasion the implementation of the report's recommendations have somehow or other sought to enhance the capabilities and investigative skills of the Military Police.

As at 21 April 2006 can I say that nothing appears to have changed. If you were to attempt to create an exercise situation in which evidence was destroyed, forensic procedures were misapplied, it would be difficult to do better than what occurred here. The Military Police failure has a number of consequences, and I accept that I have not addressed on why they have failed and I am perhaps jumping the gun a little by using the word "failure" at this stage. But their "action", shall we use a neutral term, have brought this about.

The Board has been deprived of most of the forensic evidence that would have otherwise been available to it. It's hard to think that in 2006 with the number of television shows that represent forensic crime scene investigators, "CSI", "NCIS", et cetera, et cetera, "Silent Witness", the list goes on, that people, whether they be soldiers on operations in Iraq or citizens of Australia at home going about their ordinary business, are not aware of the need to preserve evidence and of the part that can be played by forensic investigators in piecing together the jigsaw from forensic testing procedures.

Through a combination of the actions of members of the Security Detachment and the SIB effectively there is just about no forensic evidence available to assist the Board in reaching a conclusion. But it goes further than that. It's one thing to say they're incompetent and ill-equipped. But what's happened in this case is more than that. SGT Hession said the templated statements - it beggars belief that a trained investigator would prepare a formatted statement and simply just add bits and pieces as required.

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5 The statements are supposed to be the words of the person making it, not a concoction by a Military Police investigator. SGT White, the NCO responsible, it would appear, for the firearms aspect of the investigation, didn't know there was another pistol in the room. Anybody with the most basic understanding of the issue procedures for weapons might have checked the key records to see who else in the detachment had a pistol and then checked to see if the records were accurate.

10 SGT Hession appears to have gone off equipped with plastic bags and labels and nothing else to investigate a death in what was obviously unusual circumstances. Items such as the bed linen and other items in the room seem not to have been gathered or collected even if they weren't washed. The destruction of the scene of the incident effectively made it impossible for the New South Wales Police to do any more than a couple
15 of fairly basic tests; the trajectory of the round and probably the most helpful in terms of the likely position of PTE Kovco at the time the fatal shot was fired.

20 True it is there appears to be some dichotomy of opinion between the SIB, the Military Police and the Headquarters, both here and overseas, as to who told what when and how. I'm not suggesting that Soldier 39's description of the SIB version of events is necessarily the one that I would urge upon the Board. But it would appear that there was little or no thought given to the manner in which the crime scene ought to have been
25 preserved.

30 In summary, the interplay of the actions of the Military Police and the concerns about the reliability of the evidence from a number of the eyewitnesses places Judy and Martin Kovco and their family in a situation where they do not know what happened to their son Jake and, absent some further developments, are not likely to know what happened to their son Jake. It is that uncertainty which causes them the most distress and that uncertainty regrettably can be sheeted home, at least in part, to the want of professionalism by the SIB.
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I won't address you at length on the fact that it took the SIB nine days to interview people. There may have been some reasons for some delay, but nine days would appear in the circumstances to be a lengthy period of time. Yesterday, sir, there was a document placed before the Board in
40 relation to a particular event which occurred some 12 years ago. The Board assembled to inquire into that fatality said this. I quote from paragraph 194:

45 *The Board noted in particular that the ability of the Military Police to respond promptly to emergencies such as the incident at*

the range may be impaired by lack of suitable equipment.

5 The Board noted evidence presented by two members of the Military Police, that records of interview are written in notebooks. It seems that nothing has changed in the past 12 years in terms of the Military Police to investigate fatalities.

10 Finally, sir, in circumstances such as the one which confronts this Board it is very easy to blame events such as the bungled repatriation, the incompetence of the SIB, the breakdown in communication between various aspects of the ADF on some form of systemic failure. But when one analyses the term “systemic failure” what basically it means is that somebody hasn’t done their job. All that I ask on behalf of Judy and Martin Kovco and their family is that the Board’s report highlight those aspects of the systemic failures so that never again are the families of ADF members placed in the position they’ve been placed in. Thank you very much, sir.

20 PRESIDENT: Thank you, Colonel. I notice we’ve been joined by some uniform members who need to stand. I propose to take a short adjournment to allow us to find some chairs and somewhere for them to sit. Perhaps we might take a 10-minute adjournment.

25 COL GRIFFIN: Thank you, sir.

ADJOURNED [1013]

30 **RESUMED** [1033]

PRESIDENT: LTCOL Berkley.

35 LTCOL BERKLEY: Thank you, sir, and members of the Board. To begin the closing I want to first have played some of the news footage that’s relevant and was first public notice of Jake’s death. I think it will serve to focus us on a number of the issues and some of it is very pertinent to issues for decision by the Board. MAJ Jolly.

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VIDEO SHOWN

45 LTCOL BERKLEY: Thank you. With the Board’s indulgence, I’d now

ask Shelley Kovco to read a statement to the Board.

PRESIDENT: Thank you.

5 MRS S KOVCO: Ever since Jake joined the Army he wanted to be
deployed. It was all he ever wanted, to finally put his years of training to
use. His dream was to join the SAS. Jake was ecstatic to be on the trip to
Iraq. I spoke to him daily, sometimes twice a day, and he was always
very happy. Around 2 am on the morning of 22 April I was informed that
10 Jake had died on the 21st from a gunshot wound to the head and that it
was from his own weapon. The information given to me was very vague,
which made it more difficult to handle.

15 I chose not to release Jake's name to the media for around 24 hours
because I was told the media would be at the door and I wanted some
privacy, which I did not get due to the constant barrage of phone calls.
Brendan Nelson said that Jake was cleaning his pistol and then he changed
his story and said that he didn't know how it occurred. Next I was told the
20 pistol discharged after he had made some sort of movement. These things
shouldn't have been said to the media until the truth was known. All they
had to be told was that it was an accident and there would be an inquiry to
find out what happened. This would have saved me from a lot of media
attention.

25 There were reports that Jake had committed suicide because he was
emailing me at the time at the time of his death and I had sent him a "Dear
John" letter. This information that was reported in the media was untrue
and very hurtful. Also the fact that these reports came from Baghdad and
friends also overheard MPs discussing this at a military funeral and stating
30 that it was a suicide. I never once thought Jake would kill himself. We
had a happy marriage and we loved each other very much. Jake also knew
that I supported him in everything he did and that I would be waiting for
him to return, not that I should have to explain my marriage to anyone;
that was between Jake and myself.

35 I was told Jake would be returning on 26 April and we were to be at the
RAAF base in Sale at around 10.30 to fly to Melbourne to meet the plane.
I had to wake Tyrie and Alana up through the night to do this, which
didn't bother me because we were going to bring Jake home. I've since
40 heard reports in the media that the speed of the initial attempt to repatriate
Jake was at my request. I just want to clear up that not once when I heard
Jake died did I demand that he was brought home quickly. The only thing
I ever asked was when he was coming home. I think the ADF or the
Government may have thought it would look good to have him back in the
45 country on Anzac Day.

5 I was at the RAAF base in Sale with my family ready to fly to Melbourne to bring Jake home. I also had family members and some of the guys from 3RAR waiting in Melbourne. An officer came up to me and said that Brendan Nelson would like to speak with myself, Jake's parents and my parents in the next room. I was under the impression they were going to tell us what would happen when we arrived at the airport in Melbourne.

10 Brendan Nelson, Peter Leahy and several other people came into the room. Brendan Nelson informed us that Jake's body had been left in Kuwait and the body of another man had been returned instead. He was unable to tell me how this had happened. He also said that nothing could make up for this mistake; and he is spot on. I demanded to speak to John Howard and told him I wanted Jake returned ASAP and asked him to get it sorted out. The reason I did this was because if anyone in this country
15 was going to sort it out I thought he was the man.

20 I was also expecting a letter from Jake and some of his personal things and I wanted them that night. One of the other soldiers had told me they had been instructed to write letters to their partners just in case something ever happened to them. I needed this letter as I was told it may have contained Jake's wishes for his funeral. I then called Mick Mumford and asked him if the boys from 3RAR that were waiting at the airport could stay with me until Jake came home.

25 The boys were more than willing to do this and were disgusted that this had happened to their mate. When we arrived back in Sale these guys stood at my front door and kept the media away from me, which was fantastic. Thanks, guys, you did a great job and Jake would have been
30 very proud of the operation.

35 I had explained to Tyrie that daddy's mates were bringing him home so that we could say goodbye. I then had to explain to my son why we weren't picking daddy up and a few days later I had to go through it all over again. No mother ever wants to tell their children their daddy is dead and they won't see him again. But add on top of that they didn't bring daddy home, there was another man, that we have to go and get daddy in a couple of days, it's pretty hard and confusing on him and me. I really thought when I explained Jake died that would be it, but it wasn't.

40 Jake finally arrived home on Saturday, 29 April with the repatriation he deserved. He was met at Sydney Airport with the entire Battalion, what was left of them. After the ceremony I then went to the Coroner's office because I had to make sure for myself that it was Jake that had come home. Mick Mumford and Greeney went in and identified Jake and I
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asked them to take a picture of his tattoo. Greeney came out and assured me it was definitely Jake and showed me the photo. I should never have had to go through this. I'd also like to say thanks to Greeney and Mick for doing this for me because I know it was a big ask to see Jake in this condition.

I believe Alastar Adams is entirely responsible for the misidentification of Jake. Why unzip a body bag if it's not your job to identify the body and then to put a seal on it as proof the identification has been done. I just wish he'd stand up and say that he stuffed up. I saw footage and photos of that disgusting morgue that we supposedly have a contract with. I say "supposedly" because I hope this contract has been cancelled by now. To think that my husband was taken somewhere like that is with me all the time. I also heard in someone's statement that she witnessed stuffing the Bosnian's feet in the casket because he was tall. I keep thinking this would have been done to Jake as well as he was tall.

You have no idea of the picture I have in my head of this happening. It makes me angry that he could have been treated this way. I do not blame Hooky for the mix-up as it was not his duty. His duty was to escort Jake home, which he thought he was doing and, according to the Cosson Report, Nasser said, "Don't worry, we know what we're doing." At this point I'd also like to take the opportunity to thank Stomper for making sure it was Jake who arrived in Sydney and for bringing some of Jake's things home to me.

I later received a phone call from Angus Houston on 17 May advising me that BRIG Cosson had lost the report that she had done on the failed repatriation. I also learned that it was lost two days earlier and Brendan Nelson said he didn't want to contact the family and cause more unnecessary stress if it was found in the meantime. I should have been contacted straightaway. Stress has been my middle name since Jake died with all the bullshit that's occurred, so why hold back.

This was one more stuff-up that I had to deal with. Once again I dealt with my phone ringing constantly and the media outside my house, which made it hard for me to go out with my children without a camera being shoved in my face. We have had no privacy or had the freedom to leave our house without the worry of being intercepted by the media since 22 April.

Neville Paine was fantastic with helping me arrange the funeral and any paperwork that needed to be done. Maree Nagell(?) was always there for me and she still is. I always know she is a phone call away and sometimes I don't know what I would have done without her. During this Inquiry

Ann Mcleod and Nicole Hubbard from DCO have been a great support. Also whenever I have needed something when the Board has been sitting the staff here couldn't help me enough. I would also like to say a big thank you to 3RAR. For those that stayed with Jake in his last moments
5 Jake thought of you all as family and if I couldn't be there for him in the end I'm glad you were there. And also to those that assisted him immediately after the incident, I thank you for doing what you could to save him.

10 To those who were in Australia at the time, thank you for what you did at Jake's funeral and just being there for the kids and I. You guys are a part of my family now. Jake always told me he wanted a full military funeral if anything ever happened to him, and that's what you gave him. I just never thought it would happen so soon. I also don't believe that Shorey,
15 Johnno or Carrey killed Jake, nor did they have anything to contribute to his death. They were all great mates and there is no way in the world they would have done this. It was a horrible accident and I know Jake would give anything and everything in the world to be here with the kids and I today, just the way I do.

20 I know that Jake would want me to be as happy as I can even though at the moment that's impossible and to raise our children just the same as we had always done, and most of all, forever tell the kids how great their dad was. I would also like to thank the US Forces for their assistance,
25 courtesy and respect they showed Jake. This Inquiry has been a hard time for me. I have been away from Tyrie and Alana the majority of the time since Jake died. I have also missed out on a lot of things with our daughter Alana which I can never get back.

30 I had to leave the Inquiry a few weeks ago because it was too much to deal with this and trying to be both mother and father to my kids. I don't believe this Inquiry can tell me what actually happened to Jake on 21 April and regardless of anything else, nothing and no-one can bring Jake
35 Jake's death never happens to another person again. No-one deserves to be put through this.

I've not only lost my husband, I've lost my privacy. Many of the things that were personal and private between Jake and myself have been made
40 public. The thing that has hurt me the most was the release of his journal. His journal was written for the children and I, no-one else was ever meant to read it. There were things that Jake wrote in his journal which caused me more grief from people that read it. This journal should never been read by anyone other than Tyrie, Alana and myself.

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I understand the journal went to his state of mind, however, the only thing that was a major issue here was his dream. I believe this should have been the only part released to anyone. I was looking forward to receiving his journal because it was so personal, but is another thing that has been taken away from me. I don't believe that the personal items of a deceased should be copied and made public, even if they are a part of evidence. After all, the ADF can redact things that suit them.

This and many other things that were between Jake and me are no longer just mine. No-one has the right to any of this. It is up to me to decide or approve which items are made public or copied. This would have been the decent thing to do. All of Jake's possessions now belong to me and I want assurance that everything will be returned to me and not given or shown to anyone as of now.

Now, for Jake's laptop. Apparently there are a lot of things on there that are a breach of security. Do you really think that I'm going to give or show anyone anything that is on that laptop? I think everyone has seen enough and I'm the last person that wants to give things out. The reason I want everything that is on there is most of the footage has Jake's voice on it. I couldn't give two shits about what's in the background. I just think the kids and I are entitled to have that last piece of Jake.

With all the mistakes that have occurred since the time of Jake's death it has made it harder than it should ever have been. From 21 April there has been one mistake after another. I was at the point where I was getting over one thing, then another mistake was made and I was dragged down again. I would also like to say how sick I am of hearing sorry for these mistakes. Sorry doesn't cut it after the first time. Even during this Inquiry there were things that were released to the media and I was assured this would not happen.

However, my unsigned statement to the police was shown to the media before it was redacted. Then something was printed in a newspaper and again I got told "sorry. I was so worried about things I had said in that statement that I was assured that it could not be released to the media. I also believe that the media that printed the story broke the law. How many times am I expected to hear "sorry". Nothing in the world can make things okay for us now. Our lives changed on 21 April and will never be the same again. I just hope there is some light at the end of the tunnel for the kids and I whatever that may be.

I don't need to make you aware of the mistakes that have occurred since the 21st. It is quite clear that numerous procedures were not followed after Jake died, as we have heard in the last few months. I can only hope

5 that lessons have been learned and there will be some sort of procedures put in place for an accident like this ever happen again. It just hurts me that it took Jake's death for the Defence to realise this, which I hope they have. I been paid all benefits and allowances owing to me as a result of Jake's death.

10 A few things I'd like to see done and I recommend if it ever happens again would be make sure the scene and the evidence is left untouched until the experts arrive, do not let out deceased soldiers go to the Al Sabah morgue. They deserve so much more than that shitty place. In other words, cancel the contract with Kenyon International because obviously they don't care what conditions are like. Really, this should have been done already. We have all seen the images of the morgue. Tell me who would want their loved one to go there.

15 Do not use a private contractor to repatriate any soldier. Keep all repatriation matters within the ADF, no excuses. Never lose sight of the body. If any identification needs to be done get a few of the soldiers from the unit that know the deceased to go in together and identify the body. That way they can at least support each other. Find out if there are any significant markings on the body like a tattoo and physically check the deceased. There should also be some sort of time extensions for advising Centrelink, Vet Affairs or family assistance agencies. I found it very hard to deal with everything as well as try to look after my two children. Finally, I hope the ADF and the Government have learned by these tragic mistakes.

LTCOL BERKLEY: That concludes Shelley's statement to the Board.

30 PRESIDENT: Thank you, Mrs Kovco. That's been very stressful on I think everybody in the room and particularly your client. Does she feel the need for a break?

35 LTCOL BERKLEY: Perhaps five minutes might be very helpful at this stage. Thank you, sir.

ADJOURNED [1106]

40 **RESUMED** [1150]

45 PRESIDENT: Yes, thank you, Colonel.

COL GRIFFIN: Mr President, Members, during that adjournment there was a concern raised as to a possibility of security breach relating to our procedures, that hasn't been clarified as yet, so I would simply ask Counsel or anyone who addresses the Board just to remember the issues of operational security and rely on the matrixes to protect any operational security matters whilst we're in open forum.

PRESIDENT: Yes, thank you. Yes, thank you, LTCOL Berkley.

LTCOL BERKLEY: Sir, I just now wish to address you and the Members on some of the evidence. This Inquiry has, for the purposes of Shelley at least, been in two parts: the first is what happened to Jake and the second is the bungled repatriation of Jake.

In relation to the gunshot injury that led to Jake's death, it's my submission that there are in fact four possibilities. The first relates to that someone shot Jake, either intentionally or accidentally, murder or manslaughter. The second is that Jake pointed his pistol at his head with the intention of firing it and did so. The third is that Jake pointed his pistol at his head as part of a joke and it discharged unintentionally. And the fourth is that Jake had cause to have the pistol in his hand and it discharged without him intending it to.

In my submission, the first two possibilities are without any solid evidentiary foundation. There was no apparent motive for such a warlike soldier to be shot and killed. There is no evidence of sufficient anger being directed towards Jake and his room mates upon which to ground a theory that he died as a result of a momentary loss of control by another soldier. There is no evidence of any opportunity for someone outside of room 8 to enter that room and shoot Jake. There is ample evidence that Jake was a well adjusted and well liked soldier. As COL Griffin pointed out yesterday from his recruit training, he was identified as a person with god soldier skills who was very suitable to Army life.

He performed well in his too short career. He looked forward to his life in the Army, he had a loving wife and two children, as well as loving parents and extended family. There was no doubt that Jake loved them in return. This Board has heard eminent psychological opinion that Jake did not likely commit suicide. That same opinion put the journal entry concerning the dream of his own death as merely an appreciation of a soldier of his situation and the real danger that he found himself in.

Jake made it clear in his journal that he had no intention of killing himself. In my submission a finding of suicide is simply not available to the Board.

45

PRESIDENT: And the Board would agree with you.

LTCOL BERKLEY: Sir, I'll move on.

5 Jake was a big, strong, happy young man. He had good soldier skills that
were respected by others in his Battalion and he inspired confidence in his
grasps of the Military arts. He was a good man on the team, he kept
morale and spirits up. He was a bit of a joker and could often be relied
upon for a laugh. It was clear to his mates that he loved his wife and
10 children dearly.

Now, it's a very long bow to draw to find that Jake pulled the pistol from
its holster as part of any joke or demonstration. Such a proposition only
arose as a theoretical explanation as to how the pistol got in Jake's hand.
15 Neither PTE Johnson nor Shore saw it in his hand.

Now, it's one thing for Jake to expose his testicles in a mock falsetto
whilst singing along to a silly little love song, and I mean no offence to
the Cranberries, but that's what the song Dream is about, it's a love song.
20 It is another thing to escalate that joking to include putting a pistol to your
head to feign shooting yourself. Such an act is after all contrary to Jake's
training and Jake was a good soldier. You might have expected if Jake
drew his pistol as part of a joke that he would have tried to attract the
attention of his room mates. A joke to yourself is a lonely one indeed and
25 not consistent with Jake's observed behaviour.

There is not a shred of evidence that Jake took risks of self-harm with
weapons. There was some evidence that Jake was reprimanded
informally, based on his unfamiliarity with the pistol and COL Griffin
30 alluded to this yesterday and I think it's very important; Jake's occupation
was rifleman. He's issued a pistol as a secondary weapon. According to
his service records, he's had one day training with that pistol. It would be
not uncommon for soldiers in his situation to try to familiarise themselves
with the pistol, including its withdrawal from the holster.

35 None of that was ever said to go to self-harm. It should be put to rest, that
theory. A more probable explanation is that Jake had cause to have the
pistol in his hand. That cause was to unload the weapon when he noticed
that it still had a magazine in it. I'll talk about the state of weapon
40 readiness later.

Room 8 in the accommodation lines was a small room that accommodated
three men and their equipment. Some of that equipment and other
personal items was stored on the floor next to the double bunk. There was
45 no where else to store it. In close confines it begged to be tripped over.

5 If you exclude any notion that Jake was a person who would even feign
self-harm, you see the force in the argument. Jake could well have
noticed that the magazine was in the pistol whilst entertaining himself at
his computer in the moments before he died. It would be very easy for
10 Jake to reach over and with one hand, his left, steady the holster, withdraw
the pistol with his right hand, the hand was likely to be his right or firing
hand, and of course Jake would have been turned with his right side
towards the upper bunk to perform the action. No fanfare needed
15 accompany that act. In fact it might have been the cause of some
embarrassment to Jake should his pistol be found with the magazine still
in it.

15 It is quite possible that the safety lever was pushed into the instant or fire
position upon withdrawal. There is evidence before the Board that this is
possible, depending on how tightly the holster, with or without the help of
the steadying hand, was gripping the slide of the pistol. All it would have
taken is for Jake to knock his arm or to attempt to steady himself with his
20 right arm against the bed after becoming unbalanced in any way and his
finger could easily have found its way inside the trigger guard with tragic
results.

25 The entire manoeuvre would have taken mere seconds, moreover if he was
moving quickly to avoid embarrassment. If this is what happened, it need
not attract the attention of Johnson even though he was so close. Shore
says he was looking at the refrigerator and would not have seen it in any
event. The acceptance of this theory as a factual scenario requires no
question of the evidence of Johnson or Shore, nor should it because it is so
30 plausible and possible.

Let's not forget that this theory was, in substance, one of the major
theories moved by the investigating Military Police in communications
back to supervisors in Australia. I refer to Soldier 47's email to
35 MAJ Pemberton dated 27 April 2006, it has a Restricted marking and I
propose to read part of it, subject to any objection from Counsel Assisting.

COUNSEL ASSISTING: No objection.

40 LTCOL BERKLEY: Thank you:

*Sir, good morning. Re our earlier telecom, there are at this stage
two possibilities which may have happened. However, until the
printing of the weapon is done, I haven't discounted a third, being
45 someone else. The first is -*

And it reads this way:

5 *Kovco returns to his accommodation and fails to clear his pistol.
The pistol remains in the holster and is placed on the bed frame.
A short time later, whilst he is standing at his bed (he occupies
the high bunk) using his laptop computer he sees the magazine on
his pistol (in holster). Turning his shoulder towards the holster
and using his left hand he holds the holster. Using his right hand
he pulls the pistol from the holster. However, either the pistol
10 doesn't release smoothly or he applies too much backward force
and when the pistol is freed from the holster his elbow and the
backward movement knocks either the bed frame or mattress and
the pistol discharges through the lower right side of his face in an
upward direction exiting the top of the skull and onwards through
15 the roof.*

That was 27 April by Soldier 47 who MAJ Pemberton considered to be his
most experienced investigator. It is a theory that has not been dented at all
by the evidence. The question is whether there is enough evidence for you
20 to infer it as a fact from the provable facts. It has much to recommend it.

I just want to talk about this so-called slack hand or dead man's hand
theory. That is in itself a theory that is said can indicate any number of
things, from the intentional firer losing his grip due to the injury sustained
25 to the unintentional firer or accidental firer who did not hold the weapon
with the firmness required for the weapon to cycle properly. One would
expect a person so experienced with firearms to have a good grip on any
weapon he wished to intentionally fire. The so-called theory of the slack
or dead man's hand is of no assistance to you in finding how Jake was
30 shot.

Put simply, and applying the scrutiny that *Briginshaw v Briginshaw*
requires in such an important finding, you can be satisfied, firstly, that
there was no discernible reason for Jake to commit self-harm and that in
35 the absence of any such reason you should reject any proposition of
self-harm. Secondly, up until mere seconds before he was shot Jake was
observed to be in a happy mood, standing at the double bunk and
entertaining himself at the computer on the top bunk.

40 Thirdly, both PTE Johnson and PTE Shore, themselves experienced
soldiers, swear that they would have heard the sound of the slide moving
back in the motion of cocking the weapon, but there was no such sound
heard by them, indicating that the weapon was at least in the action
condition when Jake returned to his room. Fourthly, they maintain that
45 they would have heard that cocking sound over the sound of any music or

conversation that was happening in the moments before Jake's death.

5 In my submission you are well able to infer from those facts that Jake was probably unaware of the degree of weapon readiness when the weapon was withdrawn from its holster. It was found with a full magazine on it less one after Jake was rushed to hospital. There is no reason for you to infer that Jake was mucking around with the pistol before he died. Such an inference has a negative connotation that should be based on more than just Jake being in a happy mood prior to his death. It must be based on
10 some cogent evidence that Jake showed a disregard for his personal safety, and there has been no such evidence.

15 In the absence of direct evidence as to what actually happened in those last seconds before the gunshot you are left to infer the existence of facts so long as the inference is logical. The available evidence is sufficient for you to properly infer that for some reason in all probability that Jake noticed the magazine on the weapon that Jake decided, properly, to withdraw the weapon from its holster. This is the action expected of soldier of Jake's calibre.

20 You will note that Jake's F88 was unloaded. So it is logical to assume that he would have corrected an error relating to his pistol's degree of weapon readiness. The closeness and small dimensions of room 8, the amount of gear and material on the floor, the speed of Jake's movements -
25 remember the mere seconds from when Shore passed him and saw him at the computer - Jake's likely body position at the time the pistol fired, which was facing the back wall at either the attitude of 12 o'clock or 1 o'clock, and the presence of electrical cords and other items above the floor make it highly possible, if not probable, that Jake encountered a
30 minor misfortune in the process of withdrawing that weapon and that misfortune grew instantly to have catastrophic results. Any other inference must as a matter of logic be based on some evidence of a disregard by Jake for his personal safety, and again there is no such evidence.

35 I submit to you that these are not circumstances which warrant an open finding. Notwithstanding that, if you find that you simply cannot draw the inferences prayed in this submission, you must make an open finding. I'll hand to you a copy of R v City of London Coroner; Ex parte Barber
40 (1975) 1 WLR 1310. I ask you not to make an open finding. I ask you to make a finding consistent with a good soldier correcting an error in the degree of weapon readiness and an unfortunate tripping or other incident occurring.

45 An open finding will expose the next of kin to more speculation about

Jake's death. It is unhelpful and need not be made if you are prepared to draw the logical inferences prayed of you. The second part of this address of which I have copies, but I've noticed there's some atrocious grammar errors - and I'll have that corrected and I'll give it to you. But the second part is on the presence of the foreign DNA on Jake's pistol.

Now, the presence and quantity of PTE Carr's DNA on Jake's service pistol indicates handling of the weapon PTE Carr at some time approximate to Jake's death. Whether that proximity can be measured in hours or minutes is not certain, but the importance and consequences of establishing that proximity must not be the subject of speculation. Based on the presence of that DNA it was put to PTE Carr that he shot Jake. That proposition was denied. PTE Volkofsky, who shared a room with PTE Carr, said that Carr was still in the room they shared, which was next door to Jake's room, at the time that the shot rang out. CPL Saunders who was at the door to room 8 when the shot rang out opened the door but did not notice PTE Carr in the room. Neither Shore nor Johnson put Carr in the room at the time of the shooting or at any other time that afternoon whilst they were in room 8.

If the Board considers that evidence to exclude PTE Carr from the shooting, then Carr's contact with the pistol must have occurred at some other time and prior to Jake retiring to his room at the end of his workday. The most logical place for that to occur was when they occupied a certain post just prior to the end of their shift that day. That proposition was put to Carr in cross-examination but denied by him. PTE Carr simply denied touching Jake's pistol at all on 21 April 2006.

The inconsistency of that denial with the expert DNA evidence is so stark that it forces the Board to make a choice as to which evidence it believes as both cannot stand together. There is no reason to doubt the DNA evidence, nor has it been criticised. This leaves, unfortunately, to the inevitable loss of confidence in PTE Carr's evidence and the destruction of his credibility as a witness. Many people have reasons not to tell the truth, but those reasons do not implicate them in anything nefarious. It is simply a case that if the Board thinks that PTE Carr's denials about touching Jake's pistol on 21 April lack credibility, then the Board should also question his assertion that Jake moved through a doorway at such speed and in such a manner as to prevent a buddy check from happening.

To the extent that Jake could have been criticised for this action, that criticism cannot now stand and it can be uncertain whether it ever happened. Again this is especially so when Jake's F88 was later found to be cleared. The main impact of a lack of credibility in that evidence is that it has a knock-on effect as to whether the handling of Jake's pistol

was with or without his knowledge, although it would be difficult to envisage the handling happening without Jake's consent. It was after all in the thigh holster.

5 It does, however, raise a question mark as to whether Jake fully appreciated the degree of weapon readiness of his pistol. It also affects the question whether Jake simply forgot to alter the degree of weapon readiness at some other checkpoint. In summary, the presence of the foreign DNA on the weapon has the effect of casting considerable doubt on whether Jake fully appreciated the degree of weapon readiness of his
10 weapon and of whether criticism of him can fairly be made.

I'll have that formally amended and submitted to the Board, should it want so.

15

PRESIDENT: Thank you.

LTCOL BERKLEY: You've heard Shelley give her statement and you've heard the difficult and trying circumstances in which she has attended the Board and before the Board and no doubt that will continue after the Board. She blamed Mr Adams. Adams was a senior man present when the body of Mr Sinanovic was misidentified as that of Jake Kovco. Mr Adams by his own admission based his decision to place the seal on Mr Sinanovic's coffin purely on the silence of SGT Hoekstra. Mr Adams
20 noticed the moustache on Mr Sinanovic but raised no query.

It seems illogical for him to seal the coffin in these circumstances simply on the basis of the silence of Hoekstra and not to have raised any inquiry. Mr Adams also conceded that it is implicit when he seals the coffin that it contains the body of the person being repatriated to Australia. Shelley has not come here to play the blame game, but has keenly listened for someone to take responsibility for the failed repatriation of Jake. As you can appreciate, it was a gut-wrenching experience for her and for the rest of the family to have the wrong body arrive in Australia.

35

Yet no-one is prepared to accept responsibility. Kenyon's won't accept responsibility for the actions of their subcontractor or personally. The subcontractor would not even engage with the Board. The command structure won't accept responsibility. After all, they hired a contractor. In fact the only person to accept any sort of responsibility at all was Jake's OC, MAJ Tyrell. That was a noble gesture, but he could not have foreseen Jake's death, nor his bungled repatriation. The buck has to stop somewhere and it is still galling to Shelley that she still hasn't heard an acceptance of responsibility, just a lot of sorrys.

45

The system is blamed, a systemic failure. But the systems are made up of people. Shelley prays that you will find out who was really responsible. Counsel for Jake will no doubt develop this area further, but just in closing I would like to say that Shelley thanks you for the opportunity of putting her views before the Board. They were her views. I had no part in the construction, they were her words. I commend them to you as a realistic view of what's happened, particularly in relation to the bungled repatriation.

Sir, that completes my closing on the evidence. I understand that Mr Small, who of course I don't act for but is Shelley's father, and he has talked to Counsel Assisting and wishes to make a statement. That will be entertained with your leave. Sir, I simply ask on behalf of Mr Small that you give him that leave.

PRESIDENT: Yes, thank you. Mr Small, do you wish to address us?

MR SMALL: Yes, please.

PRESIDENT: We'd be grateful to hear from you.

MR SMALL: Don't worry, it's not that long, the writing is just big. Thanks for the opportunity. We just needed the opportunity to express our thoughts and those of other members of the family that have been affected by this. You've heard most of it, but from our perspective we need to say it. First off, Lorraine and I, we'd like to thank everyone that's made it possible for us to be here with Shelley. She's needed support and we've been able to give it to her. We'd especially like to ask you to thank everyone in this facility for the way they've treated us since we have been here. They have been really good to us. If you could do that, we'd be - - -

PRESIDENT: Those comments are appreciated, and thank you.

MR SMALL: I'm not good at this. I didn't have the liberty of getting a press secretary like the politicians. But as you've heard, some of us have got different views and even within our family we've had different views and we've had a few battles, don't worry. When Jake joined the Army we were proud that he wanted to do it and we also knew there were risks involved and wouldn't have been surprised if something had have happened. But never did we entertain the thought of what was about to come.

About 2.30, 2 am on the morning of the 22nd Shelley called us to say Jake had been killed. We were in a state of shock. When we were told the way it happened the shock turned to disbelief as no-one was sure of the exact

circumstances. With all sorts of variations to the story, we told the ADF not to give us anything but the truth and the facts. Even now we're not sure that they did. I'll leave that at that. While the ADF people were trying to help Shelley - and they did a pretty good job of it - we also believe that they were protecting themselves and the Government from bad publicity and not necessarily being upfront.

I still believe that this happens at times. Nothing could have prepared us for what happened next. We were at the RAAF base in Sale with Shelley, Shelley's three brothers, Tyrie, Alana and various other people. We were going with her and the kids to bring Jake home. Nelson and Leahy were there and Nelson eventually blurted out that they had the wrong body. Our words were basically, "How the hell can you have the wrong body?" We told him to get him back and get him back now. I can assure you that Nelson and Leahy knew that physical contact was imminent. They both know that and I don't say that lightly.

Nelson was told by Shane, Shelley's brother, to fix it, and he was referring to the different stories we'd heard. As far as we're concerned, Nelson is the man in charge and he has to hold the can for everything that was done. It affected the family in many different ways. We wanted to make sure that Jake had the best of care when he came back into the country and through the ADF we'd arranged for Lorraine's brother, who works for a funeral parlour, to take care of Jake and the body and return him to Sale.

Lorraine's brother was at the airport to pick Jake up and make sure he was looked after. You can imagine how he felt when he found out that he had someone else. At least the Bosnian's family can be sure that their father was looked after. Also at the airport was Lorraine's 81-year-old father and my brother. Both were returned soldiers and both had had lengthy conversations with Jake about his service and they give him some good fatherly and brotherly advice.

They were devastated to the effect that they were both ready to hand their medals in and absolutely disgusted with what happened. Jake was finally brought home and given the return and burial he deserved as a soldier. We'd like to thank 3RAR for that. They did a bloody good job and I'm sure Jake would have been proud of it. If that wasn't enough, it got worse. Cosson lost the disk. It gives me a bit of satisfaction to say, "Stop looking for it, because I've got it." And the ADF - you liked that bit, didn't you? So do I. The ADF could have got it if they had have been upfront because we weren't disappointed that they'd lost the disk. We were disappointed that it took them two days to tell us. We'd already told them to be upfront.

If they had have told us on the morning after they lost it they would have probably been given that disk if they had have told the media person that the family knew about it and were distressed. As time went on we then found out that the Australian consular official put the seal on the coffin and the Kenyon's subcontract as used by our standards a substandard mortuary. We can probably accept that that's the only place there was over there. However, Kenyon did mention dignity, and dignity is more than the type of facility that you put someone in; it's the way you handle things. And they didn't handle it very well because they placed Jake in the hands of fridge mechanics and cleaners who I understand couldn't even read and write. No soldier or person should be in a place like that.

We've since learned here that that need not have happened because with a little bit of effort he could have stayed in the US facilities and be brought home because it probably would have only been a couple of days. We also won't accept that it was Soldier 2's fault that the wrong person was sent back and it's unreasonable to have expected him to have made a formal ID prior to the coffin being sealed. Also, by the ADF policy he is only the escort.

Kenyon had a responsibility to ensure the right person was presented, not just deliver a sealed box. Kenyon's contractor was there when the coffin was sealed. If the consular official is required to put the Australian seal on the coffin it's a duty that shouldn't be taken lightly. Not only that, we believe his position is higher than that of the soldier. I don't think a soldier's word was much in Kuwait because we've also heard that the soldiers that took Jake back were made to get civilian clothes and get out of their uniform. I think that's something that needs to be looked at.

We'll also never forget the pictures of the morgue or that Jake was ever in it and we won't let that go. As far as the hearing goes, we appreciate that you have good intentions, but I believe that any chance of finding out exactly what really happened is almost gone as the handling of the incident and the evidence is, for the want of a better word, incompetent or at least careless. I personally know how it should have been handled and the evidence could have told us a lot more than it has. It can not only tell us who has done something, but it can also tell us who didn't do something and therefore take the blame off other people.

I'd like to suggest that all soldiers when they join the Army do some sort of incident and evidence control during their basic training and that could be expanded with promotion. While we may understand the way his mates felt, and we certainly do and appreciate the fact they were trying to get Jake home, the first people on the scene should have been separated until interviewed and the room physically guarded and nothing removed.

I'm not casting aspersions on anyone or suggesting anyone has done anything. Surely we've got two spare guns and a couple of sets of clothes over there as the ADF have said that we're well provided for.

5 We've been sitting here listening to people say, "I was not responsible and we acted on information provided and we passed it on." No-one did anything and nothing got done properly and it was mostly from senior officers. We've heard the Chief of Staff say an MP statement was
10 bullshit. I wonder what the MPs think of his. I personally think some of his was bullshit. It makes us wonder what hope the soldier at the bottom has got if that's what is at the top.

We've no reason and have never ever had any reason to believe that
15 Jake's death was anything but a tragic accident and have never ever entertained the idea of suicide. I'm grateful for what you've said on that. However, we do think that something has been withheld, perhaps with misguided good intentions. For Shelley and the kids' sake, if anyone does know anything that has not been said please come forward now and not in
20 a few years time because it will only increase the pain. We'll always remember Jake and never get over his death.

The stuff-ups that have followed the death are unforgivable and we hope that no other soldier's family has to go through what we have. I can
25 assure you that our lives and that of other family members will never be the same. During the Cosson debacle I was told by an ADF person we don't care what you think when I challenged an issue. Well, they need to know that this has affected our entire family as well as other families right down the line to our grandchildren, and that's the grandchildren we have other than Tyrie and Alana.

30 We're proud of Shelley and she's been strong. She has to, she has Tyrie and Alana to look after. I'm sure that Jake would be as proud of them as we are. Our criticisms are not necessarily about people but the system and note that we haven't said anything here about cover-ups or conspiracy, but
35 don't let us down and please make sure this does not happen to anyone again. We'd also like to thank all Jake's mates in 3RAR for their support to Shelley and the kids. I think today is an indication of what they all thought of Jake.

40 PRESIDENT: Thank you, Mr Small. I note the time.

COL GRIFFIN: I note the time, sir. It may be an appropriate time for an adjournment. If there are no other matters from LTCOL Berkley or the
45 next of kin, COL Young is next.

PRESIDENT: COL Young.

COL YOUNG: I'd be no more than an hour, sir. I'd be happy to start now, but I don't want to rush the submissions.

5

PRESIDENT: I think we might take the adjournment now. I know there's still some concerns external to this building which MAJ Young is attending to. If they could be put to bed in that hour, that's an hour well spent. We'll come back at half past 1.

10

COL GRIFFIN: Thank you, sir.

LUNCHEON ADJOURNMENT [1226]

15

RESUMED [1339]

20 PRESIDENT: Yes, thank you COL Young.

COL YOUNG: In the Bible story, Mr President and Members, Seth was one of the many sons of Adam and Eve and a brother for Cain and Abel. In our story, Seth is a black Labrador, Seth is Jake's dog. Being a Labrador, he likes his food, he's transferred his affections to Judy and Martin who now feed him. But I suspect that Seth keeps a look out and wonders what happened to Jake.

25

Why am I telling this, because I appear to represent Jake's interests and protect his good name and reputation. When Jake died there was a lot of misinformation put about which questioned his good name. In my submission, the evidence given to this Board has unequivocally answered those uncharitable comments.

30

It is important to know who Jake was because the interests of a deceased soldier are paramount and this Board of Inquiry is all about Jake Kovco. I've mentioned Jake's dog because that is part of who he was, a boy with a dog, a loving son, a loving husband to Shelley and father to Tyrie and Alana, a very proud soldier, a member of 3RAR, one of Australia's finest fighting units with a distinguished history.

35

40

Jake and his family were part of the 3RAR family and continue to be part of that family. Jake's diary gives a good insight into the type of man he was. And I know Shelley has indicated that she regarded that as private, but I'm sure she won't mind me borrowing just a couple of phrases to try

45

and tell us a little bit more about Jake's character.

An entry on 6 March of this year, just before he left Australia, reads in part:

5

I'm her only son, I'm glad she cares so much, she's done a top job raising me. I hope that I can be half the parent she is.

On the same day he records:

10

We had a really nice day as a family. Went to a park, had Maccas and kicked the footy with my son.

The end of the day's entry is as follows:

15

I love you Shelley, Tyrie and Alana. You'll all be in my thoughts and heart every second of the day.

In an entry on 12 March, he showed himself as a proud, typically Australian dad when he said:

20

Shelley told me that Alana crawled today, I bloody knew she would after I left.

25 He was variously described by witnesses as funny, boisterous, not inhibited, known as a person who would try to lift the mood of those around him when things did not seem to be going well, a larrikin who made people laugh.

30 His Officer Commanding, in giving evidence, said of Jake, at transcript page 55:

35

Jake himself was one of these professional soldiers, he was a staunch and loyal mate, he was a lovable larrikin and a dedicated husband and father. Jake and I had, what I would consider to be, a special relationship. As the OC, he was a private soldier, but there wouldn't be a time that we would walk past each other without stopping, having a chat, having a laugh. I had the privilege of spending some time in an observation post with Jake, only a week or so before his death. I spent about two and a half hours with him there and we shared our thoughts and that's a time that I will cherish.

40

His Platoon Commander at transcript page 1040 was asked this question:

45

there where people shoot at you and there's a risk of being killed, is that the case?---That's the case, sir.

5 *As an NCO you'd like to think that your soldiers would be prepared for any situation they might encounter where there's danger to their lives, is that right?---That is correct, sir.*

At transcript page 1093:

10 *Would you describe yourself as proficient with a 9 mm pistol, or would you describe yourself as an expert?---I would call my proficient, sir.*

15 *Working fairly closely with the soldiers as you do, would you describe any of them as experts?---I wouldn't say experts, no, sir.*

20 *If you were placed in a situation and given the choice of a Styre or a 9 mm pistol, what would your choice be?---A Styre first choice, sir.*

So would you describe PTE Kovco as a trusted and responsible soldier?---Yes, I would, sir.

25 The Notice issued to me addressing matters in relation to PTE Kovco and his handling of weapons I'll now address, there are three issues and the first one is:

30 *PTE Kovco failed to carry out a buddy system clearance of his weapons.*

The evidence of PTE Carr certainly is that both he and Jake failed to carry out a buddy system check of weapons when they came off duty on 21 April of this year. You are entitled, like all evidence, to accept or reject that evidence. If there was a failure on Jake's part and if that contributed to the incident in the room, then he's paid the ultimate price.

40 Was the buddy system rigidly enforced, was it always followed? The evidence, in my submission, suggests not. At transcript page 167, PTE Johnson indicated in his view, soldiers are responsible for their own weapons. He did not see a need for a buddy system. He said if he found himself in a situation where there was no buddy, he would simply unload his own weapon.

45 At transcript page 769, PTE Shore agreed:

There were practical problems implementing the buddy system.

LT Croft, the Platoon Commander at transcript page 1037 demonstrated the naivety of a young officer, in my submission, when he was asked:

5

Would it surprise you to know that the buddy system was not always used by your soldiers?---Sir, it would surprise me a great deal. It's an SOP, SOPs reflect the way we conduct our business and that was how they were written, it was spoken about, it was training that was conducted. If it wasn't done so, then it wasn't in accordance with our SOPs, sir.

10

15

If I tell you that we've heard evidence from a number of soldiers that there were occasions when they left their post on their own, would you accept that could have happened?---I accept that could have happened, sir. I can possibly think of an example where that may have occurred and hence the reason I amended the location of some beaches, if that helps.

20

Following Jake's death, were there some changes made to that location? Is that the case?---Yes, sir.

25

Does that indicate that there were real difficulties at the callsign prior to Jake's death?---Sir, I would consider no.

He was then asked:

30

Does that not mean that - because of the changes does that not mean that the changes made it easier for the buddy system to be used?---Yes, sir, it made it easier for it to be used.

35

Do you think there could have been some changes made to the particular paragraph of the SOP to ensure the buddy system worked properly?---I believe so, sir, it's plausible.

40

Would it be fair to say that following Jake's death there was greater vigilance in enforcing the buddy system and checking that it was being used and done properly?---I'd agree with that, sir.

45

There was no evidence before this Board that any spot checks or random checks of the state of weapons in rooms was done. That might be something to consider as far as recommendations by the Board are concerned.

Were there reasons why Jake may not have carried out a buddy check? You will recall the description PTE Johnson gave of the conditions in Iraq at transcript 813. He said:

5 *At the moment, sir, it's about 54 degrees. It's hot, it stinks living in small rooms. The food is pretty shocking. What else do you want to know, sir? People shoot at you every day.*

10 *You're carrying equipment. Is that physically exhausting in combination with the heat?---Yes, sir. By the end of the day you're pretty shattered.*

15 *You've touched on the psychological side about the possibility of being shot at somewhere. Can you tell us something about what sort of stresses you might feel under when you're there?---Sir, it's just you try not to think about it, but obviously there's a constant threat of indirect fire when you go out to certain places on jobs the chance of dying.*

20 *So you're constantly thinking about it?---I don't know. I don't know really what you mean, sir.*

You've answered what I was after. Thank you.

25

It may be that Jake was just keen to get out of the heat, get his combat armour off, get into the air-conditioning of his room, the security and sanctuary of his own little space. We know he cleared his Styre, perhaps he just forgot his secondary weapon. The 9 mm pistol is not a weapon that soldiers normally carry.

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Can you make a finding that a buddy system check was not done? On the evidence it's a finding open to the Board. As to why it was not done, I have suggested some reasons which you may feel contributed to that situation. Was there proper implementation and promulgation of the buddy system by command elements of SECDET IX to the extent that a breach would be regarded as an offence under the DFDA? Was it properly understood by soldiers? Was there any policing of the buddy system to demonstrate the OC's intent? On the evidence it's my submission there was not.

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In relation to the buddy system, the OC said there was no official policy and it was his initiative to try and do something to prevent unauthorised discharges in accommodation blocks, and he should be commended for that. The fact that there was no official policy might seem somewhat

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surprising in view of the evidence of the CDF and his statutory declaration of 7 September '06; Exhibit 209. In paragraph 5 of that declaration he says this:

5 *I telephoned the Minister to inform him of PTE Kovco's death. Like me, he was most interested to know of any circumstances relevant to the incident. I stated that it was not known how the shooting occurred. Nobody had seen the gun, a 9 mm pistol, go off. It appeared to have been a tragic accident, but this would*
10 *need to be confirmed by a thorough investigation conducted by a Board of Inquiry.*

Paragraph 6:

15 *The Minister then asked me to elaborate further on how circumstances like this could arise. I reiterated again that nothing definite was known about the circumstances of this incident or what had happened, but in the past there had been numerous unauthorised discharges associated with the handling*
20 *of weapons. I went on to describe the 9 mm Browning incidents from Vietnam times and other incidents that had occurred in Timor.*

25 One might ask, with that knowledge and prior to Jake's death, what had the ADF done about unauthorised discharges as far as trying to prevent that happening. With a history going back to Vietnam one might have thought that something more had been done than has already. I'm not suggesting nothing has been done about unauthorised discharges, but clearly the Board might like to contemplate making some further
30 recommendations that something further needs to be done.

Issue 2 within the notice reads as follows:

35 *That PTE Kovco had his 9 mm pistol loaded and in the action condition inside the accommodation area.*

40 There is no dispute that it was the 9 mm pistol issued to PTE Kovco that discharged the round that killed him. As a matter of logic, that means that the pistol was in a loaded state in the accommodation area. As a matter of logic, it also means that the pistol was at incident in order for it to discharge. It does not logically follow, however, that Jake was aware of the state of the pistol. How did the weapon come to be in the load condition?

45 We now move away from logic to speculation. Despite two soldiers being

in the room with Jake when the incident occurred, we do not know precisely what happened. It seems likely that Jake simply forgot about the pistol being strapped to his leg as a secondary weapon. We know that his Styre was unloaded, which means he turned his attention to that weapon.
5 You might find that supports the theory that he forgot the pistol. At transcript 768 PTE Shore was asked:

10 *Given your experience of being there and knowing Jake, are you able to give us what do you think happened? How do you think his pistol in a loaded state was in his room?---In a loaded state within the room?*

15 *Yes?--It's a question of - I believe that Jake would have known if he picked it up. If he'd cocked the weapon in the room I think he would have known. So I think he's had it on him when he's come in the room and because it hasn't been unloaded at some stage he hasn't remembered when we got in the room that it had a mag on and the round was in the chamber. That's how I think, because if you cock that weapon - Jake in the room - Jake would have*
20 *known. You can tell by the slide moving forward.*

You will recall from your recent experience, Mr President, Members, with the 9 mm how you cock the weapon; you pull the slide back and you let it go. It makes a noise. It requires a very deliberate act on the part of the
25 handler. As PTE Shore said, Jake would have known. Not only would have Jake have known in my submission, PTE Johnson and PTE Shore would also have known. They would have heard it in the confines of a small room and it would have very definitely attracted their attention.

30 In a statement from PTE Johnson read onto the record at transcript 63 he said, relevantly:

35 *We do not use pistols all the time. So maybe Jake forgot that his was at action. We are not as familiar with pistols as we do not have them all the time.*

You might consider that to be of some significance when you consider Jake's training on the pistol. I repeat that. At recruit training at Kapooka
40 no training on the 9 mm pistol. IE training, initial employment training at Singleton, no training on the pistol. One day's official training on a 9 mm pistol, that's it.

In my submission the evidence would allow the Board to make a positive finding that PTE Kovco's pistol was loaded and in the action condition.
45 The evidence would not, however, allow the Board to make a finding that

PTE Kovco intentionally had his weapon in that condition or that he was aware that the weapon was in the instant state. The third and final issue in the notice issued reads as follows:

5 *PTE Kovco was handling his loaded pistol when it discharged.*

10 There's evidence from an expert witness, Michelle Franco, that PTE Kovco's DNA profile was on the slide, hand grip, trigger and magazine of his pistol. That's not surprising evidence as Jake would have handled the pistol on a daily basis in the course of his duties. Does that evidence of itself mean that Jake was handling the pistol when it discharged? In my submission absolutely not. Jake's DNA profile could be on the weapon from earlier in the day or the day before.

15 What is surprising is that another soldier's DNA profile was found on that pistol, that of PTE Carr; Exhibit 151, the report of Michelle Franco. How his profile came to be on Jake's pistol remains a mystery. Despite intensive questioning he did not or was unable to explain how his profile came to be on the weapon. Just what all that means sadly remains unanswered. Is there direct evidence that Jake was handling the weapon when it discharged? The answer is no.

20 Is there circumstantial evidence from which one could infer that Jake was handling the weapon at the time of discharge? Probably yes. Is there a reason to believe that the evidence given by the two soldiers in the room is all that they know? That's a matter for speculation. One might find it almost inconceivable that PTE Johnson, given his proximity to PTE Kovco, would not have seen or been aware of something. But, as I say, that is speculation. Is there any reason to believe that Soldier 14 is knowingly withholding evidence? Again that calls for speculation.

25 In my submission the Board could not make a positive finding that Jake was handling the pistol when it discharged. Mr President, with your leave I'd like to address some other issues outside the notice and they are the repatriation mix-up and some peripheral matters.

30 PRESIDENT: Please do.

35 COL YOUNG: As an Australian soldier serving overseas, Jake Kovco would have had an expectation that if he was killed serving his country his body would be properly returned to Australia for burial. PTE Shore was asked about the mix-up and his expectations at transcript 770. This is the exchange:

40 *You told LTCOL Berkley that you were disappointed about the*

mix-up?---Yes, sir.

Could I suggest your emotions were probably more than just disappointed?---By far, sir, yes.

5

You were being polite here in this room saying you were disappointed?---Yes, sir.

10

Feel free to use any stronger language if you want?---The emotions when they are - sorry, just a second. Emotions when WO Cumming told us what had happened were, you know, very angry and just disgusted and we felt, you know, watching the plane take off and watching our mate go home and it wasn't him, you know. We were angry and then we were angry thinking what's going to happen when the family is there and they tell them. Then of course as time went by we got more - we had time to think about it and got more thinking of why we had to use that facility in Kuwait. Initially when we were there we thought this is ordinary, but especially after what happened, you know, people said - different people said - Jake might have thought - rolled his eyes and gone, "Oh God, typical. Ha ha ha." I said, "No, he wouldn't," I said, "Because I know he'd be angry." If it was me and he was looking after me he would be angry at the Army, you know, not bashing the Army but that really - that hurt the family and it hurt the blokes there. We were meant to make sure he got home and we watched someone else take off. The more we think about it we should have just held onto the coffin in the US morgue and just literally not let go of him.

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Winston Churchill once said, "It's no use saying we are doing our best. You've got to succeed in doing what is necessary." Would Defence claimed to have done its best in this case? It certainly failed in doing what was necessary, and that is, getting Jake home in accordance with his expectations, his family's expectations and indeed the Australian community's expectations. It was not a difficult task for Defence given its resources. So why did it fail in this mission?

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There's no single reason. It occurred for a number of reasons all culminating at the Al Sabah mortuary in Kuwait when a body bag was unzipped for the sole purpose of identification prior to an Australian consular official sealing the casket for the trip home to Australia. On that occasion SGT Hoekstra and the consular official, Mr Adams, failed to even communicate with one another to confirm that the body they were viewing was that of PTE Kovco.

45

5 Whilst as an escort officer alone SGT Hoekstra may not have had a specific duty to identify Jake, in my submission he became duty-bound as a senior NCO to accept that responsibility when it was drawn to his attention by the soldiers accompanying Jake from Baghdad to Kuwait that they were concerned there could be a mix-up of bodies. As a coincidental aside, Jake's diary contains an interesting entry on 11 April '06. He records:

10 *Bloody officers think they're so important. It's the grunts that do all the work.*

15 It's worth observing that it was the grunts and only the grunts who showed any initiative in being alert to the fact that there could be a mix-up with Jake's body. The hierarchy in this case had not turned its mind to the possibility of losing Jake's body. You might recall BRIG Symon's evidence at transcript 1430. Having earlier given evidence:

I had every confidence in him -

20 SGT Hoekstra -

that the right body would be returned.

25 He conceded that it had not crossed his mind that the wrong body could be sent home. Mr Adams, a consular official and diplomat of considerable experience, denied he had any responsibility in relation to identification, but conceded in his own words:

30 *It's implicit if you seal a coffin you know who is in there.*

I would now like to look at a series of other failures all contributing to the mix-up. As other Counsel have suggested, they could be described as organisational or systemic failures or they could be described as mistakes through carelessness, lack of vision or foresight or human error on the part of individuals in the chain of command.

40 As a starting point, consider the mortuary affairs plan dated May 2005 used by HQ 633 in Baghdad. That is contained in the Cosson Report. The plan had as one of its references Defence Instruction (General) - Personnel 20-6 deaths within and outside Australia. That Defence Instruction is dated 6 June '03. At paragraph 18 of that document it makes brief reference to identification of bodies. There is certainly no emphasis on the importance of getting identification correct.

45 As at the date of the Mortuary Affairs Plan supporting OPCATALYST,

5 that is May '05, there existing within Defence the Land Warfare Procedure on Mortuary Affairs dated 15 June '04, note the date, 12 months before the Mortuary Affairs Plan was drafted and signed off. That Land Warfare Procedure looked at identification in considerable detail and warned of the consequences of failure in this area in the following terms at paragraph 4.25 of the document:

10 *Repatriation, if not conducted with the highest level of professionalism will attract adverse attention from family and friends of the deceased and the general public and media. Unprofessional repatriation practises will generate scepticism about the complete Mortuary Affairs process and general handing of deceased service personnel. Unprofessional repatriation practises will very quickly erode public confidence in the ADF.*

20 You might recall these words were read to BRIG Symon at transcript page 1433 and he said "the words were prophetic". In my submission, that was the intention of the author. If you get it wrong you'd better be prepared to accept the consequences.

25 Mr President, the sad thing is that this Land Warfare Procedure was in the Defence arena as a publication when the Mortuary Affairs Plan was written. Why was it not adopted? Probably because it was an Army publication. In OPCATALYST it was a joint operation. You will recall the evidence of the Mortuary Affairs Officer attached to HQ 633 at transcript page 1314, he was asked about the handover he received when he took over the position:

30 *Were you referred to the Land Warfare Procedure on Mortuary Affairs?---I was never referred, never even in fact made aware of that until after the fact that the publication existed.*

35 *In hindsight, would you like to express an opinion on the handover that you were not alerted to that document?---Well it's a Land Warfare publication and not necessarily relevant in a joint environment, sir.*

40 *What do you think the Land Warfare Procedure on Mortuary Affairs might cover?---Mortuary Affairs, it was specific to Army - Army purposes.*

45 That Officer was also asked if the Mortuary Affairs Plan contained any reference to how you identify a body. At transcript page 1316 he said:

There was nothing about ID.

When asked:

5 *Do you think there should be?---I certainly do now, sir. That said, I think there's an expectation or an understanding that when you are moving a body that is the body you expect it to be. We all know and certainly in this case know that expectations and assumptions are dangerous.*

10

BRIG Symon at transcript page 1435 agreed that the Mortuary Affairs Plan:

15 *could have been better drafted by referring to identification as an issue. I suggest the response from the Mortuary Affairs Officer concerning the Land Warfare Procedure being Army shows a certain naivety, especially when you have regard to the words of warning in the LWP referring to the consequences of getting ID wrong.*

20

A bystander might ask, is not the Army part of the ADF? Why would a relevant, a most relevant Army publication be ignored simply because the operation was a joint operation? Mortuary affairs are mortuary affairs, surely. Does a document have to be written in purple ink before it can be regarded as a joint document? This might appear to be bureaucracy gone mad and cause the Australian public to agree with the commentary in the Australian Newspaper editorial on 20 May this year when it described Defence as:

30 *The nation's most Byzantine and complex bureaucracy.*

The author of the Land Warfare Procedure, MAJ Byway gave evidence to the Board on 4 September this year. At transcript page 1608, she had this to say, having been asked about the history of the Land Warfare Procedure document, she said:

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40 *It's dated 15 June 2004, could you tell the Board the history of your involvement in that document, please?---In 2001 I attended a Logistics course in the US and as part of that course I had to produce a research paper, so I decided to look at the US Mortuary Affairs system and compare it to Mortuary Affairs in the ADF and I realised very quickly that we lacked up to date and accurate policy and also doctrine. So on my return, I contact Director of Personnel Executive and put forward the concept of*

45 *developing joint mortuary doctrine for the ADF. At the time,*

5 *funding was limited and it was deemed a lower priority so the suggestion was we develop doctrine within Army. If funding was available at a later stage, we would lever off that to produce a joint doctrine. So I put up a proposal on how I saw the doctrine being developed, we gathered a working group and that was how the Land Warfare Procedure came to be.*

10 One might ask the question, does lower priority and funding drive best practice in the ADF? Where is the sense in allocating funds to Army to write a Mortuary Affairs Plan for Army and then repeating the exercise with further funding to write a publication to be used in a joint environment. As I submitted earlier, mortuary affairs are mortuary affairs.

15 I pass now to another failure and that relates to the Kenyon Standing Offer which is contained in the Cosson Report. The Work Authorisation Agreement refers only to:

20 *Fatality of PTE Jacob Bruce Kovco fatal shooting 21 April 2006, repatriation of remains of PTE Kovco back to Australia.*

In another part of that form it states:

List any other special requirements here.

25 There are no special requirements listed. In the Standing Offer, under the heading Services And Requirements it says:

30 *Kenyon will provide on request any or all of the following emergency services:*

- (c) *Identification and processing of remains;*
(e) *Preparation and repatriation of remains.*

35 The Work Order evoked (d) repatriation of remains, but did not evoke (c) identification.

40 Defence clearly failed to ask Kenyon to accept responsibility for identification of PTE Kovco's body. If they had been asked, the evidence shows, in my submission, that they had the expertise to fulfil that function. I refer to Exhibit 188, the statement of Robert Jensen on behalf of Kenyon in which he sets out the services they can offer "if asked".

MAJ Byway was complimentary in relation to Kenyon's expertise in Mortuary Affairs:

45 *I'm not advocating on behalf of Kenyon, but if ADF had specified*

that they wanted identification done, the outcome may have been different.

5 It's clear the relevant ADF staff were not across the detail of the Standing Offer. MAJ Byway's evidence points to why this was the case. At transcript page 1630 she said:

10 *I think very few Commanders and subordinates are aware that doctrine and policy exist in the ADF.*

At 1634 she said:

15 *The Mortuary Affairs Officers in theatre, it's usually a secondary appointment and they've received no training themselves. You will recall that that was the case with Soldier 45, the Mortuary Affairs Officer in the Headquarters at the time of PTE Kovco's death. His was a secondary appointment. His prime function was personnel and logistics.*

20 The other failure in the system is, I submit, haste. Despite the well-intentioned statements of returning PTE Kovco with dignity, the perceived Military attribute of haste took over. Exhibit 164 is a statement of BRIG Symon. At paragraph 5 of that statement he refers to a conversation he had with the Chief of Army on 22 April '06. He said in his statement:

25 *His -*
that is the Chief of Army:

30 *- guidance to me was to return the body home as quickly as I could.*

In giving evidence to the Board however, BRIG Symon was asked at transcript page 1403 if the Chief of the Army had said anything about getting the body home quickly, to which he answered "No".

35 In paragraph 7 of his statement, BRIG Symon referred to returning Jake's body with dignity to his widow as soon as possible. At transcript page 1402, the Brigadier was asked:

40 *Was the proximity of Anzac Day a factor in the timing for the return of the body?--It was on my mind, it wasn't a key factor. I could see a certain poignancy in a good soldier being returned to the nation on Anzac Day. It was a factor.*

45

MAJ Byway's evidence was that the US repatriation process was based on seven to eight days. At transcript page 1613, MAJ Byway said:

5 *There's certainly enough evidence internationally and within Australia about repatriating too quickly at the expense of accuracy and identification and management and custody of documentation and personal affects.*

10 One of the findings of the Cosson Report you might find yourself agreeing with reads as follows:

15 *The perceived imperative to repatriate the body of PTE Kovco as quickly as possible, a process that required close control and monitoring caused an accelerated approach to be taken, this increased the risk of, and indeed result in, human error.*

20 Mr President, Members, the bringing home of PTE Kovco's body to his family with dignity was a logistical exercise that was impeded by a perceived notion that it had to be done quickly. This unnecessary emphasis on speed, together with the other failures along the way, all contributed to the breakdown of returning Jake home with the dignity he deserved.

25 Before concluding on Mortuary Affairs, I wish to touch on a matter you might wish to consider as a recommendation. Exhibit 172 contains a number of documents produced by COL McManus. One of those is a directive from the CDF relating to the revision of Defence Instruction (General) PERS20-6 covering deaths within and outside Australia. The exhibit also includes what appears to be a draft Defence Instruction (General) Personnel 20-6. The document contains a number of references, most of which are typed in upper case. At page 2 of the document, in paragraph 7, are the words:

35 *More detailed procedures covering Mortuary Affairs can be found in LWP(G)118 Mortuary Affairs pending completion of joint doctrine ADFP1.1.1 Mortuary Affairs, currently under development.*

40 My submission is that the reference to the LWP on Mortuary Affairs, given what I've had to say, should be on page 1 of the DI(G) in bold and I upper case so that it cannot be missed.

PRESIDENT: Or perhaps in the one document.

45 COL YOUNG: Too simple, Mr President. It's already been ignored once

5 when the Mortuary Affairs Plan was drafted. It may suffer the same fate if not given prominence in the draft document or as you sagely suggest, the one document. That's a matter you may wish to consider and make recommendations given that one of the aims of this BOI is to identify weaknesses, recommend steps so that the same mistakes are not made again.

10 Mr President and Members, under one of the headings under your Terms of Reference in relation to recommendations is contained in paragraph 10 and that states:

15 *Whether the conduct of any person or the occurrences of any event in relation to the incident warrants further investigation by service or civilian police or any other authority.*

20 The matters I'm about to refer to might seem somewhat remote from the incident, but in my submission, all the unfortunate events that occurred after Jake's death impacted on his good name and reputation by keeping his name in the public arena. All those events have delayed that time when Jake's memory can be allowed to rest.

25 I refer to the occasion when a person found the disk left in the computer by BRIG Cosson. I invite you to consider referring that finding of the disk to civil police to investigate whether that person has committed an offence of stealing by finding. I invite you to further consider referring to the civil police, the conduct of the person who subsequently received the disk and published part of the contents. That action of receiving the disk may well amount to receiving stolen property.

30 I make no submissions in relation to BRIG Cosson as the CDF has indicated publicly that her actions have been referred to Army for investigation.

35 In relation to SGT Hoekstra and the issue of not identifying the correct body, it is my submission that you would give consideration to referring that incident to the Military Police for further investigation. In considering that, you will put to one side and not be influenced by the comments of the CDF, who incidentally is the appointing authority for this Board, when he said at a press conference on 7 July this year, when releasing the Cosson Report:

40 *So I think it is highly unlikely that there will be any action taken against the Platoon Sergeant. I say this, I don't intend to take any action against him. But of course the BOI is also having to look at the circumstances and that's why we're providing a copy*

of the BRIG Cosson's report to the Board.

5 Mr President, before concluding my remarks, I feel I need to raise with you what's been said earlier today when Counsel endeavoured to address you in relation to the issue of finding of suicide and I intended saying, and I won't go any further than just saying these few words; this BOI was convened to investigate how PTE Kovco died. There has been speculation that he committed suicide, that speculation needs to be addressed.

10 PRESIDENT: I think I can say this to you Colonel, whilst our report of course is a matter for the CDF and we must now pause and consider and weigh our report to the CDF, it is not in the contemplation of the Board at this time to speak of suicide and PTE Kovco in the same sentence. It is not within our contemplation.

15 COL YOUNG: I hear what you say, Mr President. My concern is, and with great respect, if the Board were to return an open finding, that would allow interpretation by outsiders to say that still leaves open the fact that he may have committed suicide.

20 PRESIDENT: I think I can draft the words that say that that option is not open.

25 COL YOUNG: Well, Mr President, if you won't hear from me or other Counsel, could I invite you to do something unusual and that is, perhaps make a finding today that the Board, as a fact, finds that PTE Kovco did not commit suicide?

30 PRESIDENT: I don't think it's open for us to do that.

35 COL YOUNG: Well, my concern is that representing PTE Kovco's interests, if this Board, sometime down the track, changes its mind, receives new evidence and just comes out and says we make an open finding, that still leaves open for others to interpret that he may have committed suicide and that would be most unfair if you don't hear from myself and other Counsel on that issue.

40 PRESIDENT: I'm prepared to hear you on the topic of course, but I ask the rhetorical question, to what point because it is the intention of the Board to say in very categorical terms Jake Kovco did not commit suicide. I cannot say it any plainer than that.

45 COL YOUNG: Mr President, if that's the finding that you are able to say that you will positively make, I'm happy with that.

PRESIDENT: I can't go that far because the finding is something we need to write and ultimately it's a report to the CDF. So whatever we do now, at this instant, it must of itself be tentative.

5 COL YOUNG: Well, in that event, Mr President, I would respectfully ask that you do hear from me on the issue of suicide.

PRESIDENT: If you wish.

10 COL YOUNG: PTE Kovco died in Baghdad, Iraq, on 21 April this year. He died from an occurrence whilst on Defence service which was deemed to be warlike service. His funeral was attended by his family and friends and by the Prime Minister and Minister for Defence. It is clear the nation wanted to honour PTE Kovco as a soldier who died overseas serving his
15 country.

As I've indicated, there's been speculation about suicide, and I've now addressed that. The Board of Inquiry has heard evidence from two
20 eminent psychiatrists, Prof McFarlane, whose report was marked Exhibit 111, and Prof Mitchell, whose report is Exhibit 112. I submit that you would accept those gentlemen are senior members of their profession who have no connection with the Military. You would accept they have provided independent opinions and there was no suggestion of a preferred
25 outcome when they were asked to provide a report.

They were provided with a copy of PTE Kovco's diary together with other documents relevant to his history. The professors independently found there was no evidence of depression. They noted the vast majority of
30 people who suicide do so alone. They noted there was no suicide note. Prof Mitchell said in part:

If PTE Kovco did shoot himself, this was most unlikely to have been a deliberate attempt to kill himself as a result of psychiatric disorder.

35 At page 7 of his report he said:

*It's difficult to know if the dream had any bearing on the circumstances surrounding the death. There is no suggestion in
40 the journal that the dream was indicative of any current or future suicidal intent. PTE Kovco is adamant about this, presumably to make matters clear to anyone who may later read the diary. If anything, he is disturbed by the dream and does not understand why it occurred. Dreams are sometimes reflective, usually in part
45 only, of the events or concerns of the day. In context of the*

violence in Baghdad where he was aware of frequent death around him, it's not surprising that he may have had dreams involving his own death.

5 Prof McFarlane said:

PTE Kovco does not appear to have suffered any particular psychological disorder or to have been in a suicidal state of mind at the time of his death.

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Referring to the dream, Prof McFarlane said at page 5 of his report:

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For the Inquiry the question arises as to whether this component of the journal could be indicative of some suicidal thinking. Given his mood as reflected in his diary, there is nothing to suggest this. His entries are orientated to the future. In one sense the possibility of PTE Kovco being shot in the head during combat is of his own making given that he had volunteered for the ADF. Thus, he had placed himself at risk by his own decisions of being killed in combat and his dream may represent his engagement with these contemplations during his sleep.

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Apart from the two psychiatrists, the Board heard evidence from Dr Duflou, a forensic pathologist. He prepared and signed the autopsy report for the Coroner. In that report he noted the cause of death as a gunshot wound to the head. In my submission you would find Dr Duflou's evidence compelling in complimenting Prof McFarlane and Prof Mitchell's evidence.

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30 At transcript 266 Dr Duflou was asked:

Would I be right in saying you've made autopsy findings consistent with suicide?---Yes.

35

Many?---Yes. Well, the coronial investigation in New South Wales has as one of the end points the identification of the body, the time and place of death, the cause of death and the manner of death. One type of manner of death is suicide. The purpose of the autopsy is to assist in any or all of those aspects. If I can provide an opinion as to the likely manner of death, I try and do that for the Coroner. In most of my autopsy reports for the Coroner I will provide an opinion of manner, if that is reasonably obvious from the circumstances and the autopsy findings. I'm cognisant of the fact that for making a determination of suicide that the level of certainty has to be well above that of balance of

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5 *probability. For me to advise the Coroner that this is a likely
suicide the things that I look for, beside the typical type of
suicide, if you like, are so whatever mechanism is used, that it has
fairly typical features of that. I would also like a history of
depression with or without previous episodes of self-harm.
Generally, unless there is a suicide note or a very strong
indication of the person taking his own life, I would hesitate to
suggest that it would be suicide. Looking at this case specifically,
10 I understand there is no prior history of depression of any
significant nature. There's no history of self-harm, there's no
suicide note. So even though there is a gunshot wound to the side
of the head, which is a fairly type of suicidal injury, in the
absence of those other features I don't think that a determination
of suicide can be reliably made in this case at all and that the
15 features, if anything, together with the history indicate that this is
an accidental discharge of the weapon.*

Mr President, Members, on the evidence of the psychiatrist and the
forensic pathologists it is my submission that you would be able to make a
20 finding that PTE Kovco did not suicide. As I said a few moments ago,
PTE Kovco was buried with honour as a soldier who died overseas
serving his country, as thousands of diggers before him have done. He
should now be allowed to rest in peace with his good name and reputation
intact. Mr President, Members, you will not tailor your findings to allow
25 that to happen or because that is the decent thing or out of sympathy, but
because the evidence leads you inescapably to return an open finding,
which I would submit excludes suicide, or alternatively, a finding of
accidental death.

30 In conclusion, you might recall that Prof McFarlane said it was a privilege
to read Jake's diary. For my part, it's been a privilege to appear for
PTE Jake Kovco of the 3rd Royal Australian Regiment. Thank you,
Mr President, Members.

35 PRESIDENT: Thank you. COL Griffin, any comments that you wish to
make before we proceed to close the Inquiry?

COL GRIFFIN: I have nothing by way of response to any of the
addresses, sir. I only refer to the matter that I raised on the record
40 yesterday, that is, the question of recent reports of videos that have been
discovered and the possibility of mishandling of weapons, which I
indicated to the Board yesterday that I've made inquiries about. As soon
as I have that information to hand I'll notify the Board and Counsel
Representing as appropriate.

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PRESIDENT: Thank you. Could I ask Madam Secretary if she'd go outside into the office and ask all the staff to join us, including the monitors and the transcription service. I take it, LTCOL Green, that you do not wish to make any comment.

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LTCOL GREEN: No, thank you, sir, I've got nothing which warrants a response on my part.

LTCOL WILKINSON: Sir, I just have one comment. My submission was reduced to writing. I'm just wondering whether the Board would be assisted by a copy of that.

PRESIDENT: Greatly. Thank you for that, thank you for the courtesy. Two of the people I wish to make some comment about in fact unfortunately won't be with us. That's SIG Wheeler and PTE Haddock. I'd ask SGT McLane if he'd pass my comments onto them and indeed if I get a chance at a later time I'll be saying something to them personally. A Board of Inquiry such as this is a major undertaking. I just look down at the room now and see how many people are here. This is not the number of people who come to your average murder trial.

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The logistics behind this exercise is absolutely mind-boggling. The expense of this exercise for the taxpayers is equally mind-boggling. I don't know how much it cost and I think it's a piece of information that perhaps I better not know about and perhaps the taxpayers would be better off not knowing about. That said, it happens because an enormous amount of people put an enormous amount of work into it, quite often behind the scenes unseen, unheard of and in a degree of efficiency we don't notice because it's just so good we don't see it.

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Behind the scenes we have a Board Manager, MAJ Young, who's been heading up a team of people, some of whom have been not exactly volunteers, they've just been told to come here. They have served this Board absolutely wonderfully. SGT McLane, of course one would expect something from SGT McLane because of the colour uniform that he wears. But that said, has organised that staff outside absolutely brilliantly, and I thank you, Tony, for that. SIG Wheeler and Haddock, PTE Davis there, and hiding behind - yes, thank you.

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Look, it's absolutely wonderful to see Private soldiers doing what you people have been doing. Some of the jobs we've been asking you to do haven't been jobs we should have been asking of Private soldiers; and that's great. Now, of course this has been a very technically-orientated Inquiry in that we've been talking to Baghdad regularly, sometimes not as clearly or as well as we would have liked, but that said, something that

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years ago we wouldn't have even contemplated of being able to do. I thank the technicians who have been able to make that happen. I'm very grateful to you and I'm very grateful for what I might call your "time to time crisis control". Thank you very much for that.

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Now, I'm aware that she's already been headhunted and asked to do a number of other inquiries, and that's our Board Secretary, Kim Harrison. I'm here to say to you she's not for sale, I own her and she's going nowhere. Kim is one of those people who quietly gets on with the job. You don't even know the job is being done, but it's finished, done and there's no drama. Thank you, Kim, very much.

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Moving outside the Military, and that's perhaps a comment all of its own. Much of the information we had here today or over the last three months has come to us courtesy of the New South Wales Police. The ADF for a whole host of reasons did not have the resources, expertise, skill that resides in the New South Wales Police. We owe a debt of gratitude to the fact that the Coroner insisted that the New South Wales Homicide Squad become involved. From the Inquiry's point of view, some very good things have occurred because of that.

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Can I extend my thanks to John Abernethy, the Coroner, to Detective Inspector Hayes from the Homicide Squad and his colleagues, to Detective Inspector Hoffman from the ballistics people and his colleagues. I was very grateful indeed to the services of Ms Franco from the analytical laboratories or whatever the organisation is called these days. We asked them to do some DNA testing which in my previous experience tells me it would take months. It turned around in days. That was a minor miracle, in my view, of which the Board is very grateful.

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We've had members of the clergy here, our padres, supporting the family. I thank them for that for a very necessary and perhaps unseen job, as the ladies from the Defence Community Organisation. The monitors, the transcription people, given my background, I've got an actual prejudice against monitors who don't work for the government. These are such monitors. I've got to eat some words. They've been fantastic. Counsel in these matters make or break an inquiry. It's an interesting reflection that to investigate this matter we had to send Counsel Assisting, four of them, to Baghdad.

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You can draw your own conclusions as to why that was necessary. That's not the sort of thing that lawyers are normally asked to do. I thank Counsel Assisting in the generic sense for (a) going to Baghdad and (b) providing the Board with the expertise which revolved around that team. Counsel Representing, if they don't do their job properly we don't get the

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facts. Can I thank each one of you individually for putting your clients' interest to the fore and presenting the Board with what I will call a balanced picture.

5 Now, ultimately this Inquiry is about Jake. I call him Jake because I feel I've come to know him over a period of time. This Inquiry is to Jake's family, his wife, his mum, extended family, a very difficult process. We understand that. It would be the Board's hope in a year's time, two years' time perhaps, you will see this Board as a therapeutic exercise, something
10 which helped you ultimately. You may not think that today, but hopefully in some years' time you may come to view this Board as a positive thing. I thank you for the assistance and the courtesy that you've shown the Board during your time here.

15 I'm conscious of the danger always of forgetting somebody who should be thanked and if I've missed anybody, I do apologise. Are there any other matters, Colonel, that need airing before we formally adjourn the Board for the report writing phase?

20 COL GRIFFIN: No, sir.

PRESIDENT: Very well then. The Board will now adjourn to prepare its report.

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ADJOURNED INDEFINITELY

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