

LAW REFORM COMMITTEE

Inquiry into Coroners Act 1985

Melbourne — 5 December 2005

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Witnesses

Mr J. Forrest, QC; and
Mr R. Nankivell, Legal Policy Officer, Victorian Bar Council.

The CHAIR — I welcome to this inquiry representatives from the Victorian Bar Council, Jack Forrest, QC, and Ross Nankivell, who is the legal policy officer for the Bar. This is a public hearing, so anything that you present to us will be on the public record unless of course you ask to give any in-camera evidence. You will have an opportunity to correct the transcript for any factual errors; after that it will be on the web site and be a public submission. If you would like to talk to us about your submission we will be very happy then to ask you some questions.

Mr FORREST — Can I, on behalf of the Bar and myself, thank members of the committee for fitting us in at such short notice. We are indebted to the committee. We will endeavour to keep our comments brief and hopefully to points that affect the Bar. We understand that there is a mixed bag of questions and topics that are raised, a lot of which affect the medical profession and the coronial institution more than they affect the Bar as an institution. On that issue can I say this, that the Bar plays a fundamental role in coronial inquests. Our members attend there virtually every day. Most inquests which are held by The Coroner or deputy coroner or coroners throughout the state have before them a member of the Bar, so we have a real cross-section of the legal profession in terms of the Bar attending coronial inquests, because they go there for all sorts of reasons. A number attend to represent families and a number attend to represent employers, medical professionals, or those who may be potentially charged with offences. We have a wide church in effect in terms of members of the Bar who go there.

The Bar has spent a considerable time canvassing those who attend coroners inquests and who are familiar with the coronial process, and we are sure the views we are expressing are those of the Bar. We acknowledge there are some matters — and one in particular which I will come to towards the end of our submissions — about which we cannot say there is total agreement, but nevertheless we are confident that we represent the Bar Council's views and are authorised by the Bar Council to make these submissions. We will put them in writing and have them filed with the committee in due course. We had hoped to have them before you today, but it has just been very difficult trying to get an answer to everything.

Just in terms of my own experience, so it is not thought that I am just talking off the top of the head as lawyers often do, as a junior Barrister I went to The Coroners Court a lot for families and for medical professionals, and as a senior counsel I have been down there occasionally, but I am familiar with the practical aspects of how The Coroners Court operates and also how the legislation operates.

Can I then turn, if I might, to what we are here for, and just deal with the questions and put our submissions in relation to the questions.

In relation to whether we think there is an under reporting, and this is posed by I think questions 1 and 2 which are the starting point, our own view is that from our experience — and we have canvassed a number of members of the Bar — we do not see any real indication of under reporting. Having said that, we are not in the best position to do so because we see the end process. We become involved once the death has been reported and once The Coroner has started the process, unless someone comes in wanting counsel to make an application for an inquest. Our perspective is that we do not see any particular problem in terms of under reporting. Having said that, we are not at all sure we are in the best position to say any more than that that is our experience.

We do see a problem with the topic raised by question 3, which is deaths involving anaesthetics. We think Dr Ranson hit the nail on the head in his submission. It is very difficult to see why anaesthetics are singled out from other medical interventions. We see that as a policy issue. Secondly, we are not at all sure what 'deaths involving anaesthetic' means. It is a definition that is noted in the paper, but it seems to be a definition that there is no clear guidance about.

From the Bar's point of view, we would have thought that either the definition is made more specific, so doctors know what death involving anaesthetic means, or alternatively it is done away with; it is really one or the other. At the moment it seems to be a murky area. Our view is that any lawyer would have difficulty determining exactly what a death involving anaesthetic is for so many different things these days. They are not just operative. I suspect that when it was introduced it was on a basis that it would be a patient who was under an anaesthetic at the time. We all know that these days anaesthesia is used for lots of interventionist purposes other than operative, and the patient could be conscious or whatever. We just bring to the notice of the committee that we see a problem with the definition, and one that would certainly bear examination. If it is of any assistance, when we put in our written submission we will turn our mind to what we think might be an appropriate approach if you are going to continue along that way.

In relation to question 11, the appointment of coroners is something that we have some fairly strong feelings about. The first point we want to make is that we see absolutely nothing wrong with a coroner being appointed for a fixed term. We do not think it has any potential to compromise the independence of the position because the practice has been to appoint from the ranks of the judiciary, almost exclusively from the magistracy — and I will return to that in a moment. In our view, an appointment for a fixed term, be it three years or five years, is perfectly appropriate because the independence of the particular judicial officer is preserved under his or her statute, being the Magistrates' Court Act or the County Court Act.

That takes us to the next point, which is this question of the qualifications of The Coroner. We acknowledge that there is a fairly broad definition at the moment, but the practice has been to appoint from the Magistrates Court. The strong view of the Bar is that this is a very important role — as evidenced by this committee's discussion paper and by the interest this committee is taking in the issue. In future appointments this committee should give consideration to recommending that a judge of the County Court be appointed. We think given the role fulfilled by The Coroner and the types of issues that are determined by The Coroner, which are wide ranging and highly relevant — there is a whole list of issues which have been canvassed over the last couple of years including the Grand Prix death, the deaths in custody at Port Phillip and the four-wheel drive and motorbike series of coronial inquiries — they require a good deal of judicial skill. We are not for one moment criticising the way in which they have been handled from the Bar's point of view. But, having said that, we think it demonstrates the necessity to have someone from the senior ranks of the judiciary to be appointed as state coroner in the future, or certainly consideration given to that.

As far as I can remember, I have never known a coroner be anything other than a magistrate. I cannot remember a judge ever being a coroner. It might have happened in my father's day or in the days before that, but over the last 20 years to 25 years it has always been a magistrate, and in terms of the state coroner's position, we think it demands a more senior appointment. County Court judges fulfil a lot of other administrative tasks along the way, including deputy chairmen of VCAT, chairmen of a number of other boards including the old legal profession practice board, the Racing Appeals Tribunal and a whole raft of organisations where County Court judges fulfil a role, and we think they are appointed because they are the intermediate level of judiciary and they have the expertise we think is necessary in a coronial inquest.

Mr Nankivell is drawing my attention to the Children's Court as well — Judge Coate is on the Children's Court now. I think I have said enough about the point. We think it is important that, because of the role that is fulfilled by the State Coroner, real consideration be given to legislating — we would prefer legislating — that the state coroner be a County Court judge. That would be our submission.

In relation to how long, the committee would no doubt have formed views about that. We would have thought there should be a fixed term, perhaps five years rather than three years because one has to get used to the role, but we have no problems with the fixed term. We think it ought to be a County Court judge and we think probably it is more desirable to have five years rather than three years, but we have no real view about the length of time. We want to make sure that we have the right person in the job and if they were there for five years that would give them time to do some good work for the community.

On question 14, which is the police assistance with The Coroners investigations, we think it is desirable to have such a power. I think I can put it as shortly as that. We think the power to direct investigating officers is desirable. It seems, as I read the paper, to exist in some other states and we think it would be helpful if The Coroner had the power to give directions.

The question of legal assistance with coroners investigations, as we understand it what presently happens is from time to time — this is question 15 — legal assistance will be requested by The Coroner in a complex case and we understand that in most cases it is provided. Our view about that would be it is an appropriate practice. It is not necessary to have any legislation to enshrine that because it seems to work relatively well at the moment.

In terms of question 19 — I am jumping from question to question because we are ignoring the questions on which we do not think we can help.

The CHAIR — That is fine and perfectly appropriate.

Mr FORREST — Question 19 concerns The Coroners discretion not to hold, continue or recommence an inquest. You will recall that what the Act does at the present time is that where there has been an acquittal or a

guilty verdict in particular types of cases, The Coroner has a discretion as to whether to continue the inquiry or not — if it has been murder or manslaughter. We think that should be extended to a breach of the Occupational Health and Safety Act because there will then have been a full investigation, a full inquiry. Whether it has been a plea or whether it has been dealt with on the basis of a trial and a conviction, we think it would be worth considering extending those provisions in terms of a discretion to continue what would be a mandatory inquest to a breach of the Occupational Health and Safety Act. That would only be, of course, if there had been a criminal charge, conviction and the like; it would not be if there had just been an investigation. If it had proceeded along the way to a trial or a plea, all of the relevant factors, it would seem to us, would have been raised on that plea. It may be the committee takes the view — and we acknowledge this — that perhaps there would not be the recommendations that it may want, which a coroner would be able to get. It may be for that reason it would not be appropriate. Having said that, we think it falls within the purview of those other cases.

I refer to privilege against self-incrimination — this is question 22. The Bar strongly opposes any suggestion that the privilege against self-incrimination be whittled down in any way, even with the issue of a certificate. We are not at all sure it works that well in New South Wales. We see a more fundamental issue at the moment in any event — that is, the Evidence Act is at the moment under review by the Law Reform Commission of this State and the Commonwealth Law Reform Commission. I have been to a couple of hearings that have been held by it. It seems almost certain that it will be introduced. If it introduces section 128 of the commonwealth Evidence Act, it will empower courts to grant a certificate any way.

We would have thought that at the moment it would not be helpful to make a recommendation in relation to enacting a particular provision for the granting of a certificate in relation to self-incrimination when there seems to be another road down which the Parliament is going — that is, in relation to the Evidence Act. I might say our view about that is that it is inappropriate as well, but having said that, we do not think we are getting very far with that argument.

The CHAIR — So this is your fall-back position?

Mr FORREST — It is coming, we know it is coming. There are divided views at the Bar about it, but we know it is going to come. We think it will cover the field, so to speak, in terms of self-incrimination. As we understand it, a coroner will be able to utilise it. There are lots of limits and there is a considerable amount of authority about the exercise of the discretion, but we do not think it would be wise to put in anything about certificates under this Act. Our bottom line, and our submission to members of the committee, is that it remains that a person who is entitled to, to use the vernacular, can take the fifth.

Rights of appeal; this is question 23. We submit that the Supreme Court is the appropriate jurisdiction. It should remain as the appellate court. We do not see any reason to disturb that. We have a submission to make in terms of the grounds of appeal. At the moment the section limits the grounds for appeal to findings. Our submission is that the committee should consider widening that. Often recommendations and comments are made by a coroner. A coroner has a power to do that, and our submission is that it would be appropriate, particularly where recommendations are concerned, for there to be a right of appeal. It may well be that a coroner makes a recommendation which has no basis in the evidence or, alternatively, is greatly against the weight of the evidence and which affects a number of people. The recommendation can be separate from the finding. People from any walk of life can be affected by a recommendation — social workers, manufacturers or whoever could be affected by a recommendation which, if implemented, could have a considerable effect on the way they carry out their activities. They may have views about it, and we would have thought they ought to be given a right of appeal on that issue — in other words, we think the right of appeal at the moment is a bit too narrow because it is limited to findings. While it might be thought that this is said in self-interest because barristers love making work for themselves — —

The CHAIR — No.

Mr FORREST — Never — it did not cross my mind, either. Our submission is that it be broadened to at least encompass recommendations, because at the end of the day the recommendations can be as influential as the findings and can be just as right or wrong. The point we want to make is that this is the only right that someone has to challenge a coroner's findings — you cannot go to VCAT, you cannot take out an administrative law application in the Supreme Court.

The CHAIR — While we are on this point, are you suggesting that they should be able to overturn a recommendation of The Coroner? Is that what you are suggesting?

Mr FORREST — Set it aside, yes.

The CHAIR — Bearing in mind that at the moment coroners' recommendations have no legal force, what would be the purpose of that?

Mr FORREST — I think it is the implicit force. I understand the proposition you have put to me. Normally we have findings and then a recommendation. The problem we see with the recommendation is that recommendations often carry the force of law — true it is that they do not have it; I accept that. However, they are a bit like holy writ, and they are distributed widely — they do not just go to the government.

People's lives, careers, occupations and business interests can all be significantly affected by the publication of recommendations. It is not as though they just go in-house to the government; they do not. They are often distributed and publicised. We would have thought that, just as a party would have a right in a civil court to challenge findings and the reasoning of a judge sitting at first instance — you are not just confined to the finding, you can challenge the reasoning of a judge — by analogy, why should a party affected not have the right to challenge a recommendation? I accept what has been put to me; it is not holy writ. But having said that, it can have an adverse effect upon a number of people from all ranges. I am not just talking about the manufacturer; I am talking, let us say, about the social workers if there has been a complaint about the way in which a child has been treated in custody and has, sadly, come to no good. We know the recommendations often get lots of publicity and are often widely circulated. I think, as best I can say, that is my response.

The next point we wanted to make is in relation to question 29, which is The Coroner's role in death and injury prevention. The short point to make here is that the view of the Bar at the moment is that the decision in *Harmsworth v. The State Coroner*, which effectively requires The Coroner to confine his inquiry to the particular death or fire before him or her, should be maintained. We think that, if there were a wide-ranging inquiry not confined to the relevant matter, which is the death or the fire, it could end up being in effect a royal commission without terms of reference. It would give The Coroner an extraordinarily wide range, and the proceedings could be endless. There has to be, at the end of the day, some limit on into what and about what The Coroner is to inquire. The best way to set that limit is the test of relevance, which has always been the time-honoured test in the courts — the test of relevance to the particular issue. That is often given a very broad interpretation, and we support that, but what we would find disturbing is if in the case of a death a coroner could simply range broadly from issue to issue without a relationship to the particular events surrounding the death before him or her.

The CHAIR — But is that power not about making findings relating to how a death occurred and the cause of the death? Is that not the finding of *Harmsworth*? There is a relevance provision in there.

Mr FORREST — There is as long as *Harmsworth* remains. Our concern is that, as we read some of the material, there are some suggestions around that really a coroner could just range broadly — —

The CHAIR — Roam at large.

Mr FORREST — Roam at large. We have no problem with the proposition you have advanced. That is a proposition which we would support a recommendation being made in respect of. I am conscious of the time and that I have rambled on for too long. I will conclude now, because I think that has raised all the points we think are germane from the Bar's point of view. I would welcome any questions.

The CHAIR — Thank you very much. Perhaps I could start with a general question about something which is vexing us. It is in the nature of the jurisdiction of The Coroner and The Coroners Court. He has a principal role in trying to get at the truth and determine what caused the death and how and why and make recommendations about how deaths can be prevented in the future. So in a sense there is an inquisitorial role there. We have had many witnesses who have said to us that coronial inquiries, particularly in the court, become a bit of a lawyers' picnic, if I can put it that way. Everyone is represented — the hospital is represented, individuals are represented — and often it is not so much about getting at the truth as it is about protecting the particular interests of the hospital or any other body that might be appearing before The Coroner, for insurance or other reasons or — —

Mr FORREST — Reputation.

The CHAIR — For reasons of reputation or the prospect of civil or criminal proceedings. Do you have any views as to how we could break away from that so that we can Actually get at what seems to be the central purpose of The Coroners Act, which is to find out why and how and in what circumstances the death occurred and what can be done to prevent it in the future?

Mr FORREST — Being perfectly candid, we think you are stuck with it unless you make a recommendation that legal representation be done away with, which we doubt anyone would want, more particularly because of the families but also for anyone else. But from everyone's point of view it seems to us that once you have representation, part of the representation is to ensure that your client, be it a hospital, a family or whatever, is not the subject of an adverse finding — a hospital perhaps. To do so you have to defend their interests and put forward to The Coroner the reasons why recommendations should not be made which reflect adversely upon them. It seems to us it is just part of the process. It is not as though this is new; it has been part of the process for as long as I can remember, and I am sure for a long time before.

The CHAIR — But you can understand, from a family point of view, where something has gone wrong it is not for them so much a matter of civil proceedings or a damages claim or compensation; it is really about: can we find out what Actually did happen, what went wrong and how can we correct the systems or procedures that might apply in that particular setting so it does not happen again in the future? Families often feel that they are sitting through an enormous amount of legal argument which is really about the technicalities of whether or not a finding can be made or a question put or not put. Why can we not have a system — and I suppose this relates to the other issue around the privilege against self-incrimination and whether or not it can be abrogated and subject to a certificate — where we try in a more focused way to get at what went wrong so that we can prevent it happening in the future?

Mr FORREST — My answer to that is that at the inquests I have been party to The Coroners have taken the view that you have expressed. They have not permitted, because the Act virtually entitles them to stop them, technical points to be taken. There are very rarely objections to hearsay, and often the proceeding goes through without objection. There is an amount of cross-examination by those trying to protect their interests, but surely that is permissible if the aim is to get to the truth and remembering what can happen with findings. Surely it is permissible for those who might be affected to be properly represented, just as the family is.

The technical points that you have referred to nevertheless go very much to the heart of the matter, as to what has been the cause of death and the various matters that arise out of that. I have represented families, so I am well attuned to the problem you are adverting to, because often they will come and say, 'Why is this taking so long? Why is that man representing the doctor saying X, Y and Z?'. But I am not at all sure what the solution to it is. It seems to me the solution would be to shut people out from properly defending their interests. If we are going to have this public process where there are going to be findings at the end which can be adverse to persons — and presumably you would determine to permit legal representation which, not only from a self-interest perspective but also from a fundamental rights position, we would say to the members of the committee should be ensured — it is difficult to see how you broker a middle ground.

The CHAIR — Then I suppose I am interested in the connection around your opposition to abrogating the privilege against self-incrimination. Why not abrogate that privilege, if it means that the trade-off is that evidence cannot be used in other civil or criminal proceedings? Why not have someone come forward and Actually say, 'This is what happened and this is my involvement in it'?

Mr FORREST — Because it is not just the evidence that is used. The reality at this point of time is that the person is entitled to remain silent according to all other principles. Any other investigating body would know that evidence had been given at this point of time. Firstly, it may lead them on a train of inquiry which that person would not have been subjected to if they had been entitled to rely upon privilege against self-incrimination. Secondly, in the course of the trial it is inevitable — say, they were charged — the prosecution would have access to that material and be able to endeavour to produce evidence which would either compel that person or other witnesses to give evidence along those lines.

We will put a more articulate submission to you about this in our written submissions, but the point we see is that, at the end of the day, one of the bulwarks of the criminal justice system is the privilege against self-incrimination — that people have a right not to give evidence against themselves. Once you start tinkering with it, whether by certificates or otherwise, it places them in a position of jeopardy, even if the evidence cannot be used

against them previously. It gives the prosecution or investigating authority a whole gamut of information which it would not have had previously, and that information has been obtained in the course of a coronial inquest, if that be the way in which we go.

Mr MAUGHAN — There frequently seems to be an uneven contest. We have had witnesses before the committee, for example, who have talked about somebody who has suicided. There has been an inquiry into the reasons leading up to that, and the family members simply want answers. They are confronted then with legal counsel on behalf of a major hospital. It is hardly an even contest between the family that simply wants to know what went wrong and wants, at least, an acknowledgment. It seems under our present system that the organisations concerned are reluctant to be able to do that because of obvious legal reasons. Under the present system it would seem that it is an uneven contest between the organisations that have the resources and families that frequently are starved of resources.

Mr FORREST — I have seen this happen. I have seen cases where I have been down there for hospitals or for doctors and a family is not represented. They depend a lot upon the quality of the investigating police officer. In a number of cases they will be represented; people take them on pro bono or there will be related civil litigation. It is not always that they are not represented. Those cases are going to be, from my experience, few and far between. I have seen it happen once, I think.

I have seen one nurse, I think, take privilege against self-incrimination; I have never seen a doctor do it. I can be quite candid with the members of the committee, I have given advice to several doctors at times that they should consider it. None of them has wanted to. I do not think this committee should think it happens regularly in terms of medical mishaps. I have seen it happen once, and it was a flagrant case. That is me speaking from my experience. Generally doctors do not want to do it because it reflects badly on the face of it. It would be a very uncommon case.

The other point that was made related to legal representation. I think that is a real issue for families. We understand what is said about resources and the like, but we wonder if there were not some sort of way in which there could be, say, a public advocate for families and a permanent counsel who is familiar with the process. That does seem to be something that is really lacking. I think the unevenness that a lot of the families point to might be solved if there were competent legal representation available to them by means of a permanent counsel. That is certainly a submission we would endorse, if that were to be considered by the committee — which I think it is.

The CHAIR — Is there a danger in having a higher judicial appointment in the form of a County Court judge in that we run the risk of just ending up with an even more legalistic Coroners Court?

Mr FORREST — Yes, in my experience. When appearing in front of tribunals, I think you are going to find that they are not going to be so scared of counsel — ‘scared’ is not the right word; I am trying to think of the right word. They are far more confident in dealing with senior and junior counsel; they have far more experience with it. I would have thought it would mean, in terms of dealing with some of the problems that this committee is dealing with about balancing the interests, a senior judge from the County Court would deal with nitpicking and the like particularly well and would deal also with questions of self-incrimination. He or she has to be satisfied there is a genuine basis to the argument for self-incrimination. My experience, generally, is that County Court judges sitting on administrative tribunals are delighted to do away with the rules of evidence and are more inclined than any others to get on with the case.

Mr MAUGHAN — Earlier you referred to the fact that anaesthetics were picked out for special investigation and queried why it was that only anaesthetics and not other fields of medicine were picked. I would like you to comment on the other part of that where, again, The Coroner is required to inquire into fires. Why not floods? Why not natural disasters? Why not a whole range of other things? Do you think that The Coroner is the appropriate body to inquire into fires, or would you support the notion that has been put to the committee that a coordinating body between the CFA, the MFB and the other organisations involved in fire fighting, and that have the expertise, should be the body that inquires into fires rather than The Coroner, particularly where there is not a death involved?

Mr FORREST — I will speak personally because I do not think the Bar has considered this. From a personal point of view, I would endorse the suggestion that has been made by Mr Maughan. From my point of view, I would have thought it a far better use of resources and expertise.

The CHAIR — Thank you very much. We appreciate your time and we look forward to your written submission.

Mr FORREST — We will hopefully have that within the week. Thank you very much for your attention.

Witnesses withdrew.