

Statutory Review of the *Coroners Act 2009*: Draft proposals for legislative change

Legal Aid NSW Submission
to the NSW Department of
Justice

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 33 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW's state-wide specialist service, the Coronial Inquest Unit provides free legal advice and minor assistance, and may provide legal representation to people at coronial inquests where the matter is a preliminary step to civil proceedings (for which legal aid is available) or where the 'public interest' may be advanced. Legal Aid NSW must also be satisfied that the applicant has reasonable prospects of being granted leave by the Coroner to be represented at the inquest.

In order to meet the public interest test, a matter must be of serious concern common to the public at large or a significant section of the public. It must amount to more than a private right or individual interest, although the two may coincide, for example, a death in custody or a death involving a matter of public safety.

Where eligible, legal representation at a coronial inquest may be provided to a deceased person's family member or next of kin. In exceptional circumstances, legal aid might be granted to someone other than a family member. Free legal advice may also be given to a "person of interest," although representation at a coronial inquest is usually not available in these circumstances.

Legal Aid NSW welcomes the opportunity to respond to the draft proposals for legislative change arising from the statutory review of the *Coroners Act 2009* (NSW). Should you require any further information please contact Annmarie Lumsden, Director, Strategic Planning and Policy, at Annmarie.Lumsden@legalaid.nsw.gov.au or Bill de Mars, Solicitor Advocate, Coronial Inquest Unit, Legal Aid NSW at William.DeMars@legalaid.nsw.gov.au

Introduction

Legal Aid NSW supports amendments to the *Coroners Act 2009* (NSW) (**the Act**) aimed at enhancing the transparency, effectiveness and accessibility of the coronial jurisdiction.

Of fundamental importance to the role of the coronial process is the remedial effect of the coroner's recommendation-making role. With that in mind, Legal Aid NSW urges the Government to pursue an earlier proposal that there be a legislative requirement for the provision and publication of a government agency response to coronial recommendations. This requirement on government agencies would support, as it does in other jurisdictions, the clear public benefit in transparency and accountability of the coronial process. It is particularly important in light of concerns about declining levels of adherence to Premier's Memorandum M2009 -12 over recent years.

The following submissions respond in turn to the draft proposals for legislative change.

Structure and Framework of the Act

1. That the structure of the Act be amended to represent the sequential order of the coronial process, and expressly recognise the functions of investigations pre-inquest and pre-inquiry.

Legal Aid NSW supports this proposal.

2. That the Act be amended to define the categories of deaths within the coroner's jurisdiction in a single place in the Act, including the requisite connection with NSW.

Legal Aid NSW supports this proposal.

3. That the objects clause of the Act be amended to recognise the following additional objects:
 - the inquisitorial nature of the coronial jurisdiction
 - the coronial jurisdiction's preventative role in the reduction of deaths, fires and explosions through findings
 - that the coronial system should avoid the unnecessary duplication of investigations, inquests or inquiries, expedite those processes, and operate in a fair and efficient manner.

Legal Aid NSW supports this proposal.

4. That the Act provide guiding principles a person should consider when exercising a function under the Act

Legal Aid NSW supports inclusion of a set of guiding principles in the Act. We agree with the Department's *Draft Proposals Paper* that section 8(e) of the *Coroners Act 2008* (Vic) is an appropriate model.

However, we do not support the proposed guiding principle in paragraph (c):

minimising costs that may be incurred by persons involved in coronial investigations or proceedings.

The meaning and precise rationale for inclusion of this principle is unclear. Nor does it appear to have been raised with stakeholders before now. We consider that such a principle is unnecessary in light of the proposed set of legislative objects, which already refer to the avoidance of unnecessary duplication, and the objectives of expedition and efficiency of the coronial process.

A separate principle around cost minimisation will not always be consistent with the legislative object of efficiency, or with the independent and broad role of the Coroner in appropriately identifying the issues to be investigated.

Experience suggests that there is already significant pressure on the Coroner's Court in relation to the extent of resources available, in order, for example, to engage counsel and/or suitably qualified experts to assist in essential aspects of the coronial process. It would be of great concern if those pressures were exacerbated by virtue of the inclusion of such an object.

5. That the Act be amended to provide:

- coroners with a general discretion to hold, rather than dispense with, an inquest
- the factors coroners should consider in exercising that discretion, which should include [set of prescribed factors]
- persons of sufficient interest with standing to request a coroner to hold an inquest, and for that determination to be subject to review.

Legal Aid NSW does not support this proposal. We share the concerns of other stakeholders that reversing the current presumption in favour of holding of inquests risks weakening of existing safeguards which ensure deaths are properly investigated. Such safeguards are particularly important with respect to deaths in vulnerable and marginalised communities where a death that appears to be suspicious may escape investigation.

Should this proposal proceed, we consider that:

- there should be a legislative presumption in favour of an inquest being held if the deceased's family member requests it, or
- any list of prescribed factors as to whether an inquest should be held should give priority to the views of the deceased person's family. The role of such views should not be limited to whether their views are "compelling."¹

Further, the discretion as to whether to hold an inquest should take into account that the time taken for a family of a deceased or missing person to reach a position where they request an inquest be held is highly variable.

¹ As suggested on page 16 of the *Draft Proposals Paper*

6. That the Act be amended to require inquests to be held only in the following circumstances:

- if it appears to the coroner concerned that the person died or might have died as a result of homicide (not including suicide)
- if the jurisdiction to hold the inquest arises under s 23 (i.e. deaths in custody or in police operations)

Legal Aid NSW does not support this proposal to limit the category of mandatory inquests under section 27 of the Act. As noted in the *Proposals Paper*, section 27 of the Act requires inquests to be held in cases in which the evidence does not sufficiently disclose whether the person has died, the identity of the deceased and the date, place or manner of death. These provisions² already provide the Coroner with broad discretion as to whether to dispense with an inquest. Short inquests can also be held on the basis of a tendered brief of evidence.

We do not agree with the suggestion in the *Draft Proposals Paper* that there is little utility in holding such inquests. In particular, for family members who are tormented by a lack of information as to the circumstances of their loved one's death, the mandatory inquest provision gives impetus to ensure that a high level of effort is made to attempt to provide a family with answers, regardless of whether they are ultimately provided. A mandatory inquest in such circumstances can also serve to allow a family to feel that their suspicions and concerns have been allayed to the extent possible.

7. That the Act be amended to clarify that 'lawful custody' under s 23 includes the involuntary admission and detention in mental health facilities under the *Mental Health (Forensic Provisions) Act 1990*.

Legal Aid NSW agrees with this proposal. We note that in the past there appears to have been a divergence of views among Coroners as to whether the current provisions encompass such deaths. The policy rationale for holding mandatory inquests for forensic patients is as compelling as that relating to deaths in custody. It is equally compelling in the case of involuntary mental health detainees, given such individuals' vulnerability resulting from their health and the fact of their detention.

However, it would not be appropriate to categorise a person who is involuntarily detained under the *Mental Health Act* as being "in custody." To do so might be taken to suggest their detention results from criminal conduct.

We therefore agree that the definition of lawful custody should be limited to forensic patients.

² Sections 27(1)(c) and (d))

We suggest section 23 should be further clarified by:

- an express provision that lawful custody extends to deaths in facilities such as Community Offender Support Programme centres. While deaths in such facilities are less common, the inherent vulnerability of individuals who have died in such facilities gives rise to the same policy concerns that exist in relation to formal custodial settings and mental health facilities. For further detail, we refer to Legal Aid NSW's earlier submission on this issue to the Statutory Review.
 - the phrase "police operation" be clarified in terms of whether, by act or omission, the conduct of police may have caused or contributed to the death.³
8. That the Act be amended to clarify that the death of persons involuntarily admitted and detained in mental health facilities under the *Mental Health Act 2007* are included.

Legal Aid NSW agrees with this proposal and considers such deaths should be included as a distinct category in section 23 of the Act (mandatory inquests).

9. That the Act be amended to clarify that jurisdiction under s 23 includes deaths in police operations or lawful custody associated with Commonwealth agencies.

Legal Aid NSW supports this proposal.

10. That the Act be amended to provide for the Chief Magistrate, in consultation with the State Coroner, to designate select magistrates to exercise the exclusive jurisdiction to conduct inquests into certain deaths under s 22.

Legal Aid NSW offers no comment on this proposal.

11. That the Act be amended to clarify when deaths are not the 'reasonably expected outcome of a health-related procedure' under s 6(1)(e) of the Act

Legal Aid NSW offers no comment on this proposal.

12. That the Act be amended to allow the Commissioner of the NSW Rural Fire Service to require an inquiry into any fire or explosion within the Commissioner's jurisdiction under the Rural Fires Act 1997.

Legal Aid NSW offers no comment on this proposal.

³ See Dillon and Hadley *The Australian Coroner's Manual*, page 24

Coronial findings and recommendations

13. That the Act be amended to provide, where a decision is made not to proceed to inquest following a coronial investigation, for:

- coronial findings to be delivered, and
- persons with sufficient interest in the subject matter of the coronial investigation to provide the coroner with written submissions before any adverse findings are made

We agree with this proposal, subject to the following:

- further consideration should be given to whether “findings” should be defined, as reasons for dispensing with an inquest often include “findings” in any event
- the opportunity to provide written submissions before any findings are made:
 - should not be limited to potentially adverse findings, and
 - should be expressly available to any relative of the deceased
- the opportunity for review of the decision to make adverse findings should be subject to review, as one of the categories of review under the proposed new proposed internal review process (Proposal 35).

Finally, we submit that publication of findings should only occur following consultation with the deceased’s family and the consent of the senior next of kin.

14. That the prohibition against indications or suggestions in the record of findings or recommendations that an offence has been committed by any person be clarified and amended to:

- prohibit the making of any statements that a person is or may be guilty of an offence (not yet found proven); and
- apply to a record of written reasons

We support this proposal, though note that it would appear to make more sense for “not yet found proven” to simply read “not found proven”, to avoid any confusion as to the application of the provision where there has been a trial and acquittal.

15. That the Act be amended to prohibit coroners from making findings and recommendations attributing civil and disciplinary liability.

Legal Aid NSW does not object to this proposal, provided it is clear that it does not preclude a Coroner from referring certain conduct of individuals to relevant investigative, prosecutorial or disciplinary bodies as contemplated below (proposal 16), or from commenting on such conduct as may be appropriate, short of stating a concluded view on liability.

It is not clear that such a provision is necessary, however, given that it appears to be well entrenched coronial practice that it is inappropriate for a coroner to make a finding of civil liability.⁴

It would be unhelpful if implementation of this proposal had the effect of making Coroners feel constrained in the extent of appropriate criticism that might be warranted in particular instances.

16. That the Act be amended to provide coroners with the power to refer matters to relevant investigative, prosecutorial or disciplinary bodies, where appropriate

Legal Aid NSW supports this proposal.

⁴ See Abernethy et al, footnote 3 above at [81.37].

Relatives and senior next of kin

17. That the definition of ‘senior next of kin’ be amended to enable coroners to appoint a person other than the default appointee, where appointing the default appointee is not appropriate or practicable in the circumstances.

We support provision in the Act for appointment of someone other than the default appointee in exceptional circumstances. The proposal that such appointments occur where the default appointee is “not appropriate or practicable” is, in our view, too broad, and may promote disputes amongst competing relatives. We suggest that consideration be given as to an appropriate set of inclusive factors which may guide the Coroner’s discretion in this context.

We also note that the situation of competing claims of equivalent relatives (such as two siblings) would not necessarily be addressed by this amendment.

18. That the Act be amended to enable coroners to hear and determine competing claims to be the ‘senior next of kin’ within a reasonable time. This should include an option for coroners to make orders referring such matters for mediation, where appropriate (for example, to Community Justice Centres).

Legal Aid NSW supports this proposal, but notes our suggestion above as to prescription of relevant factors in exercise of the coroner’s discretion in this context.

19. That the Act be amended to remove the requirement that senior next of kin must provide written notice to object to a post-mortem examination.

Legal Aid NSW supports this proposal. However, given the broader powers exercised by an appointee of the senior next of kin in section 98, such appointments should continue to be provided by written notice.

20. That the definition of ‘relative’ and ‘senior next of kin’ be amended to recognise persons who are part of an extended familial or kinship structure in different cultures (including ATSI cultures).

Legal Aid NSW supports this proposal.

Dealing with the deceased

21. That the Act be amended to provide medical investigators with the authority to perform a preliminary examination of a body upon the provision of a body by the coroner. Provision for a preliminary examination should only authorise procedures which are non-invasive, similar to those prescribed in s 3 of the *Coroners Act 2008 (Vic)*.

Legal Aid NSW does not oppose this proposal, but suggests the amendment provide for consultation with the deceased's senior next of kin prior to preliminary examinations taking place. As with proposals 22 and 23 below, such amendment is desirable to address the significant role of cultural, spiritual and religious beliefs in relation to post-mortems.

22. That the Act be amended to require that:

- Coroners:
 - order the least invasive post-mortem investigation direction appropriate in the circumstances,
 - specify the degree of examination required, and
 - consult with medical investigators in making such directions (where practicable)
- medical investigators use the least invasive procedures appropriate in the circumstances (within the scope of any applicable coroner's direction) for all tests and examinations.

Legal Aid NSW does not oppose this proposal, but considers it does not adequately address the significant role of cultural, spiritual and religious beliefs in relation to post-mortems. Recognition of those factors in a set of guiding principles will not, on its own, provide sufficient direction to a Coroner in exercise of the section 88 powers.

We therefore recommend that the phrase "appropriate in the circumstances" be defined to include reference to the wishes of the deceased's family. This would be consistent with the intention of Government when post-mortem procedures were amended in 2009:

To protect the dignity of deceased persons, involve family members in decisions about post mortem investigations and ensure such investigations are completed in a timely manner.⁵

The consequences of a lack of consultation prior to conduct of any form of post-mortem can be extremely painful for family members.

23. That the Act be amended to require orders for the disposal of human remains to specify the person to whom those remains may be released, and for there to be a presumption for the remains to be released to the senior next of kin (or someone authorised by the senior next of kin). The Act should provide a mechanism by which applications may be made for the receipt of those remains, and authority for the coroner to resolve any competing applications by reference to prescribed principles.

Legal Aid NSW supports this proposal.

24. That the Act be amended to expand the powers of coroners to issue written notices to the Registrar of Births, Deaths, and Marriages for the early registration of deaths where there may be delay in concluding a coronial investigation (similar to existing powers in relation to inquests).

Legal Aid NSW supports this proposal.

25. That the Act be amended to provide that coronial proceedings should be conducted with as little formality and technicality as the interests of justice permit, and in a non-adversarial manner

Legal Aid NSW supports this proposal so long as the Act is also amended to incorporate common law principles of natural justice and procedural fairness. It is suggested that this is necessary to ensure that the proposed amendment does not lead to inadvertent slippage of these principles so far as they affect interested parties in coronial proceedings.

26. That the Act be amended to authorise the holding of concurrent inquests where several deaths occur as a result of a single incident or in similar circumstances.

Legal Aid NSW supports this proposal.

⁵ John Hatzistergos MP, Attorney General, Second Reading Speech, Coroners Amendment Bill 2009 (NSW), NSW Hansard, Legislative Council, 4 June 2009, p15781

27. That the Act be amended to clarify that s 61 does not preclude the making of 'global objections' in appropriate instances.

Legal Aid NSW supports this proposal.

We also note that if the Act is amended to provide a means by which persons can be compelled to provide written statements, consideration will need to be given to the manner in which protection equivalent to that provided by section 61 is accorded to those required to make statements.

28. That the Act be amended to provide coroners with the power to compel a person to provide a written statement during the investigation phase unless there is a lawful excuse not to (including the common law privilege against self-incrimination).

Legal Aid NSW does not support this proposal.

Expanding the Coroner's powers in the manner proposed erodes the fundamental right to silence. The further abrogation of that right through the removal of the defence of lawful excuse (as occurred by legislation at issue in *Lee v the Queen*⁶ and *X7 v Australian Crime Commission*⁷) is also strongly opposed: the objects of the Act are far different from those in legislation targeting serious and organised crime.

Under the current Act, the broad investigatory powers of the Coroner are balanced by the safeguard of the privilege against self-incrimination in relation to giving evidence. The importance of the privilege is underlined by a Coroner's obligation to inform a witness that they will be given a certificate of immunity if they willingly give evidence that may incriminate them.⁸ The lack of assertion of the privilege can have significant consequences to a witness in subsequent criminal proceedings: see, for example, *R v Cowan* [2015] QCA 87.

The same protection against self-incrimination would not be assured outside of an inquest. A vulnerable person, for example, who is advised of an obligation to provide a statement, may not be aware of their right to claim privilege or seek legal advice in the time required to provide the statement. Unlike courtroom objections, no recording would be available to assess the circumstances in which a statement is made.

⁶ [2014] HCA 20

⁷ [2013] HCA 29

⁸ *Priest v West and Percy* [2012] VSCA 327.

Legal Aid NSW notes the Western Australian Law Reform’s consideration of these issues in its recent review of the WA *Coroners Act*.⁹ Although the Commission has recommended a power to compel written statements from any person, the context of that recommendation was the investigation of medical deaths, and delay in obtaining reports from health professionals and specialist investigators. Should Proposal 28 be progressed despite our fundamental objection to it, consideration should be given to narrowing its application to such persons.

29. That the Act be amended to explicitly provide for the appointment and functions of Counsel Assisting the Coroner.

Legal Aid NSW supports legislative recognition of the appointment and functions of Counsel Assisting.

A significant proportion Counsel Assisting roles are undertaken by coronial advocates who are police officers in the metropolitan area, or by police prosecutors in regional locations. Experience shows that the role of Counsel Assisting will usually be more effective when undertaken by a solicitor and advocate/barrister through the Crown Solicitors Office. A police officer undertaking the role of Counsel Assisting, with more limited resources, may struggle to fulfil these legislative functions in an effective and timely manner. For this reason it is suggested that there is a need to consider as part of this proposal the need for adequate resourcing of those tasked with performing the role, given its centrality to the effectiveness of the process.

30. That the Act be amended to:

- allow service of documents or subpoenas by DX or email, provided that the person (or their solicitor) has provided the address for electronic service or DX address for that purpose.
- remove the requirement that a subpoena be served by a police officer or Sheriff.

Legal Aid NSW supports this proposal.

⁹ Law Reform Commission of Western Australia – Review of Coronial Practice in Western Australia: Final Report, page 50-52

Publication of, and access to, coronial matters

31. That the Act be amended to authorise coroners to disseminate details of pending inquests and inquiries, both generally and to particular bodies.

Legal Aid NSW supports this proposal, subject to the provision including a requirement to consult with and consider the views of family members of the deceased about what, if any, detail of pending inquests or inquiries should be disseminated.

32. That access to documents under section 65 of the Act be amended to:

- Apply to material or things obtained or created for the purpose of the coronial investigation and proceedings
- Require coroners to have regard to whether providing access to documents may compromise a coronial investigation or proceeding
- Allow a coroner to impose conditions on access

Legal Aid NSW supports this proposal on the basis that section 65(3(b)) be amended to refer to the wishes of the deceased's family in considering the release of, or restrictions on, access to material on the coroner's file. The current provision is essential in safeguarding against material that may be distressing to family members finding its way into the public domain. However, amending the section in the manner we propose would enable a family to have a say in the release of material that they may in fact wish to see released in the public interest and in accordance with principles of open justice.

Accordingly, we suggest section 65(b) be re-worded along the following lines (our suggested additions are underlined):

(b) if the coroner's file relates to a deceased person – the impact on and the wishes of the relatives of the deceased person of allowing or restricting access

33. That the non-publication provisions in s 74 of the Act be repealed, and that the *Court Suppression and Non-publication Orders Act 2010* be amended to apply to coronial proceedings.

We note this this proposal was not raised in the Discussion Paper. It is a significant policy issue that would benefit from wider consultation.

While agreeing that section 74 should be clarified, Legal Aid NSW does not support extending the *Court Suppression and Non-Publication Orders Act 2010* (NSW) (**CSNP Act**) to coronial proceedings, for the reasons set out below.

The coronial jurisdiction is quite unique. The principle of open justice has particular resonance where certain deaths are mandated to be investigated by public hearing.¹⁰

Further, unlike court proceedings, the usual practice in inquests is that witnesses are allowed to sit in the courtroom before giving their evidence, unless directed outside by the Coroner.¹¹

Of crucial importance in the coronial jurisdiction however is the perspective of family members of deceased persons. Unlike any other court proceedings, inquests will frequently represent an extraordinary intrusion into the distress and grief of such persons, in circumstances where they have in no way been responsible for the proceedings occurring. In our experience, “open justice” principles can too readily be invoked to unnecessarily expose families to unnecessary and unreasonable distress.

In our submission therefore, non-publication provisions must recognise the need to avoid re-traumatising families given the tendency for coronial matters to attract extraordinary levels of publicity due to their often dramatic factual context.

The grounds for making suppression orders in section 8 of the CSNA are inconsistent with the unique jurisdiction of the coroner, and the established common law on the exercise of the power to prohibit publication under section 74 of the Act:

- non-publication orders ought only be made where publication or broadcast would frustrate or render the administration of justice impracticable
- non-publication orders could be made in respect of the whole or part of the evidence and could encompass names, material that may identify persons or any other subject matter
- the factors to be taken into account when a Coroner is considering whether the administration of justice would be adversely affected by publication are:
 - o not only whether it is more convenient or desirable that the order be made but whether it is necessary to secure justice
 - o the onus lies on the person seeking to prevent publication
 - o the circumstances justifying the order must be exceptional or special
 - o each case must be considered on its own merits and there is no closed category of cases in which a non-publication order is justified.¹²

¹⁰ Inquest into the death of Tyler Cassidy (23 November 2011): available at <http://www.coronerscourt.vic.gov.au/home/coroners+written+findings/findings+-+inquest+into+the+death+of+tyler+cassidy>

¹¹ Abernethy et al, footnote 3 above, page 196

¹² Per Hunt J In *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1

Should amendments to section 74 be pursued, Legal Aid NSW suggests a preferable approach would be to amend, rather than replace, the section to:

- require the coroner to have regard to the impact on the deceased's family when considering an application for suppression/non-publication orders. Such amendment could be modelled on section 65(3)(b) of the Act (in deciding whether it is appropriate to grant access to the Coroner's file, the Coroner is to have regard to (inter alia) the impact on the relatives of the deceased person of allowing access).
- clarify the extent to which "evidence" given in proceedings includes submissions that refer to evidence in proceedings.¹³

As noted at the outset, however, the preferable position would be to allow for more fulsome consideration and consultation on this issue, such is its importance for the families in particular.

34. That the provision prohibiting the publication of suicide findings be repealed.

While acknowledging the observations in the draft proposals concerning the stigmatisation of suicide, Legal Aid does notes that some individual families may nevertheless be sensitive to the publication of such findings. For this reason, while not opposing a change to, or repeal of, section 75(5), it is suggested that the section should incorporate reference to the Court taking into account the wishes of relatives in relation to the making of any orders under section 75.

35. That the Act be amended to allow persons of sufficient interest to apply to the State Coroner for review of [prescribed] decisions by coroners.

Legal Aid NSW supports this proposal, and the categories of administrative decisions that would be subject to the new review mechanism listed on page 46 of the *Draft Proposals Paper*.

¹³ See the differing interpretations of section 74 at issue in the current Lindt Siege Inquest and subject of Coroner's Barnes findings as to non-publication of parties' written submissions (9 September 2016), available at: <http://www.lindtinquest.justice.nsw.gov.au/Documents/Reasons%20re%20application%20for%20NPO%20and%20ARO%20re%20submissions%20-%209%20September%202016.pdf>

36. That the Act be amended to authorise:

- a coroner who held an inquest/inquiry, or the State Coroner, to conduct a fresh inquest/inquiry on their own motion on the basis of the criteria in s 83 of the Act
- any person of 'sufficient interest' (within the meaning of s 57 of the Act) to apply for a fresh inquest/inquiry under s 83

Legal Aid NSW supports both aspects of this proposal.

37. That the Act be amended to clarify that when a coroner issues an 'open finding' the coroner has discharged their duty, such that any re-examination of the matter would require a 'fresh inquest/inquiry' to be ordered under s 83 of the Act.

Legal Aid NSW does not oppose this proposal.