A PRACTICAL GUIDE TO REPRESENTATION AT CORONIAL INQUESTS

Paper Presented to the NSW Bar on 20 June 2011

1. This paper will deal with effective representation at coronial inquests. It is important to note that such proceedings are non-judicial non-adversarial proceedings.

2. The inquisitorial nature of coronial proceedings was expounded by Lord Lane CJ in *Reg v South London Coroner; Ex parte Thompson* 8 July 1982 adopted in *McKerr v Armagh Coroner* [1990] WLR 649 at 655 as follows:

   Once again it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish the facts. It is an inquisitorial process, a process of investigation quite unlike a trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use.

3. The nature of coronial proceedings requires a philosophical readjustment from the way that we are trained to think as lawyers and advocates. While our natural inclination may be too deny or not admit something until it is proved, a co-operative approach is often far more beneficial in coronial proceedings. It is also important to bear in mind that, in the experience of the writer, the focus of the coroner's court at the present time is very much directed towards curing systemic problems to ensure that tragic events do not recur. This philosophy is very much at the forefront of the courts mind rather than a philosophy of blaming individuals or corporations who may be responsible for any systemic failure.

4. The *Coroners Act* 2009 (s 3(c), s 81) requires the coroner is to determine the person's identity, the date and place of the person's death, and (in the case of an inquest that is being concluded) the manner and cause of the person's death. Under s 6(1)(e) a death must be reported to the Coroner if "the person died in circumstances where the person's death was not the reasonably expected outcome of a health-related

procedure carried out in relation to the person". The coroner has jurisdiction to hold an inquest in the event of a death consequent upon surgery or certain types of medical treatment. It is important to very carefully consider the nature of an inquest and the course of an inquest before it actually starts. It is not an adversarial proceeding in the normal sense in which we use that term in our courts. It is the inquiry rather than the parties which are concerned with the gathering of facts. This process is performed without the constraints of the application of the strict rules of evidence. Under s 21 of the Coroners Act 2009, a coroner has jurisdiction to hold an inquest concerning the death or suspected death of a person if it appears to the coroner that the person's death is (or there is reasonable cause to suspect that the person's death is) a reportable death.

5. Those of us who act for insurers of doctors, nurses and public hospitals will frequently find themselves representing their clients at inquests which occur into those deaths. There are also legislative provisions (s 23) conferring jurisdiction on the coroner for the holding of an inquest in the case of a death in custody, or an attempted escape from custody as a result of or in the course of police operations or from certain types of detention. There is also provision in s 24 of the Act for inquests to be held where a child who dies is in care or where a child is the subject of a report under the *Children and Young Persons (Care and Protection) Act* 1998 whether the death be that of the child of the subject of the care or a sibling.

6. The Coroners Act 2009 gives the Coroner a wide discretion to determine whether or not an inquest is desirable.

7. As the Attorney General said in the second reading speech, the underlying principle of the Coroners Bill is that coroners and investigating medical officers should be able to focus their attention on those cases where a person dies of unknown causes or in suspicious or violent circumstances. Under the 2009 Act the Coroner now has jurisdiction to investigate deaths caused by accidents or criminal conduct, no matter when death actually occurs. This approach is consistent with coronial law in all other States and territories.

8. There is often tension in a coronial inquest between what are seen to be relatively narrow terms of reference and attempts to use the inquest to gain evidence for a later

civil case arising from the death. It is not uncommon in an inquest following a death hospital for the relatives representatives to attempt to conduct a wide ranging cross examination with a view to grounding a civil case, and the legal representatives of other parties strenuously objecting upon the grounds that the cross examination goes far beyond the issue of the manner and cause of death.

9. Under s 18 there must be a prescribed connection with New South Wales to ground jurisdiction. The requisite connections under s 18(1) are:-

(a) the remains of the person are in New South Wales, or

(b) the death or suspected death or the cause of the death or of the suspected death occurred in New South Wales, or

(c) the death or suspected death occurred outside New South Wales but the person had a sufficient connection with New South Wales, as referred to in subsection (2).

Under subsection (2) a person had a sufficient connection with New South Wales if the person:

(a) was ordinarily resident in New South Wales when the death or suspected death occurred,

(b) was, when the death or suspected death occurred, in the course of a journey to or from some place in New South Wales, or

(c) was last at some place in New South Wales before the circumstances of his or her death or suspected death arose.

10. The Kovco inquest and the East Timor inquest attracted jurisdiction under this section.

11. The issue of representation is set out in s 57 which provides as follows:-

(1) The coroner in coronial proceedings may grant leave to any person, who in the opinion of the coroner has a sufficient interest in the subject-matter of the proceedings, to appear in person in the proceedings or to be represented by an Australian legal practitioner.

(2) Any person granted such leave may examine and cross-examine any witnesses on matters relevant to the proceedings.

(3) A coroner holding an inquest concerning the death or suspected death of a person must grant leave under subsection (1) to any person who is a relative of the deceased person (or suspected deceased person) unless the coroner is satisfied that there are exceptional circumstances that justify the coroner refusing leave.

(4) If an inquest or inquiry is held before a jury:

(a) a person appearing, and an Australian legal practitioner representing a person, at the inquest or inquiry is entitled to make an opening and a closing address to the jury, and

(b) the person assisting the coroner may make an opening and a closing address to the jury and in addition has a right of reply in respect of any closing address made pursuant to paragraph (a).

12. There are a wide variety of ways in which lawyers and their clients come to be involved in coronial inquests. Sometimes involvement will come about when acting for relatives who wish to be involved in the further investigation of a death which is violent or unnatural, a death where the cause is unknown, or a death in suspicious or unusual circumstances. In such circumstances you may find yourselves acting for a parent or relative who simply wants to find out the truth of what occurred or you may find yourself acting for somebody who is in jeopardy as a result of the death. The last mentioned situation can occur in many circumstances, for example matters involving potentially dangerous driving and more unusual circumstances such as the inquests into the deaths of David Iredale and Dianne Brimble.

13. In some circumstances, you may find yourselves acting for someone who may be under suspicion in relation to the circumstances of the death. There have been a number of well publicised inquests in recent years as a result of the death of a student engaged in outdoor activities or at school camps. Inquests as such as The Iredale Inquest and another involving a child who died as a result of an allergic reaction caused by eating peanut butter at a school camp are such cases. Often, the parents just want to know what happened. The case of *Annetts* in Western Australia is such a case.

14. Various arms of government will usually feature significantly in inquests. In the Iredale inquest, the represented parties were the parents, Dr and Mrs Iredale, the New South

Wales Commissioner of Police and the New South Wales Police Force, the Department of Environment and Climate Change for the managers of the National Parks and Wildlife Service, Sydney Grammar School, the Ambulance Service of New South Wales, and the Department of the Arts, Sport and Recreation, the licensed provider of the Duke of Edinburgh Scheme in New South Wales. In the Kovco inquest the spread of representation gives a further indication of the types of interests which may be represented at an inquest. At that inquest the mother of the deceased soldier Jake Kovco was represented as was his widow. The Department of Defence was represented because it perceived there was a prospect that its procedures in relation to securing and handling of weapons may have been a factor in the death of the deceased. The two soldiers in the room who were immediately present when the death occurred were separately represented as was a third soldier who was not present in the room but whose DNA was present on the gun with which Jake Kovco was ultimately found to have shot himself.

15. In reality, as lawyers, we will often become involved either when a relative comes to us wanting answers or an explanation for what occurred, when the matter is in the hands of the police or when a client receives a subpoena under s 35 *Coroners Act* 1980 for attendance at an inquest.

16. The most common form of inquest is held by a coroner sitting alone. There is a limited right to a jury. Under s 48 coronial proceedings may be conducted with jury only if State Coroner directs. The section provides:-

(1) Coronial proceedings are to be conducted without a jury, except as provided by subsection (2).

(2) An inquest or inquiry is to be held before a coroner with a jury if the State Coroner directs it.

(3) The State Coroner may direct that an inquest or inquiry be held before a coroner with a jury only if:

(a) the State Coroner is to act as the coroner for the inquest or inquiry, and

(b) the State Coroner considers that there are sufficient reasons to justify the inquest or inquiry being held with a jury.

17. Under the 1980 Act, a relative of the person who has died has an absolute right to request a jury. At a coronial inquest there are six jurors (*Jury Act* 1977 s 21). There is no right of challenge. Juries tend to only be sought where there is some suspicion of a cover-up. The overwhelming majority of coronial inquests proceed without a jury.

18. Other than counsel assisting, any person who seeks representation at an inquest must obtain leave of the coroner (s 57). There is no automatic right of appearance. The test concerning someone's right of appearance is broad – the coroner is obliged to grant a person leave to appear if that person has "a sufficient interest in the subject matter of the inquest" (s 57(1)). Relatives prima facie have a right of appearance (s 57(3)). The right of addresses in coronial inquests conducted before juries is defined in s 57(4).

19. In most inquests, there will be a preliminary hearing in the nature of a directions hearing at which those seeking leave to appear make the application before the coroner. The 2009 Act (s 49 and s 50) expressly gives the coroner powers relating to matters of case management and directions relating to jurisdiction. As the second reading speech makes clear, the effect of these provisions is to confer on coroners the power to hold preliminary hearings in open court for the purposes of assisting their investigations or preparing the matter for inquest or inquiry. Under the 1980 Act, there was no provision allowing the coroner to conduct a preliminary hearing with the parties to determine issues such as the likely length of an inquest or inquiry, who will be appearing in the proceedings and the number of witnesses who are required to attend. The new provision will allow the coroner the option to determine any preliminary questions in open court, including whether they have jurisdiction to deal with a particular death or whether or not an inquest or inquiry is necessary or desirable. In most instances applications for leave to appear are granted although obviously there may be some circumstances where, as evidence comes to light, it may be necessary for persons to be represented late in the proceedings or even during the course of the inquest itself. This occurred in the Kovco inquest. Self-evidently, when the role of a particular person in the death suddenly becomes an issue in the proceedings, it would be rare indeed for them to be refused representation by the coroner.

20. Having obtained sufficient instructions from your client to satisfy yourself that representation is appropriate, the critical issue for solicitors and barristers alike is to

determine the best course and tactics to adopt in the period leading up to the inquest and at the hearing itself. Obvious matters such as to what extent you may wish to speak to counsel assisting, the police or other bodies concerned with the events the subject of the inquest are of critical importance. It is somewhat trite but you must take detailed and precise instructions about everything which you think might be relevant.

21. You should endeavour to identify whether there are any witnesses who ought be called at the inquest who may or may not be on the list of witnesses which you ultimately receive from counsel assisting. Even at this early stage, should there be someone you believe to be material who may be able to give relevant evidence who apparently is not known to the investigating authorities or counsel assisting, it would be appropriate to bring this matter to the attention of counsel assisting or his solicitor. As a matter of practice, counsel assisting will have the control of the proceedings in the sense that he or she will call all the witnesses. You will even find that your own client is called by counsel assisting who will go through his or her evidence in chief with you having a right of cross-examination. Given the nature of a coronial inquest as an inquiry and not an adversarial proceeding it is not appropriate to effectively hide a witness and then seek to call that witness without notice to anybody.

22. After you have been given a right of appearance it may be that either counsel assisting or the police wish to further speak to your client. The general rule is that you say as little as possible but there may be limited circumstances in which it may be appropriate to do so.

23. Whether or not you choose to cooperate with counsel assisting and if so to what extent may have some bearing on the attitude which counsel assisting takes towards your client. In simple terms, if you have a sound basis for believing you have nothing to fear from the outcome, you may attract less suspicion and therefore less scrutiny if you tend to be cooperative. In other circumstances this can be a dangerous ploy as it leaves you subject to providing material or evidence which would not otherwise be made available. It is one of the most difficult aspects of appearing in any such matters and one which requires careful and forensic skill and judgment.

24. A co-operative approach can provide you with an opportunity of putting to the investigating police officer who gives evidence at the inquest the proposition that at all times my client had been entirely cooperative with the police and had complied with all requests for access to him or for interviews or information. Such a point is a powerful one in front of a jury. It cannot be over emphasised that this issue always raises most difficult issues which require the most careful consideration.

25. It is vitally important that you precisely understand the role of counsel assisting. Counsel assisting does not have a client in the conventional sense nor is he or she concerned with achieving any particular result. As a barrister, it is an interesting role acting as counsel assisting because our natural human inclination is to take a particular side and adhere to it. As counsel assisting you must be prepared to have an open mind. While it is true that human nature necessitates that we all judge a situation and form a view to some extent anywhere, counsel assisting has the luxury of being able to form a view and then promptly change it as the landscape of evidence unfolds. My analogy is that counsel assisting often has a job which involves him or her standing under a tree and giving the tree one big shake to see what falls out. It is only when facts start falling to earth that one can then make a decision about which way he might press on with the proceedings.

26. The luxury of being counsel assisting is one which must be exercised with some intellectual rigour and restraint. He or she must be careful not to pursue every rabbit down every burrow purely on the basis that there might be something vaguely relevant in the subterranean depths of the burrow. On the other hand, he or she has a duty to pursue matters which might be relevant notwithstanding the fact that they may not seem to be particularly strong at the time. A good example of the difficult predicament in which counsel assisting was placed arose during the Kovco inquest. On the one hand we had the deceased's mother espousing various theories which were unsupported by the evidence and on the other hand we had credible expert evidence on the suicide issue which although seemingly implausible in some ways required the thorough investigation which the police, John Agius SC and those instructing him ultimately gave it to that issue

27. A coroner holding an inquest during inquiry is not bound to observe the rules of procedure and evidence (s 58 *Coroners Act* 2009). This does not mean that coronial

proceedings can become an evidentiary free-for-all as it were. Although evidence may not be strictly admissible in a court of law, it will generally be permitted to be given if it tends logically to show the existence of fact consistent with a finding which might be available (*Mahon v Air New Zealand Ltd* (1984) AC 808). Hearsay will often be permitted but in order to make it relevant, it would usually need to be sourced in some way. The admission of hearsay does not mean that the coroner will permit public hearings to become vehicles for rumour, gossip and innuendo without foundation. Matters going to credit alone may or may not be admissible upon, in the author's experience, similar bases to those applying in an adversarial proceeding in a court. Of course, the ethical rules binding advocates will apply so one must be careful about putting matters without any factual foundation.

28. Notwithstanding the fact that the rules of evidence do not strictly apply, the rules of procedural fairness do apply. The rules of natural justice apply to coronial proceedings. Any person whose reputation is likely to be damaged or who may be liable to a sanction or penalty is entitled to the procedural fairness generally afforded by the law. The High Court considered what rights might be capable of protection in *Annetts v McCann* (1990) 170 CLR 596 where at 598 Mason CJ, Deane and McHugh JJ stated that a duty of procedural fairness arises because the power involved in such proceedings is one which may "destroy, defeat or prejudice a person's rights, interests or legitimate expectations". At 608 (per Brennan J) His Honour said that "personal reputation has now been established as an interest which should not be damaged by an official finding after a statutory inquiry unless the person whose reputation is likely to be affected has had a full and fair opportunity to show why the finding should not be made". The issue in *Annetts* concerned the standing of the parents in relation to findings which were implicitly critical of their deceased child.

29. It is important to note that it is not every criticism or adverse comment on collateral matters which might require the rules of procedural fairness to be applied. One must look at whether there is a real potential to prejudice the plaintiff's reputation and/business interests and whether it would be done in such a way that would become a matter of public interest and concern (see *Queensland Police Credit Ltd v Criminal Justice Commission* [2000] 1 Qd R 626).

30. It is also important to bear in mind that in coronial proceedings the coroner and the jury (if there is one) have the power to make recommendations (s 82). As the Attorney General recorded in his second reading speech, "*the importance of this power is highlighted in s 3, which, for the first time, identifies the power of coroners to make recommendations in connection with an inquest or inquiry as one of the main objects of the bill. The power to make recommendations provides coroners with the opportunity to identify any systemic failures in the health, law enforcement or other services to prevent similar deaths occurring in the future."*

31. The section provides as follows:-

(1) A coroner (whether or not there is a jury) or a jury may make such recommendations as the coroner or jury considers necessary or desirable to make in relation to any matter connected with the death, suspected death, fire or explosion with which an inquest or inquiry is concerned.

(2) Without limiting subsection (1), the following are matters that can be the subject of a recommendation:

(a) public health and safety,

(b) that a matter be investigated or reviewed by a specified person or body.

(3) The record made under section 81 is to include any recommendations made by the coroner or jury. The record must not indicate or in any way suggest that an offence has been committed by any person.

(4) The coroner is to ensure that a copy of a record that includes recommendations made under this section is provided, as soon as is reasonably practicable, to:

(a) the State Coroner (unless the coroner is the State Coroner), and

(b) any person or body to which a recommendation included in the record is directed, and

(c) the Minister, and

(d) any other Minister (if any) that administers legislation, or who is responsible for the person or body, to which a recommendation in the record relates

32. One frequently reads in the press of recommendations in matters involving deaths as a result of medical treatment. One would assume that the rules of natural justice would apply and that should a coroner propose to make a specific recommendation touching

upon a particular individual, government department or organisation, that organisation has a right to be heard in relation to the issue of whether or not a recommendation should be made and what form it should take. In the case of a coronial inquest in front of a jury, this is somewhat more problematic.

33. If there is a legal basis for it, be aware of the real risk that your client will be subject to surveillance including the recording of phone conversations. It is beyond the scope of this paper to look at these circumstances in which a warrant for such recordings can be obtained but it must be borne in mind. The devastating effect of phone conversations in coronial inquests, Royal Commissions and other inquiries is abundantly clear from the well publicised surveillance evidence given in the Wood Police Royal Commission and the numerous ICAC inquiries to mention only a few. It is also worth bearing in mind that the conduct of surveillance may not cease during the conduct of the proceedings. This would be clear from the Brimble inquest.

34. A further practical matter to consider concerns the circumstances in which it may be appropriate to have the court closed and/or non-publication orders sought. Under s 84, the coroner has power to clear the court and prevent publication of evidence. In certain circumstances you can be confident that this will attract vigorous opposition from the lawyers for the media corporations such as the television channels and the newspapers. It will however be particularly appropriate in circumstances where there is some hearsay evidence given which may not amount to anything at the end of the day but which is highly prejudicial or where parties are identified by highly prejudicial but very tenuous evidence. When more convincing evidence is given, application can be made for the suppression order to be lifted.

35. There are also obviously matters of public interest immunity involved in some circumstances. For example, in the Kovco inquest there were numerous issues relating to operational matters concerning the conduct of the Australian army in Baghdad which were the subject of non-publication orders. The issue may also arise in the context of ongoing police investigations.

36. It is very wise to maintain close contact with counsel assisting during the course of the inquest with a view to ascertaining in what direction the result might be going. Obviously, you cannot predict the result precisely, but issues such as whether recommendations might be made, and the form of such recommendations should be discussed before the final decision of the coroner. If there is a prospect that your client might be on the receiving end of recommendations, it is most useful if you have some warning as to what they might be. There may be a situation when for very good practical reasons, the recommendations which are mooted cannot be implemented. These practical problems should be raise in advance with counsel assisting. Ideally, a positive cooperative approach to an inquest may result in no recommendations at all because your client has done everything it reasonably can do to prevent the problem recurring. In such circumstances, you may even find your client being commended for his or her or its response.

37. The Supreme Court has power to order an inquest or inquiry (s 84). A fresh inquest or inquiry can be ordered under s 85 in circumstances including fraud, ejection of evidence, irregularity or proceedings, insufficiency of inquiry, discovery of new facts or evidence or otherwise it is "*necessary or desirable in the interests of justice*".

38. There are numerous provisions in various Acts about the extent to which evidence must be given under protest. The provisions of s 33AA of the *Coroners Act 1980* have been reproduced in s 61 of the 2009 Act. The section, being restricted to proceedings in NSW courts, can be extremely limited in its benefit to the witness. For example, in the Kovco inquest, it was of no use to the soldiers who might be subject to prosecution for Commonwealth offences or subject to disciplinary proceedings under military law. One solution may be to seek to obtain a letter of comfort from the relevant authorities.

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20 June 2011 **CAMPBELL BRIDGE SC**