Judicial College of Victoria | Coroners Court of Victoria

Victorian Coroners Court Conference

Shining the light

Date	Thursday 22 April 2021
Keynote Address	The public interest
Presenter	Justice Deborah Mortimer

I extend my thanks to Deputy State Coroner English and State Coroner Judge John Cain for the invitation to speak today. There are some amongst you I know, but many I do not, and I am looking forward to the Q & A.

I speak to you today from the lands of the Kulin Nation, the first peoples of this part of Australia, whose connection to their country, and whose culture, remain strong today. I pay my respects to their elder's past and present. And may I add, Tēnā koutou katoa to my fellow New Zealanders.

Having read the latest Coroner's Court Annual Report, and looked at the array of experience, skills and knowledge present in those who hold positions as Coroners in Victoria, I confess to thinking I should be listening to all of you, rather than the other way around.

Nevertheless, I hope to focus on one aspect of the statutory framework which informs your work, and indeed the work of all courts. That is the framework of the public interest, and how the work that we all do can advance the public interest.

I can see from the Annual Report that the Court has an impressive closure rate, 93.4% in the 2019-2020 year, with the average duration of investigations closed during 2019-2020 being 7.1 months, and 50% finalised within three months. Of course, there is a spectrum of cases, as in any court, between the relatively straightforward and the exceedingly complex. In the 2019-2020 period, there were 58 investigations which went to inquest (less than 1% of all cases) and 17 inquests were held. I apprehend the 2019-2020 numbers may have been affected by the pandemic, as the numbers in all courts have been, including ours.

I am going to approach my topic through two different lenses. The first might be a bit boring but cannot be avoided given my topic. The first lens concerns what Parliament has said about the role of the public interest in coronial work. I take the Victorian Act as my example.

The second lens should be more lively, or at least I shall attempt to make it so. It concerns how, by using a wider and non-statutory concept of "public interest", we can maintain or increase public confidence in the way judicial work is done, in the judicial or institutional authority which must accompany such work, and develop the role of courts in our democracy. I shall try not to be ponderous, although they are weighty concepts. I am going to invite you all to reflect on how we can change or modify what we do to help and inspire public confidence in what we do.

How does the public interest as a concept arise in coronial work under the Victorian Act?

The concept of the public interest arises in several different contexts in the Coroners Act.

- In s 8, the concept is employed as a relevant consideration to the exercise of functions under the Act, in terms of the use of people's personal or health information: see s 8(3).
- The concept appears in the provisions dealing with when a fire must be investigated; s 30(2) provides:

  > *A coroner must investigate a fire after receiving a request under subsection (1) unless the coroner determines that the investigation is not in the public interest*

- It also appears in s 67(2), in relation to the scope of findings that need to be made about the circumstances in which a death occurred where no inquest has been held. If a person was not in custody

or care immediately before their death, then the Act gives a Coroner a discretion not to make findings about the circumstances in which a death occurred if

> *there is no public interest to be served in making a finding regarding those circumstances.*

- It is employed again in s 73, as part of the conditioning of the discretion to publish "any relevant information" in cases involving family violence or children. In this provision it is the criterion by which the ordinary suppression of information under both the Family Violence Protection Act 2008 and the Children, Youth and Families Act 2005, can be set to one side and information can be published, if a coroner considers it is in the public interest.
- Finally, the concept is invoked in s 115, which relates to the powers to release documents to "any person" if a coroner is satisfied that the release is in the public interest.

The obvious point to make is that the concept is employed quite widely in the Act, in circumstances where the content of the concept might vary considerably. It is also worth noting where the concept is NOT used. The concept is **not** employed in the recommendation function in s 72(2):

> *A coroner may make recommendations to any Minister, public statutory authority or entity on any matter connected with a death or fire which the coroner has investigated, including recommendations relating to public health and safety or the administration of justice.*

The concepts of public health and safety, and the administration of justice are clearly subsets, or components of the public interest, but here Parliament has chosen to be more targeted with the purpose and subject-matter of coronial recommendations. That perhaps reflects one of the political compromises one often sees in legislation, between conferring a power on a statutory office holder which will when exercised need a reaction from government and not allowing that statutory office holder **too** much freedom so as to cause too many problems for government. Recommendations that the coroner considers in the public interest might just have been a bridge too far.

What does the law say about the content of the concept public interest?

Typically, when embarking on explaining the meaning of this phrase as used in a statute, judges resort to well-worn statements that it is a concept with no fixed meaning, of the widest import, and that it is not desirable to attempt a definition.

While we can understand why Judges say such things, they are of little assistance to those at the coal face of legislation using the concept, and who need to exercise powers, or perform functions which depend on what it means.

In *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142, Tamberlin J collected a number of the then applicable authorities, but his Honour began with some observations of his own, which do help put more flesh on the bones of the concept. *McKinnon* was a case about the public interest exemption from disclosure in the federal FOI legislation. Broadly, the subject matter of the FOI request, by a newspaper journalist, concerned fraud in the federal first home buyers scheme. The Treasurer had issued a certificate to the effect that disclosure of some documents would be contrary to the public interest and the Administrative Appeals Tribunal's task on review included deciding if there were reasonable grounds for this claim. An appeal from the Full Court was dismissed by the High Court, with 2 formidable counsel appearing – my present colleague on the Federal Court, Justice John Griffiths and my former and sadly departed colleague Justice Richard Tracey.
In his reasons Tamberlin J noted the following (at [9]-[12])

- First, the term directs attention to a

> *conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.*

- There might well be competing facets of the public interest that call for consideration when making a final determination as to where the public interest lies. We can see that in s 73 for example, and the need to balance the protection of identity and identifying information that Parliament accords in other statutes to victims of family violence, and to children against the public interest in the community being able to understand why a coroner has made certain findings, or certain recommendations.

- Second, the indeterminate nature of the concept means context is critical – that is, not only overall statutory context, but the context of the particular provision which employs the concept. So for example in s 67, where a coroner must decide if there is "*there is no public interest to be served in making a finding*" about circumstances of death, the context is first, circumstances of death where Parliament does not *require* an explanation – ie outside care or custody; and second that the coroner must identify a negative – ie no public interest, rather than a positive.

- Third, and following from the second point, Tamberlin J pointed out that the concept is not one that is homogenous and undivided. You may need to look at different facets and then decide where "the" public interest lies. There is a weighing, or weighting exercise involved – what interest should prevail? For example, in s 30(2), in deciding whether or not to investigate a fire where one has been requested. The request is made by responsible public authorities – the CFA or Vic Fire rescue, so in one sense you might say the source of the request already has a public interest element and s 30(2) imposes a duty to investigate unless the coroner is satisfied an investigation is **not** in the public interest. I suppose the kind of matters you might weigh on the other side of the scale might be such things as the amount of resources an investigation would consume – but I admit in thinking about this provision I did struggle a little to see what other facets of public interest might weigh against such a request.

The classic formulation about what must occur when a repository of a power needs to decide where the public interest lies is that set out by a plurality of the High Court said in *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210 at 216:

> *Indeed, the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view':* Water Conservation and Irrigation Commission (NSW) v Browning *[1947] HCA 21; (1947) 74 CLR 492 at p 505, per Dixon J.*

The key words then, as the three observations by Tamberlin J also make clear, are

- Its **discretionary** – that is, there is choice to be made by the coroner or judge who exercises the power. An area of "decisional freedom" as former Chief Justice French would say. Reasonable minds may differ.
- Making that point more emphatic, it involves a "**value**" judgment. That, in substance, is where the weighing exercise comes in. Where do you, as the repository of power, consider the balance lies?
- Third, is always going to be very fact dependent. Again that gives the coroner, or judge, as the repository of the power, considerable choice because of the fact finding that will also be involved.

Conclusion on the first lens

As you would expect, the concept of the public interest is used in the Victorian Coroners Act where some kind of balancing or weighing exercise is called for. Some of the situations or powers are more specific than others, but in all of them a Coroner will have a wide range of decisional freedom, depending on the facts of the case, about how to carry out that weighing or balancing exercise.
The decisions made are unlikely to be easily susceptible to appeal or review (if that is of any comfort).

Public interest in a non-statutory sense - the second lens

Just reminding you of how Tamberlin J described his understanding of the public interest – *what best serves the advancement of the interest or welfare of the public, society or the nation* –
Thinking about that meaning, I want to spend the remainder of my presentation inviting you to reflect on what I think we could all agree is a critical part of this wider concept for the judicial branch – how can we advance public confidence in the way judicial work is done, in the judicial or institutional authority which must accompany such work, and thus develop the role of courts in our democracy.
Now somebody could write a PhD about that. And probably has. I only have a few minutes, so I will try to compress what I say.

That master of saying a great deal in not many words, former Chief Justice Murray Gleeson, made these observations in a speech in 2007 about this notion of "public confidence" in the judiciary and the courts

Judges are insiders to the process. Some things that might concern them may be matters of indifference to most people outside the system; and some things that may concern people outside the system may be dismissed as insignificant by judges. Any professional group that seeks to assess the esteem in which it is held by outsiders is undertaking a risky exercise. They need to be sure they are listening to voices from outside, and that they are not working in an echo chamber.

Embarking on the risky exercise, I want to suggest that what we might have thought advanced or encouraged public confidence in the judiciary has changed very much over time. What might have encouraged public confidence in the judiciary in 1950, might not do the job now. The public has changed, the world has changed, and so must we.

But change doesn't always come easily to the courts and to judges, sometimes for good reason, bound as we are to the common law and the notion of consistency, continuity and precedent. Change is also risky. It may open us to more criticism. We might lose the public confidence we are earnestly trying to gain. How can we think about guidance or markers which can enable us to develop changes in the way we discharge out judicial tasks, which may inspire and cement public confidence, but that are also in the public interest?

My Chief Justice, James Allsop, has spoken publicly and eloquently about the importance of understanding the values which underpin public law. The function of the coroner is a pubic law function. Values such as fairness, certainty, equality, reasonableness, rationality, humanity and the dignity and autonomy of the individual. I respectfully agree. It is the way that we as judges project those values, and the way the system we work with projects those values, which is what will advance and maintain public confidence. In turn, it is that confidence which leads to an acceptance of judicial authority, and an acceptance of the rule of law.

But in 2021, in this decade and going forward, how we project those values, and how the court system incorporates them, must continue to change and adapt. I am not suggesting in any way that I am a model adherent to all these suggestions. But these are the matters which occurred to me in preparing for this presentation:

- **How we communicate. First in our reasons for decisions, and in the Coronial jurisdiction in making recommendations to government**. Do we write for those affected by what we are deciding? Or are we tempted to write for our peers, our little closed shop. Are we tempted to write too much, and with too keen an eye on appellate scrutiny? We cannot ask the community to trust our authority if they cannot understand what we say. The Federal Court has a practice in cases of public interest of publishing a summary of reasons for judgment. In contested native title cases, I have started publishing a different kind of summary, which explains the legal concepts used in the judgment, such as burden of proof. I try to make the summary easy to translate into peoples' first languages, using text that is appropriate for discussion amongst families and at meetings. Even for very long judgments I keep them to 4 or 5 pages. They are harder to write than the judgment itself, but are well received.

- **How we communicate more broadly.** Do we use social media as effectively as we can? The Supreme Court of Victoria has been a leader in this area, thanks to former Chief Justice Marilyn Warren and thanks to our current Chief Justice Anne Ferguson. How might we use social media as part of proceedings? Again, in native title cases, I regularly make orders for publication of information via social media. In the Palm Island class action, the settlement regime was largely published and publicised through social media, mostly Facebook. Not many people may see a notice in a newspaper these days, but word spreads quickly on Facebook.

- **Equality.** One of the things I think about in terms of inspiring public confidence is equality of understanding court processes and outcomes. Is our use of interpreters as good as it should be? Do we translate our court information and documents? Are those translations as easily accessible as the English versions? My own Court is working on this, but we are behind, for example, the federal Administrative Appeals Tribunal, which does very well on this score.

- **Fairness.** In our management and conduct of our proceedings, do we do all we can to ensure there is a fair contest, and therefore a meaningful opportunity to be heard? Especially in visible, complex cases how do we give a meaningful opportunity to people if they do not have their own access to lawyers? By that I mean, what steps do we take to give people access to lawyers where they otherwise cannot afford them? It might be said that is not our job as judges. But I say, **we** are responsible for the fairness of our process. Access to justice means more than giving someone time to stand up and say something. It means evening up the skills and resources which we all know are needed to present persuasive cases. And in times where increases in legal aid and public funding are unlikely, if we are to project this value of fairness, we must do what we can with our own processes. In our Court, in our high volume migration jurisdiction, several years ago the Court adopted a policy of requiring the Minister for Immigration, the respondent, to prepare the court books and appeal books. That position has been accepted as the default position by the Minister and the Immigration Department. It has made a huge difference to the presentation of cases because all the material the Court needs is available to it, even if a person does not have a lawyer. Our court has a pro bono referral scheme used across its jurisdictions, but mostly in migration, human rights and bankruptcy. The Court continues to look for ways to expand that scheme, and use it more effectively. Other courts have duty lawyer projects. All these could be expanded and refined as they don't reach everyone who needs them. We don't yet have a practising certificate requirement that a lawyer do a stipulated number of hours of true pro bono work, but perhaps we should.

- **Reasonableness.** What do we do to make sure our court processes align with what is reasonably necessary to fairly resolve the matter before us? How do we trim back on unnecessary, expensive or time consuming processes? This involves changing the culture of the legal profession. Our Court has been greatly assisted by the introduction of three provisions in our Federal Court of Australia Act – ss 37M,37N and 37P. Under those provisions, we as judges are required to exercise our powers so as to achieve the overarching objective of facilitating the just resolution of disputes according to law and as **quickly, inexpensively and efficiently as possible.**

  That is not verbiage in our Court. Our Court has made substantive changes to discovery processes through its Central Practice Note, essentially removing any automatic or first resort rights of parties to fight about discovery and forcing them to negotiate, talk and resolve as much as they can before the Court will make any orders at all. We have a regular practice of concise statement instead of pleadings, the ACCC in regulatory proceedings has wholly embraced them. The use of a concise statement which is a statement of usually less than five pages in which a party must summarise the essential aspects of its case, can substantially reduce pleadings fights. Lawyers are compelled to be concise. Access to court proceedings in a cost effective way has, ironically, been enhanced by the pandemic and the use of remote technology. Our Court used Microsoft Teams and it is likely it will remain a permanent feature of our practice in several important respects.

- **Finally, humanity and the dignity and autonomy of the individual.** I am finishing with this, because I know Deputy Coroner English was keen for me to speak about the Palm Island case. The citation is in the slides. That was the case about the aftermath of the death in the Palm Island police station of the man known to his family and community as Mulrunji. It was a class action brought under the federal Racial Discrimination Act - this was not a case about how Mulrunji died, but how the Palm island community was treated by the Queensland Police force after he died. I found there were a number of acts of racial discrimination by the police officers. The Queensland government did not appeal, and there was a very large financial settlement in favour of a significant number of members of the Palm island community. The aspect of the management and conduct of the proceeding that I want to mention under this heading of humanity, if it doesn't sound too pompous, is the hearing of the evidence of all the Aboriginal witnesses on Palm Island itself, rather than in Court in Brisbane. And the hearing of the evidence of the police officers in Townsville, rather than in Brisbane. My proposal to hear the evidence in those locations, especially on Palm Island, caused some consternation in the Court, in some quarters at least. To its credit, the State of Queensland was entirely co-operative. That is what I want to highlight.

The challenges were more inside the Court than outside of it – we can become inculcated into thinking we must be in a registry, in a capital city and everyone comes to us, we don't go to them. And in cases of public interest, if people are too poor, too remote, too disadvantaged, they do not come at all.

- **The Federal Court has pioneered a different approach in native title.** The Court goes "on country". It has come at an economic cost but it is a remarkable and vital feature of our jurisdiction. And it means we get the best evidence, because we listen to people on their country, we absorb what they show us, and we see their evidence tested in that same environment. Sometimes we take evidence from groups of people all at once. Many of the rules and processes we have all been educated to consider indispensable to legal proceedings are dispensed with. We still receive reliable, persuasive evidence. We still have it tested. We still get outcomes. And nobody argues about hearsay.

- What I experienced in the Palm Island case as a Judge, and what I continue to experience every time I have the privilege of going on country for a native title case is a genuine sense of confidence in the Court, and in me as a judge. Public confidence. Community confidence. Because the respect is not perceived to be all one way. There is great respect for the Court. Although on country we are often not robed, and there is not a suit or tie to be seen. The respect does not come from Court trappings or buildings, because we are sitting in the open air. Sometimes on folding chairs, or on the ground, sometimes sitting in a pub, or a community hall. On Palm Island we used a school hall. A lot of respect comes from the fact we have come to the community. But what the community experience and appreciate, is that the *Court respects them*. That is the source of their confidence. They see the Court respects their need to tell their story, to give their evidence, in places that enable and empower them to give the whole truth, to be confident, to convey what they really mean. The Court travels to them, and that is in itself a great show of respect.

- That is what I saw happen on Palm Island. It made me realise the tremendous flexibility in our procedures, if we are prepared to adjust. It made me realise we lose nothing of importance to the legal process and we gain a great deal. It made me realise that the public interest in the administration of justice – a phrase we can all incant – can really be brought to life by how we conduct our proceedings, and that change lies in our hands.

Justice Deborah Mortimer

Justice Mortimer was appointed to the Federal Court in July 2013, based in Melbourne. She hears first instance cases across a range of the Court's practice areas, but with a focus on Administrative and Constitutional Law and Human Rights, and Native Title. She is a National Co-ordinating Judge under the Court's National Practice Area system in native title.

Prior to her appointment, Justice Mortimer was a member of the Victorian Bar and was appointed Senior Counsel in 2003. She had a substantial public interest practice and was involved in many ground-breaking cases over her 24 years at the Bar.