

Legislative Council—No 80

As introduced and read a first time, 23 February 2023

South Australia

Forfeiture Bill 2023

A BILL FOR

An Act to make various provisions in relation to the common law forfeiture rule, to make related amendments to the *Administration and Probate Act 1919* and the *Criminal Assets Confiscation Act 2005* and for other purposes.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Forfeiture Act 2023*.

2—Commencement

- 5 (1) This Act comes into operation on a day to be fixed by proclamation.
- (2) Section 27(6) of the *Legislation Interpretation Act 2021* does not apply to Schedule 1 Part 1 of this Act.

3—Interpretation

- 10 (1) In this Act, unless the contrary intention appears—
- benefit** includes any property, interest or entitlement under the estate of a deceased person;
- Court** means the Supreme Court;
- deceased person** means a person who is unlawfully killed;
- forfeiture application order** means an order under section 8;
- 15 **forfeiture modification order** means an order under section 9;
- forfeiture rule** means the common law rule that in certain circumstances precludes a person who has unlawfully killed another person from acquiring a benefit in consequence of the killing;
- interested person**, in relation to an application under this Act, means any of the
- 20 following persons:
- (a) an offender;
- (b) the executor or administrator of the estate of a deceased person;
- (c) a beneficiary under the will of a deceased person or a person who is entitled to any estate or interest on the intestacy of a deceased person;
- 25 (d) a person claiming through an offender;
- (e) any other person who has a special interest in the outcome of the application;
- offender** means a person who has unlawfully killed another person and includes an alleged offender (within the meaning of section 8) who is subject to a forfeiture application order;
- 30 **property** means real or personal property (tangible or intangible) including a chose in action;
- unlawful killing** means—
- (a) if committed in this State—any of the following offences against the *Criminal Law Consolidation Act 1935*:
- 35 (i) murder;

- (ii) all forms of manslaughter;
- (iii) aiding, abetting or counselling the suicide of another, or an attempt by another to commit suicide;
- (iv) criminal neglect causing death;
- (v) causing death by driving a vehicle or operating a vessel in a culpably negligent manner, recklessly, or at a speed or in a manner dangerous to any person;
- (vi) aiding, abetting, counselling or procuring an offence referred to in a preceding subparagraph (other than subparagraph (iii)); or

(b) if committed in another jurisdiction—any homicide that would be an offence referred to in paragraph (a) if committed in this State.

- (2) To avoid doubt, the death of a person by the administration of a voluntary assisted dying substance in accordance with the *Voluntary Assisted Dying Act 2021* does not constitute suicide for the purposes of paragraph (a)(iii) of the definition of **unlawful killing** in subsection (1).

Note—

See section 6 of the *Voluntary Assisted Dying Act 2021*.

4—Application of Act

This Act applies to—

- (a) property within or outside the State; and
- (b) an unlawful killing whether occurring within or outside the State.

5—Property subject to forfeiture rule

The forfeiture rule applies to any benefit that an offender would otherwise obtain as a result of the unlawful killing.

Part 2—Application of forfeiture rule

6—Application of forfeiture rule by executor or administrator

- (1) If the executor or administrator knows (or ought reasonably to know) that the forfeiture rule applies in relation to the distribution of an estate, the estate must be distributed in accordance with the rule and any agreement to modify or disapply the rule is of no effect (unless the agreement is made pursuant to a forfeiture modification order).
- (2) The executor or administrator of the estate of a deceased person may—
 - (a) apply to the Court for an order specifying whether, or how, the forfeiture rule applies to the distribution of the estate; or
 - (b) apply the forfeiture rule when distributing the estate to beneficiaries without obtaining any order of the Court if—
 - (i) an offender has been found guilty, in criminal proceedings, of the unlawful killing; or

- (ii) a court has, in civil proceedings, found that the offender committed the unlawful killing.
- (3) An executor or administrator does not incur any civil or criminal liability for distributing an estate in accordance with this section.

5 **7—Rule does not apply to person who was mentally incompetent or unfit to stand trial**

- (1) The forfeiture rule does not apply to a person who is alleged to have unlawfully killed another person if the person is found under Part 8A Division 2 of the *Criminal Law Consolidation Act 1935* (or a corresponding law of another jurisdiction) to have been mentally incompetent to commit the offence.
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- (2) Subject to an order under section 8, the forfeiture rule does not apply to a person who is alleged to have unlawfully killed another person if the person is found under Part 8A Division 3 of the *Criminal Law Consolidation Act 1935* (or a corresponding law of another jurisdiction) to be mentally unfit to stand trial on a charge of the unlawful killing.
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8—Forfeiture application orders

- (1) Any interested person may apply to the Court for an order that the forfeiture rule apply to a person who has been found by a court to be mentally unfit to stand trial on a charge of an unlawful killing (the *alleged offender*) as if the person had been found guilty of the charge.
20
- (2) If an application is made under this section in relation to an alleged offender whose trial has been adjourned under section 269K(2) of the *Criminal Law Consolidation Act 1935* (or under a corresponding law of another jurisdiction), the Court may adjourn the application under this section and make such orders as the Court thinks fit (under section 10 or otherwise) in respect of any benefit to which the application relates.
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- (3) On an application under this section, the Court may make an order applying the forfeiture rule as if the alleged offender had been found guilty of the unlawful killing if the Court is satisfied that—
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 - (a) the objective elements of the offence have been established (either beyond reasonable doubt or on the balance of probabilities); and
 - (b) it is in the interests of justice for the forfeiture rule to be so applied.
- (4) In determining whether it is in the interests of justice for the forfeiture rule to be applied, the Court must have regard to—
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 - (a) the circumstances of the alleged offence; and
 - (b) the effect of the application of the rule on the alleged offender or any other person; and
 - (c) such other matters as appear to the Court to be material.
- (5) If a forfeiture application order is made in relation to an alleged offender—
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 - (a) the forfeiture rule is to apply in respect of the alleged offender for all purposes (including purposes relating to anything done before the order was made) as if the person had been found guilty of the unlawful killing; and

- (b) no application may be made under Part 3 for an order modifying the effect of the rule.

Part 3—Modification of forfeiture rule

9—Forfeiture modification orders

- 5 (1) If an offender has unlawfully killed another person and is thereby precluded by the forfeiture rule from obtaining a benefit, the offender or any other interested person may make an application to the Court for an order modifying the effect of the rule.
- (2) If the offender has been charged with the unlawful killing, an application may not be
10 made for an order under this section until the criminal proceedings against the offender have been finalised.
- (3) Orders made under this section—
 - (a) may specify that the offender or any other interested person is entitled to any benefit to which the forfeiture rule applies; and
 - (b) if the application of the forfeiture rule to the offender had any other
15 consequences under an Act or law—may deal with any other matters that the Court thinks fit to address those consequences.
- (4) On any such application, the Court may make an order modifying the effect of the forfeiture rule (including, to avoid doubt, by disapplying the rule entirely) if it is
20 satisfied that exceptional circumstances exist such that it is in the interests of justice for the effect of the rule to be modified.
- (5) In determining whether exceptional circumstances exist such that it is in the interests of justice for the effect of the rule to be modified, the Court must have regard to—
 - (a) the circumstances of the offence; and
 - (b) the effect of the application of the rule on the offender or any other person;
25 and
 - (c) such other matters as appear to the Court to be material.

Part 4—Other orders

10—Interim orders

- 30 (1) If the Court is satisfied that there are reasonable grounds to suspect that an unlawful killing has occurred, the Court may, on the application of an interested person, make any interim orders that the Court thinks fit in order to preserve property or the value of any benefit that might be subject to the forfeiture rule or to protect the interests of any interested person.
- (2) The Court may, on the subsequent application of an interested person, vary or revoke
35 an order made under this section.

11—Orders relating to other property and interests

- 5 (1) If the Court is satisfied that an offender will or may be entitled to obtain any property or interest as a result of the unlawful killing (not being a benefit that is subject to the forfeiture rule), the Court may, on the application of an interested person, make any orders that the Court thinks fit in order to prevent the offender from obtaining the property or interest including, without limitation, any of the following kinds of orders:
- 10 (a) an order conferring property or an interest on any other person who would have been entitled to it if the offender had died before the deceased person;
 - (b) an order that property or an interest held by persons as joint tenants be treated as if it were held by persons as tenants in common;
 - (c) an order preventing the offender from holding property as a trustee;
 - (d) an order preventing a trustee from distributing trust property to the offender.
- (2) The Court may, on the subsequent application of an interested person, vary or revoke an order made under this section.

12—Enforcement of forfeiture rule etc after distribution of benefits

- 15 (1) If a person has received a benefit as a result of an unlawful killing (otherwise than pursuant to a forfeiture modification order), an interested person may make an application to the Court for an order requiring the person to deliver up the benefit, or to pay an amount determined by the Court to be equivalent to the value of the benefit, to any person who would have been entitled to the benefit if the offender had died before the deceased person.
- 20 (2) In this section—
benefit includes any property or interest.

13—Return of benefits where conviction quashed etc

- 25 (1) If—
- (a) an offender has been prevented from receiving a benefit as a result of the application of the forfeiture rule or an order under this Part; and
 - (b) the offender is found not guilty of the unlawful killing by a court or a conviction for the unlawful killing is subsequently quashed on appeal,
- 30 an interested person may make an application to the Court for an order requiring a person to deliver up any such benefit, or to pay an amount determined by the Court to be equivalent to the value of the benefit, to any person who would have been entitled to the benefit had the offender not been so prevented.
- (2) The Court may make an order under this section if satisfied that—
- 35 (a) all civil and criminal proceedings relating to the unlawful killing are finalised and no new trial or appeal involving the offender is likely to be instituted; and
 - (b) it is in the interests of justice for the order to be made.
- (3) In this section—
benefit includes any property or interest.

Part 5—Miscellaneous

14—Proceedings to be civil

- (1) Proceedings on an application under this Act are civil proceedings.
- (2) In proceedings under this Act—
- 5 (a) the rules of construction applicable only in relation to the criminal law do not apply in the interpretation of this Act; and
- (b) the rules of evidence applicable in civil proceedings apply to proceedings under this Act.

15—Orders under Act

10 An order of the Court under this Act may be in such terms and subject to such conditions as the Court thinks fit.

16—Time for bringing proceedings

An application for an order under this Act may be made—

- 15 (a) within 6 months after the date of death of the deceased person; or
- (b) within 6 months after the finalisation of criminal proceedings relating to an unlawful killing; or
- (c) within 3 months after the Court has made any order specifying whether, or how, the forfeiture rule applies to the distribution of an estate; or
- (d) at any other time with the permission of the Court.

20 17—Evidentiary

In proceedings under this Act—

- 25 (a) a certificate referred to in section 42 of the *Evidence Act 1929* issued in relation to an offence that constitutes an unlawful killing is conclusive proof that the person named in the certificate committed that unlawful killing; and
- (b) a certificate purporting to be under the hand of the Registrar of the Supreme Court or the District Court or the associate or other officer having the custody of the records of the relevant court, or of the deputy of such associate or other officer, certifying that, on a specified day, the court has found that—
- 30 (i) a person named in the certificate was, at the time of an offence specified in the certificate, mentally incompetent to commit the offence; or
- (ii) a person named in the certificate was mentally unfit to stand trial on a charge of an offence specified in the certificate; or
- 35 (iii) the objective elements of an offence specified in the certificate were established beyond a reasonable doubt,
- is conclusive proof of the matters specified in the certificate.

18—Regulations and fee notices

- (1) The Governor may make such regulations as are contemplated by, or as are necessary or expedient for the purposes of, this Act.
- (2) The regulations may—
- 5 (a) be of general or limited application; and
- (b) make different provision according to the matters or circumstances to which they are expressed to apply; and
- (c) make provisions of a saving or transitional nature consequent on the enactment of this Act or on the commencement of specified provisions of this Act or on the making of regulations under this Act; and
- 10 (d) provide that a matter or thing in respect of which regulations may be made is to be determined according to the discretion of the Minister or any other specified person or body.
- (3) The Minister may prescribe fees for the purposes of this Act by fee notice under the *Legislation (Fees) Act 2019*.
- 15 (4) A fee notice may provide for the waiver, reduction or remission of fees.

Schedule 1—Related amendments and transitional provisions

Part 1—Amendment of *Administration and Probate Act 1919*

1—Insertion of section 36A

20 After section 36 insert:

36A—Grant of probate or administration to other person

If the Court considers that there are reasonable grounds for believing that a person otherwise entitled to a grant of probate of the will of a deceased person or administration of the estate of a deceased person has committed an offence relating to the deceased person's death, the Court may instead of granting probate or administration to that person, grant probate or administration to—

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- (a) without limiting paragraph (b), if there is more than 1 person entitled to the grant—any or all of the other persons entitled;
- 30 or
- (b) any person the Court considers appropriate.

2—Insertion of section 118

Before section 119 insert:

118—Person disqualified from taking interest or share in deceased estate to be treated as having predeceased testator or intestate

- (1) If a person is for any reason disqualified from—
- 35 (a) taking their interest under a will as a beneficiary; or

(b) taking their share in the distribution of an intestate estate,
the person will be treated as having predeceased the testator or
intestate (as the case may be).

(2) Subsection (1)(a) does not apply if a contrary intention appears in the
will.

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Part 2—Amendment of *Criminal Assets Confiscation Act 2005*

3—Amendment of section 7—Meaning of proceeds and instrument of an offence

Section 7(2)—after paragraph (b) insert:

(ba) it vests in a person from the distribution of the estate of a deceased
person in accordance with the forfeiture rule or a forfeiture
modification order under the *Forfeiture Act 2023* or otherwise vests
in a person pursuant to an order of the Supreme Court under that Act;
or

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Part 3—Transitional provision

4—Application of Act

This Act only applies in relation to an unlawful killing occurring after the
commencement of this Act.