

Recusal Guidelines

Introduction

The chief coroner, in consultation with the Attorney-General, has developed guidelines pursuant to s107A of the Coroners Act 2006, to assist coroners to decide if they should recuse themselves from an inquiry.

107A Recusal

The chief coroner must, after consulting with the Attorney-General, develop and publish guidelines to assist coroners to decide if they should recuse themselves from an inquiry.

These guidelines are designed to assist coroners to make his or her own choices, informed by a checklist of general principles. The general principles they identify underpin the legitimacy of judicial function which is essential to any society organised by law. As stated in the Guidelines for Judicial Conduct March 2013:

“In the end, the legitimacy of judicial function and the independence of the judiciary depend upon public confidence. Stripping away the mystique attached to what judges do and making explicit the process by which ethical dilemmas are confronted respects the community’s vital interest in judicial standards and their maintenance.”¹

Guiding Principle

1. The legal test is that a coroner should recuse him or herself “if a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.”²
2. Two steps are required:
 - 2.1. The identification of what is said might lead a Judicial Officer to decide a case other than on its legal and factual merits; and
 - 2.2. An articulation of the logical connection between that matter and the feared deviation from the course of deciding the case on its merits.³
3. Each decision to recuse must be made with consideration of the principles outlined in the Judicial Independence, Impartiality and Disqualification sections of the Guidelines for Judicial Conduct.⁴ If those Guidelines are updated, the updated version should be applied.

¹ Guidelines for Judicial Conduct, March 2013, at A.

² *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

³ *Saxmere Company Ltd & Others v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, at [4].

⁴ Guidelines for Judicial Conduct, March 2013, at D-F.

Conflict of Interest

4. Each coroner has a duty to advise all parties of any known circumstances which may give rise to a concern among the parties, or the public, that the coroner might not be impartial in the case.
5. For the purposes of recusal, a conflict of interest includes, but is not limited to situations where:
 - 5.1. a coroner, or his or her family, has a material or other fiscal interest in the outcome of the inquiry;
 - 5.2. a coroner was personally involved with the deceased or is personally involved with any parties;
 - 5.3. a coroner is personally involved with counsel;
 - 5.4. a coroner is involved with an organisation that advocates a position on a matter pertinent to the inquiry;
 - 5.5. a party or witness of disputed facts is a close friend of the coroner;
 - 5.6. the coroner has served as a legal advisor in respect of a matter in issue when in practice.
6. For the purposes of this guideline, “personally involved” includes:
 - 6.1. a family relationship with any party or with the spouse or domestic partner of any party; or
 - 6.2. an intimate or former intimate relationship with any party; or
 - 6.3. a close professional relationship, such as a current business partnership or enterprise for mutual fiscal benefit. This includes a coroner’s own solicitor, accountant, doctor or other professional adviser.

Bias

7. Different categories of bias are classified according to whether the personal interest is pecuniary or non-pecuniary. There are two types: “presumptive” and “apparent”. Presumptive bias arises where a decision-maker has a direct pecuniary interest in the outcome of the case; apparent bias where the decision maker has some personal or professional relationship with a party or witness, or a prejudice against or preference towards a particular party or result, or a predisposition leading to a predetermination of the issue(s).⁵ This type of bias is more difficult to identify as it is based on the perception of the public.

⁵ Joseph, above at n 4, at 25.5.1.

Presumptive Bias

8. Presumptive bias will generally stem from a decision maker having a direct pecuniary interest in the outcome of the case and must be fully communicated to the parties.

Apparent Bias

9. Apparent bias arises where a decision maker has some personal or professional relationship with a party or witness, or a prejudice against or preference towards a particular result, or a predisposition on a given issue that arises for determination.

A pragmatic approach

10. The question of disqualification is for the coroner. The coroner should not accede too readily to suggestions of bias. And it is not relevant that another coroner may be better placed to hear a case. The coroner should be mindful of the burden passed on to other coroners if disqualification is resorted to without need. But greater burdens are imposed if a higher court takes the view that disqualification was appropriate. It is therefore prudent for the coroner to decline to sit in cases of doubt as to appearance of bias.⁶
11. The decision to recuse oneself requires a consideration of the following:
 - 11.1. A coroner is expected to be independent and has taken a judicial oath accordingly;
 - 11.2. A coroner has an obligation to inquire into any case allocated to the coroner unless grounds for disqualification exist;
 - 11.3. Coroners must decide the case irrespective of the merits or demerits of any counsel involved in the inquiry or inquest.⁷
12. The importance of the obligation on any judicial officer to determine any case allocated to him or her has been emphasised by both Blanchard and McGrath JJ.⁸ A case should not be transferred to another judicial officer unless there are good reasons to do so, and the test for disqualification is met.

Process

13. There are four situations where a coroner may have to stand down from taking a case.
 - 13.1. A duty coroner identifies a conflict of interest when a death is reported to the National Initial Investigation Office;
 - 13.2. A conflict of interest is identified before the receiving coroner has been assigned the case;
 - 13.3. A conflict of interest arises after the receiving coroner has been assigned a case; and
 - 13.4. A party involved in the inquiry or inquest raises the possibility of bias.

⁶ Guidelines for Judicial Conduct, March 2013, at 29.

⁷ *Saxmere*, above n 1, at [8] and [97].

⁸ At [88].

Recusal on own motion

14. If a conflict of interest is identified by a duty coroner when a death is reported or by a receiving coroner before the file has been assigned, the coroner should discuss the apparent conflict of interest with the chief coroner. If, after discussion with the chief coroner, the coroner feels they are obliged to recuse, the file will be assigned to another coroner under section 133A of the Coroners Act.
15. In cases where a conflict of interest arises after the receiving coroner has been assigned the case, the coroner must discuss the apparent conflict with the chief coroner. If, after discussion with the chief coroner, the coroner feels they are obliged to recuse, the file will be assigned to another coroner under section 133A of the Coroners Act.
16. If the coroner has already commenced the inquiry, the coroner should disclose his or her interest to the interested parties at the earliest opportunity. Disclosure should be made in writing and through the Case Manager to all interested parties. The coroner should invite them to indicate if they have any views on whether the coroner should recuse themselves. A time for response should be given.
 - 16.1. Disclosure is necessary whenever the coroner feels that an interest should be considered by counsel on an informed basis. Disclosure of any matter which might give rise to objection should be undertaken even if the coroner has formed the view that there is no basis for disqualification.
 - 16.2. The extent of disclosure must be such that the parties have enough information, shorn of unnecessary detail, to make up their minds about whether to make a recusal application. Counsel should not be placed in the embarrassing position of having to seek further information from the coroner.⁹
17. If an objection is received, that will be determined by the coroner who may call for submissions and hear the parties as he or she thinks appropriate. The consent of the parties to a coroner sitting is not determinative, as the subjective perceptions of the parties are not relevant to whether there is a reasonable apprehension of bias. Even where parties do consent, the coroners should nonetheless recuse himself or herself where there is a proper basis for disqualification.¹⁰
18. If no objection is raised to a coroner's informed disclosure, the parties will be taken to have waived their right to object and the coroner can continue to fulfil his or her judicial obligations in relation to the inquiry.
19. If the coroner decides recusal is necessary, he or she will inform the chief coroner who will appoint a replacement coroner under s133A of the Coroners Act 2006.

Application for Recusal

20. Where a party considers there is a possible conflict of interest or bias on the part of the coroner, this should be brought to the coroner's attention at the earliest possible opportunity

⁹ *Saxmere*, above n 1 at [34].

¹⁰ Guidelines for Judicial Conduct, March 2013, at [44].

(preferably in writing) setting out the particular circumstances giving rise to the alleged conflict.

21. Following receipt of the notification the coroner will issue a minute addressed to all parties involved drawing their attention to the relevant circumstances and inviting them to indicate if they have any views on whether the coroner should recuse themselves. If a party objects to the coroner conducting the inquiry on the grounds raised or any other grounds, they should say so. The minute should set a time for response by the parties.
22. If an objection is received, that will be determined by the coroner who may call for submissions and hear the parties as he or she thinks appropriate.
23. If no objection is raised to a coroner's informed disclosure, the parties will be taken to have waived their right to object and the coroner can continue to fulfil his or her judicial obligations in relation to the inquiry, if the coroner considers there are no grounds for recusal.
24. If an objection is raised, the coroner must make a decision using this protocol as guidance.
25. If the coroner decides recusal is necessary, he or she will inform the chief coroner who will appoint a replacement coroner under s133A of the Coroners Act 2006.