

South Australia

# Coroners (Inquests and Privilege) Amendment Act 2021

An Act to amend the *Coroners Act 2003*, and to make a related amendment to the *Guardianship and Administration Act 1993*.

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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 *Coroners (Inquests and Privilege) Amendment Act 2021*.

## 2—Commencement

This Act comes into operation on a day to be fixed by proclamation.

## 3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

## Part 2—Amendment of *Coroners Act 2003*

### 4—Amendment of section 3—Interpretation

- (1) Section 3(1), definition of *reportable death*, (f)(iii)—after "*Mental Health Act 1993*" insert:

or the *Mental Health Act 2009*

- (2) Section 3—after subsection (2) insert:
- (3) For the purposes of this Act, a reference to the circumstances of an event may be taken to include matters related to or arising out of the event or its aftermath.

### 5—Amendment of section 13—Jurisdiction of Court

Section 13—after its present contents (now to be designated as subsection (1)) insert:

- (2) In ascertaining the cause or circumstances of an event, the Coroner's Court is to promote the public interest in open justice which may include, without limitation—
- (a) the public identification of a person, public sector agency or other organisation involved in the event, in particular in circumstances where it appears that such a person, agency or organisation caused or contributed to a death; or
- (b) requiring a person, public sector agency or other organisation to provide information about and explain their action or inaction in the circumstances of the event; or
- (c) assessing, subject to this Act, the accountability and responsibility of a person, public sector agency or other organisation involved in the event.

### 6—Insertion of section 20A

After section 20 insert:

#### **20A—Right of appearance for nominated representative of families**

- (1) This section applies to proceedings before the Coroner's Court relating to the death or disappearance of a person.

- (2) Without limiting any other provision of this Act, the nominated representative of the family of a person to whom proceedings to which this section applies is entitled to appear in those proceedings and may examine and cross-examine any witness testifying in the proceedings.
- (3) The reasonable legal costs of the nominated representative may be the subject of an application for legal assistance under the *Legal Services Commission Act 1977* which is to be determined in accordance with that Act.
- (4) For the purposes of this section, a reference to the ***nominated representative*** of a family will be taken to be a reference to a legal practitioner—
  - (a) engaged by or on behalf of the family to represent them in particular proceedings; and
  - (b) nominated, in accordance with any rules of the Court, by the family as their nominated representative.

- (5) In this section—

***Aboriginal or Torres Strait Islander person*** means a person who—

- (a) is a descendant of the indigenous inhabitants of Australia or the Torres Strait Islands; and
- (b) regards themselves as Aboriginal or Torres Strait Islander or, if they are a child, is regarded as Aboriginal or Torres Strait Islander by at least 1 of their parents;

***adult*** means a person of or over the age of 18;

***domestic partner*** means a person who is a domestic partner within the meaning of the *Family Relationships Act 1975*, whether declared as such under that Act or not;

***family***, in relation to a person, means—

- (a) the person's senior next of kin; and
- (b) in relation to an Aboriginal or Torres Strait Islander person, includes any person held to be related to the person according to Aboriginal kinship rules, or Torres Strait Islander kinship rules, as the case may require;

***parent*** of a child includes a guardian of the child;

***senior next of kin*** for a deceased person or person who has disappeared means—

- (a) the spouse or domestic partner of the person (and if the person had more than 1 spouse or domestic partner, the person's most recent spouse or domestic partner);
- (b) if the person did not have a spouse or domestic partner or if they are not available—any adult child of the person;

- (c) if the person did not have a spouse, domestic partner or adult child or if they are not available—a parent of the person;
- (d) if the person did not have a spouse, domestic partner, adult child or living parent or if they are not available—any adult brother or sister of the person;
- (e) if the person did not have a spouse, domestic partner, adult child, living parent or adult brother or sister or if they are not available—
  - (i) any person who is named as an executor in the person's will; or
  - (ii) any person who was the person's legal personal representative immediately before the person's death or disappearance;

*spouse*—a person is the spouse of another if they are legally married.

## 7—Amendment of section 21—Holding of inquests

(1) Section 21(1)(b)—after subparagraph (iv) insert:

or

- (v) the death of a person (whether before or after the commencement of this subparagraph) who apparently died from natural causes, as certified by a medical practitioner, while—
  - (A) subject to an order under section 32(1)(b) of the *Guardianship and Administration Act 1993*; or
  - (B) —
    - subject to an inpatient treatment order under Part 5 of the *Mental Health Act 2009*; and
    - held in a ward (however described) of a hospital or other facility that is an approved treatment centre under the *Mental Health Act 2009* where the whole of the ward is not set aside for the treatment of persons with a mental illness;

(2) Section 21—after subsection (3) insert:

- (4) For the purposes of subsection (1)(a) and the definition of *death in custody* in section 3(1), the death or apparent death of a person (whether before or after the commencement of this subsection) from natural causes, as certified by a medical practitioner, while—
  - (a) subject to an inpatient treatment order under Part 5 of the *Mental Health Act 2009*; and
  - (b) held in a ward (however described) of a hospital or other facility that is an approved treatment centre under the *Mental Health Act 2009* where the whole of the ward is set aside for the treatment of persons with a mental illness,

will be taken to be a death in custody.

- (5) Despite the definition of *death in custody* in section 3(1), for the purposes of subsection (1)(a), the death or apparent death of a person (whether before or after the commencement of this subsection) from natural causes, as certified by a medical practitioner, while—
- (a) subject to an order under section 32(1)(b) of the *Guardianship and Administration Act 1993*; or
  - (b) —
    - (i) subject to an inpatient treatment order under Part 5 of the *Mental Health Act 2009*; and
    - (ii) held in a ward (however described) of a hospital or other facility that is an approved treatment centre under the *Mental Health Act 2009* where the whole of the ward is not set aside for the treatment of persons with a mental illness,

will not be taken to be a death in custody.

- (6) In this section—

*mental illness* has the same meaning as in the *Mental Health Act 2009*;

*treatment* has the same meaning as in the *Mental Health Act 2009*.

## 8—Amendment of section 23—Proceedings on inquests

- (1) Section 23(4)—delete "A person" and substitute:

Subject to section 23A, a person

- (2) Section 23(5)—delete subsection (5) and substitute:

- (5) However, a person is not required to answer a question, or to produce a record or document, under this section if answering the question, or producing the record or document, would result in a breach of legal professional privilege.

## 9—Insertion of section 23A

After section 23 insert:

### 23A—Privilege in respect of self-incrimination and penalty

- (1) This section applies if a person objects to answering a question, or producing a record or document, at an inquest on the ground that the answer, record or document may tend to—
- (a) in the case of a natural person—incriminate the person in respect of an Australian law or a foreign law; or
  - (b) in any case—make the person liable to a penalty under an Australian law or a foreign law.
- (2) The Court must determine whether or not there are reasonable grounds for the objection.

- (3) If the Court determines that there are reasonable grounds for the objection, the Court is to inform the person—
- (a) that the person need not answer the question, or produce the record or document, unless required by the Court to do so under subsection (4); and
  - (b) that the Court will give a certificate under this section if—
    - (i) the person willingly answers the question, or produces the record or document, without being required to do so under subsection (4); or
    - (ii) the person answers the question, or produces the record or document, after being required to do so under subsection (4); and
  - (c) of the effect of such a certificate.
- (4) The Court may require the person to answer the question, or produce the record or document, if the Court is satisfied that—
- (a) the answer, record or document does not tend to incriminate the person in respect of, or make the person liable to a penalty under, a foreign law; and
  - (b) the interests of justice require that the person answer the question, or produce the record or document.
- (5) If the person—
- (a) willingly answers the question, or produces the record or document, without being required to do so under subsection (4); or
  - (b) answers the question, or produces the record or document, after being required to do so under subsection (4),
- the Court must cause the person to be given a certificate under this section in respect of the answer, record or document.
- (6) The Court must also cause a person to be given a certificate under this section if—
- (a) the objection has been overruled; and
  - (b) after the question has been answered, or the record or document produced, the Court finds that there were reasonable grounds for the objection.
- (7) A certificate under this section may relate to more than 1 question, record or document (or to a combination of 1 or more questions, 1 or more records and 1 or more documents).

- (8) In any proceeding in a court or before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence—
- (a) an answer given, or a record or document produced, by a person in respect of which a certificate under this section has been given; and
  - (b) any information, document or thing obtained as a direct or indirect consequence of the person having answered a question, or produced a record or document,
- cannot be used against the person.
- (9) However, subsection (8) does not apply to a criminal proceeding in respect of the falsity of the answer given, or the record or document produced.
- (10) Subsection (8) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.
- (11) This section does not derogate from Parts 7 and 8 of the *Health Care Act 2008*.
- (12) In this section—

*Australian law* means a law of this State, another State, the Commonwealth or a Territory of the Commonwealth;

*foreign law* means a law of a foreign country or of a part of, or in force in a part of, a foreign country.

### 10—Amendment of section 25—Findings on inquests

- (1) Section 25(2)—delete subsection (2) and substitute:
- (2) The Court may add to its findings any recommendation that, in the opinion of the Court—
- (a) might prevent, or reduce the likelihood of, a recurrence of an event similar to the event that was the subject of the inquest; or
  - (b) relates to a matter arising from the inquest, including (but not limited to) matters concerning—
    - (i) the quality of care, treatment and supervision of the dead person prior to death; and
    - (ii) public health or safety; and
    - (iii) the administration of justice,and is, in the circumstances, an appropriate matter on which to make a recommendation.
- (2) Section 25(4)(a)—after "Attorney-General" insert:
- and any relevant Minister other than the Attorney-General

- (3) Section 25(4)(b)(i)—delete subparagraph (i)
- (4) Section 25(5)—delete subsection (5) and substitute:
  - (5) Each relevant Minister must, within 8 sitting days of the expiration of 6 months after receipt of a copy of a recommendation resulting from an inquest—
    - (a) cause a report to be laid before each House of Parliament—
      - (i) giving details of any action taken or proposed to be taken in consequence of the recommendation; or
      - (ii) if no action has been taken or is proposed to be taken—giving reasons for not taking action or proposing to take action; and
    - (b) forward a copy of the report to the State Coroner.
  - (6) The State Coroner may, at any time after the provision of a report under subsection (5), request a supplementary report to be prepared by the Minister that addresses any matter that the State Coroner considers necessary arising out of the report.
  - (7) If the State Coroner makes a request under subsection (6), the Minister to whom the request was made must, within 8 sitting days of the expiration of 6 months after receiving the request—
    - (a) cause a supplementary report to be laid before each House of Parliament addressing the matters requested to be addressed by the State Coroner; and
    - (b) forward a copy of the supplementary report to the State Coroner.
  - (8) In this section—

**relevant Minister**, in relation to findings and recommendations of the Court, means—

    - (a) if a recommendation is directed to a Minister, or to an agency or other instrumentality of the Crown, as a result of the inquest—the Minister to whom, or the Minister responsible for the agency or other instrumentality of the Crown to which, the recommendation is directed; or
    - (b) in any other case—the Attorney-General.



## 11—Insertion of section 37A

After section 37 insert:

### **37A—Release of records to family when no inquest held**

- (1) Subject to this section, the State Coroner must, unless the State Coroner is satisfied that it is not in the interests of justice to do so, on application by the family of a person the subject of an event in relation to which the State Coroner determines an inquest is not to be held under this Act or an earlier enactment (whether the determination was made before or after the commencement of this section), provide to the applicant a copy of all records held by the State Coroner in respect of the event.
- (2) An application may only be made under subsection (1) in respect of an event in relation to which the State Coroner determines an inquest is not to be held—
  - (a) if the event is a reportable death—after the expiration of 20 years following the making of a finding as to the cause of death or a finding that the death was due to undetermined natural causes; or
  - (b) in any other case—after the expiration of 20 years following the determination that an inquest is not to be held in relation to the event.
- (3) The ability of a person to make an application under this section does not derogate from the ability of the person to make an application under section 37.
- (4) For the avoidance of doubt, records that may be provided under subsection (1) include the following:
  - (a) material that was not taken or received in open court;
  - (b) a photograph, slide, film, video tape, audio tape or other form of recording from which a visual image or sound can be produced;
  - (c) material of a class that is prescribed by the regulations pursuant to section 37(2)(d).
- (5) Material that has been suppressed from publication under this Act or any other Act (subject to that other Act) may only be provided under this section if the State Coroner is satisfied that it is in the interests of justice to do so.
- (6) The State Coroner may provide a copy of records under this section subject to any condition the State Coroner considers appropriate, including a condition limiting the publication or use of the records.
- (7) If a copy of a record to be released under this section identifies an individual, the State Coroner may redact or otherwise modify the copy of the record to the extent necessary to remove the identity of the individual from the copy if satisfied that the interests of justice require it in the circumstances of the particular case.

- (8) The State Coroner may not charge a fee in relation to—
- (a) an application for the provision of copies of records under this section; or
  - (b) the provision of copies of records under this section.

- (9) In this section—

***Aboriginal or Torres Strait Islander person*** means a person who—

- (a) is a descendant of the indigenous inhabitants of Australia or the Torres Strait Islands; and
- (b) regards themselves as Aboriginal or Torres Strait Islander or, if they are a child, is regarded as Aboriginal or Torres Strait Islander by at least 1 of their parents;

***adult*** means a person of or over the age of 18;

***domestic partner*** means a person who is a domestic partner within the meaning of the *Family Relationships Act 1975*, whether declared as such under that Act or not;

***earlier enactment*** means—

- (a) the *Coroners Act 1975*; or
- (b) the *Coroners Act 1935*; or
- (c) any other Act or law of this State providing for the holding of an inquest into the death or disappearance of a person;

***family***, in relation to a person, means—

- (a) the person's senior next of kin; and
- (b) in relation to an Aboriginal or Torres Strait Islander person, includes any person held to be related to the person according to Aboriginal kinship rules, or Torres Strait Islander kinship rules, as the case may require;

***parent*** of a child includes a guardian of the child;

***senior next of kin*** for a person the subject of an event in relation to which the State Coroner determines an inquest is not to be held means—

- (a) the spouse or domestic partner of the person (and if the person had more than 1 spouse or domestic partner, the person's most recent spouse or domestic partner);
- (b) if the person did not have a spouse or domestic partner or if they are not available—any adult child of the person;
- (c) if the person did not have a spouse, domestic partner or adult child or if they are not available—a parent of the person;
- (d) if the person did not have a spouse, domestic partner, adult child or living parent or if they are not available—any adult brother or sister of the person;

- (e) if the person did not have a spouse, domestic partner, adult child, living parent or adult brother or sister or if they are not available—
  - (i) any person who is named as an executor in the person's will; or
  - (ii) any person who was the person's legal personal representative immediately before the event in relation to which the State Coroner determines an inquest is not to be held;

*spouse*—a person is the spouse of another if they are legally married.

## **Schedule 1—Related amendment and transitional provision**

### **Part 1—Amendment of *Guardianship and Administration Act 1993***

#### **1—Repeal of section 76A**

Section 76A—delete the section

### **Part 2—Transitional provision**

#### **2—Transitional provision**

The amendments to section 23 of the *Coroners Act 2003* by section 8 and the insertion of section 23A of the *Coroners Act 2003* by section 9—

- (a) do not apply in respect of inquests commenced before the commencement of sections 8 and 9 (and those inquests may continue as if those sections had not been enacted); and
- (b) apply in respect of inquests commenced after the commencement of sections 8 and 9 (including inquests in respect of an event occurring before the commencement of those sections).