NEW ZEALAND LAW SOCIETY
NZLS EST 1869

Level 4, 17-21 Whitmore Street, Wellington
DX SP20202, Wellington
PO Box 5041, Wellington 6140, New Zealand

TEL 04 472 7837 · E inquiries@lawsociety.org.nz
www.lawsociety.org.nz

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[redacted]
Senior Policy Advisor, Courts and Tribunals
Ministry of Justice

By email: [redacted]

Re: Potential Coroners Amendment Bill – Discussion Note

1. Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (Law Society) welcomes the opportunity to comment on the Ministry of Justice's Potential Coroners Amendment Bill – Discussion Note (Discussion Note).

1.2 The Ministry is consulting on a potential Coroners Amendment Bill (**the Bill**) that would make four amendments to the Coroners Act 2006 (**the Act**), all of which are intended to address the current backlog of coronial cases and reduce the time that cases proceed through the coronial process. The aim is to minimise the distress to grieving families and whānau caused by long periods of waiting for coroners' findings.

1.3 The Law Society supports the purpose of the proposed amendments and, subject to some qualifications as to their scope, broadly agrees with the Chief Coroner's proposed amendments. The common theme of the qualifications raised is the need to ensure each proposed amendment fulfils its stated aim without unduly restricting the involvement of interested parties, particularly families and whānau, in coronial proceedings.

1.4 The Law Society has, in its response to proposed amendment 2, identified an access to justice issue concerning legal aid for families and whānau, which it recommends be addressed as part of the Bill. However, the issue could also form part of the Ministry's wider coronial work programme.

2. Amendment One: Certificates recording cause of death as 'unascertained natural causes'

2.1 The Act currently requires coroners to investigate all unexplained deaths, even when they appear to be a result of natural causes. While a coroner can still decide not to open an inquiry into a death under such circumstances, the process that must be followed under sections 63 and 64 of the Act is relatively time-consuming.

2.2 The Chief Coroner has proposed that sections 63 and 64 be amended to allow coroners to issue certificates recording the medical cause of death as "unascertained natural causes" in cases where the next of kin do not require further investigation and the death is not considered suspicious, unnatural, or self-inflicted.

2.3 The Law Society supports proposed amendment 1 in principle: 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.

2.4 The Law Society supports a change to the Act that would allow certificates to be issued in place of an inquiry when a coroner is satisfied that there is no evidence that an unexplained death was suspicious, unnatural, or self-inflicted and the certificate accords with the wishes of the deceased's family and whānau.

2.5 In summary, the Law Society's response to the specific questions posed in the Discussion Note is:

(a) Proposed amendment 1 is supported, in principle.

(b) For the purpose of obtaining consent from the deceased's next of kin, a narrower group that the defined 'immediate family' should not be adopted. However, a procedure that allows for 'deemed consent' may be warranted in some circumstances.

(c) The proposed certificate should not be issued without a written report from a pathologist confirming his or her opinion that the death was due to or consistent with natural causes. This requirement should be in addition to the need for consent from immediate family.

(d) Except as is necessary to give effect to the qualifications above, we do not suggest any further changes to the proposed amendment 1.

2.5 These responses are discussed in further detail below.

<u>Should only a limited number of family members be required to consent?</u>

2.6 The Ministry currently envisages that a coroner would need the consent of the deceased's immediate family and whānau. However, it has raised the possibility of adopting the approach of South Australia, where a coroner need only consult with the "senior next of kin"' or alternatively, giving coroners the power to decide on a representative member or members.

2.7 'Immediate family' is defined under the Act as:

(a) [members] of the dead person's family, whānau, or other culturally recognised family group, who –

(i) were in a close relationship with the person; or

(ii) had, in accordance with customs or traditions of the community of which the person was part, responsibility for, or an interest in, the person's welfare and best interests; and

(b) to avoid doubt, includes persons whose relationship to the dead person is, or is through 1 or more relationships that are, that or those of –

(i) spouse, civil union partner, or de facto partner of the dead person;

(ii) child, parent, guardian, grandparent, brother, or sister of the dead person;

(iii) stepchild, step-parent, stepbrother, or stepsister of the dead person.

2.8 Section 22 of the Act allows for family members to nominate a representative for liaison purposes.

2.9 The dynamics of families and whānau are often complex, particularly when stress-tested by tragedy. It is not uncommon now for coroners to liaise with both a nominated representative and another family member who does not recognise that representative's mandate. Section 24(2) expressly anticipates this eventuality by providing that a representative recognised under section 22 and '*any member of the dead person's immediate family who has asked to be notified of matters and has provided contact details to the coroner*' are equally entitled to be notified under s 23 about significant matters, including —

(a) the right to object to a proposed post-mortem if, under section 33, immediate family members have that right; and

(b) the receipt of removal of a body part, or the taking of a [bodily sample]; and

(c) the retention of a body part or [bodily sample].

2.10 A certificate issued under the proposed amendment would be a comparably significant matter to those matters listed under section 23. It would also be a final determination that ended any further investigation into the death.

2.11 It is not without precedent for "non-senior" family members to have misgivings about the cause of death. There is a risk that, were a certificate as to natural causes to be issued too soon or too hastily, the early closure of the case could potentially thwart the opportunity to gather crucial evidence (for instance, bodily samples). In one high profile case, a sister of the deceased challenged the evidence as to cause of death that had been supplied by his widow (who was his designated next of kin and nominally the most "senior" family member). After the coronial findings, the widow was charged and eventually convicted of his murder.[1]

2.12 We would therefore urge caution before limiting the rights of immediate family to have input into this decision. While the wide definition of "immediate family" could potentially convolute the process of obtaining consent– for instance when some members are uncontactable or decline to engage with the process – this issue could be more appropriately addressed by "deemed consent" procedures.

2.13 We acknowledge that, under section 22, a coroner can liaise with a family or whānau representative – but only if the immediate family requests it. Subject to appropriate safeguards, this could provide an efficient means of obtaining the consent of most, if not all, family and whānau members. However, we do not support it as a replacement for the need to obtain the consent of all the immediate family.

<u>Pathologist's report</u>

2.14 Before issuing a certificate under proposed amendment 1, a coroner will need to be satisfied that the cause of death was from 'unascertained natural causes' and there is no evidence to indicate that a death was 'suspicious, unnatural, or self-inflicted.' It would make sense to require any certificate under proposed amendment 1 to be supported by written advice from a qualified pathologist, as –

[1] *R* v *Milner* [2014] NZHC 233

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

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

2.15 Section 40 of the Act empowers a coroner to order a doctor's report and other health information concerning the deceased person. It would also seem sensible for a pathologist who is advising the Coroner under proposed amendment 1 to be given similar powers.

Would a pathologist's report alone suffice?

2.16 The Ministry has queried whether proposed amendment 1 should be more akin to the position in Western Australia, where '*a coroner is not required to investigate, or continue to investigate, a reportable death if the coroner determines that the death is due to natural causes and the death is reportable solely because it appears to have been unexpected*.' In other words, a coroner could decide to issue a certificate on the basis of a pathologist's expert opinion alone and would not need the consent of the dead person's family.

2.17 In our view, the pathologist's written report on natural causes should be in addition to – and not a substitute for – the requirement for immediate family consent. The aim of the proposed amendments is to alleviate distress to families from delays in coronial investigations. Unless families have expressly elected to opt-out of the system, it does not seem appropriate to remove any existing expectation of input into a coronial investigation.

2.18 However, if the Ministry still wishes to consider removing the need for family consent in such decisions, it could include this issue as part of its wider review. That may also allow time to assess the impact of proposed amendment 1 on coronial workloads.

3. Amendment Two: Coroners to have discretion whether to hold an inquest

3.1 The Chief Coroner has proposed that the Act be amended so that interested parties are able to make submissions about whether the inquiry should proceed to an inquest, but the decision as to whether to conduct an inquest would be solely a decision of the coroner.

3.2 Currently, immediate family and other interested parties have the right to give notice that they wish to give evidence or cross examine a witness in person. When an interested party gives notice, a coroner is then bound to hold an inquest.

3.3 Under proposed amendment 2, interested parties would still have the right to be heard on the question of whether an inquest is warranted, but it would be up to the coroner to make the final decision. The coroner would have to give written reasons for, and interested parties could judicially review, any decision not to hold an inquest. These changes are expected to free up resources and coroners' time and allow some cases to be determined more expeditiously.

3.4 Subject to the following, discussed in detail below, the Law Society supports proposed amendment 2:

(a) that the amendment includes additional safeguards designed to protect the existing rights of interested parties, particularly immediate family and whanau, to scrutinise evidence considered by the coroner as part of the inquiry and/or offer new evidence in respect of the death.

(b) that the amendment also addresses an access to justice issue inherent in the current legal aid system, which could be exacerbated by this change.

Additional safeguards to protect the rights of interest parties

3.5 The issues raised by this proposal need to be considered in a wider context.

3.6 The immediate family and whānau of the deceased have special status under the Act. They are required to be notified and consulted at key parts of the coronial process and they form a subset of a class of "interested parties" who are entitled to have input into coronial decisions and findings.

3.7 Practice Note 2016/01 (**PN 2016/01**) also applies to the conduct of inquests. It requires coroners to identify issues that will be the subject of an inquest – and any interested parties – and sets out the procedures that will ordinarily apply to inquests, including the means of gathering and producing evidence. Clauses 6 - 8 clarify the rights of immediate family and other interested parties, including the matters they are to be notified of and their role in the inquest.

3.8 PN 2016/01 is technically triggered only when a decision to hold an inquest is made. However, while some of its processes would only pertain to inquests (e.g. media coverage and submissions), there are other matters, particularly the identification of issues and the treatment of evidence, which ought to be considered by a coroner before he or she decides not to hold an inquest.[2] Logically, interested parties cannot properly gauge whether they would want to test evidence under cross examination, or respond to it, unless they are aware of the full scope of evidence that will likely influence the coroner's findings. The relevance of that evidence will also depend on the scope of the inquiry and the issues identified by the coroner. Interested parties should have some input into these decisions before a hearing can be safely held on the papers.

3.9 The Law Society supports proposed amendment 2, but recommends that is be qualified by a requirement that, before deciding to hold a hearing on the papers, a coroner must first have –

(a) identified all issues to be inquiried into;

(b) identified all interested parties;

(c) given interested parties the opportunity to comment on whether the issues have been properly identified;

(d) notified interested parties of all documents which the coroner holds which are relevant to the issues to be addressed;

(e) where appropriate, provided copies of all evidence referred to in (d) to interested parties and given them the opportunity to comment on it and/or to file written evidence in response;

(f) given interested parties a reasonable opportunity to be heard on the question as to whether an inquest should be held.

[2] This submission only applies to a decision to make findings without an inquest and is not intended to discourage a coroner from determining early on in the process that an inquest will be inevitable.

3.10 These criteria are drawn directly from procedures that currently exist under PN 2016/01, and should not result in any major changes to the current system.

Consequential changes to the Legal Services Act 2011

3.11 As is highlighted by the proposed amendment, the ability of the immediate family and other interested parties to provide constructive input into the coronial process (the issues to be inquired into, the evidence to be produced and the very question as to whether an inquest is held in the first place), 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.

3.12 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.

3.13 Section 11(2)(b)(i) also stipulates that (against, 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*

3.14 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 (refer, for instance to the Oxford and Cambridge dictionary definitions). The term 'inquest' carried this traditional meaning in previous legislation, including Part 4 of the 1988 Coroners Act, which immediately preceded the current Act.

3.15 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 of the Act*.'

3.16 The specific references to 'inquest' in the Legal Services Act[3] were inserted after the current Act came into effect. This could signal an intention that legal aid be available only when 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.

3.17 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.

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[3] 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.

3.18 We therefore recommend that if the Ministry proceeds with proposed amendment 2, it also takes the opportunity to amend the Legal Services Act by replacing the term "inquest" in sections 7(2)(a) and 11(2)(b)(i) with 'inquiry' or 'coronial proceeding.'

4. Amendment Three: 'Findings as to circumstances' certificates

4.1 Section 60 of the Act mandates certain circumstances when a coronial inquiry into a death must be carried out. Otherwise, the Act allows coroners some discretion as to whether to open and conduct an inquiry.

4.2 The purpose of inquiries is set out in section 57 of the Act, which reads:

> (1) A coroner opens and conducts an inquiry (including any related inquest) for the three purposes stated in this section, and not to determine civil, criminal, or disciplinary liability.
>
> (2) The first purpose is to establish, so far as possible –
>
> (a) that a person has died; and
>
> (b) the person's identify; and
>
> (c) when and where the person died; and
>
> (d) the causes of the death; and
>
> (e) the circumstances of the death.
>
> (3) The second purpose is to make recommendations or comments (see section 57A).
>
> (4) The third purpose is to determine whether the public interest would be served by the death being investigated by other investigating authorities in the performance or exercise of their functions, powers, or duties, and to refer the death to them if satisfied that the public interest would be served by their investigating.

4.3 In Victoria, Australia, where there is no public interest in recording a finding as to the circumstances of the death, coroners can issue 'findings without circumstances' certificates. Proposed amendment 3 would give New Zealand coroners a similar ability. Coroners would still issue written findings on other questions that are arise from the inquiry, such as the cause of death.

4.4 While the Discussion Note does not indicate how many cases are likely to be affected, the Ministry anticipates that this amendment would:

> (a) enable many cases to be dealt with more expeditiously (particularly when the cause is proved to be natural);
>
> (b) allow many families and whānau to access insurance and make other arrangements more quickly; and
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> (c) accelerate the time taken to complete many investigations.

4.5 The Law Society agrees that these are highly desirable outcomes and supports this amendment in principle.

Consultation with immediate family or their representatives

4.6 For similar reasons to those expressed in response to proposed amendment 2, it is the Law Society's position that the right of the deceased's family and whānau to be involved in the coronial process must be respected.

4.7 For that reason, we agree that the Act should include an express requirement that before issuing a 'findings without circumstances' certificate, the coroner must consult with the immediate family and/or any representative recognised under section 22 of the Act.

5. Amendment Four: Allowing Registrars to make duty coroner decisions

5.1 The Discussion Note proposes amending the Act so that decisions currently made by duty coroners can be made by appropriately trained and qualified registrars (as well as by coroners).

5.2 While 'registrar' in this context means a statutorily-appointed officer of the Coroners Court who is empowered to perform a range of administrative functions, it is anticipated that appointed registrars would include people who are medically qualified and trained .

5.3 The Law Society agrees this proposed change is sensible, as it could alleviate the burden placed on responsible coroners and enable them to focus on ongoing investigations. In many instances, medically-trained registrars would in fact be more qualified to fulfil the responsibilities currently required of duty coroners.

5.4 It will be sufficient for the amendment to empower registrars to fulfil the current role of duty coroners under the Act. There appears to be no obvious value in having the Act differentiate the functions of registrars any further. The proposed amendment does not anticipate replacing duty coroners altogether. It is designed to work in time-pressured circumstances where some degree of flexibility is warranted. It is also probable that, in practice, different decisions will ordinarily be allocated to the person most qualified to make them, wherever that is reasonably possible.

6. Conclusion

6.1 The Law Society is grateful for the opportunity to provide feedback on the Discussion Note. If the Ministry has any further questions, we would welcome the opportunity to provide further feedback. The convener of the Law Society's Civil Litigation and Tribunals Committee, Daniel Kalderimis, can be contacted via the Law Reform and Advocacy Manager, Aimee Bryant (aimee.bryant@lawsociety.org.nz).

Nāku noa, nā

Herman Visagie
Vice President