

## Legal Aid NSW response to draft Statutory Review of the *Coroners Act 2009* (NSW)

Rec	About	Comment
1	Additional objects in objects clause	Legal Aid NSW supports this recommendation.
2	Guiding principles	<p>Legal Aid NSW supports the inclusion of a set of guiding principles in the <i>Coroners Act 2009</i> (NSW). However, we maintain the concerns expressed in our September 2016 submission to the Statutory Review (“our earlier submission”) about the inclusion of a guiding principle around cost minimisation. This principle is not reflected in section 8 of the <i>Coroners Act 2008</i> (Vic), on which Recommendation 2 is modelled.</p> <p>While welcoming a separate guiding principle about procedural fairness, we suggest that this aspect of the recommendation be re-drafted as follows (suggested changes are underlined):</p> <p><i>“that procedural fairness should be afforded to persons involved in the coronial process, <u>including family members of the deceased</u> and those who may be affected by the making of any adverse findings and recommendations.”</i></p> <p>We also suggest the proposed principle <i>that family members affected by a death being investigated should, where appropriate, be kept informed of the particulars and progress of the investigation</i> does not go far enough in recognising the role of family members in the coronial process. We suggest that words to the following effect be added to this principle:</p> <p style="text-align: center;"><i>“and that the views of family members affected by a death are considered throughout the coronial process.”</i></p>

		<p>This would recognise the unique position of family members of a deceased person in the coronial process, and would reflect guidelines issued by the state coroner in Queensland that require the interests of the family to be considered at all stages of the coronial process.<sup>1</sup></p>
3	<p>Coronial proceedings to be conducted with as little formality etc</p>	<p>Legal Aid NSW supports this recommendation, but reiterates the concerns outlined in our earlier submission that this amendment may lead to inadvertent slippage of the principles of natural justice and procedural fairness. We therefore suggest the recommendation be amended as follows (changes are marked up)</p> <p style="text-align: center;"><i>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, <del>and in a non-adversarial manner.</del></i></p> <p>Removing reference to the non-adversarial nature of coronial proceedings recognises the reality that coronial proceedings often involve strongly held and contested positions. Findings and recommendations of the coroner may have significant consequences for parties at an inquest, including public criticism and referrals to criminal prosecution or disciplinary bodies. We also note that section 58 of the <i>Coroners Act 2009</i> (NSW) already provides that the rules of evidence do not apply.</p> <p>We suggest that section 65 of the <i>Coroners Act 2008</i> (Vic) is a good model in respect of this recommendation. It provides:</p> <p style="text-align: center;"><i>A coroner must conduct an inquest -</i></p> <p style="text-align: center;"><i>(a) with as little formality and technicality as the interests of justice permit; and</i></p> <p style="text-align: center;"><i>(b) in a way that, as far as is practicable, makes the inquest comprehensible to interested parties and family members who are present.</i></p>

<sup>1</sup> Available at [http://www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0012/206121/osc-state-coroners-guidelines-chapter-2.pdf](http://www.courts.qld.gov.au/__data/assets/pdf_file/0012/206121/osc-state-coroners-guidelines-chapter-2.pdf). See also the useful discussion about the role of families in the coronial process in Tait, Gordon, Carpenter, Belinda, Quadrelli, Carol, & Barnes, Michael (2016) "Decision-making in a death investigation: Emotions, families and the coroner" *Journal of Law and Medicine*, 23(3), pp. 571-581.

4	Restructuring of Act	Legal Aid NSW supports this recommendation.
5	List of categories of deaths	Legal Aid NSW supports this recommendation.
6	Define death to include “suspected death”	Legal Aid NSW supports this recommendation.
7	Deaths arising from health related procedure	No comment
8	“Lawful custody” to include involuntary detention in mental health facilities.	Legal Aid NSW welcomes this recommendation. We repeat the suggestion in our earlier submission that the phrase “police operation” should be clarified to reflect its broad interpretation at common law; that is, whether, by act or omission, police conduct may have contributed to or caused the death. <sup>2</sup>
9	Deaths in police operations or lawful custody associated with Commonwealth agencies	Legal Aid NSW supports this recommendation.
10	Discretion to hold, rather than dispense with an inquest.	<p>We maintain our opposition to this recommendation, for the reasons outlined on page 6 of our earlier submission. Should it be progressed, we consider the recommendation should be revised as follows:</p> <ul style="list-style-type: none"> <li>• The coroner should notify the deceased’s family members and provide them with an opportunity to provide reasons why an inquest should be held (we understand this would reflect current practice in the Coroner’s Court), and</li> <li>• Either, there should be a presumption in favour of the holding of an inquest if a deceased’s family member requests it; or, the amendment should be drafted so that the views of the deceased person’s family are given priority in the exercise of the coroner’s discretion to hold an inquest.</li> </ul>

<sup>2</sup> See *Inquest into the Death of Charles Keith Chenery* (State Coroner Abernethy, 14 July 2007, unreported and Abernethy et al, *Waller’s Coronial Law and Practice in NSW* at [23.5].

11	Mandatory inquests	For the reasons outlined on page 7 of our earlier submission, we remain opposed to this recommendation.
12	Findings without an inquest	<p>Notwithstanding our position with respect to proposed Recommendations 10 and 11, we do not oppose this recommendation, subject to the following concerns:</p> <ul style="list-style-type: none"> <li>• The findings should record: <ul style="list-style-type: none"> <li>○ the person’s identity,</li> <li>○ the date and place of the person’s death, and</li> <li>○ the manner and cause of the person’s death (as required under section 81 of the Act).</li> </ul> </li> <li>• The opportunity to make submissions on findings should not be limited to potentially “adverse” findings. The difficulties in defining “adverse” referred to on page 38 of the Review Report support our view that this important element in procedural fairness should not be so limited. The findings may not, for instance, impact on a person’s personal or professional reputation, but may nevertheless cause significant trauma to a deceased’s family member or be at odds with their view of the evidence. In instances like these, it is important that family members have the opportunity to make submissions in the absence of a public hearing.</li> </ul>
13	Compelling written statements	No comment
14	Fresh inquest under section 83	Legal Aid NSW supports this recommendation, with the exception of the proposed restriction on the standing of police to apply for a fresh inquest or inquiry in “appropriate cases” (paragraph [5.57]). Investigating police play an important role where a family of a deceased may not be in a position to initiate an application for a fresh inquest/inquiry. There is no justification for restricting that role. The proposed amendment should maintain the current ability of police to apply for a fresh inquiry/inquest under section 83 of the <i>Coroners Act 2009</i> (NSW).
15	Open findings and fresh inquest	Legal Aid NSW supports this recommendation.

16	Concurrent inquests	Legal Aid NSW supports this recommendation.
17	Definition of senior next of kin to enable appointments of persons other than default appointee	<p>Legal Aid NSW supports this recommendation, but considers that the proposed power to make an appointment other than the default appointee should only be available in exceptional circumstances; there should be a presumption in favour of appointment pursuant to the hierarchy in section 6A of the Coroners Act 2009 (NSW). We are concerned that without such limitation, competing claims to be senior next of kin may be encouraged.</p> <p>The law already recognises the coroner’s authority to take submissions from and make decisions on the question of whether a person is a senior next of kin under section 6A of the <i>Coroners Act 2009</i> (NSW)(see <i>Charafeddine v Magistrate Denes</i> [2015] NSWSC 269). However, for the reasons outlined on page 11 of our earlier submission, we suggest that the recommendation include a set of inclusive factors to guide the coroner’s discretion as to whether the statutory hierarchy should be displaced. This could occur through a regulation which prescribes relevant factors based on case law concerning disputes between family members about receipt of the deceased’s body (see <i>Darcy v Duckett</i> [2016] NSWSC 1756 (9 December 2016) and the cases cited in that decision). This would include:</p> <ul style="list-style-type: none"> <li>• the wishes of the deceased,</li> <li>• religious, cultural or spiritual factors,</li> <li>• where the deceased lived, and for how long, prior to their death,</li> <li>• the strength of deceased’s association with particular people and places,</li> <li>• the relationship of the deceased with respective competing parties,</li> <li>• practical considerations, such as which person has the money to bury the person without unreasonable delay and whether funeral arrangements have been made, and</li> <li>• whether burial in one location would unreasonably disadvantage one of the parties.</li> </ul>
18	Competing claims to be senior next of kin	Legal Aid NSW supports this recommendation, but considers that the proposed power to make an appointment other than the default appointee should only be available in exceptional circumstances. We note that, in practice, these decisions are made by the coroner, occasionally after receiving submissions from the parties. Views differ as to whether the coroner has implied

		<p>authority to make such determinations under section 101 of the <i>Coroners Act 2009</i> (NSW), or whether the Coroner is acting ultra vires in this context. The recommended amendment will resolve that uncertainty.</p> <p>We repeat the above submission as to prescription of relevant inclusive factors to guide the coroner's discretion in this context. We also suggest that this recommendation further specify that written reasons be provided to the default appointee and any competing claimant, to support recommendation 27 below (the internal review process concerning competing claims to be senior next of kin).</p>
19	Definitions of relative and senior next of kin to recognise cultural differences	Legal Aid NSW supports this recommendation, noting our previous comments that the coroner's capacity to appoint a person other than the default appointee should only be available in exceptional circumstances.
20	Authority to perform preliminary examination on provision of a body	We note our earlier submission that this amendment provide for consultation with the deceased's senior next of kin prior to preliminary examinations taking place. However, in light of the Royal College of Pathologists of Australasia's submission to the Statutory Review that incisions by way of a needle would be sufficient for taking of samples of bodily fluids (at [5.85] of the draft Review Report) we do not press this issue.
21	Post mortem investigation directions under sections 88 and 89	We support this recommendation and note our earlier submission that the requirement that coroners order, and medical investigators use, the least invasive procedures "appropriate in the circumstances" should include reference to the wishes and views of the deceased's family. We repeat, but qualify that suggestion to the effect that only <u>where known</u> should those views be taken into account.
22	Remove written notification requirement to object to post mortem and delegate functions of senior next of kin	Legal Aid NSW supports this recommendation.

23	Requiring early registration of deaths where delay in concluding an inquest	Legal Aid NSW supports this recommendation.
24	Early registration of deaths where delay in concluding a coronial investigation	Legal Aid NSW supports this recommendation.
25	Allow coroners to delegate functions re early registration of deaths to assistant coroners	Legal Aid NSW supports this recommendation.
26	Orders for disposal of human remains	Legal Aid NSW supports this recommendation and suggests, as per our comments in relation to recommendation 17, that guidance as to the relevant common law principles as to competing claims for the receipt of human remains should be prescribed, either in the legislation or by regulation. This would provide clarity to both the coroner and to potential claimants under the provision. In this respect, we suggest that the reference in section 47 of the <i>Coroners Act 2008</i> (Vic) to “common law principles” does not provide sufficient guidance to family members of the deceased on this significant issue.
27	Review by State Coroner of decision about who is senior next of kin	Legal Aid NSW supports this recommendation. We also suggest that this recommendation further specify that written reasons for the determination as to the appointment be provided to the default appointee and to any competing claimant.
28	<p>Repeal of section 97 (applications to Supreme Court for a review of decision regarding post mortems)</p> <p>Review by State Coroner of decision not to uphold objection to exercise of post mortem investigation function</p>	<p>Legal Aid NSW supports this recommendation in part. Specifically:</p> <ul style="list-style-type: none"> <li>• we support the introduction of an internal review of decisions regarding post mortems by the State Coroner, but</li> <li>• we oppose repeal of section 97 of the <i>Coroners Act 2009</i> (NSW) and its replacement with a more limited right of appeal to the Supreme Court (on questions of law alone and on questions of mixed fact and law, by leave). Hearings de novo in the Supreme Court under section 97 of the <i>Coroners Act 2009</i> (NSW) provide an important means of independent review for families of a deceased person. While recourse to the provision may be less</li> </ul>

		likely as a result of the new administrative review regime, this does not warrant its removal altogether.
29	Review by State Coroner of decision authorising disposal and exhumation of human remains	Legal Aid NSW supports this recommendation.
30	Review by State Coroner of decision not to hold an inquest	<p>Legal Aid NSW supports this recommendation.</p> <p>We also strongly support the proposed retention of the current broad powers of the Supreme Court to order inquests or inquiries under section 84 of the <i>Coroners Act 2009</i> (NSW). This power is currently available on application of the Minister or any other person. Legal error does not need to be demonstrated. Should Recommendation 10 be implemented and the current presumption in favour of inquests being held be reversed, the retention of the Supreme Court’s jurisdiction under sections 84 and 85 are particularly important.</p> <p>We note, however, that the flowcharts on pages 59 and 60 of the draft Review Report (as well as the discussion in section 5.5.1 Overview) do not accurately depict the proposed new process. In particular,</p> <ul style="list-style-type: none"> <li>• the appeal process under section 84 of the <i>Coroners Act 2009</i> (NSW) is not depicted, and</li> <li>• the steps in relation to appeals to the Supreme Court under section 84 suggest that only “persons with sufficient interest in the circumstances of the death” may seek review in the first instance, and that only “affected persons” may then appeal to the Supreme Court. If section 84 is retained (as we agree it should be) then the flowcharts should be amended to clarify that <i>the Minister or any other person</i> may still appeal to the Supreme Court.</li> </ul>
31	Prohibition on State Coroner from delegating review functions	Legal Aid NSW supports this recommendation, but suggests that there should be some mechanism for delegation of the review functions to the Chief Magistrate or a Deputy State

		Coroner in exceptional circumstances (to address situations where, for example, the State Coroner is on leave or unwell).
32	Appeal to Supreme Court on limited grounds for decisions under Recs 27–30	<p>We repeat our comments above in relation to Recommendation 28 and the proposed repeal of current appeal rights to the Supreme Court under section 97 of the <i>Coroners Act 2009</i> (NSW).</p> <p>We are also concerned that reference to the significant appeal rights under section 85 (orders for fresh inquests or inquiries) appears to have been overlooked altogether. Legal Aid NSW strongly supports retention of section 85 of the <i>Coroners Act 2009</i> (NSW) and the coexistence of the important role played by the Supreme Court under this provision with the new statutory rights of administrative review by the State Coroner.</p>
33	Discretion to hold or dispense with inquiry about a fire	No comment.
34	Findings without inquiry (re fires)	No comment.
35	Commissioner of RFS to request inquiry	No comment.
36	Appointment of counsel assisting	Legal Aid NSW supports this recommendation.
37	Prohibition against suggestion that an offence has been committed	Legal Aid NSW supports this recommendation.
38	Findings and recommendations attributing civil liability	Legal Aid NSW supports this recommendation.
39	Referral of power to relevant investigatory etc bodies	Legal Aid NSW supports this recommendation.
40	Dissemination of pending inquests/inquiries	Legal Aid NSW refers to our earlier submission that the coroner should 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. Consistent with our response to Recommendation 21, we qualify that submission to the effect that only <u>where known</u> should those views be taken into account.

41	Access to documents in coronial proceedings under section 65	<p>We repeat our earlier submission that the proposed amendment to section 65 should require consideration of the wishes of relatives of a deceased before access to such material is granted or not. Coroners already have the same powers as the District Court to deal with contempt in the face or hearing of the court (via section 103 of the <i>Coroners Act 2009</i> (NSW), which picks up section 24 of the <i>Local Court Act 2007</i> (NSW) and sections 199 - 202 of the <i>District Court Act 1973</i> (NSW). We therefore consider a further offence is unnecessary.</p>
42	Access to documents etc where no coronial proceedings held	<p>Legal Aid NSW supports provisions enhancing access by family members of the deceased to documents etc, regardless of whether coronial proceedings have been held. However, we do not support the proposed new offence provision where such individuals have not complied with conditions of access. While we acknowledge that existing contempt provisions would not apply in the absence of a coronial proceeding, we are nevertheless concerned that family members who breach a condition of access would be re-traumatised by the prospect of criminal sanction for breach of an access condition. If a family member disclosed the contents of an autopsy report to a support person or counsellor in breach of a non-disclosure condition, for example, that conduct may lead to criminal sanction. This would be inconsistent with the proposed guiding principle that recognises the distress caused by the death of a family member, friend or community member <i>and that such persons may require referral for professional or other support.</i></p> <p>Should the proposed offence provision be implemented, we suggest that it be reframed to take into account this principle.</p>
43	Allow research bodies to access documents	<p>Legal Aid NSW does not oppose this recommendation in principle, but considers it is unclear and requires further detail for us to respond fully. We raise the following interim concerns.</p> <p>First, the Recommendation and related discussion in the Review Report (at [6.28]) should clarify what is meant by the phrase “documents in relation to the coronial process as a whole.” Does it extend, for example, to material from individual coronial files, or is it limited to material about the coronial process more generally and which is not derived from individual investigations?</p> <p>Second, we consider that only research bodies whose research has been approved by an appropriate human research ethics committee should be granted access to documents,</p>

		<p>consistent with both current practice (as reflected in Form 24, Local Court NSW, <i>Application for Access to Coronial Documents</i> and section 115 of the <i>Coroners Act 2008</i> (Vic)).</p> <p>Third, consideration should be given to the factors relevant to the exercise of the coroner’s discretion in granting access to research bodies, noting, for example, the detailed list of factors that a coroner must consider before granting access to investigation documents for research purposes in section 53 of the <i>Coroners Act 2003</i> (Qld).<sup>3</sup></p> <p>Fourth, provision should be made for the coroner to place conditions on access by research bodies to documents, consistent with recommendations 40 and 41. Depending on the scope and intention of the recommendation, this may entail conditions about de-identification of particular information. We also query whether an offence should be introduced for breach of such orders (should the offences proposed in recommendations 41 and 42 be introduced).</p>
44	Repeal of prohibition on publication of suicide findings	<p>Legal Aid NSW reiterates its suggestion in our earlier submission that publication of findings concerning self-inflicted deaths should take into account the wishes of family members of the deceased. As noted by the leading commentary on coronial practice in NSW, and as reflected in the experience of our Coronial Inquest Unit lawyers, suicide remains a source of embarrassment or even shame for bereaved families in some cultures.<sup>4</sup> Our suggested approach to section 75 would address the issue of stigma associated with suicide, but would also be consistent with the proposed guiding principle that <i>different cultures and religions have different beliefs and practices surrounding death that should, where appropriate, be respected</i>.</p>

<sup>3</sup> The prerequisites for granting access to research bodies are prescribed in section 53(4):

- (a) *the State Coroner is satisfied that the person is a genuine researcher; and*
- (b) *the State Coroner is satisfied that the document is reasonably necessary for the research; and*
- (c) *for a police document in relation to which the State Coroner decides not to obliterate information that identifies someone—the commissioner of the police service agrees to the person having access to the document; and*
- (d) *for an investigation document that is not a coronial document or document mentioned in paragraph (c)—the chief executive officer of the entity that prepared the document agrees to the person having access to the document*

<sup>4</sup> See Abernethy et al, *Waller’s Coronial Law and Practice in NSW* at [75.1–75.3].

		Should this submission not be accepted, then we submit, in the alternative, that there should be a presumption in favour of de-identification of the deceased in respect of publication of suicide findings, if requested by the deceased's family members.
45	CMO to appoint selected magistrates under section 22	No comment
46	Electronic service of documents	Legal Aid NSW supports this recommendation.
47	Service of subpoenas	Legal Aid NSW supports this recommendation.
48	Practice Notes	Legal Aid NSW supports this recommendation.
49	Power to issue guidelines	Legal Aid NSW supports this recommendation.