JURISDICTION	**:**	CORONER'S COURT OF WESTERN AUSTRALIA
ACT	**:**	CORONERS ACT 1996
CORONER	**:**	Rosalinda Vincenza Clorinda Fogliani, State Coroner
HEARD	**:**	10 JANUARY 2023
DELIVERED	**:**	12 JANUARY 2024
FILE NO/S	**:**	CORC 853 of 2021
DECEASED	**:**	MACKAY, HERBERT WILLIAM

Catchwords:

Nil

Legislation:

Nil

Counsel Appearing:

Sergeant A Becker assisted the State Coroner

Ms H Cowie (State Solicitor's Office) appeared on behalf of the Department of Justice

Case(s) referred to in decision(s):

Nil

Coroners Act 1996
(Section 26(1))

RECORD OF INVESTIGATION INTO DEATH

*I, Rosalinda Vincenza Clorinda Fogliani, State Coroner, having investigated the death of **Herbert William MACKAY** with an inquest held at Perth Coroners Court, Central Law Courts, Court 85, 501 Hay Street, Perth, on 10 January 2023, find that the identity of the deceased person was **Herbert William MACKAY** and that death occurred on 3 April 2021 at Fiona Stanley Hospital, 102-118 Murdoch Drive, Murdoch, from complications associated with metastatic adenocarcinoma of the lung, treated palliatively, in the following circumstances:*

Table of Contents

INTRODUCTION **3**
MR MACKAY **4**
CUSTODIAL STATUS **5**
MEDICAL TREATMENT AND CARE IN CUSTODY **6**
First admission to Fiona Stanley Hospital 7
Return to Casuarina Prison 8
Second admission to Fiona Stanley Hospital 9
Return to Casuarina Prison 9
Third admission to Fiona Stanley Hospital 10
Return to Casuarina Prison 10
Fourth admission to Fiona Stanley Hospital 11
Return to Casuarina Prison 11
Fifth admission to Fiona Stanley Hospital 12
CAUSE AND MANNER OF DEATH **13**
QUALITY OF SUPERVISION, TREATMENT AND CARE **14**
Multiple transfers 15
The cessation of smoking 17
Restraints 18
Family contact 21
Review process - IDO 22
IMPROVEMENTS **23**
Smoke free prisons 23
CONCLUSION **24**

INTRODUCTION

1. Herbert William Mackay (Mr Mackay) was 45 years old when he died on 3 April 2021 at Fiona Stanley Hospital from complications associated with metastatic adenocarcinoma of the lung (lung cancer). The lung cancer was not able to be detected until a late stage and the complications developed very quickly.

2. Mr Mackay had a history of violent offending. At the time of his death, he was serving a term of imprisonment at Casuarina Prison as a result of an Indefinite Detention Order made by the Supreme Court on 23 December 2020 under the *High Risk Serious Offenders Act 2020* (HRSO Act). This detention followed the completion of his 10 year and six-month imprisonment term for prior offences.[1]

3. Mr Mackay first showed symptoms that may have been related to his lung cancer when he was seen at the Casuarina Medical Centre with respiratory related symptoms on 31 December 2020. Medical investigations and treatments were promptly commenced. Prior to this time, he had not complained of respiratory symptoms. His prior medical history did not disclose any conditions that could reasonably have given rise to a concern or suspicion about a lung cancer.[2]

4. Because Mr Mackay's lung cancer presented at an advanced stage, curative treatment was not possible, but his symptoms were managed at the Casuarina Infirmary and Fiona Stanley Hospital. He died approximately three months after he first displayed respiratory symptoms.

5. By reason of s 16 of the *Prisons Act 1981 (*WA), as a sentenced prisoner, Mr Mackay was in the custody of the Chief Executive Officer of the Department of Justice. Therefore, he was a "*person held in care*" within the meaning of s 3 of the *Coroners Act 1996* (WA) (Coroners Act). His death was reported to the coroner as required and an inquest was mandated under s 22(1)(a) of the Coroners Act.

6. I held an inquest into Mr Mackay's death on 10 January 2023. I heard evidence from Dr Catherine Gunson (Dr Gunson), Acting Director of Medical Services, Department of Justice, in relation to the health services offered to Mr Mackay, and from Ms Toni Palmer (Ms Palmer) Senior Review Officer, Department of Justice, who oversees the departmental reviews into deaths in custody.

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[1] Exhibit 1, tab 15.
[2] Exhibit 1, tabs 5 and 17.

7. I received one exhibit containing 18 tabs into evidence at the inquest. Investigations continued and I received a further eight exhibits (being exhibits 2 to 9) into evidence between 25 January and 8 February 2023.

8. My primary function under s 25(1) of the Coroners Act is to find how Mr Mackay's death occurred, and the cause of his death. Section 25(5) of the Coroners Act prohibits me from framing a finding or comment in such a way as to appear to determine any question of civil liability or to suggest that any person is guilty of an offence.

9. As Mr Mackay was a person held in care, pursuant to s 25(3) of the Coroners Act, in this finding I must comment on the quality of his supervision, treatment and care. This obligation reflects the community's concern about the treatment of those who are deprived of their liberty.

10. The focus of the inquest was on the care provided to Mr Mackay.

11. My findings appear below.

MR MACKAY

12. Mr Mackay, an Aboriginal man, was born in Port Hedland on 29 March 1976, one of seven children of his parents. Sadly, his father died in a car accident when he was two years old. After his father's death, he went to live with his grandmother in Geraldton.[3]

13. Mr Mackay enjoyed a healthy childhood and played a number of sports, including football and basketball. He went to schools in Port Hedland, Carnarvon and Geraldton and appears to have completed his studies up to year 10, though some of his schooling was sporadic and missed due to difficulties he experienced in achieving a stable and consistent attendance.[4]

14. Mr Mackay had a long-term partner with whom he shared a number of children, and he was also a grandfather.[5]

15. For a period of time Mr Mackay was employed by an Aboriginal Corporation, working at a fruit farm, a prawn factory, a fuel station and a tyre outlet.[6]

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[3] Exhibit 1, tabs 2 and 9.
[4] Ibid.
[5] Ibid.
[6] Exhibit 1, tab 15.

16. After a time, Mr Mackay went to live in a remote alcohol free Aboriginal community in the eastern region of the Pilbara. However, he would visit Broome and Post Hedland, and when there, he would be seen to drink alcohol to excess, and be exposed to anti-social behaviour and the usage of illicit drugs.[7]

17. In addition to a high alcohol intake, Mr Mackay smoked heavily, and he also intermittently used intravenous drugs. As a result of this intravenous drug usage, he was diagnosed with hepatitis C in 2012. He was treated for this disease in 2017, and was re-infected in 2020, and treated again. He had also been prescribed medication for depression.[8]

18. Mr Mackay's family informed the court that there were intra-familial difficulties experienced due to some of his criminal convictions. Some members of his family advised him that they no longer wished to remain in contact with him, and those connections were not maintained.[9]

19. However, Mr Mackay maintained a regular and ongoing contact with his mother up until the time of his death, through weekly telephone calls via the Prisoner Telephone System. Previously he had received visits from his mother and other relatives whilst placed at a regional prison for visits. Records reflect that Mr Mackay was made aware of e-visits, and the process for temporary transfer for visit purposes, in order to maintain social contact in the future, as part of his Custodial Management and Placement Report completed at Casuarina Prison on 14 January 2021.[10]

CUSTODIAL STATUS

20. On 4 September 2020, Mr Mackay completed a 10 year and six month term of imprisonment that had been imposed by the District Court at Perth in respect of various serious offences. Afterwards he continued to be remanded in prison under the Interim Indefinite Detention Order made by the Supreme Court on 6 August 2020 under the *Dangerous Sexual Offenders Act 2006* (WA). This remained in force until a substantive Indefinite Detention Order, subject to annual review, was made by the Supreme Court on 23 December 2020 under the HRSO Act. He was held in custody at Casuarina Prison, due

[7] Ibid.
[8] Exhibit 1, tabs 2 and 17.
[9] Exhibit 1, tabs 2 and 9.
[10] Exhibit 1, tab 15.

to his security level being set at "*maximum security*." It was his thirteenth admission to a prison in Western Australia.[11]

21. The Indefinite Detention Order was due to unmet treatment needs, and an extensive criminal history of violent offending, including sexual offending. It was determined that Mr Mackay had a high risk of re-offending. He had a poor response to prior Community Supervision Orders, with four out of six previous orders either cancelled due to re-offending, or breached.[12]

22. On 14 January 2021, Mr Mackay's Custodial Management and Placement Report outlined his serious offending, recorded that the Indefinite Detention Order was imposed to ensure adequate protection of the community, and recorded that his treatment needs would need to be addressed before he would be released.[13]

23. The Custodial Management and Placement Report recorded the determination that Mr Mackay would remain at Casuarina Prison due to his "*maximum security*" rating. Steps were commenced to formulate an Individual Management Plan for him. Shortly prior to his death, the Initial Individual Management Plan process for Mr Mackay had commenced, and he had been assessed for educational and vocational training (on 19 January 2021). The next review for his Individual Management Plan had been scheduled for 22 July 2021.[14]

24. Mr Mackay's Indefinite Detention Order would have come up for its first statutory review on 22 December 2021.[15]

MEDICAL TREATMENT AND CARE IN CUSTODY

25. Mr Mackay's Electronic Health On-Line medical notes (EcHO Notes) do not indicate that he had any serious medical conditions in the last two-year period immediately preceding the commencement of his Indefinite Detention Order on 23 December 2020.[16]

26. The focus of the inquest was on the care and treatment offered to Mr Mackay on and after 31 December 2020 when he was first seen to have respiratory related symptoms upon presentation to the Casuarina Medical Centre. Dr Gunson reviewed Mr Mackay's medical records and could not find a

[11] Exhibit 1, tabs 10, 11 and 15.
[12] Exhibit 1, tab 15
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid.

record of any symptoms that she would have ascribed to the presence of lung cancer prior to that time.[17]

27. Following prompt investigations at Fiona Stanley Hospital, Mr Mackay was found to have a stage 4 metastatic adenocarcinoma of the lung. In the months prior to his death, he had numerous presentations to Fiona Stanley Hospital due to the accumulation of malignant fluid collections in his chest cavity (namely, around his lungs) and in the pericardium (namely, around his heart), which required drainage. The procedures were performed for symptom control and were not curative in nature.[18]

28. At the inquest Dr Gunson explained that in the case of stage 4 metastatic adenocarcinoma of the lung, meaning that the cancer has metastasised to sites other than the lung, only palliative options for care are offered. She informed the court that this type of adenocarcinoma, which was not a "*solid mass*" is known to present at a late stage. It was a diffuse growth of cells, and a tumour was not able to convincingly be seen. Consequently, it is unlikely that it could have been detected earlier by a chest x-ray.[19]

29. The details of medical treatment and care appear below.

First admission to Fiona Stanley Hospital

30. On 31 December 2020 Mr Mackay presented to the Casuarina Medical Centre complaining of a cough, tightness and pain in his chest, pain in his throat, upper abdominal pain and vomiting. He was reviewed by the doctor and arrangements were promptly made to transfer him by ambulance to Fiona Stanley Hospital for review.[20]

31. Mr Mackay was admitted to Fiona Stanley Hospital on 31 December 2020, and he remained there as an inpatient until 13 January 2021.[21]

32. During this admission Mr Mackay was assessed and diagnosed with a large pericardial effusion (fluid in the sac around the heart) for which he underwent pericardiocentesis (the insertion of a needle to drain the fluid around the heart). He was also diagnosed with left pleural effusion (fluid in the space surrounding the lungs) which worsened, requiring him to undergo

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[17] ts 6.
[18] Exhibit 1, tabs 6 and 15.
[19] ts 5 to 7; ts 15.
[20] Exhibit 1, tabs 14, 15 and 17.
[21] Ibid.

a thoracentesis (insertion of a needle to drain fluid around the lungs). He was administered a diuretic to treat his fluid overload.[22]

33. Mr Mackay's liver function tests were found to be deranged, and this was thought to be related to his recent re-infection with Hepatitis C. He was referred to the Hepatology Department at Fiona Stanley Hospital for treatment.[23]

34. At this stage, it was suspected that Mr Mackay had a metastatic adenocarcinoma of the lung (lung cancer). A CT scan was performed, but no obvious mass was detected in Mr Mackay's chest, abdomen or pelvis. To further investigate the suspected lung cancer and its origin, arrangements were made for him to undergo a PET scan at a future date, as an outpatient.[24]

Return to Casuarina Prison

35. After his assessment and treatment, Mr Mackay was discharged from Fiona Stanley Hospital and returned to Casuarina Prison on 13 January 2021. He underwent a post-hospitalisation review with the prison doctor on 14 January 2021, who noted the possibility of lung cancer. The prison doctor ordered observations twice daily, with a further review the next week. On 15 January Mr Mackay was transferred to the Casuarina Infirmary, and permanently housed there for closer monitoring (there were no beds available on 13 and 14 January 2021).[25]

36. Mr Mackay was reviewed by the prison doctor again on 18 and 21 January 2021. On the latter date he said he was feeling better but complained of some breathing difficulties when lying on his left-hand side. It was noted that his chest was clear, and his oxygen saturation was 98%. The reviewing doctor was aware that Mr Mackay was awaiting the PET scan to identify the origin of the suspected lung cancer and cleared him to return to his unit pending those further investigations.[26]

37. Mr Mackay was reviewed by the prison doctor again on 28 January 2021 and on this date, he reported nausea, and was talking in only a few words at a time. His oxygen saturation had dropped, and he had reduced air entry in the left lung, suggestive of a re-accumulation of pleural fluid. He looked

[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Exhibit 1, tabs 14, 15 and 17; ts 7.
[26] Exhibit 1, tab 17.

uncomfortable and unwell. The doctor arranged for his transfer to Fiona Stanley Hospital by ambulance.[27]

Second admission to Fiona Stanley Hospital

38. Mr Mackay presented to Fiona Stanley Hospital on 28 January 2021, and he remained there as an inpatient until 8 February 2021.[28]

39. He was diagnosed with worsening pericardial effusions and left pleural effusion. On 29 January 2021 he underwent another pericardiocentesis, with the drain left in situ. Cytology of the pericardial fluid confirmed metastatic adenocarcinoma.[29]

40. Mr Mackay's diagnosis was considered to be metastatic lung adenocarcinoma (stage 4) with an uncertain primary site.[30]

41. On 4 February 2021 he underwent a pericardial window operation in which a small part of the sac around the heart was removed to allow excess fluid to drain. A chest drain was inserted to drain the fluid around the lung.[31]

42. On 5 February 2021, a PET scan showed no lung or pleural lesions, but showed multiple non-specific lymph nodes in the mediastinal and hilar region of the chest.[32]

Return to Casuarina Prison

43. Mr Mackay was discharged from Fiona Stanley Hospital and returned to Casuarina Prison on 8 February 2021. The nursing review at Casuarina Medical Centre noted the hospital treatment and the required inpatient follow up.[33]

44. On 9 February 2021, Mr Mackay was reviewed by the prison doctor, who also noted the hospital treatment, and the required follow up. Mr Mackay was in pain and analgesia was scripted.[34]

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[27] Ibid.
[28] Exhibit 1, tabs 15 and 17.
[29] Exhibit 1, tabs 14, 15 and 17.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Exhibit 1, tabs 14, 15 and 17.
[34] Ibid.

45. In view of his medical condition, his medical management, and his prognosis, on 9 February 2021 Mr Mackay was placed on the Terminally Ill Module at Stage 3 by the Director of Medical Services at Casuarina Prison, due to the expectation of his death within three months, or the possibility of sudden death, due to the advanced stage of his metastatic adenocarcinoma of the lung. Mr Mackay was referred to the palliative care team. His prognosis was considered to be: "…. *poor though investigations regarding extent and nature of disease are ongoing*."[35]

46. Mr Mackay's health continued to be regularly monitored. On 14 February 2021 in the course of a nursing review, it was noted that excess fluid was leaking from his chest drain site, and he was returned to Fiona Stanley Hospital by ambulance.[36]

Third admission to Fiona Stanley Hospital

47. Mr Mackay presented to Fiona Stanley Hospital on 14 February 2021, and he remained there as an inpatient until 18 February 2021.[37]

48. A pericardial effusion and a pleural effusion were noted. Systemic therapy was prescribed to decrease the re-accumulation of fluid in his chest and stronger pain medications were prescribed.[38]

Return to Casuarina Prison

49. Mr Mackay was discharged from Fiona Stanley Hospital and returned to Casuarina Prison on 18 February 2021, to the Casuarina Infirmary. The nursing review on that date noted the hospital treatment. The prison doctor who reviewed him the next day assessed him and increased his pain medications.[39]

50. Mr Mackay continued to be regularly monitored by the doctor, the nurse and the palliative care team at the Casuarina Infirmary. His dressing related to the chest drain was changed daily. On 10 March 2021, following a Multidisciplinary Team Meeting of the Oncology Clinic, Mr Mackay's cancer was reported to be a TTF1 positive, stage IVA adenocarcinoma.[40]

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[35] Exhibit 1, tabs 15 and 17.
[36] Exhibit 1, tabs 15 and 17.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid.

51. On 14 March 2021 during a nursing review, it was noted that he was having difficulties breathing and he had chest pain. As a result, he was returned to Fiona Stanley Hospital by ambulance.[41]

Fourth admission to Fiona Stanley Hospital

52. Mr Mackay presented to Fiona Stanley Hospital on 14 March 2021, and he remained there as an inpatient until 31 March 2021. It was his third hospital admission for the recurrent pleural effusions. The prison nurse made daily calls to Fiona Stanley Hospital to follow up on his progress.[42]

53. On 19 March 2021 Mr Mackay underwent some procedures at Fiona Stanley Hospital to manage his ongoing pleural effusions. Previously there were not enough spaces on the emergency list, and this was the first time such procedures could be undertaken, as follows:

    a. subxiphoid drainage of pericardial effusions with pericardial window; and

    b. drainage of left pleural effusion and insertion of a left PleurX catheter (this type of catheter is used for intermittent, long-term drainage of recurrent pleural effusions).[43]

Return to Casuarina Prison

54. Mr Mackay recovered well and was returned to the Casuarina Prison infirmary on 31 March 2021. He had a "*Rocket drain*" in his left chest, to allow for the drainage of the recurrent effusion from his chest. The instructions were for the catheter to be drained for one hour each day.[44]

55. On the date of his return, Mr Mackay was reviewed by the prison nurse and on the next day (1 April 2021) he underwent the requisite drainage of the catheter, and he was reviewed by the prison doctor.[45]

56. The prison doctor reviewed the Fiona Stanley Hospital discharge summary and noted that Mr Mackay had some shortness of breath and an increased heart rate. The prison doctor also noted that Mr Mackay's surgical sites were

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[41] Ibid.
[42] Ibid.
[43] Exhibit 1, tab 17.
[44] Ibid.
[45] Ibid.

healing. Mr Mackay complained of chest and back pain and some analgesia was scripted.[46]

57. However, over the course of the day Mr Mackay's condition deteriorated. He was reviewed by the prison nurse on the evening of 1 April 2021 who noted that his drain was leaking fluid. He was short of breath and tachycardic. The prison nurse sought the advice of the Director of Medical Services, which resulted in Mr Mackay being returned to Fiona Stanley Hospital by ambulance.[47]

Fifth admission to Fiona Stanley Hospital

58. Mr Mackay presented to Fiona Stanley Hospital on 1 April 2021 in respiratory distress, with chest pains and fevers. He was treated at this hospital, and he remained there until he died on 3 April 2021. The details of his treatment follow.[48]

59. Investigations commenced upon Mr Mackay's arrival. A CT scan of his chest showed an increase in the volume of the pericardial effusion with an associated compression of the left atrium and left pulmonary veins. A bedside echocardiogram was performed, showing pleural and pericardial effusion. It was felt that the pleural and pericardial fluid was most likely infected. He was commenced on IV antibiotics and oxygen therapy.[49]

60. Mr Mackay continued to deteriorate and after discussion amongst the medical specialists involved in his care, it was decided to perform a surgical washout to control the infection. Consequently, Mr Mackay underwent a left posterolateral thoracotomy and washout on 3 April 2021. No pus or abscess was found in the chest. However, thickened pleura and serous loculated pleural effusions were noted.[50]

61. During this surgery Mr Mackay experienced significant respiratory distress and suffered a PEA cardiac arrest, possibly as a result of the compression effect on his heart from the surrounding effusion, when positioned on his right side to obtain surgical access to his chest. CPR was promptly commenced, together with an emergency subxiphoid drainage of the pericardium. However, it was not possible to drain this collection from the subxiphoid window. More invasive surgery with sternotomy would have

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46 Ibid.
47 Exhibit
48 Exhibit 1, tabs 13 to 15; Exhibit 1, tab 17.
49 Ibid.
50 Ibid.

been required (involving surgical incision through the breast bone). Mr Mackay was not stable enough for this procedure. Antibiotic treatment was continued, and he was transferred to the ICU.[51]

62. Mr Mackay was moribund upon his arrival at the ICU. Despite continuing medical treatment, he could not be revived, and he was pronounced dead a short time later, at 6.53 pm on 3 April 2021.[52]

CAUSE AND MANNER OF DEATH

63. On 15 April 2021 the forensic pathologists Dr N. Vagaja and Dr L. Downs (together referred to as the forensic pathologists) made a post mortem examination at the State Mortuary on Mr Mackay's body. Relevantly their examination showed an apparent cancer in the left lung associated with the marked thickening of the pleura and the pericardium. There was evidence of recent medical intervention, including cardiothoracic surgery and the medical devices present appeared properly situated.[53]

64. Further investigations were undertaken, with multiple tissues examined under microscope. The forensic pathologists reported that these examinations confirmed the presence of metastatic carcinoma of the lung which had spread through the lungs and into the heart and the pericardium. There was no evidence of infection around the heart.[54]

65. The forensic pathologists' examination of the lining of the chest cavity (the pleura) showed further spread of the lung cancer and some inflammatory changes which were consistent with a possible focal infection in the right lower lung pleura. There was no microscopic evidence of pneumonia or other significant infection in the chest. Smoking related pigmentation was present in the lungs.[55]

66. The forensic pathologists reported that virology testing did not demonstrate the presence of significant viral infection in the lungs. Microbiology testing of the pleural fluid (right lung) showed moderate mixed bacterial growth. Testing of lung tissue, chest catheter, pericardium and blood cultures showed growth of *Staphylococcus aureus*. The forensic pathologists explained that this is a common microorganism which typically asymptomatically

[51] Ibid.
[52] Exhibit 1 tab 5; Exhibit 1, tabs 13 to 15; Exhibit 1, tab 17.
[53] Exhibit 1, tab 6.
[54] Ibid.
[55] Ibid.

colonises the skin and which may be introduced into the body through surgical procedures and catheterisations.[56]

67. The results of toxicological testing, that became available on 10 May 2021 showed multiple common medications in the blood, at low and therapeutic levels. Alcohol was not detected.[57]

68. On 2 November 2021, following the receipt of the results of all the additional investigations, the forensic pathologists formed their opinion on the cause of death.[58]

69. I accept and adopt the forensic pathologists' opinion on cause of death. **I find that the cause of Mr Mackay's death was complications associated with metastatic adenocarcinoma of the lung, treated palliatively**.

70. The forensic pathologists opined that Mr Mackay's complications, including a probable infection, were the consequences of high stage metastatic malignancy which had significant spread within his chest cavity, and which required recurrent palliative drainage of fluid that was accumulating in his chest and around his heart (carrying the risk of infection).[59]

71. I accept and adopt the forensic pathologists' opinion regarding the manner of Mr Mackay's death. **I find that the manner of Mr Mackay's death occurred by way of natural causes**.

QUALITY OF SUPERVISION, TREATMENT AND CARE

72. Immediately before death, Mr Mackay was a prisoner and therefore a person held in care, within the meaning of the Coroners Act.

73. Under s 25(3) of the Coroners Act I must comment on the quality of supervision, treatment and care of Mr Mackay while he was in that care.

74. Dr Gunson reviewed Mr Mackay's Casuarina Prison medical records and felt that Mr Mackay was appropriately referred to specialists and seen in a timely manner. When Mr Mackay was in the Casuarina Infirmary, he could immediately be seen to and assessed by a clinician.[60]

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[56] Ibid.
[57] Exhibit 1, tabs 6 and 7.
[58] Exhibit 1, tab 6.
[59] Ibid.
[60] ts 14.

75. Ms Palmer reviewed Mr Mackay's custodial records at Casuarina Prison and felt that his supervision and care was in accordance with the prevailing policies and procedures. Ms Palmer also reported to the coroner on the range of prisoner treatment programs that would have been available to Mr Mackay at Casuarina Prison, in respect of his extensive criminal history of violent offending. Ms Palmer informed the court that he would have been offered the same programs, to address his criminogenic treatment needs, during his incarcerations prior to the Indefinite Detention Order.[61]

76. At the conclusion of the inquest, I made my comments on the quality of supervision, treatment and care. I found that the treatment of Mr Mackay was fair, reasonable and appropriate, having regard to his supervision, the availability of prisoner treatment programs and the treatment and care that he received in connection with his medical condition. I accepted that his medical condition, and its seriousness, could not reasonably have been identified at an earlier stage during his incarceration.[62]

77. Aspects of the matters that I have taken into consideration in making these comments are outlined below.

Multiple transfers

78. Over a period of approximately three months, between 31 December 2020 and 1 April 2021 Mr Mackay had five admissions to Fiona Stanley Hospital. At the inquest, having regard to the concerns of his family, Dr Gunson was asked about the number of transfers to and from Fiona Stanley Hospital, and whether Mr Mackay should instead have remained in hospital the whole time.

79. Fiona Stanley Hospital is an acute care hospital, and patients are discharged when they no longer require acute care. In her response, Dr Gunson acknowledged the strain on Mr Mackay in being moved back and forth between the prison and the hospital but ultimately felt that if Mr Mackay had been living in the community, he would have been discharged to his home, with in-home nursing care provided.[63]

80. Dr Gunson outlined the medical support available in the Casuarina Infirmary, staffed by a medical officer and nurses, allowing for more frequent nursing observations to be taken, the involvement of the medical

[61] Exhibit 1, tab 18; ts 18 to 19; ts 28.
[62] ts 31.
[63] ts 8 to 9.

officer as requested, the administration of medications including intravenous antibiotics, and a more appropriate environment for changing wound dressings. While it is not (and it cannot be) of the level of a hospital, upon her review Dr Gunson was satisfied that Mr Mackay's daily needs were met on the occasions when he was returned from Fiona Stanley Hospital.[64]

81. Dr Gunson also explained that she had previously written to the Head of the Emergency Department of Fiona Stanley Hospital (in respect of another patient) asking whether some of their clinicians would be interested in an inspection tour of the Casuarina Infirmary, so that they have a greater awareness of the capacity of this facility, including the more limited overnight capacity.[65]

82. After the inquest, as requested, Dr Gunson made some suggestions as to improvements in their communications with hospitals, when seeking to convey the capacity of the Casuarina Infirmary. She suggested an information flyer to accompany the medical paperwork for each prisoner who is being transferred to hospital for treatment to address the following:

a. The limitations faced by prison medical staff in caring for a prisoner post-discharge;

b. The prison locations where health staff are not on duty during the night hours;

c. With respect to information about the Casuarina Prison Infirmary, advice along the following lines:

i. That it is not a hospital environment;

ii. That adherence to custodial restrictions is still required;

iii. That intravenous therapies and more frequent and close observations can be undertaken at the infirmary; and

iv. Contact details for the health staff so that the hospital treatment team could liaise directly with the Casuarina Prison health staff if appropriate or desired.[66]

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64 Ibid.
65 Exhibit 7; ts 10.
66 Exhibit 7.

83. After the inquest through the SSO I received information concerning the views of the Head of the Emergency Department of Fiona Stanley Hospital, indicating a receptiveness to learning about the capacity of the Casuarina Infirmary and to work together to work together to develop guidelines that may be of assistance to both entities.

84. While a recommendation regarding this process is outside the scope of the inquest, it is encouraging to see the preparedness to explain and receive explanations from both entities, with a view to reaching a greater understanding of the issues, when prisoners are discharged from hospital, back to the prison.

85. In the case of Mr Mackay, I am satisfied that the clinical staff at Casuarina Prison and Casuarina Infirmary acted appropriately in assessing him, making their decisions to convey him to Fiona Stanley Hospital for treatment, familiarising themselves with his hospital treatment and his ongoing medical needs upon his discharge and return to prison, monitoring him, managing his symptoms where possible, and escalating his care as appropriate.

The cessation of smoking

86. Mr Mackay was known to have been a heavy smoker, over a long period of time. In her report to the coroner, Dr Gunson, on her overview of issues concerning this case, referred to a lack of interventions to facilitate Mr Mackay's cessation of smoking, noting that during his custodial term, there was only one documented referral for assistance with quitting smoking for Mr Mackay. Dr Gunson felt that it is possible there were informal discussions along the same lines held by other clinicians, but that they were not recorded (though they should be recorded).[67]

87. Dr Gunson also reported that while the link between tobacco smoking and lung cancer has long been documented, and the risk is essentially elevated, the particular mutation that was seen in Mr Mackay's adenocarcinoma of the lung is seen commonly in non-smokers. Dr Gunson was not able to say whether or not continued smoking would affect the progression of the type of lung cancer that Mr Mackay had.[68]

88. While it cannot now be known whether Mr Mackay would have ceased smoking in prison if hypothetically there had been more frequent encouragement and support from clinicians for him to cease smoking, I

[67] Exhibit 1, tab 17; ts 11 to 12.
[68] Exhibit 1, tab 17; ts 17.

accept Dr Gunson's suggestion that there would have been value in his cessation of smoking.[69]

89. I acknowledge the importance of efforts continuing to be made to educate and encourage prisoners to cease smoking, including where appropriate, the prescription of medications. On balance, the better approach is to move towards smoke-free prisons, and to implement programs that assist prisoners, who would otherwise wish to continue to smoke, with this transition. This project is under way and is addressed under the heading: *Improvements*, later in this finding.

Restraints

90. The Department of Justice reported that Broadspectrum Control (Broadspectrum) commenced its hospital sit duties for Mr Mackay on 2 April 2021. Broadspectrum, as it was then known, was the entity responsible for guarding Mr Mackay at Fiona Stanley Hospital, on behalf of the Department of Justice.[70]

91. During the hospital sit duties Mr Mackay was subject to a routine restraint regime, with the condition that at any time a Broadspectrum officer was required to leave the room, an extra restraint in the form of a single handcuff to the bed was to be applied.[71]

92. On that same date of 2 April 2021, the Casuarina prison nurse had commenced a plan for Mr Mackay's referral to Bethesda Hospital for symptom control and management, due to his recent return from Fiona Stanley Hospital and the need to send him back again. However, events overtook this, as a plan was made by his medical specialists to perform surgery at Fiona Stanley Hospital on 3 April 2021. As outlined above, Mr Mackay suffered a cardiac arrest during the surgery and was transferred to ICU, where he later died.[72]

93. Records reflect that at approximately 6.40 pm on 3 April 2021, Fiona Stanley Hospital medical staff informed the Broadspectrum hospital sit staff that Mr Mackay's condition was "*poor*" and that they would be seeking to have all restraints removed. The Broadspectrum hospital sit staff advised that this

[69] Exhibit 1, tab 17; ts 11.
[70] Exhibit 1, tab 15.
[71] Ibid.
[72] Exhibit 1, tabs 14 and 15.

would require approval from Casuarina Prison, which was the appropriate procedure.[73]

94. Approximately 13 minutes later, at 6.53 pm Mr Mackay was pronounced dead and his restraints were removed, with the Broadspectrum hospital sit staff maintaining security of the hospital room until police arrived.[74]

95. It had not been expected, nor anticipated, that Mr Mackay, a Stage 3 Terminally Ill prisoner, would experience a cardiac arrest during his surgery (although the possibility of sudden death had not been negated). A prisoner whose death is expected imminently is classified as a Stage 4 Terminally Ill prisoner.

96. I have considered the process regarding the removal of restraints when prisoners are hospitalised, given that restraints were still in place when Mr Mackay died.

97. At the inquest Ms Palmer outlined the process for seeking and obtaining approval for removal of restraints as follows:

    a. The treating doctor makes the request for removal of restraints, by writing a short letter to that effect, which is delivered to the prison through Broadspectrum;

    b. The Superintendent of the prison, or their delegate, perform a risk assessment and make a decision as to whether all restraints can be removed, or some of them;

    c. The decision is communicated back through Broadspectrum to their officers undertaking the hospital sit duties, and if it has been approved, they will remove the restraints, or alter the restraint regime in accordance with the decision made.[75]

98. Ms Palmer explained this approval process can take minutes, or hours, depending on accessibility of staff. In her experience, however, it is usually a very quick turnaround. She felt that the issue concerning the process for removing restraints could be reviewed, to make it faster, but also pointed to the fact that the prisoner is in a public place (the hospital) but still in the

[73] Exhibit 1, tabs 14 and 15; ts 20.
[74] Ibid.
[75] Exhibit 1, tab 15; ts 20.

custody of the "*home prison*." It follows that this decision could not necessarily be made independently of the Superintendent or their delegate.[76]

99. In terms of safety, regard needs to be had to the prisoner and their health condition, the treating clinicians, visiting family members, the Broadspectrum hospital sit staff and members of the public present at the hospital.

100. After the inquest, and following my request, I received a statement from Ms Palmer, regarding the use of restraints, and the process for their removal. The statement addressed aspects of the Corrective Services Commissioner's Operating Policy and Procedure (COPP) in respect of "*Use of Force and Restraints*" (COPP 11.3) and in respect of "*Conducting Escorts*" (COPP 12.3).[77]

101. The statement elaborated on the procedures regarding restraints referred to above. Records reflect that Mr Mackay was subject to a "*routine*" use of restraints. Relevantly, under paragraph 9.2.1 of COPP 11.3, the Superintendent may authorise the routine use of restraint equipment during a prisoner's temporary absence from a prison (such as conveyance to and from Fiona Stanley Hospital and during that hospital stay). Under paragraph 9.2.2 of COPP 11.3, when having regard to individual risk, particular consideration will be given to:

    a. Medical conditions;

    b. Elderly or frail prisoners; and

    c. Prisoners with significant mobility issues.[78]

102. Under paragraph 5.3.1 of COPP 12.3 further guidance is given on matters to be taken into account when considering the use of restraints. It provides that prisoners with significant medical and/or mobility issues shall not be placed in restraints unless there is a requirement to do so, following the completion of an External Movement Risk Assessment by prison staff, that is approved by the Superintendent of the prison or their delegate. At the material time there was specific caution, in paragraph 5.3.1, in respect of Stage 4 Terminally Ill prisoners, but no specific caution in respect of Stage 3 Terminally Ill prisoners.[79]

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[76] ts 20 to 23.
[77] Exhibits 2, 4 and 8.
[78] Exhibits 2 and 8.
[79] Exhibits 4 and 8.

103. Under paragraph 9.3.6 of COPP 11.3, where medical staff advise that the use of restraints should cease or be modified for medical reasons, this shall occur as soon as possible with due regard to the safety of staff. Requests may be made in writing but are more often made verbally. In Ms Palmer's experience, a treating doctor's recommendation to remove restraints receives a careful focus by the Superintendent or their delegate.[80]

104. I have considered the 13 minute time lapse, from when the doctor sought removal of the restraints, to when Mr Mackay died. The approval process would have required Broadspectrum to communicate that request to the prison, for a decision to be made, and for a response to be communicated back, as outlined above. There was likely an insufficient time period available for that process to occur.

105. I have had regard to Mr Mackay's "*maximum security*" status, the fact that he had not been transferred to Fiona Stanley Hospital in order to remain there for end-of-life palliative care, but instead had been transferred there primarily because the drain in his chest was leaking fluid and he was short of breath and tachycardic. The expectation at that stage was that he would be treated for his pericardial and pleural effusions and either returned to Casuarina Prison or potentially transferred to Bethesda Hospital for symptom control and management.[81]

106. I am satisfied that the Casuarina prison staff and the Broadspectrum hospital sit staff acted in accordance with the prevailing policies and procedures regarding the application of restraints to prisoners such as Mr Mackay, being transferred to a hospital for treatment.

Family contact

107. During the inquest Ms Palmer addressed the considerations regarding notification, and family visits for prisoners who are transferred to hospital. After the inquest Ms Palmer provided a statement that elaborated on the matter of family contact under these circumstances. Paragraph 5.10.1 of COPP 12.2 requires the Superintendent (or officer in charge) of the prison to ensure the prisoner's next of kin/legally appointed guardian is notified in

[80] Exhibits 2 and 8.
[81] Exhibit 1, tabs 15 and 17.

writing, when a prisoner is removed from a prison for the treatment of a serious illness.[82]

108. The intent is to allow for arrangements to be made for family contact and/or visits at the hospital. The notification requirement is subject to security considerations. At the inquest Ms Palmer provided a hypothetical example of a security requirement, such as the existence of a Family and/or Violence Restraining Order, that would need to be properly considered. There was none in respect of Mr Mackay. Ms Palmer also testified as to the process for assessing and communicating details of the next of kin to Broadspectrum, so that as far as is reasonable, contact, in respect of an approved caller/visitor, can be achieved.[83]

109. In the case of Mr Mackay, approval was given, and he contacted his mother by telephone at approximately 11.00 am on 3 April 2021, prior to going into theatre for his surgical procedure.[84]

Review process - IDO

110. At the material time, due to his Indefinite Detention Order, Mr Mackay would not have qualified for consideration for release pursuant to the Royal Prerogative of Mercy, despite being a Stage 3 Terminally Ill prisoner. This is because a prisoner who is the subject of an Indefinite Detention Order would need to apply to the Supreme Court for a review of that Order, subject to certain conditions.[85]

111. The applicable policy, the Commissioner's Operating Policy and Procedure (COPP) 6.2 "*Prisoners with a Terminal Medical Condition*" did not at that time include a specific procedure for the management of reviews for terminally ill prisoners who were subject to an Indefinite Detention Order. Following the inquest into the death of Henry ALLEN the Deputy State Coroner's recommendation was implemented and the appropriate guidance was given in an updated version of COPP 6.2.[86]

112. I am satisfied that this has now been rectified and that COPP 6.2 now provides for a process that relevantly includes the following:

[82] Exhibits 3 and 8; ts 22 to 24.
[83] Exhibits 3 and 8; ts 24 to 25.
[84] Exhibit 1, tab 15.
[85] Exhibit 1, tab 15; ts 26 to 27.
[86] Exhibit 1, tab 15; ts 26 to 27; [2022] WACOR 36

a. Explains that the release of a prisoner the subject of an Indefinite Detention Order can only be considered by the Supreme Court upon application for review; and

b. Provides for advice to be given to the State Solicitor's Office of the prisoner's medical condition with a request that it be forwarded to the prisoner's legal representative.[87]

IMPROVEMENTS

Smoke free prisons

113. After the inquest I was provided with information about the Department of Justice's pilot program related to making all prison facilities in Western Australia smoke free, which is a positive initiative towards a healthier and safer environment for prisoners and staff who work there.[88]

114. The pilot commenced at Bandyup Women's Prison in October 2022, and is supported by the principles outlined in COPP 6.7: "*Smoke free prisons*." There is a strong focus on a staged implementation, ongoing evaluations, and programs to support the transition to a smoke free environment, to enable prisoners and staff to individually prepare for smoking cessation. Support for prisoners includes educational resources, counselling, and access to nicotine replacement therapy.[89]

115. At the inquest Dr Gunson shared her experience of the effects of the transition to a non-smoking prison at Bandyup Prison, indicating that a lot of prisoners appreciate the opportunity and support to cease smoking, stating: "*even a few months without smoking has got to be better than continuing*."[90]

116. Dr Gunson outlined her thoughts around the development of smoke-free prisons programs, referring to everybody doing it together and encouraging each other, and the importance of prison staff not smoking or smelling of smoke when they are working there: "…. *because subtle cues like that increase cravings and then people might be in a difficult emotional state and act out*."[91]

[87] Exhibit 1, tabs 15 and 16.
[88] Exhibit 9.
[89] Ibid.
[90] ts 11.
[91] ts 17.

117. Dr Gunson also suggested that nicotine patches could helpfully be made available for prisoners free of charge, to encourage their usage while they are not smoking.[92]

118. The expectation is that the smoke free prison policy will be rolled out to all prison sites across Western Australia by the end of 2024.[93]

119. While there is no evidence that establishes Mr Mackay's smoking contributed to his lung cancer, clearly he, like any other person with a history of smoking, would be better off not smoking.

CONCLUSION

120. Mr Mackay had been incarcerated in West Australian prisons over a long period of time. Due to the violent nature of his offending, he was placed on an Indefinite Detention Order and kept in custody at Casuarina Prison. When he first showed respiratory symptoms, medical investigations were promptly commenced. He was appropriately monitored at the Casuarina Infirmary and his care was escalated to Fiona Stanley Hospital as required. He had a number of hospital admissions prior to his death, as a consequence of the complications associated with his lung cancer. It is evident that the clinical staff at Casuarina Infirmary made every effort to manage his symptoms and keep him comfortable as far as was possible.

R V C Fogliani
State Coroner
12 January 2024

[92] ts 13.
[93] Exhibit 9.