Submission to the Coronal Council of Victoria

REVIEW OF THE RE-OPENING AND APPEAL PROCESS FOR CORONIAL INVESTIGATIONS

To: Coronal Council Appeals Reference
Email: coronialappeals@justice.vic.gov.au
Date: Monday 29 May 2017

Contact:
Gemma Hazmi, Acting Principal Lawyer, Legal Policy
T: (03) 9607 9374
E: ghazmi@liv.asn.au
W: www.liv.asn.au

© Law Institute of Victoria (LIV).
No part of this submission may be reproduced for any purpose without the prior permission of the LIV. The LIV makes most of its submissions available on its website at www.liv.asn.au
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>2</td>
</tr>
<tr>
<td>The existing operation of the appeal and reopening provisions in the Coroners Act 2008</td>
<td>3</td>
</tr>
<tr>
<td>The historical development of appeal and re-opening provisions in the Victorian coronial jurisdiction</td>
<td>4</td>
</tr>
<tr>
<td>Appeal and re-opening provisions in other Australian coronial legislation</td>
<td>5</td>
</tr>
<tr>
<td>LIV Recommendations</td>
<td>6</td>
</tr>
<tr>
<td>Is there a need to amend the existing appeal and re-opening provisions and, if so, what should the nature of those amendments be?</td>
<td>6</td>
</tr>
<tr>
<td>Section 77</td>
<td>6</td>
</tr>
<tr>
<td>Section 84(1)</td>
<td>6</td>
</tr>
<tr>
<td>Section 83(3)</td>
<td>6</td>
</tr>
<tr>
<td>Section 87(1)</td>
<td>7</td>
</tr>
<tr>
<td>Section 87A</td>
<td>8</td>
</tr>
<tr>
<td>The impact of proposed changes for families, the interests of justice, the interests of maintaining finality of decision-making, and the efficiency of the court system</td>
<td>8</td>
</tr>
<tr>
<td>The impact of any proposed changes for the Coroners Court and the appellate jurisdiction</td>
<td>9</td>
</tr>
<tr>
<td>Conclusion</td>
<td>10</td>
</tr>
</tbody>
</table>
INTRODUCTION

The Law Institute of Victoria (LIV) is Victoria’s peak body for lawyers and represents more than 19,500 people working and studying in the legal sector in Victoria, interstate and overseas. The fundamental purpose of the LIV is to foster the rule of law and to promote improvements and developments in the law as it affects the public of Victoria. Accordingly, the LIV has a long history of contributing to, shaping and developing effective state and federal legislation, and has undertaken extensive advocacy and education of the public and of lawyers on various law reform and policy issues.

This submission has been prepared by members of the LIV’s Criminal Law Section with contributions from the Litigation Lawyers Section. The LIV Criminal Law Section, which is comprised of over 2,500 members, has a long history of contributing to, shaping and developing effective criminal legislation, and has undertaken extensive advocacy on law reform and policy issues.

General comments

The LIV welcomes this review and is grateful for the opportunity to provide the Coronial Council of Victoria (the Council) with comments on the existing operation of the appeals and reopening process outlined in the Coroners Act 2008. We note that the Council has been asked to advise the Attorney General on whether any changes are needed to the appeals and reopening process provisions to ensure that the laws are working appropriately, having regard to the interests of families, the history of existing provisions, and the operation of coronial legislation in other Australian jurisdictions.

Accordingly, the LIV’s comments are made in light of the history of coronial legislation in Victoria and the operation of the coronial appeals and reopening process in other Australian States and Territories. This submission directly responds to the Council’s Terms of Reference.

After careful consideration of the issues underlying any potential amendments to the appeals and reopening process in Victoria, the LIV submits that:

- Section 77 is working appropriately and does not need amendment;
- Section 87(1), as it relates to section 83, should be amended to broaden the grounds of appeal beyond questions of law;
- Sections 84(1) and 83(3) should be amended to provide for a three-month period in which to initiate appeals from both coronial findings, and from a refusal to reopen an investigation; and
- Section 87A should be deleted.
The existing operation of the appeal and reopening provisions in the Coroners Act 2008

Appeals against findings

Appeals against the findings of a coroner are made pursuant to s 83 of the Coroners Act 2008. Persons with ‘sufficient interest’ may make an appeal on a question of law against the findings of a coronial investigation to the Supreme Court, and an interested party may make an appeal on a question of law against the findings of a coronial inquest to the Supreme Court. Appeals must generally be made within six months.

In 2016 the Andrews Labor government proposed a review of the appeals process, in response to public calls for reconsideration of whether the grounds of appeal should be broadened so that families, and others affected by a death, can challenge coronial findings of fact in the course of an inquest or investigation.¹

The requirement that appeals be made on a question of law has proven to be an obstacle to families and affected parties seeking intervention from the Supreme Court in coronial decisions that they perceive as based on unfounded conclusions. In Mortimer v West,² a challenge to a coroner’s failure to consider certain evidence failed because it did not address a question of law. The general approach of the Supreme Court has been to reject appeals pursuant to s 83 on the basis of insufficient evidence or poor reasoning based on the evidence. The Supreme Court has reasoned that the fact that reasonable minds may come to different conclusions on the facts does not preclude a particular finding from being open to the Coroner.³ If some aspect of the coronial process falls short in the fact-finding or reasoning process, this high threshold for a feasible appeal has inhibited the ability of families to challenge the coroner’s decision.

Reopening investigations

A person may apply to the Coroners Court (constituted by the coroner who conducted the original investigation, except in particular circumstances)⁴ – for an order that some or all of the findings of a coroner should be set aside and, if the Court considers it appropriate, that the investigation be reopened.⁵ For an investigation to be reopened, the Coroners Court must consider a two-limb test:

- That there are new facts and circumstances; and
- That it is appropriate to reopen the investigation.

If a coroner refuses to reopen an investigation, the coroner’s decision can be appealed to the Supreme Court on a question of law, generally within 28 days of the refusal.⁶ A senior next of kin, or another person with a sufficient interest in the investigation, can appeal to the Supreme Court against a refusal by the Coroners Court to re-open an investigation or to hold an inquest into a death. The Supreme Court may allow such an

¹ The Hon Martin Pakula MP, ‘Coroner’s Court Appeal Process to be Reviewed’ (Media Release, 16 December 2016).
² Mortimer v West [2016] VSC 150.
³ Thales Australia Ltd v Coroners Court of Victoria [2011] VSC 133.
⁴ Coroners Act 2008 s 77(4).
⁵ Coroners Act 2008 s 77.
⁶ Ibid s 84.
appeal if satisfied that it is ‘necessary or desirable to do so in the interests of justice’. Whether an appeal is ‘desirable in the interests of justice’ depends on factors such as the distress an appeal may cause for family, friends and others affected by the death, and the amount of time that has passed between a death and an appeal.8

The historical development of appeal and re-opening provisions in the Victorian coronial jurisdiction

The Coroners Act 2008 came into operation on 1st November 20099 and introduced significant reform to Victoria’s coronial jurisdiction, which had previously been regulated by the Coroners Act 1985.10 Under the Coroners Act 1985 (Vic), any person could apply to the Supreme Court for an order that inquest findings were void and that the inquest should be reopened or a new one ordered.11 Such an order could be made if the Supreme Court was satisfied that it was necessary or desirable because of fraud, consideration of evidence, failure to consider evidence, irregularity of proceedings or insufficiency of inquiry, mistake in the record of the findings, because of new facts or evidence, or because findings were against the evidence or the weight of the evidence.12 The 2008 legislation limited the grounds of appeal so that they could only be made on questions of law. There has only been one appeal against a coroner’s finding in Victoria since the Coroners Act 2008 was implemented.

The 2008 legislation established the Coroners Court, which was given power to order that coronial findings be set aside if satisfied that new facts and circumstances warrant it. Appeals against a decision not to investigate a fire,13 not to hold an inquest14 and not to re-open an investigation15 were to be made to the Supreme Court within three months, and appeals against findings were to be made within six months.16

The Courts Legislation Miscellaneous Amendments Act 2014 introduced several amendments to the appeals process outlined in the Coroners Act 2008. These changes were introduced by the Victorian Parliament as a way to ‘reduce delays in the coronial process, while remaining sensitive to the needs of senior next of kin and other people affected by the coronial process’.17

The key change made to the appeals process was to provide an additional ground upon which an appeal against a refusal to reopen an investigation may be granted. While appeals to the Supreme Court must generally be made on questions of law, the insertion of s 87A allowed for the senior next of kin or others with sufficient interest to appeal to the Supreme Court on grounds other than on a question of law in respect of a decision by a coroner not to hold an inquest into a death or a refusal to reopen an investigation. Per s 87A(2), the Supreme Court can now allow an appeal against the coroner’s refusal to reopen an investigation if satisfied that it is ‘necessary or desirable in the interests of justice’ to do so. This was intended to increase

---

7 Ibid s 87A.
8 Somerville v Coroners Court of Victoria [2016] VSC 543 [89]-[93].
11 Coroners Act 1985 (Vic) s 59(2).
12 Ibid s 59(3).
13 Coroners Act 2008 (Vic) s 80.
14 Ibid s 82.
15 Ibid s 84.
16 Ibid s 83(3).
the capacity for senior next of kin and others with sufficient interest to appeal in relation to significant
decisions regarding coronial investigations and inquests. However, the 2014 amendments shortened the
limitation period for such an appeal from three months to 28 days.

Appeal and re-opening provisions in other Australian coronial legislation

All Australian coronial legislation provides a statutory right of appeal to the Supreme Court, except in
Queensland, where appeals are directed to the District Court. Grounds of appeal against coronial findings
are broader in other Australian jurisdictions than they are in Victoria, as appeals are allowed based on
questions of both fact and law.

In Queensland, the District Court may set aside a finding if there was no evidence to support the finding or
the evidence could not reasonably support the finding. Investigations may only be reopened where new
evidence has been found or if the circumstances require more investigation.

The NSW and ACT appeals provisions are identical and provide that the Supreme Court may order that a
fresh inquest or inquiry be held if the Supreme Court is satisfied that it is necessary or desirable to do so in
the interests of justice because of fraud, rejection of evidence, irregularity of proceedings, insufficiency of an
inquiry, the discovery of new evidence or facts, or for any other reason.

In Western Australia and the Northern Territory, the grounds of appeal are identical to those that have
been amended or removed from the old Victorian Coroners Act 1985. In both of those jurisdictions the
Supreme Court may grant an appeal against a coronial finding if satisfied that:

a) It is necessary or desirable because of fraud, consideration of evidence, failure to consider evidence,
irregularity of proceedings or insufficiency of inquiry; or
b) There is a mistake in the record of the findings; or

c) It is desirable because of new facts or evidence; or

d) The findings are against the evidence or the weight of the evidence.

The Tasmanian legislation is identical to the Western Australian and Northern Territory legislation, except for
an additional ground of appeal where the Supreme Court is satisfied that there is a ‘compelling reason’ to
allow the appeal.

In South Australia the grounds of appeal are very broad, and may be granted for any reason ‘in the interests
of justice’.

---

18 Ibid.
19 Coroners Act 2008 (Vic) s 69.
20 Coroners Act 2003 (Qld) s 50.
21 Coroners Act 2003 (Qld) s 50B.
22 Coroners Act 2009 (NSW) s 85.
23 Coroners Act 1996 (WA) s 52(3).
24 Coroners Act 1993 (NT) s 44(1).
25 Coroners Act 1995 (Tas) s 58.
LIV RECOMMENDATIONS

Is there a need to amend the existing appeal and re-opening provisions and, if so, what should the nature of those amendments be?

Section 77

The LIV submits that the existing reopening provisions in the Coroners Act 2008 should remain, as they are consistent with other Australian legislation allowing coronial investigations to be reopened where significant new information comes to light. Additionally, the LIV is satisfied that the Supreme Court remains the appropriate body to hear coronial appeals on findings and reopening decisions to be heard. The reopening provisions are operating satisfactorily to allow new evidence to be factored into coronial findings where new facts and circumstances have come to light. The ‘appropriate’ threshold is a reflection of the notion that new facts and circumstances must be significant enough to potentially change or redirect the outcome of a case, and encourages the Court to exercise its power in a manner which would discourage people from negligently withholding information and then seeking reopening on the basis of ‘new facts’.27

Section 84(1)

The limitation period for reopening an investigation under section 77 was reduced in 2014 from three months to 28 days.28 Since those amendments were made, there has been some public concern that this does not allow sufficient time for grieving families to seek the legal advice they need to make an application.29 The LIV agrees that this public concern is well placed. The 28 day time limit may not afford families sufficient opportunity to obtain legal advice.

The LIV acknowledges that Section 86 may be relied upon to extend the restrictive 28 day time limit stipulated in Section 77 if the Court finds that the failure to lodge an appeal within time was due to “exceptional circumstances”, and if it is “in the interests of justice” to grant leave to lodge out of time.30 However, the LIV submits that a simple solution would be to simply give a party more time to consider their position before lodging an appeal, rather than forcing a rushed consideration or requiring them to satisfy the requirements under Section 86. To rely on Section 86 means the party bringing the application must additionally satisfy the ‘exceptional circumstances’ and ‘interests of justice’ thresholds, and further ties up court resources. The LIV suggests that a three month time period for appeals strikes the correct balance between court efficiency and allowing grieving families sufficient time for to seek legal advice and lodge an appeal.

Section 83(3)

Section 83(3) of the Coroners Act 2008 provides for a six-month period, from the day on which a determination by a coroner is made, for a person with sufficient interest in an investigation to appeal against

---

20 Coroners Act 2003 (SA) s 27.
21 Explanatory Memorandum, Coroners Bill 2008 Clause 77.
22 Coroners Act 2008 (Vic) s 84(1).
24 Coroners’ Act 2008 (Vic) s 86
the findings of the coroner. As noted above, this lengthy period is out of step with other limitation provisions in the Coroners Act 2008, and unduly compromises Court efficiency. The LIV submits that three months is an appropriate appeal period to enable a family to seek legal advice and institute an appeal, and therefore suitably balances the interests of the family with the need for finality of proceedings.

Shortening the limitation period to three months would bring the appeal provision into line with Section 77, as discussed in the preceding recommendation, and would thereby make the time limits for appealing decisions under sections 83 and 77 consistent.

Section 87(1)

The LIV submits that Section 87(1) of the Coroners Act 2008, to the extent that it is related to the appeal provision in Section 83, should be reformed to allow parties with sufficient interest to appeal the findings of an investigation or appeal on broader grounds than are currently allowed under the Act. In light of the fact that all other Australian coronial legislation provides for appeals on grounds other than on matters of law, it is appropriate that Victoria adopt an approach that is consistent with the broader Australian approach to coronial law by lowering the threshold for appeals to the Supreme Court when a Coroner’s findings are unreasonable based on all of the available evidence.

Section 87A(2) of the Coroners Act 2008 provides that the Supreme Court may allow an appeal if satisfied that it is necessary or desirable in the interests of justice to do so. However, Section 87A(2) is fettered by the stipulation in Section 87(1) that an appeal can only be made on a question of law, and is not so broad as to override the ‘question of law’ requirement.

The LIV submits that Section 87(1) of the Coroners Act 2008 ought to be amended, similarly to NSW and ACT legislation, to state that the Supreme Court may grant an appeal against a coronial finding if the Court is satisfied that appeal is required in the interests of justice because of fraud, rejection of evidence, irregularity of proceedings, insufficiency of an inquiry, the discovery of new evidence or facts, or for any other reason.

The LIV recognises that the 2008 amendments, which significantly narrowed the available grounds of appeal against coronial findings, were made in order to increase the efficiency of the Coronal appellate system by preventing baseless appeals that would unnecessarily prolong an already stressful process for families of the deceased. However, LIV members report that the 2008 amendments have made the grounds of appeal unduly restrictive, as evidenced by the fact that there has only been one appeal against a Coroner’s finding in Victoria since the 2008 amendments were implemented. The LIV submits that Section 83 should be amended to reflect the wording currently used in the NSW and ACT legislation. The LIV suggests that the wording used in the old Victorian Coroners Act 1985, or the provisions in the Queensland, WA, NT and Tasmanian jurisdictions are also acceptable. The only wording the LIV expressly opposes is the wording used in the South Australian legislation, which is too broad.

The right to appeal against findings based on how a coroner has interpreted evidence or given weight to certain evidence is recognised in other Australian coronial jurisdictions and should be considered in Victoria in the interests of pursuing a just outcome for families and others affected by a death. Fact-finding is at the center of the coronial process; as such, judicial supervision of this process is the only meaningful way to ensure the evidentiary process is operating correctly to ensure fair outcomes for families. To prevent appeals on any grounds other than questions of law denies families recourse to challenge the most central function of the coronial jurisdiction; that is, to make an assessment of cause of death based on available evidence.
Where the Supreme Court is satisfied that an appeal should be allowed, the Coroner can be ordered to reopen the inquest to re-examine the finding, or to hold a new inquest or investigation.

**Section 87A**

If section 87(1) is amended as proposed in the immediately preceding recommendation, the provision in section 87(A) is redundant and ought to be deleted.

**The impact of proposed changes for families, the interests of justice, the interests of maintaining finality of decision-making, and the efficiency of the court system**

**Families**

The LIV recognises that the family of the deceased is the primary stakeholder in the coronial process, and acknowledges that families' primary interest during this time is in receiving answers as to the circumstances of their loved one's death. If families feel that questions have been answered unsatisfactorily by a coronial investigation or inquest, there is merit to the notion that grounds of appeal against such a finding should be broadened to include the weight given to particular evidence by the coroner during the original inquiry or other questions of evidentiary interpretation.

In line with these concerns, it has been suggested that limitation periods for appealing a refusal to reopen an investigation should be widened to allow next of kin or interested parties time to seek appropriate legal advice. However, the LIV acknowledges that this consideration may be outweighed by the interest of families and affected parties in receiving an outcome as quickly as possible. Prolonging the investigative and legal process may have a negative effect on the mental health of families and others affected by the death.

**Natural Justice**

It is a widely accepted maxim in Australian jurisprudence that justice must be done and be seen to be done. The LIV recognises that it is not only imperative that the Victorian coronial system practice fairness, but that the public sees the system operating in a way that prioritises justice as its primary aim. To this end, if a coronial decision is unsatisfactory because an inappropriate finding has been made based on the evidence available, it is desirable that interested parties be entitled to appeal and feel as if they have right of recourse to question coronial decisions in a superior appellate court.

The right to appeal against findings based on how a coroner has interpreted evidence or given weight to certain evidence is recognised in other Australian coronial jurisdictions and should be introduced in Victoria in the interests of pursuing a just outcome for families and others affected by a death. Fact-finding is at the center of the coronial process; as such, judicial supervision of this process is the only meaningful way to ensure the evidentiary process is operating correctly to ensure fair outcomes for families. To prevent appeals on any grounds other than on a question of law denies families recourse to challenge the most central
function of the coronial jurisdiction; that is, to make an assessment of cause of death based on available evidence.

When high-profile cases are perceived as being handled poorly or grieving families are denied access to appeal on what can be perceived as a legal technicality, public confidence in the administration of justice in Victoria can be shaken. The promotion of public health and the administration of justice is an important factor in the coronial process. Where families’ concerns are seen as being undervalued, there are likely to be consequences for the perception of the Victorian justice system and the importance it places on the safety of the community.

**Finality in Decision-Making**

As a matter of efficient and fair judicial administration, the LIV considers it important to maintain the perception and reality that, as a general rule, the decision of any court or judicial body is final and matters are not open to appeal unless necessary in the interests of justice. A prolonged process of appeals and reviews of decisions is not only costly and inefficient, but creates the perception that Coroners and the Coroners Court are incompetent and largely incapable of robust decision-making without supervision from superior judicial bodies.

However, if findings are not supported by the facts, or evidence has been interpreted incorrectly and in a way that would have a significant impact on the outcome of a case, finality in decision-making must come second to the administration of justice. Broadening the grounds of appeal to cases where a finding was not open on the evidence or against the weight of the evidence will preserve finality in coronial decision-making except in a narrow set of circumstances where justice demands that findings be voided and the investigation reopened.

**Efficiency of the Courts**

The widening of grounds for appeal against coronial findings will likely give rise to more appeals to the Supreme Court against coronial findings, thereby slowing the court system to an extent. Although expediency of justice is an important factor in the consideration of amendments, the LIV submits that it is possible to minimally broaden the grounds of appeal without ‘opening the flood gates’ to a host of vexatious and unmeritorious appeals that will unduly take up the Supreme Court’s time.

**The impact of any proposed changes for the Coroners Court and the appellate jurisdiction**

**Costs and resourcing**

The LIV notes that it is rare for the findings of a coroner to be the subject of review, both in the Victorian Supreme Court and in the Supreme Courts of other jurisdictions, even where the grounds of appeal are

---

31 Coroners Act 2008 s 8
comparatively much broader, such as in Western Australia.\textsuperscript{32} With this in mind, the LIV does not consider that the increase in appeals resulting from these changes will be so great as to significantly impact on costs and resources for the Coronial Court and the Supreme Court.

\section*{CONCLUSION}

As outlined in this submission, the LIV’s comments are made in light of the history of coronial legislation in Victoria and the operation of the coronial appeals and reopening process in other Australian States and Territories, in addition to our members’ practice experience.

The LIV would be pleased to participate in any ongoing work proposed by the Council in addressing these issues.

\footnote{\textsuperscript{32} Western Australian Law Reform Commission, \textit{Review of Coronial Practice in Western Australia}, Discussion Paper No 100 (2011) 115.}