New Zealand Law Society
Te Kāhui Ture o Aotearoa

# Coroners Amendment Bill

*4/10/2022*

**Coroners Amendment Bill 2022**

## 1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Coroners Amendment Bill (**Bill**), which seeks to amend the Coroners Act 2006 (**Act**), and address delays and pressures in the coronial system by:[1]

(a) Establishing a new position of coronial associate;

(b) Empowering coroners to record the cause of death as unascertained natural causes in certain circumstances;

(c) Enabling coroners to hold hearings on the papers, where appropriate; and

(d) Enabling written findings to be issued stating cause of death only, where appropriate.

1.2 The Law Society broadly supports the proposed amendments, including, in particular, the amendments which establish the position of coronial associate. These amendments provide for processes which will help diminish the backlog of unresolved cases and improve access to justice, and the coronial system.

1.3 It is important for these provisions to strike an appropriate balance between having regard to the desires of family members and interested parties, as well as the wider public interest in the proper and timely understanding of the causes and circumstances of deaths.[2] The provisions in the Bill seek to balance these interests to some extent – for example, clause 10 of the Bill allows coroners to dismiss unreasonable requests for inquiries to be opened, if it is in the public interest to do so.

1.4 However, further work is needed to ensure family members and interested parties are not marginalised or disenfranchised from participating in the coronial process, and that their desires are more appropriately balanced against the wider public interest. We therefore recommend amending the Bill to:

(a) Require coroners to have regard to the desires of a wider group of family members, when deciding whether to open and conduct an inquiry;

(b) Provide that a coroner may only record the cause of death as unascertained natural causes after obtaining a certificate or letter from a pathologist;

(c) Provide for a statutory process for family members to challenge a coroner's decision not to open an inquiry (without applying for a judicial review);

(d) Clearly set out the criteria for deciding whether to hold a hearing on the papers;

(e) Ensure interested parties have the right to request a reconsideration of a coroner's decision to hold a hearing on the papers, or a decision not to enquire into the circumstances of the death; and

---

1 Explanatory note of the Bill.

2 The Explanatory Note of the Bill states that the Bill seeks to ensure that public interest in the proper and timely understanding of the causes and circumstances of deaths is well served.

(f) Clearly set out any factors that must be considered when determining whether there is a public interest in enquiring into the circumstances of a death.

1.5 In addition, we recommend amending the Legal Services Act 2011 to ensure civil legal aid is available to family members who wish to seek legal advice on the question of whether a hearing should be held on the papers. These amendments are discussed further below.

1.6 We note the Law Society has previously provided feedback on these matters, in its submission on the Ministry of Justice's *Potential Coroners Amendment Bill – Discussion Note* (**MOJ Discussion Note**).[3] While this Bill addresses some of the issues we have previously raised, a number of points remain unaddressed, and are reiterated here.

1.7 This submission has been prepared with input from the Law Society's Civil Litigation & Tribunals Committee, and Criminal Law Committee.[4] The Law Society does not wish to be heard on this submission, but would be happy to answer any questions the Justice Committee may have.

## 2 Coroner's decision not to open an inquiry (clause 10)

2.1 Clause 10(2) of the Bill replaces section 64(2) of the Act and enables coroners to record the cause of death as 'unascertained natural causes' when no further investigation is required.

2.2 The Law Society supports this amendment in principle and agrees there is no public interest in conducting a coronial inquiry against the wishes of the family and whānau, when the cause of death is uncertain but evidently natural. This change may also be of benefit to members of particular religions, who seek to have funerals very quickly after death, and/or have cultural or religious objections to autopsies.

2.3 However, we consider the following amendments are required to ensure the Bill better balances the wishes of aggrieved family members, and the wider public interest in deciding not to hold a hearing.

*Adopting a wider definition of 'immediate family'*

2.4 In deciding whether to open and conduct an inquiry, *"a coroner must have regard to" … "the desire of any members of the immediate family of the person who is or appears to be the person concerned that an inquiry should be conducted"*.[5] The Law Society questions whether 'immediate family' (as defined in section 9 of the Act) is an appropriate term and degree of interest, and whether it accommodates Aotearoa New Zealand's multi-cultural society and the frequency of individuals having multiple relationships during their lives.

2.5 We consider the coroner should reasonably be expected to have regard to the views of the members of a more widely defined family/whānau group, without being bound to adopt them. The Law Society therefore suggests adopting a wider definition of 'immediate family', which allows the coroner to have regard to, for example, views of the dead person's

---

3 A copy of this feedback is available on the Law Society's website: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/l-MOJ-Proposed-Amendments-Coroners-Bill-29-11-21.pdf.

4 See the Law Society's website for more information regarding these committees: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.

5 Coroners Act 2006, s 63(e).

previous partners, when deciding whether to open and conduct an inquiry under section 63 of the Act.

*Requirement to obtain certificate or letter from pathologist*

2.6 The Law Society has previously submitted, in its feedback on the MOJ Discussion Note, that a coroner's decision not to open an inquiry should be supported by written advice from a qualified pathologist, as –

(a) it is unlikely that a coroner could reach this conclusion without an expert medical opinion; and

(b) the integral role of pathologists in the coronial system is already recognised under the Act.

2.7 The Law Society remains of the view that a coroner should be required to obtain advice from a qualified pathologist before deciding not to open an inquiry. However, we acknowledge that any new requirement to obtain and review a comprehensive report will likely create a new 'bottleneck', and ultimately increase the time taken for cases to move through the coronial process. This would be at odds with the objective of the Bill, to reduce the time it takes for certain types of cases to move through the coronial process.[6]

2.8 Therefore, a certificate or letter which simply confirms the death is not inconsistent with death from natural circumstances may suffice, if it can be more easily prepared. This would ensure the desires of the family members are better balanced against the public interest in not opening an inquiry, and potentially reduce the number of family members seeking to judicially review such a decision.

*Alternatives to judicial review*

2.9 Aggrieved family members who nevertheless wish to challenge a coroner's decision not to open an inquiry would need to apply for judicial review – this is a costly and time-consuming process. We therefore suggest amending the Bill to provide for an alternative statutory process for challenging such decisions. This would reduce the burden on family members who wish to challenge a decision, and better balance their interests against the wider public interest in deciding not to open an inquiry.

2.10 We also note that sections 95-97 of the Act empower the High Court and the Solicitor-General to order an inquiry to be opened if the coroner has failed or refused to open one. The ability of the Solicitor-General (who is an agent of the executive) to effectively order a judicial officer to act in a particular way is undesirable, and risks undermining the separation of powers between the executive and the judiciary. We suggest modifying sections 95-97 of the Act and removing the Solicitor-General's powers to order an inquiry to be opened.

2.11 In addition, it may be helpful:

(a) To amend sections 95 and 97, to clarify that the High Court can continue to exercise its powers under a regime where the holding of an inquiry is discretionary, rather than compulsory;

---

6 Explanatory Note of the Bill.

(b) To amend new section 64(2) (in clause 10 of the Bill), to provide that an 'approved form' issued under this section must include a reference to the High Court's powers to order an inquiry to be opened (so family members are aware of these powers); and

(c) For the Chief Coroner to issue a new practice note which provides guidance on the circumstances and the processes for opening an inquiry, following an initial decision to not do so.

## 3 Discretion to hold hearings on papers (clause 12)

3.1 Clause 12 of the Bill replaces section 77 of the Act, and gives coroners the sole discretion to decide to hold a hearing on the papers, rather than by an inquest. While this amendment addresses unnecessary delays and costs (for example, due to parties seeking a hearing on the basis of cross-examining witnesses but then not actually following through), it shifts the balance significantly by enabling coroners to hold a hearing on the papers despite contrary views of one or more interested parties. It is therefore important for any criteria and processes which govern this new discretion to be clearly specified in the Act.

*Criteria and process for deciding whether to hold a hearing on the papers*

3.2 New section 77(c) in clause 12 currently requires a coroner to consider the views of interested parties, "among other factors and information" when deciding whether to hold a hearing on the papers. This requirement is vague – it does not adequately set out the criteria that should inform a coroner's decision to hold a hearing on the papers, or refer to the factors in section 80 of the Act, which must be considered when deciding whether to hold an inquest.[7] We therefore recommend amending clause 12 to:

(a) Expressly provide that the coroner must have regard to any public interest that could be served by a public hearing;

(b) Expressly refer to the factors set out in section 80 of the Act; and

(c) Clearly set out any additional considerations/criteria for deciding whether to hold a hearing on the papers.

3.3 In addition, the following amendments would assist interested parties in making an informed decision as to whether a hearing should be held on the papers:

(a) Including an express requirement for a coroner to provide copies of relevant documents to interested parties. In the absence of such a requirement, interested parties may not know what issues they need to address, or be in a position to form an opinion as to whether an inquest should be held. The allowance for interested parties to be heard would therefore be illusory, and inconsistent with natural justice principles.

---

[7] Section 80 requires the coroner, when deciding whether to hold an inquest into a death, to consider whether the death was a death in official custody or care, whether the death would not reasonably have been expected by a doctor who had access to the person's health information, and whether an inquest would assist the inquiry into the death by providing an opportunity for persons who have not been involved in the inquiry to scrutinise evidence, or offer new evidence.

(b) If the requirement for a coroner to provide relevant documents is unnecessarily burdensome, the Bill could:

(i) Provide that a 'notice' given to an interested party under section 77 should set out, in writing, the reasons why the coroner is considering not holding an inquest; and

(ii) provide for a statutory process whereby parties can request relevant documents from the Coroners Court to assist with responding to a section 77 'notice', and the Court is required to provide those documents, unless there are good reasons to withhold them.

(c) Providing for the rights of interested parties to request a reconsideration of a coroner's decision to hold a hearing on the papers (with other interested parties being advised of the objection and having the right to respond to the objection). Alternatively, the Bill could provide for a process for the matter to be referred to the Chief Coroner (noting, however, that this may potentially create a new 'bottleneck').

*Amendments to the Legal Services Act 2011*

3.4 The ability of family members and other interested parties to provide meaningful input into the coronial process (including on the question of whether to hold an inquest), will often depend on legal advice and representation. In some cases, these parties will have limited ability to access legal services unless legal aid is available.

3.5 Section 7 of the Legal Services Act 2011 sets out the proceedings for which civil legal aid may be granted. Under section 7(1)(e)(v), this includes proceedings in any administrative tribunal or judicial authority. Section 7(2)(a) states, for the avoidance of doubt, that this includes an 'inquest' held by a coroner for the purposes of Part 3 of the Coroners Act.

3.6 Section 11(2)(b)(i) also stipulates that (with added emphasis):

> [provisions setting financial eligibility criteria for legal aid grants] do not apply to … applications for legal aid by a victim in respect of … an **inquest** held by a coroner for the purposes of Part 3 of the Coroners Act 2006

3.7 Historically, 'inquest' was the common term used to describe a full judicial inquiry into a death, which included but was not limited to a public hearing. The term 'inquest' carried this traditional meaning in previous legislation, including Part 4 of the Coroners Act 1988, which immediately preceded the current Act.

3.8 The 2006 Act, however, now uses the terms 'proceeding' and 'inquiry' interchangeably and more narrowly defines an 'inquest' as *"a hearing held by a coroner in connection with an inquiry opened and conducted by a coroner under Part 3"*.[8]

3.9 The specific references to 'inquest' in the Legal Services Act[9] were inserted after the current Act came into effect. This could signal an intention that legal aid be available only when

---

8 Section 9 of the Act.

9 The provisions were originally inserted into the Legal Services Act 2000 by the Legal Services Amendment Act 2009 and were carried over when that legislation was replaced by the Legal Services Act 2011.

representation is required at a public hearing. Alternatively, it may be a drafting error based on the assumption that 'inquest' carried its historical meaning. The latter explanation seems more likely, given the important role of interested parties in a coronial proceeding, with or without a public hearing. Further, under its new definition, an 'inquest' is similar to a court trial as, when one takes place, it does so in public, at the tail end of the judicial process and only after most other preparatory steps have been completed.

3.10 In practice, civil legal aid will often be granted for the entire coronial proceeding, not just for representation at a public hearing. However, we are also aware of some applications that have been declined because an inquest had not yet been directed. This can in theory be ameliorated under the current Act by an interested party giving notice to the coroner under section 77 of their wish to give evidence orally. However, if these amendments remove that ability, the lack of access to legal aid could effectively preclude interested parties from having constructive involvement in key decisions about the scope of the inquiry and the format of any hearing.

3.11 We therefore recommend also amending the Legal Services Act by replacing the term "inquest" in sections 7(2)(a) and 11(2)(b)(i) with 'inquiry' or 'coronial proceeding.'

3.12 We note this amendment, and the availability of legal aid, would also support the objective of the Bill to reduce the time taken for matters to move through the coronial process, by promoting more efficient and effective engagement by families and interested parties.

## 4 Findings in relation to the circumstances of the death (clause 16)

4.1 Clause 16 amends section 94 of the Act, and seeks to limit the need to enquire into the circumstances of a death where there is no sufficient public purpose in doing so. The Law Society supports this amendment in principle, and considers the Bill strikes an appropriate balance in giving family members and interested parties the opportunity to participate, and give evidence and input during the coronial process.

4.2 However, the Bill does not give family members and interested parties the right to challenge a decision not to enquire into the circumstances of the death. It would be preferable to have a simple and inexpensive process that will allow concerns to be aired without unduly burdening the coronial system. For example, the Bill could:

(a) provide for a right of an interested party to request reconsideration of a coroner's decision not to enquire into the circumstances of the death (with other interested parties being advised of the objection and having the right to respond to the objection); or

(b) empower the Chief Coroner to review a decision not to make findings in relation to the circumstances of the death (but noting this may potentially create yet another 'bottleneck').

4.3 Lastly, we note that any 'public interest' decision made under new section 94(1A) would be hard to review or appeal through any form of an appeal process in the absence of evaluative criteria. We recommend clearly setting out any factors that must be considered when determining whether there is a public interest in enquiring into the circumstances of a death, including, for example:

(a) the availability of sufficiently probative evidence of the circumstances, and

(b) whether such findings would promote the purposes of the Act.

Frazer Barton
**Vice-President**