

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



Kontis & Anor v Coroners Court of Victoria [2022] VSC 422

Supreme Court of Victoria, O'Meara J, 1 August 2022

A judicial review of a Coroner's decision requiring managers of an aged care facility to give evidence in an inquest.

Key words: Aged Care, Victoria, St Basil's Home, Coroner's Court, Self-Incrimination, Bias, Family Impact Statements

1. In 2020, 45 residents of St Basil's Home for the Aged (St Basil's) died as a consequence of COVID-19.
2. The Chairman of the Board and the Facility Manager/Director of Nursing (Management) were found to be the management of St Basil's at the time.
3. The Coroner held an inquest into the deaths lasting 23 days, with 55 witnesses being called, including staff of St Basil's and family members of the deceased.
4. Various interested parties appeared at the hearing, including:
 - St Basil's;
 - the Department of Health, Victoria;
 - the Commonwealth Department of Health;
 - WorkSafe; and
 - certain family members of the deceased.
5. WorkSafe Victoria (WorkSafe), under the [Occupational Health and Safety Act 2004](#) (Vic) (OHS Act) were at the time conducting an investigation concerning the COVID deaths at St Basil's. Management claimed a right to silence in relation to the investigation.
6. Management also objected to giving evidence on the ground that it may tend to incriminate them in the Coronial hearing, and the Coroner considered whether 'the interests of justice' required that the Management give evidence, reserving his decision on the matter.

7. An informal session was held at the end of the hearing to read 31 family impact statements. The solicitor for Management sought copies of the coronial impact statements, but this was denied on the basis that, among other things, the statements were not evidence in the inquiry.
8. The Coroner found that it was in the interests of justice for Management to give evidence in the hearing as there was a 'real risk' that the 'inquisitorial and remedial functions' of the inquest would be 'frustrated' if the evidence of Management was not before the Court.
9. The Coroner rejected a submission to the effect that the finalisation of the inquest should be adjourned until a criminal investigation or proceeding was completed as this could take many years. There was potential for the process to distress family members and adjournment was not practical or desirable.
10. Management sought a judicial review of the Coroner's ruling, demonstrating that the Court had made a material legal error in the course of determining the question that arose. It was not an appeal on the merits as this is not provided for under the Act.
11. The grounds for judicial review were that:
 - there was an error of law on the face of the record;
 - there was an alteration to the accusatorial system of justice effected by requiring Management to give evidence in the Inquest over their valid objections;
 - the Court took into account an irrelevant consideration, namely the nature of the penalty attached to any potential criminal charge; and
 - the decision was affected by apprehended bias.

The integrity of the 'accusatorial system of criminal justice'

12. Management's contention was that the need to safeguard the integrity of the 'accusatorial system of criminal justice' was such that if there was an arguable risk that a witness to be called at an inquest might subsequently be charged with a criminal offence (certainly, any indictable offence), then such a witness should rarely if ever be compelled to give evidence over objection.
13. The Court found that the Coroner had identified and plainly took into account:
 - (a) that Management had reasonable grounds for objecting to giving evidence;
 - (b) that it was 'conceivable' that Management could in the future face charges; and
 - (c) that the provision of a certificate would amount to only 'imperfect protection'.
14. However, a witness may nonetheless be required to give evidence in an inquest in 'the interests of justice', albeit with the imperfect protection provided by a certificate, and there was no error in the Coroner's approach.

Nature of the Penalty

15. It was argued that the Coroner, having taken into account that any potential criminal charge faced by Management would not seem to attract any penalty of imprisonment, took into account an irrelevant consideration.
16. The Court rejected this ground as the Coroner's findings included any implication that the Management's rights to claim a privilege against self-incrimination were lesser because of the nature of the penalty that they might face in respect of any charge that might later be commenced.
17. The Court also noted that such matters had previously been taken into account, and it was undeniable that there was a qualitative difference between an offence punishable by a fine and one to which a period of imprisonment may attach.

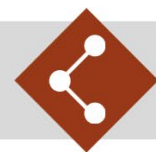
Bias

18. Management's objections in connection with the events of the reading of impact statements related to asserted elements of 'personal familiarity', an appearance of 'alliance', and the fact that, in broad terms, some family members raised the responsibilities of those apparently involved in the subject events – including the plaintiffs, St Basil's and/or the State and Federal governments.
19. The Court did not accept that any statement had any real prejudicial impact, and more importantly, no party raised an objection at the time.

Decision

20. Each of the grounds was rejected, and the Coroner's decision stands.

IMPLICATIONS



This proceeding involved a judicial review, as a merits review was not available.

A merits review looks at the decision of the original decision maker, and considers the decision anew, as though the decision had never been made. This means that the review considers all the same material that the original decision maker considered.

A judicial review is a review by the Court of the lawfulness or the legality of the decision of an administrative body. In other words, whether the decision maker (often a tribunal member) had the power to make that decision, and if they made it fairly without error of law.

Grounds of judicial review include, but are not limited to, matters such as no jurisdiction – whether the decision maker had the power to make the decision; error of law – misunderstanding or misapplication of the law; improper exercise

of power; taking into account irrelevant considerations; failing to take into account relevant considerations; and improper purpose – where a decision or action, whilst on its face may be proper under the law, is designed to achieve a purpose beyond the responsibility of that government body.

VIEW THE CASE



This case may be viewed at <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2022/422.html>

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Author: McGregor-Lowndes, Myles & Hannah, Frances M.

Email: acpns@qut.edu.au

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