

Advocacy in coronial inquests: a seminar

By Donna Ward

Coronial inquests present many challenges for advocates, some of which are unique to the jurisdiction. On 25 February 2021, the Bar Association's Inquests & Inquiries Committee presented an online seminar on the topic. This article is an edited collection of highlights of the discussion. Emma Sullivan and Donna Ward prepared the seminar. Kristina Stern SC, Jason Downing SC, Kirsten Edwards and Hugh Dillon (former Deputy State Coroner) were the panellists.



What is the inquisitorial method and the ethos of the coronial system?

Hugh Dillon (HD): The inquisitorial method requires the coroner and the coronial team to lead the search party – the fact-finding exercise. Counsel Assisting is the lynch-pin of the exercise. So my advice would be that advocates should not treat Counsel Assisting as an adversary but seek to work with them.

The initial problem for advocates is to identify the direction the coroner and Counsel Assisting are going and then to analyse the implications for their individual parties. In doing that, I think advocates should always be conscious of the almost unique combination of values or aims underlying coronial investigations. I would say they are a restorative ethos concerned with moderating grief and bewilderment; making sense of a particular death; preventing further death and injury; and accountability. Here, accountability is not so much about blame as open justice, which is an end in itself in the coronial jurisdiction.

What is the role of Counsel Assisting?

Kristina Stern SC (KS): I see Counsel Assisting as having an institutional role rather than a client-barrister relationship. My role as Counsel Assisting is assisting the inquiry body to achieve what they need to achieve or want to achieve out of the proceedings. I think that what you are trying to achieve within the ambit of the terms of reference or

the statutory questions is four things: fairness; effectiveness; legitimacy; and efficiency.

I have two top tips. First, I think Counsel Assisting's role really is to test the evidence. *Both ways.* Sometimes you see Counsel Assisting really gunning for a particular outcome and they test the evidence in some respects but let others things slide by. I think that really undermines the legitimacy of the process.

My second is that when making final submissions, characterise the evidence as fairly as you can. Advocates in adversarial proceedings are used to putting our cases as high as we possibly can, whereas in an inquest you really need to identify the strengths and weaknesses and where the outcome *could be* without putting it too high. I often find that people for interested parties, although they may have been a bit grumpy because you've been testing the evidence, respond well when you show in your submissions that you are not trying to put it too high. That leads, I think, to greater legitimacy and more fairness at the end of the day.

Advice when appearing as counsel for interested parties

Jason Downing SC (JD): Counsel for interested parties should take the opportunity to talk to Counsel Assisting. Partly this is a matter of courtesy but also it helps, before you get to an inquest, not to be meeting them cold for the first time. At

an informal level, such a discussion can give you a sense of how well-prepared Counsel Assisting actually is.

Secondly, I think it's helpful to try to scope out just how much of a focus your particular interested party is going to be in the inquest. You typically get an idea of that because it is normal now to get a list of issues and witnesses distributed so that you get a hint. But, no matter what the list of issues says, you'd be surprised by how often things have moved on and how much information you can get by just speaking to Counsel Assisting.

The third thing is that having that conversation with Counsel Assisting early can be helpful, giving you a better sense of whether there's utility in seeking a certificate [under s 61 of the *Coroners Act*] and whether it's tactically wise or whether you are just putting a target on the back of someone when you don't need to.

Donna Ward (DW): If you are acting for a party with a 'sufficient interest', and you think it likely that you will need to seek a certificate, use the structure of the Act to frame the argument you are going to make. It makes the coroner's job easier.

Advice for appearing as counsel for bereaved families

Kirsten Edwards (KE): Families need to understand, first and foremost, the statutory limitations of the role. The coroner does not make findings of negligence or criminal liability, and can't award damages. They

can't get a doctor struck off. Ultimately, the family will get a written finding about the date, place and 'manner and cause' of death.

The coroner also has a recommendation function. In my experience, contrary to the myth that families are always focussed on blame, they are generally very focussed on how to stop other people going through their experience. They often come up with ideas for recommendations. You should raise them (if they are feasible) with Counsel Assisting as soon as you can.

You hear a lot, as counsel for families, about 'managing expectations'. That is the role other parties throw onto you. And that means, first of all, explaining delay: it's going to be two or three years after a death before a hearing takes place. That is very painful for the family. Adjournments are also excruciating and sadly all too common. There is nothing more distressing to a family than thinking that an inquest is going to be delayed. Delay causes more trauma than any other aspect of an inquest. Research shows that families' satisfaction with the process is directly related to how long it takes.

You need to explain that the inquest is *not* a Royal Commission: there is no possible way that this inquest will ever meet their expectations of what the family want to look at and what they want to deal with. So, there's going to come a triage point at which you decide what you are going to focus on and you need to explain that early.

You can have a say in who the witnesses are going to be and have a say in what the issues might be. So, you need to start early so you get an understanding of what your family wants and what is in the brief so that

you can guide them to achieve that.

When we come to the hearing, that's the opportunity for accountability – people asking questions and things of that nature. Families need to understand that that role is mostly played by Counsel Assisting. Your job is actually more behind the scenes. Most of the role of counsel for the family does not involve speaking very much. From a practice management point of view, you need to think about that too. A good job won't give you that much of a profile because you will probably be confined to a fairly narrow area.

When appearing for the family, you've got to carve out a niche. You've got a fair bit of capital from being for the grieving family. Don't blow it going all over the place. The best thing to do is to think about one or two issues that are relevant, connected to the death, and which might lead to a recommendation. Counsel Assisting may accept that they are relevant but doesn't want to make them the main focus. So, how do I focus on this?

If you have a good Counsel Assisting nothing will annoy people more than you asking the same questions all over again. People will switch off and it drives people crazy and it's frustrating. I've just done an inquest as Counsel Assisting with a really good family representative who didn't do that. Every question he asked had not been asked before. It meant that he had so much more capital when he came to say to me, 'Could you ask this?' The more you have a confined niche you are operating in, the more open Counsel Assisting will be to asking some of your other questions for you because you have shown you can be disciplined and

focussed. And also, of course, sometimes you can engage with other parties. Don't think that everyone in that room is against you. Sometimes that is the case, but often you can engage behind the scenes with other parties as well.

Something that we all see time and time again is that families say that they want people to go to gaol or to be referred or something like that. But what they actually want to see is a level of accountability. They hope to see a level of distress from the people who have been involved. They want to see those people look them in the eye and say, 'I am so sorry. I think about your dad every time I do a surgery.' They want the hospital to sit down and say, 'This has gutted us and we have had so many in-services within the hospital to work out what went wrong and to try and fix it.' So, it's very important for you [as counsel for the family] to start thinking about what you can potentially achieve at this inquest. Would a meeting with the surgeon work? Would a meeting with the hospital work? Would they engage in an open disclosure process?

But also be aware that when your clients want a referral to police or a disciplinary body, that's when everyone shuts down and gets defensive. So, if that's what your client wants, they are not going to get anything else. Or do they really want an apology? Do they want reform? Do they want a face-to-face meeting? That won't be on the table if they are wanting the surgeon to be referred. You must be careful not to be paternalistic about what the client 'really' wants but your job is to explain the options available in the jurisdiction.



Finally, I'd like to say with respect to experts that experts are beautiful with families. They are generous, they're compassionate. You might have to work out the fees but, in my experience, experts are very willing to give their time and will sit down with your family and explain what this expert report means and some will probably even do that for free.

My advocacy tip is – start early. Read the brief, do a chronology, meet with your family, get hold of that witness list and issues list and start thinking about what you can achieve for your clients. Make requests for evidence, think about recommendations, read the coroner's past findings and think about what you want in them, call Counsel Assisting, arrange a conference.

Behaving tactfully and sensitively

HD: I have always liked that quotation of Owen Dixon's that good advocacy is 'tact in action'. It is not a large number of people who infringe but it's remarkable to me that *anyone* in the coronial jurisdiction could behave in a tactless way, particularly as they must know that right behind them are sitting the bereaved family. The family and the coroner are watching the behaviour of the people at the bar table *intently*. I think that advocates should always try to view their cases from the perspective of the family and see what implications that has for how they frame their case and how they present their case. It's really important to understand

– and it's so obvious really – that, in most cases, the coroner's natural sympathies are likely to lie with the family. Interestingly to me, the individual clients are also very often naturally sympathetic to the family – doctors, nurses, police officers and so forth.

Acknowledgments of loss and apologies

HD: Very often, it seems, people are told 'You can't apologise. Don't give anything away'. I think the exact opposite is the case. If someone has some responsibility for or involvement in a death it is cathartic for them to open up to families and families embrace this, in most cases. But not always – when families don't it is usually because, through no fault of the doctors or nurses or police officers, it has taken two or three years to get to the point. So if an apology can be given, not in some anodyne or formulaic way, it can have a remarkably restorative effect and it can take the steam out of the drive for a referral. The vision of remorse is very, very affecting. So my top tips are – behave well and try to get your client to apologise.

DW: I've certainly seen apologies happening more frequently and you now see them being made eloquently. This has come from experienced and thoughtful counsel working in the jurisdiction and it's really changed that way in my time at the Bar.

JD: When I'm acting for an interested party, at an early stage I'm trying to work out one of two courses. That can be oversimplifying to a degree but course 1 is where you genuinely think that the death in this instance is not

because of some want of care or wrongdoing on the part of those you act for. That doesn't mean you then conduct yourself in an uncaring way – there's plenty of scope for apologising and having individual doctors or nurses speak to the family. But it does mean that when they're pushed on why the death occurred, they are likely to defend themselves.

Where it's obvious there was wrongdoing and want of care, to acknowledge that as an advocate and to get your clients to do it is good. It will often then mean moving to having some form of evidence – a statement as to changes that have been made. When those statements are being written, I always suggest, 'Write it so that when the coroner is looking at it, the coroner will say, 'Ah, that's the way I can feel comfortable that this won't happen again.' Because if you get to the end of it and you can't see how it would avoid a future death, then it's a pretty useless statement.

So, I would try to work out which of the two streams to go down. I would try to speak to my witnesses to see whether they are comfortable with the approach chosen. Unfortunately, even in cases where it's pretty obvious to you as counsel that things have failed, sometimes people can't bring themselves to acknowledge that. Then your job as an advocate gets harder. But I would try to speak to them and get them to understand how I'm seeing it.

The certificate [under s 61 of the *Coroners Act*] is some protection for apologies but the *Civil Liability Act* has a specific provision [s 69] that makes it plain that there is no liability that arises from apologies. So, I encourage people to apologise. People do it in their own way. I think it's more effective to come from a doctor or a nurse than from me, but some just can't do it. I'm happy to do it as an advocate but I think it does not look as sincere as coming from the person. Sometimes when you read what they've written they pretty much say, 'I'm sorry that you feel that way.' I say, 'That's just hopeless. Go and start again' because unless there's some genuine sentiment being conveyed, saying that would just inflame things.

DW: I'm a bit worried sometimes about witnesses who will be overly critical of their own work and I don't know if they're speaking from guilt or what but they are almost ready to apologise for a whole lot of things they did right.

JD: I've had that situation and I've had conferences where I've had to say to them, 'Look, stepping back from it, I think you did an all right job, and you're beating yourself up here. It reflects well on you that you are thinking this way but you might be being a little harsh on yourself.' It happens.





Accountability, responsibility and blame

DW: We often hear in opening submissions, 'It is not the role of the Coroner to apportion blame.' Is this right or just a platitude offering false comfort to witnesses who might actually be at risk of referral for further investigation?

KE: I think it's a platitude. If a coroner is going to determine who caused or contributed to a death, and you're one of the people who is in the cross-hairs for that, you definitely feel that there is blame being apportioned. I think that what we are trying to get at with that quote, which we have all used as Counsel Assisting, is that the process is forward-looking. The purpose of the proceedings is not to focus on an individual. Once it's been determined what their role is, the focus still should be on how we prevent this from happening again. But there is that intermediate step and it will feel like blame to that person. When I'm Counsel Assisting, I've tried to make clear, 'None of the organisations or individuals is on trial', even though they may feel that they are.

DW: Some witnesses very much feel indirectly blamed. Our job [as Counsel Assisting] is not so much necessarily to tell them that they should cop the blame but that part of the inquest is to explore responsibility for decisions that might have gone wrong.

KS: I agree that the quote is a platitude. I think maybe it is more correct to say that an inquest is not about liability, it's about identifying shortcomings. It's important that people know that so that, if there are shortcomings and people could have done

better and should have done better, that will be identified. In an inquest, unlike in a lot of civil proceedings, everything can be judged with hindsight. In many ways that kind of accountability and identification of shortcomings is more extreme in this kind of jurisdiction because you take account of what should have been done with the benefit of hindsight. On a personal level and on an institutional level that can be quite damning.

HD: As a coroner in a complex case I rarely thought the right question to ask was, 'Who's to blame?' I preferred to address systemic failure see if we could say something about that rather than focus on individuals. But it can be a cop out to say, 'It's the system's fault'. When someone has behaved egregiously – which is rare – but also when they have made a mistake I think that should be recognised. And if we don't recognise that, we are skirting around something very important psychologically. I think it retards the healing process. This is not to say that if you find someone has made a mistake, even a bad mistake, you necessarily say, 'Well, OK, you're off to the HCCC or the DPP'.

Self-protection while working in a traumatic jurisdiction

HD: Because of the meaningful nature of the work and the sense that you are doing something for people who are going through the worst days of their lives, most of the time I was happy as a coroner. It's a vocation, actually, to find meaning in these cases. That's a very powerful reservoir for one's

resilience I think.

KE: I'd recommend reading *Any Ordinary Day* by Leigh Sales. It made me feel that what we are doing is very noble. You can actually run an inquest, particularly with experienced counsel where people are reasonably satisfied at the end. Families feel a little bit better. Sometimes you do get the doctor hugging the family. Sometimes you get outcomes you just can't get from any other kind of work. But having said that, I have had to start sitting out of family statements [a statement made by a family member to the court about the person who has died and the family's sense of loss] because I was getting to my limit of grief, and people are very understanding. But we get rewards that you don't get in other jurisdictions, so it does balance out.

KS: People often say that if you are kind to people that's good for your mental health. In an inquest there are so many people who need kindness and who respond really well. For me, trying to engage with the family, and also some of the people who are super nervous about what's about to happen, actually really helps. So I think that's quite a good protective thing to think about.

JD: It's not necessarily easy to do but occasionally just to step back and reflect on how you're travelling doesn't hurt. Because it can, cumulatively, get to you over time. I know it's a sort of platitude but it helps just giving yourself a bit of down time doing something completely unrelated and reflecting on how you're travelling.

DW: Thank you to everyone. We've had a good time talking. **BN**