

Introduction

Appearing in the Coronial jurisdiction

Very narrow scope for today

Ed Whitton- Lawyer, Legal Aid Queensland - Serious Crime.

The basics- What to do and to know when you end up with an inquest matter as a Solicitor for a client who is legally aided.

What can be done better (with thanks to Michael Barnes, QLD State Coroner 2003-2013)

Craig Chowdhury – Private Bar.

The complex- Arguments relating to abuse of process, compulsion and indemnity, and *X7 v. Australian Crime Commission* [2013] HCA 29 26th

General points about the Office of the State Coroner.

Who?

- State Coroner Mr Terry Ryan (replaces Mr Michael Barnes July 2013).
- 6 other Coroners through Brisbane and the QLD regions.
- 7x In house counsel
- Domestic and family violence review unit
- QPS Coronial support unit

What?

A statutory body provided for Under the *Coroners Act* 2003 QLD. The Coroner is required to investigate “**reportable deaths.**”

Why ?

- *The primary focus of Coronial investigations is not whether someone should be held criminally or civilly liable for a death, although that may be an eventual outcome in some cases.*
- *Rather, **more effort will be devoted to identifying the root cause of the incident that precipitated the death** with a view to analysing **systemic failures** that contributed to the death and designing remedial responses.”* (Coroner’s Guidelines – available at <http://www.courts.qld.gov.au/courts/coroners-court>)

Relevant legislation and resources

Coroners Act 2003 QLD

- S104 renders it a code.
- Application of The Act guided by:
 - **Coroners Guidelines** (issued under s14 of The Act in 2003 and currently under review).

Common Law

Defining terms such as:

- “reasonable suspicion” (*George and Rockett* (1990) 170 CLR 104) And;
- “in the public interest” (*Gentner v Barnes* [2009] QDC 307).

Also

- Cases re s30 of the Coroners Act (where you are appealing a decision of a Coroner not to hold an inquest into a death)
- Administrative Law decisions relating to procedural fairness and natural justice.

When do you have an inquest?

- See ss 8,9 & 27-30 of the *Coroners Act*.
 - When you have **both** a “**reportable death**” - as defined in s8 of the *Coroners Act* :
 - s8
 - The death has a connection to Queensland (this is defined in subsection 2) and,
 - The death is one of those mentioned in subsection 3(a-h).
 - For example: a death that is violent or otherwise un-natural, a death that happened in suspicious circumstances, death in custody, death in care.

“Reportable death” and...

Either

An inquest is made mandatory under s27 of the *Coroners Act* (for example a “death in custody” or a “death in care”);

Or

The Coroner determines that having an inquest is “*in the public interest*”- See *Coroners Act* ss28 to 30 & *Gentner v Barnes* [2009] QDC 307

When do you end up representing a Legal Aid client in an inquest?

- Where there may be significant criminal ramifications for the client because of the evidence that may be heard and / or the possible findings of the Coroner.
 - Most likely, where there has been a trial in relation to a death and the client has escaped conviction.

LAQ Grants?

- Parameters are:

- Means test.

- \$\$\$\$?

- Guideline Five

- A grant of legal assistance is available for legal representation at a Coronial Inquest where:

- The applicant has in some way been involved in the death or deaths **and may be criminally charged**, or

- There is a substantial public interest element, or

- The applicant for aid is a relative of an Aboriginal or Torres Strait Islander who died in custody.

- Related matter: A grant of legal assistance may also be available to provide legal representation for families before Crime and Misconduct Commission (CMC) enquiries related to the death in custody of an Aboriginal or Torres Strait Islander person.

- Merits test

- To satisfy the merits test, the applicant for assistance must meet each of the following three tests:

- The Reasonable Prospects of Success test

- The Prudent Self-Funding Litigant test, and

- The Appropriateness of Spending Limited Public Legal Grants of Legal Assistance Funds test.

What you need to know, and what you should tell your Legal Aid client.

- They could totally be in trouble !!!
 - The Coroner is to make a finding about how someone died (if possible) and the circumstances that led up to that death. This may go badly for them if they are a person of interest.
 - Coroners Court is not bound by the rules of evidence, and may inform itself in any way it considers appropriate. (*Coroners Act* s37(1))
 - Admissibility is determined by relevance to the issues being investigated.

- Previously the Coroner had a power to commit to trial directly to the higher court.

- This power was removed in 2003 amendments to the act (But still can if death before 2003.)

- The Coroner can make recommendations in findings to the DPP / Police, but must not make a statement in findings to the effect that a person is guilty of an offence- see s45(4).

- Usefulness of that protection is dubious because does not limit the type of finding outside of an explicit finding of guilt.

Section 48 Referral powers

Mandatory referral where the Coroner reasonably suspects the commission of an offence (and the offence is an indictable one) they must refer that information to the DPP (or CDPP) – *Coroners Act* s48(2).

Any offence will trigger this. Does not have to be an offence connected in any way to the death.

Reasonable suspicion is determined by common law: *George and Rockett* (1990) 170 CLR 104

Discretionary referral to the CMC regarding (Public) Official or Police misconduct - s48(4).

- “Misconduct” is defined by Section 15 of the *Crime and Misconduct Commission Act 2001* (QLD).
 - Essentially a Criminal offence **or** a disciplinary breach that could see the particular official sacked.
- Where the issue is with a police officer “misconduct” is defined in schedule 2 of the *Crime and Misconduct Commission Act* as conduct *which is:*
 - (a) *Is disgraceful improper or unbecoming; or*
 - (b) *Shows unfitness to be or continue to be a police officer; or*
 - (c) *Does not meet the standard of conduct the community reasonably expects of a police officer*

A s48(1) of the Coroners Act says that

The referral powers / requirements do not apply to reasonable suspicion that has come about by virtue of evidence obtained under s39.

.....So what is so special about s39??

Compulsion of evidence.

- S39(1) and (2) give the Coroner the power to compel evidence from a witness who wishes to remain silent, if the coroner is satisfied that it is *in the public interest* to do so.
- This includes evidence that would tend to incriminate the witness.

Ss 39 (3) to (5) provide some protections

S39(3) *The evidence (that which is compelled under s39 (1) and (2)) is not admissible against the witness in any other proceeding, other than a proceeding for perjury.*

S39(4) *Derivative evidence is not admissible against the witness in a criminal proceeding.*

S39(5) *Derivative evidence means any information, document or other evidence obtained as a direct or indirect result of the evidence given by the witness.*



**“Just put it on the tab
mate!”**

....Is what your client may well say.

Hooray! Contempt !

If when the time comes the client refuses to give evidence, then will most likely be charged by the bench with contempt.

This invokes s42 of the *Coroners Act* which says that:

“The Magistrates Court Act 1921, section 50, applies to the Coroners Court in the same way as it applies to a Magistrates court, with all necessary changes.”

ss50 (1-7) of the *Magistrates Court Act* are the general provisions for the offence and penalty for contempt in the Magistrates Court.

s50(2) A contempt under subsection (1) must be dealt with in the way prescribed under the rules. (ie The UCPR).

What then?

Client must be called upon by the bench and given an opportunity to purge their contempt (give the required evidence) and if they don't they will be convicted of the offence of contempt.

Should expect to do **actual custody**, in general, in the vicinity of a 6 month head sentence (subject to the context of the contempt, their criminal history etc..)

Contempt proceedings are separate to the inquest, and as you and counsel are most probably a witness to the offence you should not act for the client in these proceedings as well.

Current issues, and what lawyers can do better?

A few (slightly edited by me) thoughts from Michael Barnes, QLD State Coroner 2003-2013

Early preparation (when isn't it a good idea?)

In inquests, unlike most criminal trials, legal representatives are given an opportunity to frame the issues that will be examined.

It is important to be prepared, on top of the issues and have taken (pretty much complete) instructions from the client by the time of the pre-inquest conference.

Engaging with peripheral issues.

“How the person died” is always going to be on the top of the list of the terms of reference. The Coroner is also interested in what happened surrounding this death (especially where they may be considering making broader findings about the death, or recommendations for the public interest).

Legal representatives need to be alive to arguing whether these inquiries made by the Coroner or Counsel Assisting are beyond jurisdiction - either because they are really focused on a criminal issue, or are not supported by any evidence.

The difficulty for a lawyer making these sorts of submissions is that they should expect a response along the lines of “*this is an inquiry, not a trial, and so the inquest should be free to follow any leads.*”

Treading the line between Criminal and Coronial.

Musumeci v Attorney General NSW & Anor [2003] NSWCA 77 is a good example of where the “part inquisitorial part adversarial” nature of an inquest can create conflict with the principles of natural justice and procedural fairness.

[My note] In the above case a person of interest in an inquest relating to a shooting death was denied access by the coroner to the brief of evidence for “tactical reasons.” This made it all the way to the NSW Court of Appeal where there was significant discussion before it was ultimately found to be a breach of natural justice (by majority 2-1).

There is a lack of jurisprudence on this type of issue, and this is not something that is easily overcome. It remains a difficult issue for both representatives and those on the bench.