

Protecting human rights through the coronial process

By JULIE O'BRIEN



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HUMAN RIGHTS PRINCIPLES may influence the scope of an inquest and how a coroner exercises their discretion to comment or make recommendations about matters related to a death.

Although any party can make submissions that seek to protect or promote human rights, there is a clear role for a human rights intervener in cases that raise systemic issues. The Australian Human Rights Commission has been granted leave to appear in a number of coronial inquests in NSW,¹ Qld,² WA³ and the NT.⁴ The Commission is also

involved in a number of ongoing inquests in the NT (concerning the deaths of Mr Guralpa and Mr Plasto-Lehner) and WA (concerning the death of Mr Ward).⁵

Coroner's discretion

The coroner's role is to investigate a death or suspected death. The scope of the investigation is defined by the coroner's obligation to make findings on the identity of the deceased, time and place of death and cause of death.

There is also discretion for the coroner to make comments and/or recommendations on matters connected with the death relating to public health and safety.

The coronial process is a flexible one. It is inquisitorial, rather than adversarial. Coroners are not bound by the rules of evidence and may

inform themselves in any way they consider appropriate.

Human rights principles provide a legitimate reference point for the exercise of the coroner's discretion. The need to conduct a comprehensive inquest into both the immediate and systemic causes of a death to adequately protect human rights provides a basis for arguing for a broader scope to an inquest, both in terms of the issues it covers and the evidence it receives.

Moreover, the power of the coroner to comment provides a valuable opportunity to protect human rights, and human rights considerations may influence the scope and nature of these comments.⁶

A human rights intervener

Generally, persons with a "sufficient interest" may appear in coronial proceedings

to examine and cross-examine witnesses and make submissions. The Commission has been recognised as having a sufficient interest in inquests that raise human rights issues, based on its statutory functions to protect and promote human rights, including its function to intervene in court proceedings that raise human rights issues.

Commission interventions

Mulrunji

This inquest concerned the death in custody of an Aboriginal man who was arrested for public nuisance. The Commission's submissions considered issues including:

□ The arbitrariness of the arrest (Article 9 of the International Covenant on Civil and Political Rights (ICCPR)). The Commission submitted the arrest involved an inappropriate exercise of discretion and

■ WORKERS COMPENSATION

More uncertainty for workers and employers

By BRIAN MORONEY

WHETHER THE REPAYMENT OF workers compensation payments made to, for and on behalf of a worker out of damages paid by a third party are reduced due to the worker's contributory negligence in circumstances, where there was no determination of that issue in the third-party proceedings, was the question addressed by the High Court in its judgment in *Hickson v Goodman Fielder Limited* [2009] HCA 11, dated 12 March 2009.

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Facts

Mr Hickson sustained an injury for which he was paid workers compensation benefits. Mr Hickson commenced proceedings against a third party in respect of the injury. The third party alleged in its defence that, inter alia, the injury was caused or contributed to by Mr Hickson's contributory negligence. Mr Hickson settled his claim against the third party. Accordingly, there was no final determination of whether Mr Hickson's injuries were partly due to his contributory negligence. Rather, the settlement of the third-party claim presumably represented a compromise on many matters by Mr Hickson and the third party, such that it would be impossible to determine whether there was any agreement as to Mr Hickson's contributory negligence and, if so,

The employer sought a full repayment of the workers compensation benefits paid to, for and on behalf of Mr Hickson out of the third-party damages pursuant to s.151Z(1)(b) of the *Workers Compensation Act 1987*. Mr Hickson rejected this claim and argued that his liability to repay the workers compensation benefits was reduced due to his contributory negligence pursuant to s.10(2) of the *Law Reform (Miscellaneous Provisions) Act 1965*. The employer subsequently commenced proceedings against Mr Hickson, seeking a full recovery of the workers compensation benefits paid. The employer contended that the reduction in the repayment for a workers contributory negligence only applied if there was a judicial determination in the third claim that the worker was guilty of contributory

High Court found for proportionate reduction

The High Court rejected the employer's arguments, which had been successful in the Court of Appeal, and held that Mr Hickson was entitled to argue that he was not required to repay all of the workers compensation benefits, but rather a reduced amount that was proportionate to the reduction in Mr Hickson's damages against the third party for his contributory negligence. If this matter could not be resolved between Mr Hickson and the employer, it would need to be judicially determined in the recovery proceedings.

However, the High Court rejected Mr Hickson's claim that his liability to repay the workers compensation benefits was reduced by the amount to which the total

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a lack of awareness of alternatives to arrest.

□ The failure to assess and monitor Mulrunji's health as being inconsistent with the right to life (Article 6 of the ICCPR) and the right to humane treatment (Article 10 of the ICCPR).

□ The adequacy of the police investigation of Mulrunji's death.

The Commission made 40 recommendations on systemic issues that, in its view, would contribute to the protection of human rights. The Deputy Coroner adopted all 40 comments.

Simpson

This inquest involved the death in custody of a man suffering from a serious mental illness. Mr Simpson hanged himself. He had been held in segregated custody, locked in his cell for 23 hours a day, for more than two years prior to his death.

The Commission submitted that Mr Simpson's treatment

was inconsistent with his rights to humane treatment (Articles 7, 10(1) of the ICCPR) in the following respects:

□ the prolonged detention in segregated custody, particularly in light of his mental illness;

□ the failure to transfer Mr Simpson to the acute psychiatric ward, contrary to the recommendations of psychiatrists that he required treatment in hospital; and

□ the failure to provide adequate psychiatric care while he remained in the correctional environment.

The Commission's submissions were taken into account by the coroner in making her findings and formulating her recommendations to prevent future deaths.

Ongoing inquests

Gurrappa and Plasto-Lehner

These inquests were heard together as the circumstances leading to the deaths were

similar. Mr Gurrappa was in custody at the time of his death and Mr Plasto-Lehner's death appears to have been caused or contributed to by injuries sustained while in custody. Both deaths followed the use of force by police, and in particular the use of a 'prone restraint'. The human rights issues include:

□ the amount and type of force used by the police;

□ the police obligation to care for the health and life of the deceaseds during their arrest and detention;

□ police training in the use of the prone restraint, including the dangers and risk factors; and

□ police training in strategies to deal with the mentally ill (Mr Plasto-Lehner suffered from a mental illness).

Ward

This inquest concerned the death of an Aboriginal man while in a prisoner transport van. The human rights issues include:

□ the decision to arrest Mr Ward and then refuse bail;

□ the care and treatment of Mr Ward while in the transport van;

□ the adequacy of policies and training on the transport of prisoners; and

□ the adequacy of the police investigation into Mr Ward's death. □

ENDNOTES

1. Inquest into the Death of Scott Simpson, NSW Coroners Court, 17 July 2006.

2. Inquest into the Death of Mulrunji, Queensland Coroners Court, 27 September 2006.

3. Inquest into the Deaths of Nurjan Husseini and Fatimeh Husseini, WA Coroners Court, 16 December 2002.

4. Inquest into the Death of Andrew Ross, Alice Springs Coroner's Court, 9 February 1999.

5. Submissions to the inquest into the death of Mulrunji are available at tinyurl.com/crl2nw; tinyurl.com/ccguuh; tinyurl.com/chajj8. Submissions on the death of Scott Simpson are available at tinyurl.com/c5s4bp.
6. J. Hunyor, "Human Rights in Coronial Inquests" (2008) 12 *Australian Indigenous Law Review* 64-74. □

reduced due to his contributory negligence.

In other words, the High Court held that if the worker's third-party damages were reduced by 25 per cent for contributory negligence, the worker's liability to repay workers compensation benefits would also be reduced by 25 per cent.

Outcome for employers

Employers will now be placed in a difficult position in seeking repayment of workers compensation benefits out of settlement between workers and third parties as it will be open for the worker to argue for a reduced repayment to take into account the worker's contributory negligence. As contributory negligence is often pleaded by defendants, there will be at least a prima facie basis for the worker's arguments in many cases. Accordingly, there is more uncertainty for workers and employers

Advice to employers

In order to maximise the extent of any recovery of workers compensation benefits, employers will need to give urgent consideration to

the following:

□ Commencing recovery proceedings against third parties as soon as possible to ensure that they are heard on the issue of whether the worker's injuries were partly caused by their contributory negligence, either in settlement discussions or judicial determinations. This will require expert and medical evidence to be obtained when a recovery potential is identified in a workers compensation claim. Ideally, employers should commence

recovery proceedings prior to the worker commencing their claim against the third party, although, if the worker has already commenced proceedings, the employer may seek leave to intervene in the

may raise their contributory negligence in response to a claim for repayment of workers compensation benefits. If so, the employer will need to consider whether to apply for an injunction to preserve the

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worker's third-party claim or, alternatively, commence separate proceedings and seek to have them heard together with the worker's third-party claim. The commencement of separate proceedings will have the benefit of allowing the employer to make a claim for the payment of interest on workers compensation payments against the third party.

□ In cases where the employer was not involved in the third-party proceedings that have been settled by the worker, the worker

benefits while the dispute is resolved.

A practical outcome of the High Court's decision is likely to be increased litigation, as employers will need to act promptly to protect their position, otherwise workers may assert in any claim for the recovery of workers compensation payments out of third-party claims, and the employer will either incur costs in arguing this issue or be forced to accept the worker's assertions and accept a reduced repayment.