Submission No 19

INQUIRY INTO CORONIAL JURISDICTION IN NEW SOUTH WALES

Organisation: Police Association of NSW

Date Received: 10 July 2021

PANSW
POLICE ASSOCIATION OF NSW

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Select Committee on the coronial jurisdiction in New South Wales

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Thank you for the opportunity to contribute to this important inquiry.

The Police Association of NSW represents the welfare and professional interests of all NSW police officers.

The law, practice and operation of the Coroner's Court has a significant impact on police officers, who are involved in coronial procedures in a variety of capacities, including conducting the investigations for the Coroner, as well as being witnesses and involved officers in coronial proceedings.

Coronial Inquests can be lengthy and stressful experiences for everyone involved, including police officers.

Inquests also have the potential to significantly impact on the rights of a witness.

The recommendations we make below will improve the operation of the Coroner's Court and ensure the rights and wellbeing of witnesses.

We are happy to provide further information if it will assist the Committee.

Objections and Certificates

Section 61(1) of the Act provides that a witness in coronial proceedings may object to "giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness" has committed an offence or is liable to a civil penalty.

The Coroner is granted the power to require such a witness to give the evidence over this objection if (along with another consideration) "the interests of justice require that the witness give the evidence." (Section 61(4)(b)).

If the Coroner requires an objecting witness to give the evidence, or if the objecting witness does so willingly, the coroner must cause the witness to be given a certificate under section 61 in respect of the evidence. (Section 61(5)).

The effect of this certificate is evidence given by a person in respect of which a certificate under this section has been given, and evidence obtained as a direct or indirect consequence of the person having given evidence, cannot be used against the person in any proceeding in a NSW court (Section 61(7)).

The PANSW submits an objecting witness should be permitted to make a "global" objection or an objection to giving evidence on a topic, and then subsequently any certificate issued should apply to all the evidence objected to by the witness.

This is frequently the practice in coronial proceedings and has been for some time. For example, in Rich v Attorney General of New South Wales & Ors [2013] NSWCA 419 (9 December 2013), Leeming JA, with whom Beazley P and Bathurst CJ agreed, stated:

> 45. The evaluation of the "interests of justice" to date has been conducted at a high level, because of the "global" nature of the applicant's objection. This Court was told that that was a course typically followed by the Coroner, and it was what occurred in Attorney General of NSW v Borland [2007] NSWCA 201…

The Judicial Commission also makes reference to this practice in the *Local Court Bench Book — Coronial Matters [44 – 200] Conducting an Inquest*.

However, despite this being a common practice, it is predicted that if there were to ever be a challenge to the Coroner's power to do so, the provisions would likely be interpreted as not authorising that practice.

For example, see Rich v Attorney General of New South Wales & Ors [2013] NSWCA 419 (9 December 2013), per Leeming JA at [45]. Also see the *Judicial Commission's Local Court Bench Book — Coronial Matters [44 – 200] Conducting an Inquest*.

This problem arises from the wording in section 61 – "particular evidence" and "evidence on a particular matter".

The problem is that, coronial proceedings involve questioning on a highly complex incident. That questioning will cover a range of topics, and the evidence given in response to that questioning could:

- Be related to multiple of those topics,
- Affect the witness' potential liabilities or adverse actions (for example, criminal liability, civil liability, or decisions regarding disciplinary action), and
- Prejudice the witness in current or future proceedings or decision making processes.

In the midst of questioning, with all that complexity, it is extremely difficult, even impossible, to properly delineate between "particular" evidence, matters or topics, and to determine what evidence might be given in a response to a question and whether that evidence may be subject to reasonable grounds for an objection under s61.

This creates uncertainty over decisions in s61, including whether a witness should or should not be required to give evidence, and whether the evidence is covered by a certificate.

This uncertainty is unacceptable for a witness who has been compelled to give evidence over an objection under s61.

We submit the Act should be amended to rectify this and clearly provide that a witness is permitted to make a "global" objection or an objection to giving evidence on a topic (as circumstances require), and then subsequently any certificate issued should apply to all the evidence objected to by the witness, without uncertainty as to its coverage.

This issue was reviewed jointly by the Australian Law Reform Commission, the NSW Law Reform Commission and Victorian Law Reform Commission. The review recommended the equivalents in the Uniform Evidence Act, which are the same as section 61 of the Coroner Act 2009, be amended to provide more flexibility to accept broader objections than the existing wording might permit, and that the certificate clearly apply to all such evidence. (Australian Law Reform Commission Report 102, Uniform Evidence Law, 2006, Recommendation 15 – 7).

We note the broadly equivalent provision providing protection against the use of compelled evidence under the *Law Enforcement Conduct Commission Act* 2016 (s 57) and the *Crime Commission Act* 2012 (s 39), are not confined to objections relating to "particular evidence".

Legal representation of police witnesses

Police officers, as first responders dealing with death in the community, are called upon to appear in a great many coronial inquests, most obviously including (but not limited to) those deaths for which an inquest must be held under s 23 of the *Coroners Act.* Attending such incidents and the consequent requirement to give evidence in coronial proceedings, is an ordinary part of the day to day duties of a police officer.

Often, the officers themselves will have a sufficiently close connection with the subject matter of an inquest as to warrant a Coroner issuing the officer with a "sufficient interest" notice under s 57 of the *Coroners Act,* permitting them to be separately represented in the coronial proceedings.

It is therefore entirely proper that they are afforded legal advice and representation for such incidents and proceedings.

To some extent this is provided for under *M2019-01-Guidelines for the Provision of Ex-Gratia Legal Assistance for Ministers, Public Officials and Crown Employees* **(the Guidelines)**.

The current version of the Guidelines was issued in February 2019, following correspondence with the Attorney General's Department about inadequacies in their predecessor (M1999-11 Guidelines for the Provision of ex Gratia Legal Assistance for Ministers, Public Officials and Crown Employees). The current Guidelines have a review date of July 2024.

The current version of the Guidelines were, in our understanding, intended as an interim version while a thorough review was undertaken. We have not, to date, been invited to participate in any such review and are unaware of any such review having otherwise been undertaken.

Insofar as the Guidelines apply to police officers in coronial proceedings, they are absurd and deny police, the very public officials who are most likely to be involved in coronial proceedings as an ordinary incident of their employment, the *right* to legal representation.

Police should have an entitlement to legal advice and representation in coronial proceedings, and for officers who are given leave to appear under s 57 of the Coroners Act (leave given to a person where the Coroner is of the opinion the person "has a sufficient interest in the subject-matter of the proceedings, to appear in person in the proceedings or to be represented by an Australian legal practitioner"), that advice and representation should be independent of that given to the Commissioner of Police or the NSW Police Force as a whole.

Currently, the Guidelines provide a police officer may *apply* for a discretionary grant of ex-gratia assistance when (emphasis added):

(a) The officer uses force which results in a person's death, provided:

i. the force used was applied in the course of the officer protecting his or her life, protecting somebody else's life, or in preventing the commission of a serious offence; *and*

ii. The force used is, *in the opinion of the Commissioner of Police* (or, by the Minister for Police where the Commissioner considers that he or she is in some way involved in the matter), *considered to have been reasonable in the circumstances.*

(b) Where a death occurs in lawful custody (lawful custody being broadly defined[1]):

[1] The meaning of death in lawful custody includes:

(i) The death wherever occurring of a person who is in lawful custody.

(ii) The death wherever occurring of a person whose death or injury is caused or contributed to by traumatic injuries sustained or by lack of proper care whilst in lawful custody.

(iii) The death wherever occurring of a person who dies or who is injured and later dies in the process of police attempting to detain that person.

(iv) The death wherever occurring of a person who dies or who is injured and later dies in the process of that person escaping or attempting to escape from lawful custody.

i. if he or she has a substantial interest in the subject matter of the inquest; *and*

ii. *where the Police Service Solicitor is unable to represent the officer(s) concerned*.

The application is made, in the case of police officers, to the Commissioner of Police (the relevant "Departmental Head"), who is then required to carry out a "thorough Departmental investigation". Those applications which are supported by the Department Head are forwarded to the Secretary, Department of Justice. The application for assistance may be accepted "with the Secretary's prior approval".

Where applications are accepted, payment is made from the budget of the Department.

A problem has arisen, in recent times, around the representation of police officers in coronial proceedings. It has become increasingly common for police witnesses, including those for whom leave has been given under s 57 of the *Coroners Act,* to be represented by the same legal practitioner/s as represents the Commissioner of Police.

This not infrequently means that the same legal practitioner represents both:

- a witness who may at some point be subject to (or is at the least at potential risk of) criminal charges and/or disciplinary action, and

- the very person (the Commissioner of Police) who will decide whether to charge that witness or take disciplinary action against them in relation to the same evidence being examined in the coronial proceedings.

This is plainly an incredibly difficult conflict of interest for that legal practitioner to manage, and creates the risk, or at least perception of risk, that the police witness' interests will not be properly represented.

This is perhaps most starkly illustrated when the legal representative acting for both the police officer (or as if often the case, more than one police officer) and the Commissioner of Police, is instructed to seek a certificate under s 61 of the *Corners Act* to operate to the benefit of one or more of the police officer clients.

In substance, in those circumstances the legal representative is asking for a certificate under s 61 of the *Coroners Act* (that in a practical sense enable's the officer's common law right against self-incrimination to be abrogated), to be issued to the benefit of one client (the individual officer), to ensure the other client (the Commissioner of Police) can't either charge or discipline the police officer because of the evidence they give.

The conflict between the respective client's interests is obvious. The conflict will arise on *any* occasion such a legal representative is instructed to seek a certificate on behalf of an officer – given the grounds upon which such a certificate may issue, the conflict is unavoidable.

Despite the obvious conflict, in recent times it has become increasingly common for lawyers acting for the Commissioner of Police to advise individual officers that they can and will act for them in the course of a coronial. That places an individual officer in an invidious position

– accept the assistance, despite potential concerns that the lawyers for the Commissioner of Police will not necessarily always act in their best interests (because, for example, they are focussed upon the interests of the police force as a whole and inadvertently fail to examine a particular issue or subject through the prism of the individual officer's interests), or run the risk that they engage costly legal representation but will be unsuccessful in their application for a discretionary grant of ex-gratia assistance.

Moreover, it has lead to significant issues in the conduct of coronial matters where the legal representatives for the Commissioner of Police initially form the view they can act for an officer, but because of matters that arise as the coronial proceedings progress, form the view they can no longer represent the individual officer (or officers) *and* the Commissioner of Police at a time proximate to the hearing, leaving the individual police officer to rapidly secure their own independent legal representation.

The PANSW submits the Guidelines need urgent review to establish an entitlement for a police officer that has been given leave to appear under s 57 of the *Coroners Act*, to secure legal advice and representation in relation to coronial proceedings, independent of the legal representation of the Commissioner of Police.

Names of Officers to be Suppressed as a matter of course

The PANSW submits the Act should provide the names of involved officers in inquests under s23 be suppressed as a matter of course. Inquests of this type attract enormous media attention, and alleged facts and interpretations are reported long before coronial findings are made.

Officers suffer severe emotional distress, their reputations and careers are destroyed, and their wellbeing and health suffers, even if no adverse findings or criticism is ultimately made of them.

Again, the officers come to be involved in a coronial proceeding because of actions the officers took in the ordinary course of performing their duties as a police officer.

They should not suffer this distress and potentially harm as a consequence of the ordinary performance of their duties, unless they are subsequently charged and ultimately convicted of an offence for the conduct in question.

Therefore, their names should be suppressed from publication in inquests.

Inquest required to be held for deaths "resulting from police operations"

The PANSW, along with all police officers, appreciate that deaths occurring in the context of police operations will necessitate thorough investigation of the circumstances of death, and possibly consideration and making of recommendations that will improve public safety and prevent future deaths of a similar kind.

We acknowledge this will be applicable in a significant proportion of any deaths that occur in the circumstances envisioned by section 23 of the Act.

However, we submit the mandatory application of s27(1)(b) to deaths in which there is even the remotest concurrence with police actions, even when those actions have no influence on the death, the circumstances of the death, or preceding events, results in inquests being held where there is:

- no uncertainty about the identity of the deceased, the cause, circumstances or manner of their death,
- no possibility that police conduct or practices need to be further examined in an inquest,
- no public policy objective served by that inquest being held, and
- it is not in the interests of the public, the family of the deceased or the police officers affected to conduct an inquest.

Bear in mind, prior to an inquest being held, a full investigation will be conducted under the supervision of the Coroner. Counsel will review the conduct of the investigation and oversee the preparation of the brief, and the full brief provided to the Coroner.

Inquests take a very long time to complete and can be stressful and traumatic for everyone involved.

In 2017, the Coroner reported 105 unfinalised deaths to which section 23 applied (*Report by the NSW State Coroner into deaths in custody/police operations 2017*), showing the length of time these inquests can take to finalise.

We submit the mandatory requirement to hold an inquest means inquests are held in circumstances when the relationship between police actions and the death is non-existent.

It would better meet the needs of affected individuals and the public interest if a senior Coroner were given the ability to decide whether an inquest should be held in relation to section 23, in particular subsection (1)(c), rather than it be mandatory.

We therefore propose an amendment to the Act to enable a senior Coroner to decide whether an inquest is needed, rather than be required to hold an inquest.

Again, bear in mind, prior to an inquest being held, a full investigation will be conducted under the supervision of the Coroner, Counsel will review the conduct of the investigation and oversee the preparation of the brief, and the full brief provided to the Coroner. Under our proposal this would all still occur, and the Coroner could consider, based on the brief and all that had occurred in the investigation, whether an inquest is needed.

Our proposal would not prevent inquests from being held – a senior Coroner would still be able to decide to hold an inquest, and indeed in most circumstances would likely decide to do so. It would simply enable a senior Coroner to, having received and considered a brief, decide whether an inquest is needed or not.

We anticipate in most circumstances the senior Coroner would decide to hold an inquest if there was any relationship between the circumstances of the death and police action.

Our proposed amendment would result in a change in practice in only a small number of cases, and those case would alleviate situations where police officers who had had no

influence on the circumstances of a death from being subjected to the stress and trauma of a long drawn out coronial inquest.

Attempts have previously been made to narrow the operation of s 23(c) of the Coroners Act. Prior to 2016, s 23(1)(c) relevantly provided: "*A senior coroner has jurisdiction to hold an inquest concerning the death or suspected death of a person if it appears to the coroner that the person has died (or that there is reasonable cause to suspect that the person has died):… (c) as a result of, or in the course of, a police operations, or…"*

The underlined words "*, or in the course of,"* were repealed in 2016 (*Law Enforcement Conduct Commission Act* 2016, Sch 6.5 items [1] and [2]), apparently for the purpose of narrowing the scope of the mandatory inquest jurisdiction in relation to police operations under s 23(1)(c). Unfortunately, as the table below demonstrates, the narrowing of that provision does not appear to have materially impacted on the frequency of inquests.

The Coroner provides an annual report on the number of deaths that fall within the definitions of section 23 (*Report by the NSW State Coroner into deaths in custody/police operations*).

Not all of these deaths relate to police custody or operations. The vast majority do not, but relate to deaths in NSW Correctional facilities. For example in 2019, there were a total of 58 deaths falling within section 23. Of those, 44 occurred in a NSW Correctional Facility, 3 in another form of custody, and 11 occurred "within or as a result of a police operation" (*Report by the NSW State Coroner into deaths in custody/police operations 2019*).

The table below provides a summary of the numbers of deaths falling within section 23 from 1995 to 2019:

Year	Section 23 Deaths	Deaths in Police Operation
2019	58	11
2018	41	14
2017	47	19
2016	37	21
2015	41	15
2014	27	13
2013	43	17
2012	41	21
2011	29	9
2010	41	18
2009	30	18
2008	24	10
2007	28	11
2006	32	16
2005	27	16
2004	31	18
2003	38	21
2002	35	17
2001	37	16
2000	39	20
1999	34	7
1998	38	9
1997	56	15
1996	32	6
1995	37	14
Total	923	372

(Source: *Report by the NSW State Coroner into deaths in custody/police operations 2019 – Table 1, page 15)*

We therefore submit that our proposal would result in a practical change for only a small number of section 23 deaths, but would make a large difference to the police officers, other witnesses and family of the deceased in those circumstances where an inquest was not needed and only prolongs the stress and suffering of those involved.