



# OFFICE OF THE STATE CORONER

## FINDING OF INQUEST

**CITATION:** Inquest into the death of  
**Liam Richard VIDLER-CUMMING**

**TITLE OF COURT:** **Coroner's Court**

**JURISDICTION:** Brisbane

**FILE NO(s):** BRIS-COR 175/01

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July 2006

**FINDINGS OF:** Mr Michael Barnes, State Coroner

**CATCHWORDS:** **CORONERS: Inquest, Shaken baby syndrome.**

### REPRESENTATION:

Counsel Assisting: Dr Wendy Vidler:	Mr Brad Farr Mr Peter Davis, SC (instructed by Ryan & Bosscher Lawyers)
National Family Day Care Association & Elizabeth Benson: Fox)	Mr Stephen Lumb (instructed by Phillips)

# Findings into the death of Liam Richard Vidler-Cumming

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*The Coroners Act 1958* provides in s43(1) that after considering all of the evidence given before a coroner at an inquest the coroner shall give his or her findings in open court. What follows are my findings in the inquest held into the death of Liam Richard Vidler-Cumming.

### ***Introduction***

On 22 March 2001 a baby, Liam Richard Vidler-Cumming, was found by his day carer unconscious in his cot. She commenced cardio-pulmonary resuscitation and called an ambulance. The baby was taken to hospital and attempts to save him continued but two days later he was declared brain dead and his life support system was disconnected.

These findings seek to establish how baby Liam came to suffer the injuries that led to his death and determine whether anybody should be committed for trial in connection with the death.

### ***The Coroner's jurisdiction***

Before turning to the evidence, I will say something about the nature of the coronial jurisdiction.

#### **The basis of the jurisdiction**

Although the inquest was held in 2006, as the death being investigated occurred before 1 December 2003, the date on which the *Coroners Act 2003* was proclaimed, it is a "*pre-commencement death*" within the terms of s100 of that Act and the provisions of the *Coroners Act 1958* (the Act) are therefore preserved in relation to it.

Because the hospital staff recognised that the death of Liam was unnatural or suspicious within the terms of s7(1)(a)(i)(iii) of the Act, they reported the death to police who were obliged by s12(1) to report it to a coroner. Section 7(1) confers jurisdiction on a coroner to investigate such a death and s7B authorises the holding of an inquest into it.

#### **The scope of the Coroner's inquiry and findings**

A coroner has jurisdiction to inquire into the cause and the circumstances of a reportable death.

The Act, in s24, provides that where an inquest is held, it shall be for the purpose of establishing as far as practicable:-

- the fact that a person has died,
- the identity of the deceased,
- when, where and how the death occurred, and
- whether anyone should be charged with a criminal offence alleging he/she caused the death.

After considering all of the evidence presented at the inquest, findings must be given in relation to each of those matters to the extent that they are able to be proved.

An inquest is not a trial between opposing parties but an inquiry into the death. In a leading English case it was described in this way:-

*It is an inquisitorial process, a process of investigation quite unlike a criminal trial, where the prosecutor accuses and the accused defends... The function of an inquest is to seek out and record as many of the facts concerning the death as the public interest requires.*<sup>1</sup>

The focus is on discovering what happened, not on ascribing guilt, attributing blame or apportioning liability. The purpose is to inform the family and the public of how the death occurred with a view to reducing the likelihood of similar deaths. As a result, the Act authorises a coroner to make preventive recommendations<sup>2</sup>, referred to as “*riders*”, but prohibits findings being framed in a way that appears to determine questions of civil liability or suggests a person is guilty of any criminal offence.<sup>3</sup>

### **The admissibility of evidence and the standard of proof**

Proceedings in a coroner’s court are not bound by the rules of evidence because s34 of the Act provides that “*the coroner may admit any evidence the coroner thinks fit*” provided the coroner considers it necessary to establish any of the matters within the scope of the inquest.

This flexibility has been explained as a consequence of an inquest being a fact-finding exercise rather than a means of apportioning guilt: an inquiry rather than a trial.<sup>4</sup>

A coroner should apply the civil standard of proof, namely the balance of probabilities, but the approach referred to as the *Briginshaw* sliding scale is applicable.<sup>5</sup> This means that the more significant the issue to be determined, the more serious an allegation or the more inherently unlikely an occurrence, the clearer and more persuasive the evidence needed for the trier of fact to be sufficiently satisfied that it has been proven to the civil standard.<sup>6</sup>

Of course, when determining whether anyone should be committed for trial, a coroner can only have regard to evidence that could be admitted in a criminal trial and will only commit if he/she considers an offence could be proven to the criminal standard of beyond reasonable doubt.

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<sup>1</sup> *R v South London Coroner; ex parte Thompson* (1982) 126 S.J. 625

<sup>2</sup> s43(5)

<sup>3</sup> s43(6)

<sup>4</sup> *R v South London Coroner; ex parte Thompson* per Lord Lane CJ, (1982) 126 S.J. 625

<sup>5</sup> *Anderson v Blashki* [1993] 2 VR 89 at 96 per Gobbo J

<sup>6</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 per Sir Owen Dixon J

It is also clear that a coroner is obliged to comply with the rules of natural justice and to act judicially.<sup>7</sup> This means that no findings adverse to the interest of any party may be made without that party first being given a right to be heard in opposition to that finding. As *Annetts v McCann*<sup>8</sup> makes clear that includes being given an opportunity to make submissions against findings that might be damaging to the reputation of any individual or organisation.

### ***The investigation***

I turn now to a description of the investigation into the death.

The ambulance officers who responded to the calls for assistance at the day carer's house advised police of the incident and a local uniformed crew and a detective from the Morningside Juvenile Aid Bureau attended and commenced investigating the incident. Police photographers and scenes of crime officers also went to the house and took possession of items of the baby's clothing, the feeding bottles, etc. A version was obtained from all those who had contact with the baby on that day.

On 24 March, when the investigating officers were advised that the life support system would be disconnected, a homicide investigation was commenced.

During the course of the inquiry, all witnesses were extensively interviewed and reports were obtained from various relevant medical specialists.

I am satisfied that the investigation was thorough and competently carried out.

### ***The inquest***

The inquest was opened on 20 November 2003. Counsel assisting was appointed and leave to appear was granted to the parents of the dead baby, Dr Wendy Vidler and Mr Robert Cumming and the day carer Mrs Elizabeth Benson. The matter was then adjourned to enable further inquiries to be made. The inquest reconvened on 4 May 2006. A witness list was settled and a list of issues was agreed upon. The hearing proper then proceeded on 24 and 25 July. Sixteen witnesses gave evidence and 45 exhibits were tendered.

### ***The evidence***

I turn now to the evidence. I can not, of course, even summarise all of the information contained in the exhibits and transcript but I consider it appropriate to record in these reasons the findings of fact on which I have based my decisions concerning the particulars of the death.

### ***The Vidler-Cumming household***

First, a description of Liam's family and the living arrangements at the time of his death may be useful. His mother, Dr Wendy Vidler lived at 7 Kennet Place

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<sup>7</sup> *Harmsworth v State Coroner* [1989] VR 989 at 994 and see a useful discussion of the issue in Freckelton I., "Inquest Law" in *The inquest handbook*, Selby H., Federation Press, 1998 at 13

<sup>8</sup> (1990) 65 ALJR 167 at 168

Carina in a two story unit with his father, Mr Robert Cumming and her two children from a previous relationship; Julian Vidler Ellerton (d.o.b 21.03.1996) and Abigail Bakhita Ellerton (d.o.b. 23.06.1999). Mr Cumming has a son Mathew Todd Cumming (d.o.b. 7.03.1992) who sometimes stayed with them on access weekends or special occasions.

### **Medical issues - mother and son**

Liam was born by elective caesarean section at the Wesley Hospital on 28 December 2000. His birth weight was 3675 grams and a physical examination by a paediatrician, Dr Bruce Slaughter, was unremarkable. Liam was reviewed five times during this admission and other than moderate jaundice he was found to be healthy. Liam and his mother left hospital when he was six days old.

On 15 February 2001, when Liam was seven weeks old, Dr Slaughter again reviewed him. He had developed an eye infection for which his mother had consulted an ophthalmologist. He was regurgitating after feeds which was treated with antacids and thickened formula. Liam appeared bright, alert and was smiling. He had gained adequate weight. His head showed mild postural moulding which the doctor considered was of no significance. For reasons unknown, his mother had arranged for a renal ultrasound to be performed. The results were within normal limits. Dr Slaughter gave evidence that he had no concerns about Liam's progress, health or wellbeing at this stage.

Dr Vidler was apparently not reassured by Dr Slaughter's comments concerning the mild and temporary deformity of Liam's head as she raised it with another doctor on two occasions. On 8 March, Dr Vidler attended on Dr Coroneos, a neurosurgeon, in relation to neck and back pain she had suffered since Liam's birth. In response to a request from Dr Vidler, Dr Coroneos looked at Liam's head and indicated that there was some asymmetry but this was of no concern. He gave evidence that the slight distortion was a common symptom produced by pressure in the womb or birth canal or as a result of a baby habitually sleeping in the same position.

On 22 March 2001, Dr Vidler again attended Dr Coroneos' rooms in connection with a neck injury that was causing her pain and asked if Dr Coroneos would again examine Liam's head. Dr Coroneos inspected Liam's face and head from in front and above. He said in evidence that he detected nothing out of the ordinary in the baby on this occasion.

### **The child care arrangements**

At the time of Liam's death, Dr Vidler was easing herself back into work as a general practitioner and accordingly Liam had begun going to the same home based day care as Dr Vidler's two older children. On Mondays, Abigail and Liam were cared for by Mrs Elizabeth Benson, a day care mother working from home who was sponsored by the Salvation Army Carina Family Day Care. In 2001, Mrs Benson had been a registered day care provider for six and a half years. Mrs Benson holds a first aid certificate including cardio pulmonary resuscitation and extensive in service training including nutrition,

behaviour management and SIDS courses. Julian attended the Canossa Kindergarten on Mondays, Tuesdays and Wednesdays. On Thursdays and Fridays, all three children attended Mrs Benson's home.

### **The events of 22 March**

I turn now to the events on the day that Liam sustained his fatal injuries.

Robert Cumming arose between 5 and 5:30am and as usual prepared a morning bottle for Liam and his sister Abigail.

He says that after feeding the baby, Liam was put in a mechanical rocker in the downstairs living room while Mr Cumming went about showering and getting ready for work.

He says that during this time Liam remained in his rocker, Abby and her brother Julian played in the lounge room, while Matt got himself ready for school.

Wendy Vidler arose sometime after 7am, before Mr Cumming left the house at about 7:45am.

Just before Mr Cumming and Matt left, Wendy's mother Mary Jo Vidler arrived to assist getting the children ready for day care and transporting them there.

All three adults say that nothing untoward occurred in the morning before Mr Cumming left the house.

At about 8:30am Mrs Vidler senior, drove her grandson Julian to Elizabeth Benson's house. The other two children, Liam and Abby followed with their mother in her car. Julian ran inside when they got there and Mary Jo Vidler assisted Abby into the house. Wendy Vidler took the older children's bags into the house and then left with Liam to go to a doctor's appointment in the city.

The appointment was with Dr Michael Coroneos. As described earlier, Wendy Vidler was attending on him for a number of ailments. The appointment on this day was for 9:30am. When Dr Vidler came into Dr Coroneos' examination room she again asked him to look at Liam's head. Dr Coroneos says he inspected Liam's head from above and from in front. He says that he attracted the infant's attention and moved around the room noting that the infant followed him with his eyes. Dr Coroneos says he also examined the sutures and fontanelles on the baby's head with his fingers. He determined from these examinations that the child was developing well neurologically and that the asymmetry would resolve with time.

He is adamant that at this time the baby appeared completely normal other than having a mild developmental variation of the head called plagiocephaly. He also said in evidence that he feels certain that if the baby was then suffering from the injuries that led to his death, Dr Coroneos would have detected that something was amiss.

After undertaking this examination the baby was given to Dr Coroneos' receptionist to be cared for while Dr Coroneos attended to Dr Vidler.

After this appointment, Dr Vidler and Liam left the rooms and went downstairs where she came across an acquaintance, Mr Ram Rau. He says this was at about 10:10am. They stopped and talked for 5 or 6 minutes. Mr Ram Rau remembers that Liam was in a stroller and that he became a bit "niggly" and that he "grizzled". He didn't pay much attention to the child.

Dr Vidler then crossed Wickham Terrace to a multi-story car park where her car was parked, put Liam into the baby capsule and drove to Elizabeth Benson's house. She had forgotten to take into the doctor's surgery the bottle of formula that she had in the car and so Liam had not been fed since his father fed him early in the morning.

There is some discrepancy about the time she arrived at the Benson's house but it seems it must have been between 10:30am and 11am.

Elizabeth Benson immediately changed Liam's nappy. She then handed the baby back to Dr Vidler whilst she helped Julian change into the clothes he was to wear to a birthday party his mother was taking him to. As soon as this was completed, Dr Vidler and Julian left, leaving Liam and Abby with Mrs Benson. There was one other little girl also being cared for in the house. David Abbot, the boyfriend of Mrs Benson's daughter, was in the living room of the house. He was recuperating from minor surgery. His sister, Belinda Church, who had driven David there was in the day care room with Mrs Benson when Liam and Wendy arrived and she remained there while Liam was changed and then fed after his mother had left.

Mrs Benson has given inconsistent accounts of Liam's condition when he arrived at her home on this morning.

When interviewed by a general duties officer later the same day, Mrs Benson said that when Liam was dropped off he was "*in good health and appeared very happy.*" She went on to say that "*everything appeared normal*" and that after she'd fed him she put him in the cot and "*Liam then played for a while*".

However, four days later, a lengthy statement was taken from Mrs Benson by a detective from the Juvenile Aid Bureau. In that statement Mrs Benson said that when Liam was brought to her place at about 10:40am, he was very hot and humid; "*he was wet with perspiration*". She also said that when she fed Liam he was drowsy and that he was slower to drink his bottle than was usual. She said that she had to keep withdrawing the teat to keep him sufficiently interested to finish the bottle.

Another version of Liam's condition when he came to the Benson's household was provided by Ms Church, a registered nurse. She made notes of what occurred and confirmed in evidence that she had seen nothing unusual about Liam at the time in question. Her notes record that "*he sucked well*" although this information has to be seen in the context of Ms Church never before

having seen the baby being fed and the fact that he had not been fed since early in the morning and was an hour or more overdue for his feed.

After feeding Liam, Mrs Benson put him in a collapsible cot in her bedroom and returned to the day care room to attend to Abby and the other child she was minding.

Ms Church left the house soon after. This was around noon.

Mrs Benson checked Liam about fifteen minutes later and he appeared to be sleeping soundly on his stomach.

After about another fifteen minutes she accompanied the other child to the toilet and took the opportunity to again look in on Liam. Her statement says she thought that the position of his head was unusual and so she leant down and touched him on the back. She said there was no response and she could see that the skin around his mouth was blue. She grabbed him out of the cot and yelled to Mr Abbott in the lounge room. She placed the baby on the end of her double bed and immediately commenced CPR.

Mr Abbot came into the room and Mrs Benson told him to call the ambulance. He did so. The call was made at about 12.35pm. He then relayed instructions concerning the CPR provided by the ambulance operator.

Two ambulances arrived in quick succession after a few minutes.

The paramedics established that the baby was not breathing but that he had a slow ventricular heart rhythm. They ventilated the patient and his heart beat improved.

### **Hospital care**

They then transported Liam to the Mater Children's Hospital. The resuscitation continued at the hospital. However tests revealed that Liam's brain was grossly oedematous.

At about 6pm on the evening of 22 March, Liam was examined and found to have retinal haemorrhages in the right eye. He was also found to have gross coagulopathy.

Over the next twenty four hours, Liam's neurological status continued to deteriorate with a reduction in spontaneous breathing and then loss of pupillary reflexes.

On 23 March 2001, Mrs Benson and her daughter went to the hospital to see Liam. They spoke with Wendy Vidler about Liam's injuries and prognosis. They recall her making comments about the police investigation, indicating that she had an alibi should she become the focus of suspicion. They considered she made inappropriate comments not consistent with what they perceived to be normal for a grieving mother.

On 24 March 2001 testing confirmed loss of brain stem reflexes; that is, Liam was brain dead. At 3:45pm on 24 March 2001 ventilatory support was removed which resulted in almost immediate cessation of cardiac function.

At the time the paediatrician treating Liam came to the view that it was difficult to exclude a metabolic disorder or mitochondrial dysfunction. He suggested the retinal haemorrhages were difficult to interpret in view of the abnormal coagulation profile and concluded "*the most likely condition (to explain the death) remains a probable metabolic disorder*".

### **Expert medical evidence**

On 26 March 2001, an autopsy was conducted on Liam's body by Professor David Williams, an experienced forensic pathologist. Of significance, Professor Williams found the following injuries;

- Underneath the scalp on each side of the head above the ear and slightly towards the back there were bruises.
- The skull was not fractured but the brain was severely swollen.
- There was a subdural haemorrhage with less than five grams of "free" blood between the cerebral hemispheres and anteriorly.
- There were retinal haemorrhages in both eyes.
- There was global hypoxic brain necrosis.

Professor Williams formed the opinion that these injuries were indicative of two separate insults to the brain; the bruises on each side of the head were consistent with blunt trauma to each side of the head and the subdural haemorrhage, the retinal haemorrhages and global hypoxic necrosis were "*highly suggestive*" of the infant having being violently shaken.

Professor Williams was assisted in reaching his conclusions by a report provided by Dr Tannenberg, a neuropathologist. Dr Tannenberg examined the brain and spinal cord and found global hypoxic necrosis, interhemispheric subdural haemorrhage and retinal haemorrhages.

Both Professor Williams and Dr Tannenberg, when giving evidence, indicated that the global necrosis could be caused by any extended deprivation of oxygen. Both were equally adamant however that the bruises to the sides of the head, the subdural haemorrhage and the retinal haemorrhages could only be explained by the application of force. Whilst the bruises to the side of the head and the subdural haemorrhage would not have required very significant force, the retinal haemorrhaging could only be caused by severe trauma.

An expert ophthalmologist, Dr Stark, also provided a report and gave evidence. Dr Stark said even if a baby was a passenger in a car that collided with another head on, such retinal haemorrhaging would not be expected. In his view, considerable violence with rotational force, such as could occur if a

baby was violently shaken, would be necessary. He indicated that in such a scenario if the baby was then thrown onto even a soft surface, the other injuries could occur.

Dr Stark also indicated that haemorrhaging in the sheath of the optic nerve, such as was found in this case, is common in non-accidental injuries and is consistent with shaken baby syndrome. He went so far as to say that it was “a *hallmark*” of that diagnosis.

The paediatrician who was present at the baby’s delivery and who had examined Liam a month before his death, Dr Slaughter, gave evidence that he was suffering from no abnormalities at those times. A metabolic physician, Dr McGill, who reviewed all of the records and test results relating to Liam, discounted a metabolic disorder as an explanation for the global necrosis.

### ***Findings required by s43(2)***

I am required to find, so far as has been proved, who the deceased was and when, where and how he came by his death.

As a result of considering all of the material contained in the exhibits and the evidence given by the witnesses, I am able to make the following findings.

**Identity of the deceased –** The deceased was Liam Richard Vidler-Cumming.

**Place of death –** He died at the Mater Hospital, South Brisbane, in Queensland.

**Date of death –** He died on 24 March 2001.

**Cause of death –** The cause of death was global hypoxic brain necrosis as a result of a non-accidental violent shaking of the deceased.

### ***The committal question***

In addition to the findings concerning the particulars of the death that I have just pronounced, I am also required by s 24(1)(d) and s43(2)(b) of the Act to find whether anyone should be charged with murder or manslaughter as a result of the death.

It is not my role as Coroner to decide whether any person is guilty of an offence in connection with the death of Liam, rather, I have to determine whether anyone should be committed for trial. That requires I consider whether a properly instructed jury *could*, on all of the evidence presented at the inquest, reasonably convict a specific person of an offence.<sup>9</sup>

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<sup>9</sup> see *Short v Davey* [1980]Qd R 412

## **The Criminal Code provisions concerning unlawful killing**

Section 291 of the Criminal Code provides that it is unlawful to kill another person unless that killing is authorised, justified or excused by law.

Section 293 provides that any person who causes the death of another is deemed to have killed that person.

Section 300 *Criminal Code* states that “*any person who unlawfully kills another person is guilty of a crime, which is called murder, or manslaughter, according to the circumstances of the case.*”

Insofar as is relevant to this case, s302 defines murder as an unlawful killing where the offender intends to kill or do grievous bodily harm.

Section 303 provides that any person who unlawfully kills another in circumstances which do not constitute murder is guilty of manslaughter.

Applying that law to the facts of this case, I am able to make the following findings.

There is ample evidence that Liam did not die as a result of the progression of some natural disease or a congenital condition. I consider there is sufficient evidence to enable it to be proven to the criminal standard that Liam died as a result of some violent act or acts. There was some attempt by Dr Vidler’s legal representatives to suggest that the injuries could have been caused by the cot Liam was in, collapsing and smothering him. While such an event could lead to global hypoxia and even explain the bruising to his head, it provides no explanation for the severe retinal haemorrhages. These were so severe that Dr Stark was adamant that they could only be caused by severe force in multiple planes. The cot theory is baseless and can be disregarded.

I consider the evidence establishes that Liam’s injuries were most likely caused by the severe shaking of the baby either preceded or followed by his being slammed against some padded surface. Dr Stark in his evidence rejected the possibility that such injuries were caused accidentally. He said that in particular haemorrhaging in the sheath of the optic nerve is common in non accidental injury and was a “*hallmark of shaken baby syndrome.*” I consider that the totality of the evidence would enable a jury to reasonably conclude that the death was caused by an intentional act and was therefore unlawful.

The question is, who did that act. None of those who gave evidence at the inquest admitted to witnessing it. None of those who were interviewed by police admitted to doing it or seeing anybody else do it. Of course, responsibility for the death could be established by circumstantial evidence but to do that the Crown would need to be able to prove when the death occurred and show that only the accused was, at that point in time, in a position to have done it. I don’t consider the evidence enables those matters to be established with sufficient certainty.

Despite some conflict in the evidence, I do not consider that the examination undertaken by Dr Coroneos would have failed to detect the injuries had they been present at that time. He is a highly qualified specialist with significant experience in paediatric neurosurgery. He examined the baby in order to exclude any possible neurological irregularities being responsible for the shape of his head. I consider it likely that he would have noticed some symptoms of distress had the injuries been then extant.

The mother was then alone with the baby from when she put him in the car until she arrived at Mrs Benson's house approximately 25 to 35 minutes later. During the investigation she was not closely questioned about any incidents that may have occurred during that period nor was she cross examined about it at the inquest as Dr Vidler refused to answer questions on the basis that she might incriminate herself.

At the relevant time, Mrs Benson had considerable experience with infants and had observed Liam on numerous occasions. In one of her statements to police, she said that when Liam arrived at her place at about 11.00am he was manifesting symptoms consistent with his having suffered an injury of the type that ultimately led to his death; he had an elevated temperature he was sedated and sleepy and he didn't take his food enthusiastically even though it was well overdue. However, in an earlier statement she contradicted this by saying that there was nothing abnormal in Liam's presentation at that time. Further, there was another person in the house and Mrs Benson was not questioned about his movements and may not have been in a position to positively say that he did not go near Liam when Liam was in the cot in Mrs Benson's bedroom.

I hasten to add that there is no evidence that this happened and had Mrs Benson given evidence she may have been able to explain the inconsistency of her versions. She may also have been able to satisfy me that a jury could accept her evidence as sufficient to prove that the fatal injuries were caused before Liam came to her house. However, Mrs Benson refused to answer questions about the events in question on the basis that she might incriminate herself. That is a claim that the judicial officer to whom it is made is not in a position to test, not knowing what a witness might say if required to answer. If there was a genuine basis for the claim – a real and substantial risk of incrimination as the authorities have phrased it - it is appropriate that Mrs Benson received the protection the privilege affords. However, its negative impact on the capacity of this inquest to establish how Liam died demonstrates why the privilege has been modified by the *Coroners Act 2003*.

The effect of this uncertainty is that it cannot be established who was responsible for inflicting the fatal injuries suffered by Liam on the morning of 22 March. Accordingly, I find that no person should be committed for trial in connection with the death.

Infanticide is an abhorrent crime. Research consistently shows that babies are at greater risk of being killed before they reach their first birthday than at any other time in their lives. The perpetrators are most frequently parents or other

family members. The complex and contradictory horrors of this crime in which the offender is also a victim, cannot be ameliorated by trite comments from coroners. The circumstances of this offence do not fit the more usual profile of such killings and there is no evidence that any child welfare agencies should have been alert to the risk of Liam being killed. Accordingly, there are no prevention issues that warrant any comment by me.

I close the inquest.

Michael Barnes  
State Coroner  
Brisbane  
28 July 2006