CORONERS AMENDMENT BILL 2001

Second Reading

Resumed from 17 October.

MRS EDWARDES (Kingsley) [8.28 pm]: It is significant that in 1995, as the then Attorney General, I introduced the Coroners Amendment Bill in this House. It incorporated a major overhaul and restructuring of the legislation governing the operation of coroners in Western Australia after some 75 years. That Bill went to the Legislative Council in 1996, the then Attorney General, Hon Peter Foss, took charge of it and the legislation came into existence in 1997 after the regulations were drafted. Drafting took about six months because this was a major overhaul and restructuring of the legislation covering the operation of coroners in this State. The legislation arose after a 1992 report by Dr Colin Honey, an ethicist, who provided valuable recommendations about what ought to be done. At the time there were several concerns about coronial autopsies. I will mention a couple of those concerns that were covered in the amending legislation. An ad hoc committee was established and it provided further recommendations. I committed to a review of the Act 12 months after it had been in operation, because I firmly believe that when such a major overhaul of legislation takes place, everything is not always necessarily right. It was important to have a review given the sensitivities and concerns of many people, particularly families, at the time, so that they could have confidence in the system. The review was carried out in 1999 by the State Coroner for South Australia, Wayne Chivell. I will point to a couple of his recommendations and major conclusions.

The Coroners Act was probably one of the most sensitive pieces of legislation that I dealt with as Attorney General and, possibly, it was one of the most sensitive pieces of legislation dealing with family members that I have dealt with as a member of Parliament. When a family member dies suddenly and unexpectedly and the coroner's office becomes involved, it is a shock. One can understand that there is a level of numbness. The level of numbness that one feels as one is taken through processes and procedures that one does not understand must be dealt with sensitively by the public servants, doctors, investigators and the like who work within the coroner's system. They must fully understand the needs of the family and ensure that the processes and procedures are sensitive to the needs of the family.

In 1992, the Honey report highlighted three basic areas for which the Coroners Act was introduced: the communication between the next of kin and those involved in the post-mortem examination of a coronial inquiry; the rights of the next of kin; and the potential use of body parts or tissue. Some States in Australia are still grappling with some of the issues with which we grappled back in those days - although that is not to say that the Health Department does not still have some concerns.

The Coroners Act established the office of the State Coroner. It gave the State Coroner the equivalent status of a chief stipendiary magistrate. The other important approach taken then was to provide for uniformity in death investigations. Yesterday, I noted that the coroner inquired about why a police officer had not taken evidence from some witnesses to a tragedy involving a tourist who had gone night diving. The reason the police officer had not taken evidence from the witnesses was that occupational health and safety investigators had arrived first and had been involved. One of the issues raised in the 1992 report was that trained people were to conduct the investigation. Therefore, if police officers were not trained, the trained investigators in fatalities from occupational health and safety would meet those needs. It will be interesting to hear what the coroner has to say about that in light of the specific provisions that were provided in the Act to ensure that those who investigated fatalities were experienced. That measure was introduced because of the lack of uniformity throughout the State at that time.

Also, the State Coroner had to issue guidelines for the information or assistance of persons involved in the coronial system. The guidelines included the right of objection before the Supreme Court to have or to not have a post-mortem examination, which was a very important aspect from the point of view of families; advice of the post-mortem examination procedure to the next of kin and the possibility of the retention of body tissue; the repeal of section 28(3) of the Human Tissue and Transplant Act to prohibit the removal of tissue in a course of a post-mortem examination for the use in research or for any other purposes other than the investigation of the death without written consent of the deceased or in the event that the wishes of the deceased are not known, the written consent of the senior next of kin; and the requirement that inquests be held into all deaths in custody or in care. I will refer to that issue later because, at the time, a major issue was whether the proposed amendments would comply with the recommendations of the royal commission into deaths in custody. The State Coroner's guidelines also included the right of appeal to the Supreme Court to have an inquest; the right of appeal to the Supreme Court against the exhumation of a body; the abolition of juries at the inquest; the removal of fire investigation from the jurisdiction of the coroner; the authority to engage civilian investigators where necessary;

the power to isolate a death scene and collect exhibits; and the power for items of physical evidence to be seized and attained for the purpose of the death investigation.

A review was carried out 12 months after the operation of the Act - although the report was conducted in 1999, it was commenced in 1998. That review recommended that the Coroner's Act 1996, when coupled with the guidelines made by the State Coroner pursuant to clause 58, comprehensively implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody. That was a pleasing outcome of the review. The legislation guidelines have resulted in a system whereby relatives of deceased persons have substantial rights and they have the information and support to exercise them effectively. The new system has been implemented smoothly and successfully despite the radical nature of some of the changes made. The State Coroner proceeded to make a number of recommendations, which we are considering tonight in the amendment Bill.

Essentially, there is support for the tidying up of the Coroner's Act arising out of the recommendations of that report that followed a 12-month review of the Coroner's Act. We must follow through and make sure that sensitive issues are dealt with. Previously, I referred to people who are involved in the coronial system and the need to ensure that they deal sensitively with the needs of the family. A question was asked in the other place of which some notice had been given. The question was whether the coroner's office provided information to bereaved families about the availability of services that they may require in the aftermath of a death, in particular, cleaning services. As members know, the coroner's office has that information readily available.

Mr McGinty: What type of services is the member referring to?

Mrs EDWARDES: I am referring to cleaning services, for example, for a death that involves blood on the carpet. The family members must deal with the sudden death of a family member and they must also deal with the aftermath. The minister's answer to the question was true and correct. The services are available and strict provisions have been made to ensure that those services cannot tout. Family members, friends or whatever cannot be lobbied. Some guidelines prevent contractors from taking advantage of their involvement in the coronial processes. An example that falls outside that is when a person who is involved in the coronial process attends a home and a family member asks, "What do I do about this?" The coronial attendant who does not come through the coronial counselling service - although I do not know who else might attend who was not attached to the coroner's office -

The DEPUTY SPEAKER: Order members! It is considered unparliamentary to hold conversations while another member has the call. If members wish to continue those conversations, I ask that they remove themselves from the Chamber so that we can hear what the member for Kingsley has to say.

Mrs EDWARDES: That attendant might inform the family members that he has the business card of a cleaning service. It may be hard to prove that the attendant touted or took advantage of a family member or friend of the family. The attendant who could provide the information might or might not be a member of the coroner's office but would definitely not be a member of the coroner's counselling service. Although the provisions are there to prevent what we are saying from happening, it is actually occurring from the other way round. It is not the touting or the attempt to take advantage; one of the officers who attends at the home or wherever provides the card. They are not doing the work; somebody they know might be doing the work. The Attorney General might want to follow that up a bit further with the member.

Mr McGinty: I remember the question. I did not know anything about the background to it. It seemed to be a straightforward question and answer. I did not know that there was any history or background to it of the nature you have just relayed.

Mrs EDWARDES: I accept that, but that is why I am bringing it to the attention of the Attorney General. That issue needs to be further explored. I will suggest to the member that he take it up directly with the Attorney General. That will give the Attorney General an opportunity to explore it further. On that note, the Opposition supports the legislation.

MR McGINTY (Fremantle - Attorney General) [8.40 pm]: I place on record my appreciation for the support for this legislation. I was aware that the work behind the Coroners Act 1996 was substantially done by the then Attorney General, the member for Kingsley, although she might have just stepped down from that position at that time. This Bill essentially involves some minor amendments to pick up matters to improve the coronial service in Western Australia. I appreciate that the House will consider the Bill in detail. I thank members opposite for their support for this legislation. I believe it will make for a better coronial service.

Question put and passed.

Bill read a second time.

Consideration in Detail

Clauses 1 to 8 put and passed.

Clause 9: Section 26A inserted -

Mrs EDWARDES: Clause 9 is an amendment to section 26 of the Act, which deals with access to evidence. The Bill proposes inserting the following section -

> If the senior next of kin of a deceased person asks a coroner for access to evidence obtained for the purpose of investigating the death, the coroner is to give that person access -

I know that has been an issue in New South Wales and Victoria, but I was not aware that it had become an issue here. Can the Attorney General enlighten me on that point? My purpose for standing is to ascertain whether the appeal provisions under the Act apply; that is, if access is refused on the basis that it is not desirable or practicable to provide the evidence, does the appeal to the Supreme Court apply to this section?

Mr McGinty: Can you quickly draw my attention to the appeal section in the Act?

Mrs EDWARDES: I could not find it myself. I know that a couple of sections in the Act deal with appeals to the Supreme Court. I bring section 36 of the Act to the attention of the Attorney General, titled "Application for post mortem examination". An appeal can be made within two days to the Supreme Court to quickly deal with that. There is another appeal provision somewhere in the Act that deals with those matters.

Mr McGinty: Section 24(2) is perhaps another one.

Mrs EDWARDES: I am not sure that clause 26A, titled "Access to evidence", actually links in with the provision of an appeal to the Supreme Court. If that is not the case, the Attorney General might perhaps consider between now and when the legislation is transferred to the other House whether it is appropriate.

Mr McGINTY: I am more than happy to do that. My broad understanding - if I am incorrect I will inform the member for Kingsley tomorrow - is that certain decisions by the coroner are appealable, as of right, to the Supreme Court. Of course, in the absence of any ousting of jurisdiction generally, any judicial review of the decisions of the coroner could occur in situations in which it was argued that there had been an error of law and excessive jurisdiction. It would therefore be reviewable. For instance, it would be appealable if the coroner, under proposed new section 26A, refused access by the senior next of kin to evidence that was obtained for the purpose of investigating the death on the basis that he took irrelevant considerations into account, or on any other ground that might give rise to judicial review. I do not believe that the Coroners Act gives a general right of appeal to the Supreme Court. It gives a specific right in particular instances. That is my broad understanding of the issue. I will have those comments reviewed first thing in the morning and if I am in any sense incorrect, I will relay that to the member for Kingsley, so that it can be corrected in the other place if need be. However, that is my broad understanding of the way in which it operates.

Clause put and passed.

Clause 10 put and passed.

Clause 11: Section 33 amended -

Mrs EDWARDES: Clause 11 is a rather long clause. It deals with the powers of the investigator and the ability to enter and inspect places, and to take possession of and keep items. As with the previous clause concerning access to evidence, have any instances arisen which have led to these amendments?

Mr McGINTY: It is my understanding that the review conducted by Mr Chivell provided the recommendations in this area. The State Coroner passed on some supplementary observations, which were also incorporated. I am not familiar with whether there has been a case in which a deficiency has been found with this section of the legislation or whether, based upon Mr Chivell's experience in South Australia and knowledge of the legislation generally, amendments to these shortcomings were recommended. I am not in a position to say what prompted that recommendation. The additional powers that are proposed to be inserted into the Act relate to entry, inspection and possession. As the member for Kingsley has rightly observed, it is a long amendment. Although there is no increase in the penalty for people who commit an offence against this section - it remains at $2 000 - additional powers are given to a coroner or the coroner's inspector to deal more comprehensively with the death scene. I am not able to inform the member whether the specific experience of the coroner since 1996 has given rise to the suggestion for this to be amended along these lines, or whether it is based on Mr Chivell's broad knowledge of these provisions.

Mrs Edwardes: There is concern in New South Wales and Victoria about family members accessing evidence held by police. Again, I do not know whether there have been any such instances in Western Australia.

Mr McGINTY: None has been drawn to my attention; however, I appreciate the problem of accessing material in the possession of the Police Force. Proposed new section 26A will for the first time give rise to a right to

evidence that has been gained during the course of an investigation into a death. I guess that links with the section now under consideration, which will give greater powers to acquire that evidence. That should be sufficient to overcome any reluctance on the part of the police to part with evidence they have gained in the course of an investigation and which they would normally keep secret.

It will need to be looked at. If I can obtain that information, I will pass it on to the member during the next few weeks. It appears to be a perfectly reasonable proposition. I did not bother to find out what has given rise to it. If it were a more radical proposition, I would have asked why such extraordinary powers were needed. These do not seem to be extraordinary. I must say to the member for Kingsley, who has far more knowledge about these matters than I, that I am not able to answer her question, but will endeavour to do so.

Clause put and passed.

Clause 12: Section 37 amended -

Mrs EDWARDES: This provides a new definition of senior next of kin - those persons who should be contacted first in the event that the coroner's office is involved. De facto couples, including same-sex couples, are added to that definition. That is not the issue in question. The issue is the drafting and the terminology that is used. I break it up into two sections. I am talking about proposed subsection (5)(a)(ii), which states "of or over the age of 18 years". I take it that has more to do with the legality of signing documents than any other reason. The issue during the debate on the Family Court Amendment Bill was that "over the age of 18" caused concern in relation to a homosexual couple. This is drafted differently, so I do not have the same concern as with that provision. Has this been drafted this way primarily for the legal validity of some of the documentation that might need to be signed in these instances?

Mr McGINTY: No. As the member for Kingsley has rightly said, this clause was drafted to extend the right to object to a post-mortem to a partner of a homosexual relationship.

Mrs Edwardes: Or a de facto couple. It includes same-sex or de facto couples.

Mr McGINTY: I thought de facto couples were covered by the existing legislation, but it appears they are not.

Mrs Edwardes: No. I am sure that discretion was exercised by the coroner's office. According to section 37(5), the senior next of kin is -

(a) if the person, immediately before death, was married - the spouse;

(b) if the person, immediately before death, was not married, or if married, the spouse is not available - a son or daughter . . .

A person is either married or not married, and then the right goes to the son or daughter.

Mr McGINTY: Subsection (6) extends the definition of a spouse to a de facto heterosexual partner. Essentially, the coroner deals with the spouse of the person who dies. The interaction of subsections (5)(a) and (6) means that the spouse can be a legally married person or a de facto partner. That is my understanding.

Mrs Edwardes: Have you removed subsection (6) and reordered the rest?

Mr McGINTY: Yes.

Mrs Edwardes: Why the requirement of 18 years?

Mr McGINTY: I am answering this question in a long-winded way because it is unusual. The coroner raised with me the need for him to be able to deal with a homosexual partner. This amendment is based on experience that he personally related to me. In matters of this nature, he is required to ignore a grieving long-term partner in a homosexual relationship. This is something he said should be fixed - apart from the Government's policy to deal with this matter.

Mrs Edwardes: It is also recommended in the report by the South Australian coroner.

Mr McGINTY: Yes. In that sense, this provision is relatively uncontroversial. When we considered this provision, we asked for the age of 18 years to be inserted. It was not in the first proposition that came forward, nor in any of the other recommendations. We wanted to ensure that when dealing with de facto relationships, whether they be same sex or otherwise, we excluded young people who might be in a casual relationship from having a say over whether a post-mortem should be conducted. This is the reason behind the inclusion of "of or over the age of 18 years". Otherwise, there could be argument about whether the couple was in a sufficient de facto relationship. Under the original wording, someone who was in a relatively short-term relationship could have had a say. The situation could be that of an older man with a younger man or a de facto relationship of some short standing when compared with what I presume will remain the interests of a person who was married,

even though that relationship had broken down. We wanted to eliminate the possibility that a very young person could have a say in whether a post-mortem should be conducted, particularly if the partner was somewhat older. We requested that that be inserted after the first draft of the legislation was prepared. Basically, this was done to deal with that situation and not with the other questions of legality or contractual capacity.

Mrs EDWARDES: The issue then arises, as the House debated at some length in relation to the Family Court Amendment Bill, particularly in relation to homosexual couples, that the age of consent is still 21. Until such time as this Parliament changes that, the concerns arise as to how that is to be determined. It is being lumped together with de facto couples, who can be of opposite as well as the same sex. By the incorporation of those words, the legislation is being put into jeopardy, though not to the same extent as the Family Court legislation. A younger person reacting vindictively to a broken relationship could take action through to the Family Court. The circumstances are totally different, but it has been an issue in the House, in bringing forward amendments which could potentially be interpreted, although the wording is different, as accepting the lowering of the age of consent.

Mr McGINTY: What the Government had in mind here was an older person in a relationship with a younger person sufficient to become the senior next of kin for the purposes of objecting to a post-mortem. Whether it be a homosexual or heterosexual relationship, there was a feeling a younger person in that situation - there is not a great deal of logic in this - should be excluded. If someone was 16 and married, which can occur, that person would have the right to object, in respect of the deceased spouse, no matter how old the spouse was, as the senior next of kin. This was inserted for the purpose of abundant caution. In my view, with the passage of time, the age limitation might prove unnecessary, and may be deleted in the future. Nonetheless, it is there for the sake of caution, given that we will be extending the right to object to the conduct of a post-mortem from a married or de facto partner - both of whom currently have the right to object - to a homosexual partner as well. It was thought to be an appropriate restriction.

I understand the view being put by the member for Kingsley, that any male having sexual intercourse with a male under the age of 21 commits a crime, punishable by five years imprisonment. To insert the requirement that somebody living in a homosexual relationship must be over the age of 18 years to object to a post-mortem in no way affects the criminality of the sexual relations that would take place if that person was aged between 18 and 21. That is something that would be prosecuted separately. It is simply inserting a floor, beneath which no-one can go, on the right to object. It does not sanction something which is currently illegal, and cannot be used as a defence to that illegal act. It simply recognises the reality that people will live in homosexual relationships. I have no doubt that people today are living in homosexual relationships in which one partner is under the age of 21. It does not give any blessing to that arrangement, nor convert to lawfulness something which is criminal. It is really there for abundant caution, and I do not think it will have any great practical impact. It certainly will not have any impact on the provisions of the Criminal Code relating to sexual conduct between a homosexual couple, where one of the partners is under the age of 21.

Mrs EDWARDES: The other issue I wish to raise is the marriage-like relationship. That has been changed from the definition in the Act itself, in which section 37(6) refers to a permanent bona fide domestic basis. I can understand that that legislation was drafted back in 1995, and that law changes. The concerns that were raised during debate on the Family Court Amendment Bill, about whether a couple regards itself as being in a marriage-like relationship, really need to be dealt with if that term is to continue to be used. It offends people who do not regard themselves as being in a marriage-like relationship. In this instance, I do not think those people will complain too much, since they are being given a right they would wish to have. However, it does offend same-sex couples, as well as de facto couples, by continuing to refer to them as having a marriage-like relationship.

The other question is the change made to incorporate the definition of de facto relationship and de facto partner into the Interpretation Act, and the tightening of that definition which would apply here, since the two-year limitation and all the other criteria are not used here. On the other hand, the legislation deals with a different situation which needs to be addressed quickly, and court proceedings to determine a de facto relationship would be undesirable. Another difference is that, before the Family Court, in the way some of those amendments were drafted, there was quite clearly a downgrading of the role of marriage. In this legislation, a person married and living with a person immediately before that person's death is regarded as the senior next of kin. If the deceased person were married, the spouse would fall behind the person with whom the deceased person was living at the time. That relationship could have lasted for a very short time. I do not know whether there is any real concern about how the coroner would be able to determine the senior next of kin, and whether that has been able to be worked through when it has occurred in the past. I do not know the number of circumstances in which this could apply. I suppose the number of sudden deaths requiring post-mortems would be about four or five a day. Would the figure be about 1 700 in a year?

Mr McGinty: It would be of that order, but I am not sure of the exact figure.

Mrs EDWARDES: I have not seen any breakdown of that data to determine whether a legal spouse falling behind the de facto partner of a short-term relationship would be an issue. Hopefully, by giving those in long-term committed relationship - I know there have been some concerns in that area - recognition as senior next of kin, any concerns about short-term relationships are able to be resolved through the coroner's office.

Mr McGINTY: The order of seniority as next of kin is, first, people living together who are legally married and living with each other. Secondly, someone over the age of 18 years living in a de facto relationship would take priority behind someone who is legally married and living with someone, regardless of whether it is a same-sex or heterosexual relationship. After that in the seniority list would come people who are legally married but estranged and not living together; in other words, the marriage relationship for practical purposes is finished but has not been legally dissolved. That appears to be the correct priorities in a practical sense for a coroner who must decide with whom to deal in respect of a post-mortem. That is not in any sense an improper priority.

I come to the earlier point raised by the member about the definition of a de facto relationship. At this stage the Parliament has not yet accepted the definition of a de facto relationship as proposed to be included in the Interpretation Act. If that is accepted by the Legislative Council and becomes law, it may or may not be appropriate to apply it to this situation. I say that because the coroner must decide quickly on whom to consult for permission to conduct a post-mortem. The idea that there might be lengthy legal proceedings to determine whether a couple were living together for two years and whether they satisfied the other tests could be problematic. In this Bill we are not referring to the determination of property rights; we are referring to the people who have a greater right to object to the conduct of a post-mortem, and that decision must be made immediately.

A matter to which we must give a bit of thought, if the amendment to the Interpretation Act dealing with de facto relationships is acceptable and becomes law in this State, is whether we should, for the sake of uniformity, apply that definition to this Bill or whether we should leave it as a broad definition to give the Coroner some discretion. The definition in the Bill would certainly empower him to deal with a homosexual relationship, which he is not currently empowered to deal with.

Mrs Edwardes: The definition does not make provision for what the coroner must do in the case of a post-mortem. You are correct in what you said about court action; however, you must be conscious of the fact that there might be a dispute between family members on conducting a post-mortem. This matter must therefore be monitored. You will find that the definition will not be able to be used in all instances as you proceed down your raft of amendments.

Mr McGINTY: That might be correct; however, I do not know the answer to that which is why I am saying we will need to monitor it to see whether it is able to be used. Currently there are a number of requirements when dealing with a homosexual relationship. First, the surviving person must be of or over the age of 18 years, and the couple must have been living together at the time of death and have been in a marriage-like relationship. We had an extensive debate about the meaning of a "marriage-like relationship" in the context of the commonwealth Family Law Act, which relationship has the notion of permanency and interdependence in financial, sexual and other senses. The coroner, by this limited three-part definition, will be empowered, when he is dealing with the death of a partner in a long-term relationship, to deal with the surviving partner in any objection to a post-mortem. The simpler that definition is for present purposes the more satisfactory it will be, given that it is essentially an enabling definition and gives the coroner discretion. Intuitively I agree with the proposition put by the member that the broader definition of "de facto relationship" will not be applicable in all circumstances. This situation might prove to be one of those circumstances but we may need to monitor it.

Clause put and passed.

Clauses 13 to 15 put and passed.

Title put and passed.

Third Reading

Bill read a third time, on motion by Mr McGinty (Attorney General), and transmitted to the Council.