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Aboriginal Legal Service (NSW/ACT) Limited

Indigenous Issues in the Coronial System

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Gerry Moore, Chief Executive Officer :- (personal introduction)

Aboriginal and Torres Strait Islander people in Australia have to cope with the deaths of loved ones and community members all too frequently. The tragic statistics of our life expectancy as compared to other Australians will be well known by Australian coroners. Our overseas visitors can see from the slide shown the relevant figures.

I want to address you today in terms of the humanity and intense personal feelings of our people about the ever-occurring deaths, many of which are preventable. The frequency of deaths within our communities does not in any way lessen the personal grief and deep sense of loss felt about each and every death.

In the days before European settlement in Australia, our ancestors conducted their own form of investigation into unexpected deaths¹. It was a community-wide examination of how the death occurred and often it was followed by retaliation if outsiders were judged to have been responsible or punishment if one of the community was at fault. Today we look to the Coronial system to give us the answers we seek when one of ours dies in avoidable circumstances.

What Aboriginal people seek from a coronial process is similar to what everyone else seeks in the same circumstances, but the frequency of our deaths makes it an even higher priority.

We want the following:

- 1] to find out the TRUTH of how the death happened;
- 2] to find out who, if anybody, has RESPONSIBILITY for the death; and
- 3] PROTECTION from it happening again.

We want to be able to understand all of the process, even though we are distraught with the grief at our loss. We need to have our requests about the process seriously considered and given proper responses, including the reasons if our requests cannot be met. Most importantly, we need to feel that we are appropriately respected as essential people in the process. The loss is ours, and it is deeply felt. We want to be central to the operation of the process, from the very start of the investigation of the death to the follow-up of any recommendations made in the inquest. If we are made to feel sidelined and unappreciated through the process, it only adds to the grief and loss that we experience.

¹ Law Reform Commission of Western Australia, "Aboriginal Customary laws", Project No. 94, Discussion paper (2005) 300

In recent times there have been two highly publicised inquests into deaths of Aboriginal men, the death of Mulrunji on Palm Island and the death of Mr Ward in Western Australia. John McKenzie will discuss some of the issues that arose from those two inquests, as well as issues that have arisen more generally. We desperately want the lessons that should be learnt from these very tragic deaths to be learnt and put into practice, because we are sick of losing so many of our loved ones in circumstances where those responsible should have known better and should have already learnt from earlier deaths and inquiries.

We look to you, the most senior Coroners in Australia, to make the coronial system work properly so that it provides the answers to the three central questions I outlined earlier, truth, responsibility and protection. We support you in your work, it is of the greatest importance to us. We want governments around the country to give you and your colleagues more certainty in your roles, greater powers to control the investigations and proper procedures for the serious consideration of any recommendations you may make arising from any death.

John McKenzie, Chief Legal Officer :- (personal introduction)

The purpose of this presentation is to outline the issues which Aboriginal people in Australia have raised with their legal representatives in the various Aboriginal Legal Services in all the states and territories regarding their experiences in coronial inquiries. It is not intended to be a learned paper complete with numerous references and footnotes.

The importance of an efficiently running coronial system to Aboriginal people cannot be over-estimated, as the reference to the life and death statistics and the constantly recurring presence of deaths within communities referred to earlier by Gerry demonstrates. They seek the truth about how a death happened, they seek findings as to who is responsible, if anybody, for the death and they quite naturally seek protection from similar deaths occurring in the future. These desires relate not just to the actual inquest hearing into a death, but relate to everything that happens from the moment of death onwards.

I will seek to highlight the issues raised by Aboriginal people regarding (1) the conduct of pre-inquest investigations and arrangements; (2) the conduct of the inquest hearing; and (3) steps taken post-inquest in the follow-up to matters raised. I will draw most heavily upon experiences of family and community members in three of the most notorious deaths of Aboriginal people in recent times: the death of Mulrunji on Palm Island in Queensland; the death of an Elder at Kalkarindji air-strip in the Northern Territory and the death of Mr Ward in the back of a prison van in outback Western Australia. Other deaths are also examined and the issues raised by them are added to an attempt to list the most important issues which Aboriginal people have raised with their legal representatives based on their experiences in the coronial system.

I do recommend to you the Australian Indigenous Law Review, 2008, Volume 12, Special Edition 2, which contains a collection of articles authored by various Aboriginal Legal Service staff members from around the country, as well as commentary from academics and a representative of the Australian Human Rights Commission. The lead article is one co-authored by Professor Ray Watterson, Penny Brown and myself, titled, "Coronial Recommendations and the Prevention of Indigenous Deaths". It is published by the Indigenous Law Centre at the University of New South Wales (www.ilc.unsw.edu.au). There you will find more detailed accounts of matters raised by Aboriginal people about their experience with the coronial system, as well as learned commentary, complete with references and footnotes.

I also recommend the Issues Paper released by the Australian Coronial Reform Working Group in September 2009. The working group is a growing alliance consisting of workers who support families in the coronial process, social justice advocates and coronial researchers. The paper sets out the case for coronial law reform across the nation and for a national inquest clearing house to collect, collate and disseminate best practice tips and expert referrals for those representing families. It is available from "policy@fcl.org.au".

Now for the task of distilling the issues specifically as they relate to Indigenous people for your individual and collective consideration:

1] Pre-Inquest

- ❖ Credibility of the Investigation : especially in circumstances in which authorities appear to have had a role in the lead-up to, if not the cause of, the death. An immediate response of setting up a crime scene around the place of death and the conduct of the investigation with a truly open mind as to whether an offence has been committed are essential. The independence of the investigators from those involved in the circumstances leading to the death is vital, both in substance and in appearance. (Reference examples). This issue is of such importance that I advocate the extension of the powers of a coroner so as to be able to direct the personnel and the approach involved in a more detailed way than presently occurs. (reference Ward and Mulrunji)

- ❖ Autopsy and Treatment of the Body of the Deceased : respect for both the deceased person and their family and loved ones is very important in this part of the process. Aboriginal customs and protocols for the handling of a body vary from region to region, let alone state to state. A coroner needs the assistance of Indigenous people familiar with the local customs of the community in which the deceased lived. The

smallest deviation from what the family expect in this process will negatively affect the confidence and comfort of the family members, especially if such deviation happens without careful and detailed communication to the family as to the reasons for it. As Gerry has stated, the family want to be central players in the process and require respectful communications about the timing, location and personnel of the autopsy. The issue of any body parts that are removed for further testing and their return is highly sensitive and needs special attention in the explanation to family members. The release of the body for burial needs to be closely co-ordinated with the desires of the family for the funeral arrangements, but it should be emphasised that, although disappointment may occur at any delay, it is overall more important that all necessary investigations be conducted upon the body of deceased before release for burial.

- ❖ Liaison with Family and Handling their Requests : Some Aboriginal people may have very little understanding of the workings of the coronial system, while others may have a jaundiced view as a result of earlier dealings with the system. Clear and understandable briefings about what is happening and what is about to happen should be delivered to the family members, and in some circumstances and with the family's consent, to the affected community. Usually, the best method of communication about such matters is face to face, with the assistance of an Aboriginal staff member of the coroner's office. The family's requests about the location and timing of the actual hearing should be seriously considered. Where it is not possible to grant their requests, the reasons for refusing them should be communicated respectfully, so that the family members do not feel that their wishes are too easily dismissed. The manner in which any requests from the family are treated in the lead up to the inquest hearing will largely determine the level of confidence they will have in the propriety of the whole process. (reference Ward and Elder)

- ❖ Timely and Comprehensive Briefs : In order to be able to properly inform the family and community of the inquest process and the subject matter to be covered, we need the Brief of Evidence to contain all relevant information and to be provided at least two months before the starting date of the inquest. (reference Ward, Elder & Mulrunji)

These pre-inquest issues largely go towards the first of the three word mantra, that is, they determine from the outset the confidence which the family will hold in the system delivering to them the Truth about how the death occurred.

2] The Inquest

- ❖ Location : whilst the requirements for the proper conduct of the hearing, including those of expert witnesses and legal representatives of all parties, will be important, so too should be the accessibility of the location to the family and the community. Transport and accommodation for the family and interested community members should be assisted where the location of the inquest is not immediately accessible to them. The importance of “place” to Aboriginal people should never be under-estimated. The fact that an inquest is held on the land to which the deceased was connected and in which his or her family will conduct the burial is of great importance. If the death has occurred away from the land of the deceased and the practicalities of arranging all relevant witnesses necessitate the hearing happening in the vicinity of the place of death, then the closer it is held to the actual place of death the better. A view of the scene as part of the hearing is important, regardless of any aides such as photographs, diagrams or videos that are to be utilised. It demonstrates an acknowledgement of the intimate link between place and person that is at the heart of Aboriginal cultural practices.(reference Elder)

- ❖ Interpreters and Other Cultural Needs : it should be ascertained whether there are any needs for an interpreter to assist with the understanding of family members of the coronial hearing and all the processes contained within it. It is my view that it is part of the responsibility of the presiding coroner to provide the resources and make the arrangements for interpreters, if they are required. (reference Elder and Ward) Other culturally significant issues should be determined before the hearing gets underway. Of great importance is the issue as to how all involved in the inquest will refer to the deceased person. Once it has been established the manner in which the family wants all references to be made, the coroner should direct all legal representatives and witnesses to abide by that form of words. Also of importance is the arrangement of a person selected by the family to give evidence about the person who is deceased. It is disrespectful to talk in detail about the death without including a testimonial-type statement by someone who knew the deceased well. At what point in the hearing such evidence should be accepted will vary, so long as it is dealt with in a prominent way in order to give a positive picture of the life and personality of the deceased. (reference Ward)

- ❖ Leave to Appear : the parties to whom leave to appear at the inquest is granted is a matter for the discretion of the coroner. It is important that not only the family of the deceased be granted leave, but also that the community from which the deceased has been lost and any other party wishing to have input as ‘amicus curiae’ in furtherance of human rights issues or systemic analysis and criticism be granted leave to appear also.

Aboriginal people often see a line of lawyers appearing for individuals and agencies and departments at the bar table of an inquest. Where there are requests for leave by parties who are likely to be supportive of issues raised by the family, they want to see some even-handedness in the performance of the coroner's discretion. (reference Mulrunji)

- ❖ Scope of the Inquiry : no other issue is as fundamental to the desires of Aboriginal people as the overall scope of matters into which the inquest will allow evidence and questions to be put. Any narrowing of the terms of the inquiry will multiply any suspicions held by the family. I think the best way to encapsulate this issue is to quote the State Coroner of Western Australia, Alastair Hope, in handing down his findings and recommendations in the inquest into the death of Mr Ward. His Honour supported the continuing relevance of the Royal Commission into Aboriginal Deaths in Custody's recommendations. In doing so he quoted the research paper contained in the Australian Indigenous Law Review special edition mentioned earlier:

*'In my view the correct approach in this state is described by (our research paper) "The Royal Commission recommended an expansion of coronial inquiry from the traditional narrow and limited medico-legal determination of the cause of death to a more comprehensive, modern inquest; one that seeks to identify underlying factors, structures and practices contributing to avoidable deaths and to formulate constructive recommendations to reduce the incidence of further avoidable deaths. The Royal Commission provides a timeless reminder that every avoidable Indigenous death calls upon us to identify its underlying causes, consider Indigenous disadvantage, uncover the truth about the death and resolve upon practical steps to prevent others."'*²

That passage was relevant to the arguments and submissions put by representatives of the state agencies involved in the custody of Mr Ward that sought to narrow the scope of the inquiry to the actions of the two escort officers in the prison truck on the day of the death. My observation is – why is this point still being argued 18 years after the Royal Commission reported? Why have not these functions of an inquest been enshrined in legislation in every state and territory jurisdiction?

- ❖ Scope of the Recommendations : I make exactly the same comments on this issue as I have above in relation to the scope of the inquiry. Unless the family can see some well-directed and practical recommendations that will address the underlying causes of the

² Inquest into the Death of Mr Ward, at pp.116-117, quoting Watterson, Brown and McKenzie, "Coronial Recommendations and the Prevention of Indigenous Death", (2008) 12 (6) Australian Indigenous Law Review, 4, 6

death, they will not be satisfied that they are receiving any Protection from such a death recurring.

With the exception of the last issue that deals with recommendations, all the issues raised pertaining to the inquest itself go towards delivering both Truth and Responsibility regarding the death in question.

3] Post-Inquest

- ❖ Return of Belongings : It is important that all personal belongings of the deceased that may have been retained for the purposes of the inquest are returned to the next of kin. Any omission may trigger a feeling of incomplete dealing with the one who has passed on by the next of kin. A sympathetic treatment of any body parts that may also have been retained for testing is important. The message is, there is no item too small or insignificant to require a sensitive and formal return or an official explanation as to why a return is not possible.
- ❖ Referral for prosecution : If there is to be any such referral to the prosecutorial authorities, a complete explanation of the process involved, the relevant factors that will be weighed in the making of a decision as to whether to proceed with a prosecution and an on-going update of developments should be provided to the contact person for the family. The family should not find out via the media whether a prosecution will be pursued. That is a matter of disrespect.
- ❖ Recommendations – Action and Reports : The body of our research paper sets out the evidence gathered and the conclusions drawn as to the disregard of many coronial recommendations. The National Forum of Aboriginal and Torres Strait Islander Legal Services (ATSILS) is at the forefront of a campaign to achieve legislative reform so that in every state and territory it is legislatively ordained that government related agencies and departments must consider and respond to any relevant recommendation within a set period of time. The responses are to be in writing and be publicly available, so that an objective assessment can be made of the reasonableness or otherwise of any refusal to carry out a recommendation arising from an inquest. The relevant State Coroner would be empowered to report annually to parliament on the adequacy of all responses to recommendations. The family should be kept up-dated with the progress, or otherwise, of any recommendation. At present, only the regimes in the Northern Territory and recently in Victoria lay down such requirements for all deaths in the jurisdiction.

The post-inquest issues go to the needs of Aboriginal people to obtain both a finding of Responsibility about the death and Protection against recurrence.

Conclusion

The Aboriginal Legal Services have been, and will continue to be, practice leaders in the area of coronial law and practice. We need to be because of the overwhelming importance in the lives of our clientele communities of finding a way to reduce the number of avoidable deaths within communities. It is one of the most important roles we assume in the legal representation of our clients and communities. It is a role that needs the active support of all coroners, and in turn, we realise the need to support coroners in their work and lobby for an increase in powers and resources that are provided to you by governments. We are genuine in our desire to work co-operatively with you and your colleagues throughout Australia.

To those of you from other countries, if there are any issues and considerations to which I have made reference today that may be relevant to the coronial system in your own countries, I would welcome your inquiries as to how we may try to assist you, based on our experience representing the Indigenous people of Australia in the coronial system.

In the end, I believe all people, everywhere, want the Truth, a determination of Responsibility and Protection from recurrence in regard to any death that affects them and their family and their community. Over-arching the whole process needs to be a resolute determination by all officials and lawyers involved in any inquest that the family of the deceased must, at all times, be treated with the utmost Respect.