



**STATE CORONER'S COURT
OF NEW SOUTH WALES**

Inquest:	Inquest into the death of Rebecca Maher
Hearing date:	18 January 2019
Date of decision:	18 January 2019
Date of publication:	4 March 2019
Place of decision:	NSW State Coroner's Court
Decision of:	Acting State Coroner, Magistrate Teresa O'Sullivan
Catchwords:	CORONIAL LAW – objections raised by police officers – directed interviews – whether any legal obstacle to records of interviews being provided to the Court and interested parties – whether any legal obstacle to records of interviews being admitted into evidence in inquest
File number:	2016/218940
Representation:	<ol style="list-style-type: none">1) Counsel Assisting Mr David Buchanan SC of counsel, instructed by Ms Clare Skinner of the NSW Crown Solicitor's Office2) Next of kin Mr William de Mars of counsel, instructed by Ms Helen Cooper of Legal Aid NSW3) Sergeant Brooks, Senior Constable Coleman and Acting Sergeant Hosie Mr Kenneth Madden of Walter Madden Jenkins4) NSW Commissioner of Police Mr Nicholas Regener of Makinson d'Apice5) Dr Gunendra Weerabaddana Ms Belinda Epstein of counsel

Decision:	<p>The objection of the officers to the inclusion of the records of their directed interviews in the brief of evidence and its admission into evidence on the basis of their objection to being compelled to answer is rejected. I reserve the question of the admissibility of that evidence if objection is taken on any other basis.</p> <p>I direct that the transcripts of the directed interviews be included in the brief of evidence, and be provided to the interested parties to these proceedings.</p>
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Introduction

1. In the course of the coronial proceedings into the death of Rebecca Maher, three of the interested parties granted leave to be represented in the proceedings have raised questions about the use to be made of records of interviews which were conducted with them pursuant to direction under cl. 8(1) of the *Police Regulation 2015*.

Background

2. Rebecca died in a cell at the Maitland police station on 19 July 2016. On that day, a critical incident was declared, pursuant to the NSW Police Force (“NSWPF”) *Critical Incident Guidelines* (“the CI Guidelines”). Detective Inspector Peter Mahon (“DI Mahon”) was appointed the Senior Critical Incident Investigator (“SCII”). DI Mahon identified four police officers as “involved officers”:
 - a. Sergeant Nathan Brooks (“Sgt Brooks”);
 - b. Senior Constable Elizabeth South (“SC South”);
 - c. Senior Constable Laurie Coleman (“SC Coleman”); and
 - d. Acting Sergeant Greg Hosie (“A/Sgt Hosie”).
3. On 19 July 2016, SC South was required to and did participate in an interview about the circumstances of Rebecca’s death. The interview was electronically recorded and subsequently transcribed.
4. On 20 July 2016, Sgt Brooks, A/Sgt Hosie and SC Coleman were required to and participated in interviews about the circumstances of Rebecca’s death. A typed transcript was prepared at the time that the interviews were conducted.
5. The direction to the officers was as follows:

“Pursuant to clause 8(1) of the Police Regulation 2008 (NSW) which states:

‘... Police officers are to comply strictly with the Act and this Regulation and promptly comply with all lawful orders from those in authority over them ...’

You are directed to:

- *Answer all questions asked of you in strict honesty and truthfulness.*
- *Not willingly or negligently make any false, misleading or incorrect statements.*
- *Produce and not alter, destroy or otherwise remove, hide or dispose of any document or thing under your control that may relate to this matter; including where applicable photographs, audio/visual footage, emails, text messages, electronic or other records.*
- *Comply with any other lawful direction given to you in connection with or during the course of this investigation generally.”*

6. The interviewing officers also told the officers that, if they thought that by answering a question they may expose themselves to a risk of criminal prosecution they should say so and could object to answering questions on that basis in which case they would not be compelled to answer questions and the interview would not proceed. Each of the officers stated that they did not wish to claim privilege against self-incrimination. Each then went on to make a prepared statement. The statement was the same in each case. Relevantly, it included a statement that the officer was not participating in the interview of their own free will but because they had been directed to do so.
7. The prepared statement made by each of the officers also included the following objection to the interview being provided to anyone outside the NSWPF or admitted into evidence at an inquest:

"I object to any written recording of this [directed interview] being produced under subpoena or by notice to produce or by a similar process or being admitted as evidence or used in any way in any criminal, civil, disciplinary or other judicial or quasi-judicial proceeding of any type at which I am required to appear as a witness or at which I appear or participate in any capacity.

...

Further, I claim derivative use immunity of anything I say or do during this [directed interview]. Unless I advise to the contrary, I object to this [directed interview] being provided to any person or organisation outside the New South Wales Police Force. If it is proposed that this [directed interview] is to be provided to any person outside the New South Wales Police Force, then I request that I am notified beforehand so that I could take legal advice and I am given the opportunity to be heard before it is released.

Unless I advise to the contrary, I object to this [directed interview] being admitted into evidence at any coronial inquest held in relation to this critical incident investigation.

If you do not agree to interview me in accordance with the terms of this declaration I have just read, then please advise me now before we continue so that I can take legal advice."

8. In no case did the interviewing officers advise the officers that they did "not agree to interview" them in accordance with the terms of the statement read out.
9. On 19 October 2016, DI Mahon conducted a "walk-through" interview of A/Sgt Hosie at Maitland police station. The interview was video-recorded and a transcript prepared. At the outset of the interview, A/Sgt Hosie objected to being asked to participate. DI Mahon directed A/Sgt Hosie to participate.¹ A/Sgt Hosie

¹ DI Mahon directed A/Sgt Hosie to participate, "as this is a Part 8 complaint". The transcript of the interview has the following note: "(unintentional mistake by Detective Inspector Peter R Mahon. Should have said this is a direction under clause 8(1) of Police Regulations Act, 2015)". No complaint had been made under Pt. 8A of the *Police Act 1990*. The interview was conducted in the context of a critical incident investigation. It is clear that DI Mahon intended to refer to cl. 8(1) *Police Regulation 2015* and it appears, from his response referring to having been directed "pursuant to Regulation 8 of the New South Wales Police Regulations 2008", that A/Sgt Hosie understood that DI Mahon intended to refer to cl. 8(1) *Police Regulation 2015*.

responded by making the same objection he had made on 20 July 2016 to the direction that he answer questions. Specifically, that objection also included objection to the interview being video-recorded.

10. The CI Guidelines, as at the relevant time, required that the duty Coroner be consulted in the event of a critical incident involving a death, and before determination that a death arising from “police operations” was a “critical incident”. The requirements under the *Coroners Act 2009* were to be taken into account in the conduct of a critical incident investigation. On 22 August 2016, DI Mahon met during his investigations with the duty coroner, Deputy State Coroner Stone.
11. Further, the SCII of the investigation was required to provide the brief of evidence compiled for the critical incident investigation to the coroner. Accordingly, as coroner with carriage of the proceedings, I have been provided with the interviews of Sgt Brooks, SC South, SC Coleman and A/Sgt Hosie.
12. The interview of SC South was included in the brief of evidence distributed to the interested parties to this inquest. However, because of the objections taken at the time of interview, the interviews of Sgt Brooks, A/Sgt Hosie and SC Coleman were not included in the brief of evidence distributed to the interested parties.

Issues

13. The issues in dispute are:
 - a. whether there was or is any legal obstacle to investigating police providing records of the directed interviews to the Court and to those assisting me;
 - b. whether there is any legal obstacle to records of the directed interviews being provided in advance of the inquest to parties to the proceedings granted leave to appear pursuant to s. 57 of the *Coroners Act*; and
 - c. whether there is any legal obstacle to records of the directed interviews being admitted into evidence in the inquest by reason of objections to the interview raised by interviewed police.

The Statutory Framework

14. Determination of the issues in dispute requires me to consider the legislation that applied to the directed interviews, as well as the legislation which governs these coronial proceedings.

Police Act 1990 and Police Regulation 2015

15. The functions of NSWPF are specified in s. 6(2) of the *Police Act 1990* as:
 - (a) to provide police services for NSW;
 - (b) to exercise any other function conferred on it by or under the *Police Act* or any other Act; and
 - (c) to do anything necessary for, or incidental to, the exercise of its functions.

16. A reference to “the functions of the NSW Police Force” in s. 6 of the *Police Act*, includes a reference to the functions of members of the NSWPF.

17. Further, s. 14(1) of the *Police Act* specifies that:

“In addition to any other functions, a police officer has the functions conferred or imposed on a constable by or under any law (including the common law) of the State.”

18. However, nothing in either ss. 6 or 14 confers on the NSWPF a power to provide a police service in a way which is inconsistent with any provisions applicable to police officers under the *Law Enforcement (Powers and Responsibilities) Act 2002* (ss. 6(6) and 14(2) of the *Police Act*).

19. As at July 2016, NSWPF conducted critical incident investigations under the Guidelines made by the Commissioner of Police. Pursuant to s. 8 of the *Police Act*, the Commissioner could issue instructions to members of the NSWPF with respect to the management and control of the NSWPF. Section 201 of the *Police Act* makes it an offence for a police officer to neglect or refuse to obey any lawful order or carry out any lawful duty as a police officer. Clause 8(1) of the *Police Regulation 2015* provides that:

“Police officers are to comply strictly with the Act [being, the *Police Act 1990*] and this Regulation and promptly comply with all lawful orders from those in authority over them.”

Coroners Act 2009

20. The *Coroners Act* provides for inquests to be conducted by a senior coroner if it appears to the coroner that the death occurred while in police custody (s. 23(1)(a)) or as a result of police operations (s. 23(1)(c)).² “Police operation” means any activity in which police officers engage “while exercising the functions of police officer”, other than a search and rescue operation (s. 23(2)). It is mandatory to hold an inquest in these circumstances (s. 27(1)(b)).

21. Chapter 5 of the *Coroners Act* makes provision for coronial investigations. Chapter 6 makes provision as to coronial proceedings (as defined in s. 46). Section 51 (Ch. 6) provides that a coroner may give a police officer directions concerning investigations to be carried out for the purposes of coronial proceedings. Conducting such investigations, plainly, are functions that the NSWPF has – and thus its members have – under s. 6(2)(b) of the *Police Act*.

a. The nature of the powers and duties of a police officer conducting investigations into a death where there is jurisdiction to hold an inquest, and particularly where an inquest is mandatory, is informed by the functions, duties and powers conferred by the *Coroners Act* upon a coroner in such matters. Those functions, duties and powers include the making of findings as to the manner and cause of a person’s death (s. 81(1)), the making of recommendations in relation to the death (s. 82) and the referral to the Director of Public Prosecutions of the papers where the

² Note that Rebecca’s death occurred prior to the amendment of s. 23 of the *Coroners Act 2009* on 1 July 2017, pursuant to Sch. 6.5 cl. 1 of the *Law Enforcement Conduct Commission Act 2016*.

coroner is of the view that the evidence is capable of satisfying a jury that a known person has committed an indictable offence (s. 78).

22. The functions of a coroner include giving instructions both to the solicitor and counsel assisting the coroner as to specified steps to be taken in relation to coronial proceedings (s. 49(2(a) & (3)(d)) and directions to police as to investigations to be carried out for the purpose of coronial proceedings (s. 51(2)). “Coronial proceedings” include not just the inquest but also the determination of ancillary questions (s. 46). The powers also include the issuing of a subpoena for the appearance of a person to give evidence as a witness and/or to produce a document or thing (s. 66(1)).
23. Part 6.3 of the *Coroners Act* contemplates the involvement of other parties in the coronial proceedings. Pursuant to s. 57, the coroner may grant leave to any person with a “sufficient interest” to appear. That person may examine and cross-examine any witness on matters relevant to the proceedings.
24. Further, Pt. 6.3 of the *Coroners Act* makes it clear that the inquest proceeds by way of the taking of evidence and authorises the giving of directions “for the speedy determination of the real issues with which the proceedings are concerned” (s. 49(1)).

Submissions

25. Counsel Assisting, counsel for the family, and the solicitor for Sgt Brooks, A/Sgt Hosie and SC Coleman provided written submissions in relation to the issues in dispute in advance of a directions hearing before me on 18 January 2019. Each also made oral submissions at the directions hearing.
26. The legal representatives for two other interested parties, the Commissioner of the NSWPF and Dr Gunendra Weerabaddana, were also present at the directions hearing but did not make any submissions.

Submissions of Counsel Assisting

27. Counsel Assisting submitted that the conduct of the directed interviews themselves, the provision of the records of the directed interviews to me and to those assisting me and to the interested parties, and, *prima facie*, the admission of records of the directed interviews into evidence, were all sanctioned by legislation.
28. He argued that, when taken together, the *Police Act*, *Police Regulation* and *Coroners Act* provide a framework of power and obligation on police officers tasked with investigating a death in custody to conduct investigations:
 - a. in a *manner* which includes directing under cl. 8(1) *Police Regulation* that officers involved in the matter under investigation answer questions truthfully and honestly; and
 - b. for a *purpose* of providing the questions and answers to the coroner – both:

- i. to inform the coroner conducting coronial proceedings in deciding how the proceedings, including the investigation, should be conducted; and
- ii. as appropriate, for use as evidence in the inquest.

29. As to the issue of whether there was or is any legal obstacle to investigating police providing records of the directed interviews to me and to those assisting me, counsel assisting noted firstly that the involvement of Sgt Brooks, A/Sgt Hosie and SC Coleman in the events surrounding Rebecca's death made their evidence relevant to my functions and powers in respect of determining the manner and cause of Rebecca's death and making any recommendations. Further, he submitted, the *Coroners Act* clearly authorises the provision of the product of police investigations to both the coroner and those assisting. That is because an investigation for the purposes of an inquest under the *Coroners Act* involves those assisting, on instructions from the coroner, collecting and assembling evidence for presentation to the inquest.
30. As to the second issue, whether there is any legal obstacle to records of the directed interviews being provided in advance of the inquest to the interested parties, Counsel Assisting submitted that the parties would be denied procedural fairness if the interviews were admitted into evidence without the parties having been served with that material prior to the inquest and having sufficient notice to prepare in relation to them and make submissions on that evidence at the inquest.
31. Finally, as to the third issue, Counsel Assisting submitted that the objections to the directed interviews raised by the interviewed officers did not create any legal obstacle to the admission of the interviews into evidence. His submissions considered two possible legal obstacles: the legislation itself, and procedural fairness to the interviewed officers. Counsel Assisting contended that the circumstances of the interviews being compelled did not appear to provide any other legal basis for objection.
32. In relation to the legislation itself, Counsel Assisting argued that the manner and purpose of the conduct to which the objection was taken was authorised by legislation. As this conduct was authorised, neither the fact that the interviews were compelled nor the objections made by the interviewed officers could be considered an obstacle.
33. In relation to procedural fairness, Counsel Assisting submitted that no unfairness arose from the admission into evidence of the interviews. As a starting point, he drew on the approach to this issue in proceedings before a court of law, to which the rules of procedure and evidence apply. Counsel Assisting relied on *Director of Public Prosecutions v Attallah* [2001] NSWCA 171 ("*DPP v Attallah*"), in which Fitzgerald AJA held (Meagher JA & Ipp AJA agreeing), at [27], that in exercising the discretion under s. 90 of the *Evidence Act 1995* to refuse to admit evidence of the accused's admissions:

"it was not open to the court to hold that the use of the evidence in criminal proceedings against the accused would be unfair solely because of the

manner in which and the purpose for which the evidence was obtained if (as was conceded) that manner and purpose were sanctioned by parliament.”

34. Counsel Assisting argued that, given that the statutory framework authorised the manner and purpose for which the evidence of the directed interviews were obtained, it cannot be unfair to likewise use the records of such interviews as evidence in proceedings under the *Coroners Act*, in which the rules of evidence do not apply (see s. 58 of the *Coroners Act*).
35. In addition, Counsel Assisting submitted, there was no evidence that any of the interviewed officers were led to believe that what they said in the interview could not be used as evidence in an inquest into Rebecca’s death.
36. As noted by Counsel Assisting, none of the interviewed officers claimed the privilege against self-incrimination or any other privilege and, in any event, there was nothing to suggest that the officers were the subject of pending criminal or disciplinary proceedings.

Submissions on behalf of the family

37. Counsel for the family, Mr de Mars, adopted the submissions of Counsel Assisting generally, but made additional comments about the need to afford procedural fairness to the family.
38. Mr de Mars argued that the provision of the interviews in a timely fashion to the parties granted leave was sanctioned by legislation. He submitted that, in order to give substance to ss. 57 and 60 of the *Coroners Act*, it is essential that key parts of the brief of evidence – relevantly here, the records of the directed interviews – are provided to the interested parties.
39. Further, Mr de Mars submitted, the provision of the records of the interviews to the family was also beneficial to the purposes of coronial proceedings; in particular, to the family’s interest in the proceedings, the coroner’s recommendation-making role, and certain recommendations of the Royal Commission into Aboriginal Deaths in Custody.

Submissions on behalf of the interviewed officers

40. The key submission made on behalf of Sgt Brooks, A/Sgt Hosie and SC Coleman, was that “as a matter of discretion” and to afford procedural fairness to the officers, the records of their directed interviews should not have been provided to those assisting the coroner, and should not be disseminated to the interested parties.
41. Mr Madden submitted that each of the officers had made it clear that:
 - a. they were only participating in the interview because they were directed to do so;
 - b. they objected to the interview being provided to any person outside the NSWPF;
 - c. they objected to the interview being admitted as evidence at the coronial inquest; and

- d. they wished to be advised at that time if the interviewer did not agree with the terms of the objection, so that they could seek legal advice.
42. Further, Mr Madden argued the officers only participated in an interview because they feared that disobeying the direction could result in disciplinary or criminal consequences under any of ss. 173, 181D or 201 of the *Police Act*.
43. Mr Madden outlined three reasons to support his procedural fairness argument:
- a. First, each of the interviewed officers made an objection and declaration at the time of the interview, and none of the interviewed officers were advised by the interviewer that the interviewer disagreed with the terms of the declaration. Thus, they were misled into believing that their interviews would not be disseminated unless they were given the opportunity to be heard.
 - b. Secondly, none of the interviewed officers were notified that their interviews were to be provided to those assisting the Coroner, and were not given the opportunity to be heard prior to the records being released.
 - c. Thirdly, the interviewed officers may be the subject of adverse criticism in the coronial proceedings, and such criticism could be regarded as a complaint under Pt. 8A of the *Police Act* and action taken against them adverse to their interests.

Consideration

44. As Counsel Assisting submitted, the decision of the Court of Appeal in *DPP v Attallah* is of relevance in determining the issues before me.
45. In that matter, the respondent had given evidence at hearings before the Independent Commission Against Corruption (“ICAC”), in which he made certain admissions. By virtue of certain provisions of the *Independent Commission Against Corruption Act 1988*, the respondent was required to answer all relevant questions even though his answers would incriminate him. The respondent objected to the tender of the transcript of the ICAC hearing in the Local Court, and the magistrate refused to admit the transcript into evidence under s. 90 of the *Evidence Act 1995*.
46. The Court of Appeal noted that a magistrate had a discretion under s. 90 to refuse to admit evidence of the admissions if their use against the accused in those proceedings would be unfair. However, the Court held at [27] (see [3] above), that the discretion could not be exercised on the basis of unfairness solely because of the manner in which, and the purpose for which, the evidence was obtained, *if* that manner and purpose was sanctioned by Parliament.³
47. I am satisfied that the provisions of the *Police Act* and the *Police Regulation*, together with the provisions of the *Coroners Act*, authorises each of the following actions:

³ See also, *Director of Public Prosecutions (NSW) v Majok* [2009] NSWSC 192 per Rothman J at [11] and *Beckett v R* [2014] NSWCCA 305 per Beazley P at [186] (R A Hulme and Bellew JJ agreeing).

- a. the manner of creating the evidence objected to, namely, the obtaining of answers to questions by compelling the officers concerned to answer the questions posed truthfully and honestly;
- b. the provision of the records of that evidence to the Court and to those assisting me; and
- c. the provision of the records of that evidence to interested parties prior to the commencement of the inquest.

48. The submissions of Mr Madden, on behalf of the interviewed officers, argue that it would be unfair to those officers for the evidence of the directed interviews to be included in the brief of evidence and provided to the interested parties, or to be admitted into evidence at the inquest.

49. However, as the Court of Appeal held in *DPP v Attallah*, a finding of “unfairness” cannot be made in such circumstances if the manner and purpose for which the evidence was obtained was authorised by Parliament. Accordingly, I reject the objection to the admission of the transcript into evidence on the basis that the interviewed officers took objection to being compelled to answer at the time the interviews were conducted. However, I reserve the question of the admissibility of that evidence if objection is taken on any other basis.

50. In my view, I am bound to follow the Court of Appeal decision in *DPP v Attallah*. The objection of the interviewed officers to the inclusion of the records of the directed interviews in the brief of evidence and its admission into evidence on the basis of their objection to being compelled to answer is therefore rejected.

51. I direct that the transcripts of the directed interviews be included in the brief of evidence, and be provided to the interested parties to these proceedings.