STATE CORONER'S COURT OF NEW SOUTH WALES

Inquest into the deaths arising from the Lindt Café siege

Re application for access restriction and non-publication orders re written submissions

On 7 September 2016, I made orders concerning the delivery of written submissions by Counsel Assisting and those granted leave to appear in relation to the findings and recommendations that inquest should make (the submissions). In summary, those orders provided that the families of Katrina Dawson and Tori Johnson would have four weeks after Counsel Assisting's submissions had been delivered and the New South Wales Police Force, the Commonwealth and various other interested parties would have a further five weeks to respond.

Senior Counsel Assisting the inquest, Mr Jeremy Gormly SC, applied for orders pursuant to s. 74(1) and s. 65(4) of the *Coroners Act 2009* (the Act) prohibiting the publication of the submissions of counsel and access to them, other than by the parties, until after the inquest findings had been handed down.

After hearing oral submissions from all interested parties, I made the following orders.

1. I am of the opinion that it is in the public interest that none of the submissions be published before the inquest findings are published. Accordingly, pursuant to s. 74(1)(b), I order that the submissions not be published until two clear days after the findings are handed down.

2. Further, pursuant to s. 65(4) I direct that no copies of any of the submissions referred to above be provided to any person other than those assisting me and the parties granted leave to appear until the expiration of the non-publication order referred to in Order 1.

These are my reasons for those orders.

Mr Gormly's application was supported by counsel for the New South Wales Police Force, the Commonwealth, "Officer A" and "Officer B" respectively.

It was opposed by counsel for the family of Tori Johnson and counsel for the family of Katrina Dawson.

Submissions

Those supporting the application did so on a number of bases which I have summarised below.

- **Statutory interpretation:** ss. 65 and 74 of the *Coroners Act 2009* confer upon the Court the power to make the proposed 'embargo' orders.

  It was submitted that the meaning of 'coroner's file' in s. 65(7) ought to be construed so as to include written submissions, thereby allowing a coroner to restrict access to such documents under s. 65(4).

  As to the matters that must be taken into account in determining that it would be inappropriate to grant access to the written submissions under s. 65(3), the following submissions were made:

  - **Procedural fairness considerations weigh in favour of making the orders:** it was submitted that, unlike the relatively simultaneous nature of oral submissions, the span of the timetable for written submissions, especially the amount of time that was sought by the families, would mean that any criticism would go unanswered by the affected person or entity for many weeks and, depending on the nature of those criticisms, there may be irreversible damage to reputation.

  - **The open justice principle would not be undermined:** it was submitted that the proposed 'embargo' orders are not a perpetual ban on access or publication but are, rather, a temporary measure with a fixed expiration date, amounting to a postponement of publication. Therefore, there can be no definable harm to the parties or the public.

  - **The risk of inadvertent disclosure:** owing to the large volume of evidence that was given in closed court, and to the regime of access restriction, non-publication and closed court orders that are in place with respect to an array of material relevant to the questions being addressed in written submissions, it was submitted that postponing publication of written submissions would guard against the inadvertent disclosure of such material without delaying the delivery of findings.

  With respect to s. 74, it was submitted that the reference to 'evidence' s. 74(1)(b) ("that any evidence in the proceeding not be published") should be construed broadly to include written submissions, as they are analyses of evidence, which restate, discuss and proffer certain constructions of the evidence. It was submitted that a purposive approach be adopted with respect to the task of statutory construction as a strict interpretation, taking into account the wording of s. 74(1)(c), which expressly confers a power to order non-publication of a certain kind of submissions, would deprive a coroner of very significant powers.

- **As to the common law:**

    - **The court has an implied power to make such orders:** it was submitted that, even if I find that the Act does not empower me to make such 'embargo' orders, the court's implied powers are enlivened as the orders are reasonably necessary to ensure the proper administration of justice in the coronial proceedings before me. That is, to so order would be to uphold the integrity of what has been a public, inquisitorial proceeding, as well as maintain the balance that has been struck, within the public mind, upon conclusion of the oral evidence. It was submitted that the risk of adversarial, one-sided submissions skewing public opinion would undermine the integrity of the process.

Those opposing the application did so on the following bases.

- **Statutory interpretation:** that ss. 65 and 74 of the *Coroners Act 2009* do not confer upon the Court a power to order that parties' written submissions be access-restricted and not be published.

  More specifically, it was submitted that, in light of s. 74(1)(c), which expressly refers to the non-publication of submissions (concerning whether a known person has committed an indictable offence), the text of s. 74(1)(b) ("that any evidence in the proceeding not be published") cannot be read so as to encompass written submissions.

  Furthermore, with respect to access restriction, the Act does not confer a power to order suppression. Therefore, access restriction is a severe form of order that should be reserved for information that is highly distressing or sensitive, such as information bearing on national security. It was submitted that the disadvantage suffered by affected persons is that the orders would operate as a 'gag order' and add to the trauma experienced by the families by prohibiting free and open discussion of the families' position.

  In response to the submissions made under s. 65(3), it was submitted:

    - **The orders do not concern procedural fairness:** it was submitted that, in an inquest, submissions are ordinarily delivered orally in open court, able to be heard and published. What is proposed in this inquest departs from that course. However, those who are subject to criticism in written submissions will be able to consider the criticism and respond more thoroughly in their submissions and persuade me that moderate findings (or no adverse findings) ought to be made. Any damage to reputation is thus ameliorated.

    - **Confidential submissions can address protected information:** it was submitted that any concerns surrounding the inadvertent disclosure of information that was examined in closed court, or which is subject to extant access restriction or non-publication orders, may be addressed by way of confidential submissions or, alternatively, by counsel identifying such information in the body of their submissions by highlighting/underlining such text or by using separate headings in

their submissions. It was submitted that there ought not be a regime attaching to submissions that is more stringent than the orders that related to the evidence.

- **As to the common law:**
    - **the principle of open justice ought not be overridden:** to make orders amounting to a form of suppression, in order to protect persons or entities from reputational damage arising from improper or unsubstantiated allegations, is baseless and would amount to a serious breach of the open justice principle.

Ms Bashir for the Johnson family submitted that her clients believed that denying them the right to publish the findings would amount to a "gag order" that would traumatise them. She acknowledged her clients were mistaken in their belief that a non-publication order would prevent them from discussing their views about the case but insisted that, as that was their view, it would be inappropriate to make the order.

The law

(a) *Coroners Act 2009*

Section 65 of the *Coroners Act 2009* authorises a coroner to supply a person with a copy of a coroner's file (or part of the file) at the request of the person, if it is "appropriate" to do so (s. 65(2)) or, alternatively, direct that the file not be supplied (s. 65(4)).

In determining whether it is "appropriate" for a person to be supplied the file, regard must be had to the matters listed in s. 65(3):

> *(a) the principle that coronial proceedings should generally be open to the public,*
> *(b) if the coroner's file relates to a deceased person—the impact on the relatives of the deceased person of allowing access,*
> *(c) the connection that the person requesting access has to the proceedings concerned,*
> *(d) the reasons why access is being sought,*
> *(e) any other matter that the coroner or assistant coroner considers relevant.*

Section 65(7) defines "coroner's file" to mean "*the documents (including the depositions of witnesses, transcripts and written findings) that form part of the file kept by a coroner in respect of a death, suspected death…".* A broad construction of the "documents that form part of the file" would necessarily serve the principle of open justice and the objects of an inquest (set out in s. 3(c)) by providing members of the public with greater access to the information that is the subject of proceedings in which the functions of a coroner include inquiring, on behalf of the public, and in their interests, into matters of public concern.

The word "published" is defined in s. 73 of the Act to mean matter that is *"(a) inserted in any newspaper or any other periodical or publication, or (b) publicly exhibited, or (c) broadcast by radio or by television, or (c) published by means of the Internet*".

In so far as it is relevant, section 74(1) of the Act empowers a coroner who considers it in the public interest to do so to order:-

> *…*
> *(b) that any evidence given in the proceedings not be published,*

In forming an opinion as to the public interest, the coroner may have regard (without limitation) to the following matters, listed in s. 74(2):

> *(a) the principle that coronial proceedings should generally be open to the public,*
> *(b) in the case of an order that is proposed to be made in relation to a witness in the proceedings—the likelihood that the evidence of the witness might be influenced by other evidence given in the proceedings if the witness is present when that other evidence is given,*
> *(c) national security,*
> *(d) the personal security of the public or any person.*

(b) The common law

A fundamental rule of the common law is that the administration of justice must take place in open court: *Scott v Scott* [1913] AC 417 at 441. Indeed, this applies to coronial proceedings, which are held in public in accordance with this principle and with the functions of a coroner and the objects of an inquest: s. 74(2)(a) of the *Coroners Act 2009* and *John Fairfax Publications Pty Ltd v District Court of NSW* [2004] NSWCCA 324; 61 NSWLR 344.

The principle of open justice entails that courts be open to the public and the media may freely publish fair and accurate reports of the proceedings: *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 481 per McHugh JA. It has been observed that courts have no general authority to make orders binding people in their conduct outside the courtroom: *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 477.

The advantage of open justice is that courts are open and accountable; the disadvantage is the "personal and public harm" that may be caused by unrestricted publicity: in *John Fairfax Group Pty Ltd v Local Court of NSW* (1991) 26 NSWLR 131 at 164 per Mahoney JA. The balance has been weighed very clearly in favour of open justice and departures from that principle, such as orders to close the court or to allow the use of pseudonyms, are only valid in those wholly exceptional circumstances where they are "really necessary to secure the proper administration of justice" in the proceedings: *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 477 per McHugh JA; *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294 at 299-300 per Street CJ; *John Fairfax Group Pty Ltd v Local Court of NSW* (1991) 26 NSWLR 131 at 160 per Mahoney JA.

In this vein, the statutory powers of a coroner to close the court (s. 47 of the Act) and to make non-publication orders (s. 74) reflect that the principle of open justice is not absolute in the coronial jurisdiction.

In *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101; 62 NSWLR 512 at [29] Spigelman CJ (Mason P and Beazley JA agreeing) observed that whilst significant in guiding the court in a range of matters, the principle of open justice remained a principle, with no corresponding right to access a court file for the purposes of reporting proceedings.

Principles of open justice do not generally recognise damage to reputation as a proper basis for making a non-publication order: *John Fairfax Group Pty Ltd v Local Court* (1991) 26 NSWLR 131 at 142. However, such orders may be made to protect the integrity of the proceedings where a person may otherwise be adversely affected: *R v Kwok* [2005] NSWCCA 245; *Anon 2 v XYZ* [2008] VSC 466;

Waller's at [74.3] p. 196. The authors of *Waller's Coronial Law and Practice in New South Wales* also identify protecting the integrity of the inquiry to be a public policy rationale for the coroner's powers: at [74.2] p. 195.

In *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1 Hunt J set out the general principles applying to the exercise of the power to prohibit publication, which have been summarised by the authors of *Waller's* at [74.6] p. 196, as follows:

- non-publication orders ought only be made where publication or broadcast would frustrate or render the administration of justice impracticable;
- that the non-publication order 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;
- that the factors to be taken into account when a coroner is considering whether the administration of justice would be adversely affected by publication are:
    - not only whether it is more convenient or desirable that the order be made but whether it is necessary to secure justice;
    - the onus lies on the person seeking to prevent publication;
    - the circumstances justifying the order must be exceptional or special;
    - 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.

Decision

I am satisfied that the submissions when received will form part of the coroners file as defined by s. 65(7) and that I therefore have power under s. 65(4) to make a non-access order in relation to them.

I am also satisfied that the submissions will contain "evidence given in the proceedings" and so they could properly be the subject of an order prohibiting publication under s. 74(1)(b).

I am satisfied that when seeking to maintain the open justice principle I am not limited to only making the orders sought if they are necessary to secure justice – that ss. 65 and 74 give greater scope for the making of such orders than does the common law. I find I am entitled to have regard to anything I consider relevant: ss. 65(3)(e) and 72(2).

I am of the view that delaying the publishing of the submissions until after the inquest findings have been published advances the interests of justice by preventing unfair damage to the reputation of those who may be criticised in submissions before they have an opportunity to respond to those submissions.

I am satisfied that delaying publication, rather than prohibiting it in perpetuity, has proper regard to the open justice principle and balances it against the harm that might be done to individuals and the integrity of the inquest process by allowing publication of partisan submissions that will of necessity remain unanswered for some weeks.

I am also required to have regard to the impact of any proposed order on the family of the deceased –s. 65(3)(b)— but I do not consider that requires me to take into account harm done by family members misconstruing the effect of any order made.

Accordingly, I am of the opinion that it would be in the public interest to delay the publication of the submissions and that it would be appropriate to prohibit access to the submissions until the non-publication order expires.

M A Barnes

State Coroner

9 September 2016