

INQUIRY INTO CORONIAL JURISDICTION IN NEW SOUTH WALES

Organisation: Public Service Association of New South Wales

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SUBMISSION



Submission to the Select Committee Inquiry into the Coronial Jurisdiction in New South Wales



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GLOSSARY

Association – Public Service Association and Professional Officers’ Association Amalgamated Union of New South Wales

CPSU – Community and Public Sector Union

CSNSW – Corrective Service New South Wales

DEFINITIONS

‘The Association’

For clarification, the Public Service Association and Professional Officers’ Association Amalgamated Union of NSW (PSA) is a state-registered employee organisation. The Community and Public Sector Union - NSW Branch (CPSU) is its federally-registered counterpart. All members of the former are also members of the latter, although not vice-versa. Where industrial rights and representation are pursued in the NSW industrial relations system, it is the PSA who is the relevant organisation, but where this is done in the national system under the *Fair Work Act 2009* (Cth), such as the state-owned corporation, Forestry Corporation of NSW, the CPSU is the appropriate body. For the purposes of this submission, the terms are interchangeable and will both be referred to as ‘the Association.’

ACKNOWLEDGEMENT

We acknowledge the traditional owners of the land we live and work on. We pay our respects to Elders both past, present and emerging.

INTRODUCTION

The Select Committee Inquiry into the Coronial Jurisdiction in New South Wales (“the Inquiry”) is welcomed by the Association and we thank the Select Committee for considering this submission.

Although the Association represents the industrial and professional interests of the majority of New South Wales public servants, these submissions are focused on the experiences of our members employed as correctional officers by Corrective Services NSW (“CSNSW”). Due to the nature of their duties, correctional officers are often persons of sufficient interest in Coronial Inquiries.

In overview, the focus of the Association’s submission is on whether there are sufficient protections afforded to our members under the *Coroners Act 2009* (NSW). Additionally, the Association has provided its views on the appropriate institutional arrangements of the coronial jurisdiction, the adequacy of its resources and the outcomes of recommendations made.

We note that the Association has had the benefit of being able to consider the various submissions made by others in the Inquiry. Where relevant, we have identified the submissions and recommendations of the other interested parties which the Association supports.

The Association looks forward to providing any other assistance that may be required.

Yours sincerely 

 Stewart Little

General Secretary
Public Service Association of NSW

Part 1. Amendments to the *Coroners Act 2009* (NSW)

Response to:

Term of Reference 1(a)(iv): the law, practice and operation of the Coroner's Court of NSW, including the outcomes of recommendations made, including the mechanisms for overseeing whether recommendations are implemented.

Term of Reference 1(b): whether, having regard to coronial law, practice and operation in other Australian and relevant overseas jurisdictions, any changes to the coronial jurisdiction in New South Wales are desirable or necessary.

The Association submits that amendments should be made to Parts 6.3 and 6.4 of the *Coroners Act 2009* (NSW) to better protect our members when giving evidence to the coroner.

Part 6.3 of the Coroners Act 2009 (NSW) – Representation and Evidentiary Matters

Akin to the submission of the Police Association of New South Wales, the Association supports amendments to the *Coroners Act 2009* (NSW) to better protect witnesses who are compelled to give evidence, from self-incrimination and civil liability.¹

Overview of Current Provisions

Section 59(1) of the *Coroners Act 2009* (NSW) provides that the coroner in coronial proceedings may examine all persons who are able to give evidence relevant to the proceedings. A witness may object to giving particular evidence or evidence on a particular matter on the grounds that the evidence may tend to prove that the witness has either committed an offence or is liable to a civil penalty: s 61(1).

If the coroner forms the view that there are reasonable grounds for the objection, the coroner may nevertheless compel the witness to give the evidence if the coroner is satisfied that the evidence does not tend to prove that the witness committed an offence or is liable to a civil penalty under a foreign law, and, the interests of justice require that the witness give the evidence: s 61(4). In these circumstances, the coroner must cause for the witness to

¹ Police Association of NSW, Submission No 019 to the Select Committee on the Coronial Jurisdiction in New South Wales, Parliament of New South Wales, *Police Association of NSW Submission: Inquiry into the coronial jurisdiction in New South Wales – Select Committee on the coronial jurisdiction in New South Wales* (10 July 2021) 4 - 5.

be given a certificate in respect of the evidence. The effect of the certificate is that the evidence given in respect of that certificate, or evidence arising directly or indirectly from the witness giving that evidence, cannot be used against the witness in any proceedings before a New South Wales court or other body: s 61(7).

Global Objections

In practice, given the factual complexities of coronial matters and the practical difficulties associated with witnesses identifying particular evidence which may give rise to criminal or civil liability, witnesses will seek that general or 'global' objections be given to all evidence of that witness. Subject to whether the coroner considers there to be reasonable grounds for the objection and whether the evidence should nevertheless be given in the interests of justice, a certificate is issued in respect to the evidence.

Despite the ubiquity of this practice, there may nevertheless be a concern as to the lawfulness of the certificates given in respect to global evidence. The difficulty arises under s 61(1) which requires that the objection is given in respect to "particular evidence or evidence on a particular matter". In other words, s 61(1) does not contemplate global objections on all evidence given by the witness. It follows that any certificate issued on evidence given under a global objection is inconsistent with s 61(1) and likely beyond power. To remedy this issue, the Association recommends that the *Coroners Act 2009* (NSW) be amended.

RECOMMENDATION 1

Part 6.3 of the *Coroners Act 2009* (NSW) be amended to allow a certificate to be issued in respect to evidence given under a global or general objection to all evidence given by that witness.

Part 6.4 of the Coroners Act 2009 (NSW) - Disclosure of Information

Again, akin to the submissions of the Police Association of New South Wales, the Association submits that, as a matter of course, non-publication orders should be made in respect to any information which tends to identify correctional officers involved in mandatory inquests under s 23 of the *Coroners Act 2009* (NSW).²

From conferring with our staff who represent correctional officers, it is clear that the process of participating in a coronial inquest is deeply distressing and poses a real risk of psychological injury. The key causes for this emotional distress are the public nature of the proceedings and the consequential effect of the public proceedings on their reputation, both inside and outside the workplace. Moreover, the coronial process compounds the distress felt by the officer over the incident which is the subject of the inquest. Accordingly, and in consideration of the fact that correctional officers become involved in the coronial process as a by-product of the proper performance of their duties (due to the mandatory

² Police Association of NSW, Submission No 019 to the Select Committee on the Coronial Jurisdiction in New South Wales, Parliament of New South Wales, *Police Association of NSW Submission: Inquiry into the coronial jurisdiction in New South Wales – Select Committee on the coronial jurisdiction in New South Wales* (10 July 2021) 8.

nature of inquests under s 23), the Association considers it appropriate that non-publication orders be issued as a matter of course for correctional officers.

The Association notes that such non-publication orders would not and should not apply in respect to any subsequent proceedings, for example criminal proceedings flowing from the coronial inquest.

RECOMMENDATION 2

Part 6.4 of the *Coroners Act 2009* (NSW) be amended so that non-publication orders are made in respect to any matters that identify any correctional officer involved in a mandatory inquest under s 23 of the *Coroners Act 2009* (NSW).

Mechanisms for Implementation of Recommendations in the Public Service

The Association submits that the current mechanisms for the implementation of recommendations of the coroner's court are ineffective and the *Coroners Act 2009* (NSW) should be amended to create a mandatory obligation on public sector agencies to provide written reasons to the NSW Parliament for any decision not to implement a recommendation.

The *Coroners Act 2009* (NSW) does not require recommendations to be responded to or, in the event that they are not adopted, for reasons to be provided. Under Premier's Memorandum 2009-12 'Responding to Coronial Recommendations' (which was to be reviewed by 31 December 2014), there is a discretionary obligation on public service agencies to write to the Attorney General to advise whether a recommendation will be implemented or alternatively, to provide reasons where the agency does not propose to implement the recommendation.

In the Association's view, these arrangements are wholly inadequate in ensuring any degree of compliance with coronial recommendations and leads to the same issues reemerging in subsequent inquiries.

RECOMMENDATION 3

The *Coroners Act 2009* (NSW) be amended to require all public service agencies listed under schedule 1 of the *Government Sector Employment Act 2013* (NSW) to, within 3 months of receiving a coronial recommendation:

- (a) advise the Attorney General in written correspondence of the steps to be taken to implement the recommendation; or,
- (b) where the recommendation is not being implemented, provide the Attorney General with detailed written reasons for the decision to not implement the recommendation.

These written reasons will be tabled for discussion in NSW Parliament and made available on the NSW Parliament website.

The Association considers that the amendments proposed in Recommendation 3 should have the practical benefit of improving the likelihood of coronial recommendations being implemented by way of parliamentary oversight.

2. Standalone Coroners Court

Response to Term of Reference 1(c): the most appropriate institutional arrangements for the coronial jurisdiction in New South Wales, including whether it should be a standalone court, an autonomous division of the Local Court or some other Arrangement.

Consistent with the approaches adopted in Queensland, Victoria, Western Australia and South Australia, the Association submits that the Coroner's Court should be a standalone court, with the functions of the coroner not conferred on local court magistrates. To this end, the Association supports recommendations 1 and 2 proposed by Gilbert & Tobin.³

Considering the fundamental jurisdictional differences between the coronial jurisdiction and the local court, primarily that the coronial jurisdiction is inquisitorial not adversarial which requires a distinctly different legal approach and mindset, paired with the specialised subject matter, the Association considers it is conducive to the effective operation of the coronial jurisdiction if the Coroner's Court was constituted as a standalone specialised court, independent of the local court.

Flowing from the above submission, the Association also submits that magistrates should not exercise the functions of the coroner. Rather, the Association considers that these functions should be conferred on permanently appointed judicial members with the requisite practical experience of the coronial jurisdiction.

RECOMMENDATION 4

The *Coroners Act 2009* (NSW) be amended to establish the Coroners Court of NSW as a standalone specialist inquisitorial court.

RECOMMENDATION 5

The jurisdiction and functions of a coroner no longer be conferred on magistrates, but instead conferred on permanently appointed judicial members.

³ Gilbert and Tobin, Submission No 39 to the Select Committee on the Coronial Jurisdiction in New South Wales, Parliament of New South Wales, *Legislative Council: Select Committee on the coronial jurisdiction in New South Wales* (8 August 2021) Recommendations 1 – 2.

3. A Well-Funded and Well-Resourced Coroner's Court

Response to Term of Reference 1(a)(ii): That a select committee be established to inquire into and report on the coronial jurisdiction in New South Wales, and in particular the law, practice and operation of the Coroner's Court of NSW, including the adequacy of its resources.

The Association submits that the NSW Government must allocate additional funding to the Coroner's Court to ensure the effective operation of the jurisdiction. To this end, the Association supports Recommendation 8 and the associated submissions made by the Legal Aid Commission of NSW.⁴

A Coroner's Court with the necessary funding and staffing to effectively undertake its role in investigating deaths is undoubtedly in the interests of all parties involved in the coronial process.

For completeness, we observe Recommendation 31 of the Report of the Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody and the NSW Government's response:

Recommendation 31:

That the NSW Government allocate additional resources, including adequate funding and staffing, to ensure that the NSW Coroner's Court can effectively undertake its role in investigating deaths in custody.

NSW Government Response:

14. Under the 2021-22 State Budget, the Local Court jurisdiction received a funding boost of \$56.1 million to appoint eight extra magistrates, including a full-time coroner (recommendation 31). This will enable the pilot of centralised decision-making for regional deaths to be continued on an ongoing basis, which supports high quality decision-making and timely outcomes in these matters.

Noting our observations in Part 2 – Standalone Coroner's Court, the Association does not consider the appointment of eight magistrates to the Local Court and a single full-time coroner to be an adequate or appropriate increase in resources.

⁴ Legal Aid NSW, Submission No 46 to the Select Committee on the Coronial Jurisdiction in New South Wales, Parliament of New South Wales, *Inquiry into the coronial jurisdiction in New South Wales: Legal Aid NSW submission to the Legislative Council Select Committee on the Coronial Jurisdiction in New South Wales September 2021* (17 September 2021) Recommendation 8.

RECOMMENDATION 6

The NSW Government should allocate additional resources, including adequate funding and staffing, to ensure that the NSW Coroner's Court can effectively undertake its role in investigating deaths in custody.

CONCLUSION

The Association again thanks the Senate Committee for conducting the Inquiry and for affording the Association an opportunity to be heard. The Association looks forward to providing any other assistance that may be required.