



MAGISTRATES COURT of TASMANIA

CORONIAL DIVISION

Record of Investigation into Death (Without Inquest)

Coroners Act 1995

Coroners Rules 2006

Rule 11

I, Olivia McTaggart, Coroner, having investigated the death of Rodney Kirk

Find, pursuant to Section 28(1) of the Coroners Act 1995, that

- a) The identity of the deceased is Rodney Kirk.
- b) Mr Kirk was born on 13 March 1947 and was aged 73 years when he died. Mr Kirk was diagnosed with dementia in 2016 after displaying symptoms since 2011.¹ He was cared for by his wife, Mrs Christine Kirk, in their home until October 2019. Following admission to hospital for cellulitis of the hand, Mr Kirk was placed in the Roy Fagan Centre (RFC), a specialised Tasmanian Health Service facility to assess and treat elderly persons with mental illness and dementia. RFC is also an approved hospital under the *Mental Health Act 2013*. Mr Kirk remained as a patient of RFC due to his advanced dementia with severe language impairment and behavioural symptoms of dementia that were too challenging to manage in residential aged care.²

Unfortunately, Mr Kirk suffered a steep decline his health and function in the last six months of his life. On 3 February 2021, Mr Kirk aspirated and developed pneumonia. He received palliative care until his passing three days later.³

On 20 December 2019, Mrs Kirk was appointed by the Guardianship and Administration Board as limited guardian of Mr Kirk. This order allowed Mrs Kirk to decide where he was to live and included the power under

¹ Kirk Exhibit C9 p. 1.

² Exhibit C5.

³ Kirk, above n 1, p. 2.

Section 28 of the *Guardianship and Administration Act 1995* to use restraint.⁴

He was subject to this order at the time of his death.

- c) Mr Kirk's cause of death was aspiration pneumonia following advanced dementia.⁵
- d) Mr Kirk died on 6 February 2021 at the Roy Fagan Centre in Lenah Valley, Tasmania.

In making the above findings, I have had regard to the evidence the investigation into Mr Kirk's death. The evidence includes:

- The Police and Hospital Reports of Death to the Coroner;
- Affidavits establishing identification and life extinct;
- Report of the Forensic Pathologist regarding cause of death;
- Guardianship and Administration Order;
- Tasmanian Health Service medical records; and
- Medical review by the coronial medical consultant, Dr A Bell.

Comments and Recommendations

The investigation into the deaths of Mr Kirk and Mr Damien Callinan raised the question of whether a coroner is mandated to hold a public inquest under s 24(1)(b) of the *Coroners Act 1995* on the basis that they were, immediately before their death, 'persons held in care' as defined in Section 3 the Act. This issue arose because of the coercive nature of the guardianship orders and that they were patients in an 'approved hospital' as that term is defined under the *Mental Health Act 2013*.

I have received helpful submissions from counsel assisting, Ms E Belonogoff, and for the reasons set out in the attached ruling, I agree with those submissions and find that I am not required under the Act to hold a public inquest into the deaths because they were not 'persons held in care' immediately before their deaths.

Further, the evidence satisfies me that Mr Kirk received good care and treatment at RFC and that it is not desirable, in my discretion, to hold a public inquest.

⁴ Kirk Exhibit C7.

⁵ Kirk Exhibits C5 and C6.

The circumstances of Mr Rodney Kirk's death are not such as to require me to make any recommendations pursuant to Section 28 of the *Coroners Act 1995*.

I convey my sincere condolences to the family and loved ones of Mr Kirk.

Dated: 13 April 2022 at Hobart Coroners Court in the State of Tasmania.

Olivia McTaggart

Coroner



MAGISTRATES COURT of TASMANIA

CORONIAL DIVISION

Ruling

Introduction

1. The deaths of Mr Damian Callinan and Mr Rodney Kirk raise the question of whether a coroner is mandated to hold a public inquest into their respective deaths under s 24(1)(b) of the *Coroners Act 1995* (the Act).
2. As discussed in the individual findings, both were under restrictive guardianship orders under the *Guardianship and Administration Act 1995*. Their deaths were reported to the coroner because they may have been 'person[s] held in care' under the Act although they were due to natural causes and did not appear to be reportable on any other ground under the Act.
3. By Section 3 of the *Coroners Act*, the relevant definition of 'a person held in care' is:
 - (a) a child, within the meaning of the *Children, Young Persons and Their Families Act 1997*, in the custody or under the guardianship of the Secretary, within the meaning of that Act;
 - (b) a person detained or liable to be detained in an approved hospital within the meaning of the *Mental Health Act* or in a secure mental health unit or another place while in the custody of the controlling authority of a secure mental health unit, within the meaning of that Act.
4. The death of 'a person who immediately before death was a person held in care' is a 'reportable death' within the meaning in Section 3 of the Act.⁶ A coroner has jurisdiction to investigate a death if it appears to the coroner that the death is or may be a reportable death.⁷
5. Section 24(1) of the Act relevantly provides:

⁶ Provided one of sub-s (i), (ii), (iii) or (iiia) of the definition of 'reportable death' is also satisfied.

⁷ *Coroners Act 1995* s 21(1).

(1) Subject to section 25, a coroner who has jurisdiction to investigate a death **must** hold an inquest if the body is in Tasmania or it appears to the coroner that the death, or the cause of death, occurred in Tasmania or that the deceased ordinarily resided in Tasmania at the time of death and –

.....

(b) The deceased was immediately before death a person **held in care** or a person held in custody; ... (*my emphasis*)

6. The coroner also has a discretion to hold an inquest into any death which he or she has jurisdiction to investigate where the coroner considers it desirable to do so.⁸
7. However, as required by Section 24(1)(b) as set out above, all deaths of a person held in care are required to be reported and to be the subject of a mandatory inquest.
8. Further, in inquests concerning a person held in care, a coroner must, in addition to their usual findings under Section 28(1), report on the care, supervision or treatment of the deceased person while they were a person held in care.⁹

Guardianship orders pertaining to Mr Callinan and Mr Kirk

9. The restrictive provisions in the orders applicable to Mr Callinan and Mr Kirk were made under, and were lawful because of, Section 28 of the Guardianship and Administration Act. The terms of their orders are set out in full below.
10. The order in respect of Mr Callinan provides:
 1. The Public Guardian (Tas) is appointed as guardian for Damian Francis Callinan with the power to:
 - i. Make medical treatment decisions for Damian Francis Callinan.
 2. Pursuant to section 28 of the *Guardianship and Administration Act 1995*, the Public Guardian; any police officer; ambulance officer; any employee or agent of the Tasmanian Health Service (THS) or Royal Hobart Hospital (RHH) where Damian

⁸ *Coroners Act 1995* s 24(2).

⁹ *Coroners Act 1995* s 28(5).

Francis Callinan (*sic*) receiving medical treatment as determined by the Guardian, are empowered to take the measures or actions specified below to ensure that Damian Francis Callinan complies with any decision of the Guardian made under this Order.

Specified measures or actions:

- a. The use of such reasonable force or physical and/or chemical restraint as is necessary to facilitate transport of Damian Francis Callinan to the RHH as determined by the Guardian from time to time; and to keep Damian Francis Callinan there or return him there should he leave, contrary to the Guardian's decision.
 - b. Restraining Damian Francis Callinan by physical and/or chemical means in order to provide medical treatment to which the Guardian gives consent.
3. This Order remains in effect until 17 February 2021.

11. The order in respect of Mr Kirk provides:

1. Christine Kirk is appointed as limited Guardian of Rodney Kirk with the power to:
 - i. Decide where Rodney Kirk is to live whether permanently or temporarily.
2. Pursuant to section 28 of the Guardianship and Administration Act 1995, the Guardian or any police officer or any ambulance officer or any employee or agent of the Roy Fagan Centre or any Tasmanian Health Service facility or age care facility where Rodney Kirk is staying as determined by the Guardian, are empowered to take the measures or actions specified below to ensure that Rodney Kirk complies with any decision of the Guardian made under this order.

Specified measures or actions:

- a. the use of such reasonable force or physical and/or chemical restraint as is necessary to facilitate transport of Rodney Kirk to and from the Roy Fagan Centre or any Tasmanian Health Service facility or age care facility determined by the Guardian from time to time; and to as determined by the Guardian from time to time; and to keep Rodney Kirk there or return him there should he leave, contrary to the Guardian's decision.
3. This Order remains in effect until 19 December 2022.

12. While these orders have obvious differences, they have a similar effect. Both Mr Callinan and Mr Kirk were being accommodated in medical settings at the Royal Hobart Hospital (Whittle Ward) and the Roy Fagan Centre as determined by their respective guardians. Further, both orders contained provision under Section 28 to use reasonable force should either attempt to leave their accommodation without their guardian's consent.

The issue in this ruling

13. The resolution of the issue as to whether the two deaths in question should be the subject of a mandatory inquest is to be resolved by answering one question: whether the words within Section 3 of the *Coroners Act* ‘within the meaning of the *Mental Health Act 2013*’ attach only to the phrase ‘approved hospital’, or also to the phrase ‘a person detained or liable to be detained’.
14. I considered this question of statutory interpretation in different factual circumstances in the inquest into the death of *Molly Jessie Smith*.¹⁰ In that case, Molly Smith suffered long-standing mental illness and was unable to live outside an institutional setting. Whilst she had been accommodated by the State in an approved hospital before her death, no orders under the *Mental Health Act* were in place. I determined, in the circumstances, that Ms Smith was nevertheless a person held in care as she was a person detained or liable to be detained and also that she was in an approved hospital before her death.
15. In my finding, I took the view that the words ‘within the meaning of the *Mental Health Act*’ attached only to the phrase ‘approved hospital’ and not the phrase ‘detained or liable to be detained’.
16. The implications of that interpretation are that, so long as a person was:
 - (a) detained or liable to be detained by any means or by any enactment;
 - and
 - (b) that immediately before death, he/she was accommodated in an approved hospital, then the person satisfied the definition of a person held in care.
17. I have now re-considered my reasoning in that regard and am persuaded that my interpretation was incorrect. I have had the benefit of comprehensive and persuasive submissions from Counsel Assisting, Ms E

¹⁰ [2017] TASC 444.

Belonogoff, and also Ms G Chen, Counsel for the Tasmanian Health Service.¹¹

18. For the reasons set out below, I find that the phrase ‘within the meaning of the *Mental Health Act*’ attaches to the entirety of the clause ‘a person detained or liable to be detained in an approved hospital’. The result of this interpretation means that the detention or liability to detention of a deceased person must apply only to persons with a mental illness within that definition under the *Mental Health Act*, and not otherwise.

Legislative background and reasoning

19. Under Section 140 of the *Mental Health Act*, an approved hospital is one which is notified by the Minister in the Gazette. However, Section 4(1) of the *Mental Health (Transitional and Consequential Provisions) Act 2013* operates to recognise hospitals that were approved under the previous *Mental Health Act 1996* as approved hospitals under the current *Mental Health Act 2013*.
20. Under Section 9 of the *Mental Health Act 1996*, the Minister approved both the Royal Hobart Hospital and the Roy Fagan Centre as hospitals under that Act.¹² It follows that both Mr Callinan and Mr Kirk died at approved hospitals under the *Mental Health Act 2013*.
21. As correctly submitted by Counsel Assisting, the principles of statutory interpretation require words in legislation to be interpreted according to their ordinary meaning, within the context in which they appear. Extrinsic materials may be used to assist interpretation where the provision is ambiguous or obscure.¹³ In this case, the ambiguity is sufficient to invoke the assistance of extrinsic materials.

¹¹ Counsel of the Tasmanian Health Service was in agreement with the submissions of Counsel Assisting in the investigation into the deaths of Mr Callinan and Mr Kirk. However, she has, in another investigation, provided comprehensive and helpful submissions on the same point.

¹² Tasmania, Gazette, 3 October 2007, 1518.

¹³ *Acts Interpretation Act 1931* s 8B.

22. The *Coroners Act 1995* as passed contained the definition of a ‘person held in care’ as:
- ... a person detained or liable to be detained under the *Mental Health Act 1963* in a hospital within the meaning of that Act.
23. This original definition made it abundantly clear that the detention or liability to detention must be under the (then current) *Mental Health Act*.
24. On 1 November 1999, the definition of a ‘person held in care’ was then amended by the *Mental Health (Consequential Amendments) Act 1996* to read:
- ... a person detained or liable to be detained in an approved hospital within the meaning of the *Mental Health Act 1996*.
25. The second reading speech for that amending Act does not specifically mention the amendment to the *Coroners Act*. It referred only to amendments to a significant number of Acts due to the repeal of the *Mental Health Act 1963* and the enactment of the *Mental Health Act 1996*.¹⁴
26. The definition was further amended as a result of the *Mental Health Amendment (Secure Mental Health Unit) Act 2005* to read:
- ...a person detained or liable to be detained in an approved hospital within the meaning of the *Mental Health Act 1996* or in a secure mental health unit or another place while in the custody of the controlling authority of a secure mental health unit, within the meaning of that Act.
27. This amendment was sought to extend jurisdiction to the then newly created secure mental health unit, without otherwise amending the first limb of the definition.¹⁵
28. On 17 February 2014, the definition was amended pursuant to the *Mental Health (Transitional and Consequential Provisions) Act 2013* to replace the reference to the *Mental Health Act 1996* to the current *Mental Health Act*

¹⁴ Tasmania, *Parliamentary Debates*, House of Assembly, 3 October 1996, TJ Cleary (Minister for Transport on behalf of the Minister for Community and Health Services).

¹⁵ Tasmania, *Parliamentary Debates*, House of Assembly, 8 November 2005, DE Llewellyn (Minister for Health and Human Services).

2013. This was the most recent amendment to the definition of a ‘person held in care’ under Section 3 of the *Coroners Act*.

29. It is apparent, therefore, that there was no express intention in the legislature to make broader the class of persons detained or liable to be detained by omitting on amendment the first appearing reference to the *Mental Health Act 1963*. Omitting the name of the Act in the first limb was likely to have been simply for the purpose of streamlining the phrase as a whole, rather than changing the class of persons who are said to be ‘held in care’. Therefore, the sequence of amendments are reflective only of the changing of other legislation, providing an indication that the phrase ‘a person detained or liable to be detained’ should be interpreted as it originally was, being applicable only to those detained or liable to be detained specifically under the *Mental Health Act*.
30. Reinforcing this view, legislative provisions are to be interpreted as a whole and in context, rather than word by word.¹⁶ The assumption that words will be read in context often leads to the omission of words. As noted, it appears that the drafter of the amendment has chosen not to repeat the phrase ‘within the meaning of the *Mental Health Act*’ after both phrases ‘a person detained or liable to be detained’ and ‘in an approved hospital’. By using the phrase only at the end of both parts within the definition, a sensible contextual approach involves its applicability to the entirety of each clause.
31. As submitted by Counsel Assisting, the definition of a person held in care relies on the deceased person being within ‘approved hospitals’ and ‘secure mental health units’. These are places that are specifically defined under the *Mental Health Act*.¹⁷ They are only defined as such in other Acts by reference to the *Mental Health Act*.

¹⁶ *Ghali v Chief Commissioner of State Revenue* (2013) 85 NSWLR 378 at [21].

¹⁷ *Mental Health Act 2013* ss 3 and 140.

32. Similarly, the phrase ‘another place while in the custody of the controlling authority’ is also linked to the *Mental Health Act*. The definition of ‘controlling authority’ in the *Coroners Act* refers to its definition in the *Mental Health Act*. I accept counsel’s submission that the frequent use of terms specific to the *Mental Health Act* creates the context in which the entirety of the definition of ‘person held in care’ should be interpreted.
33. For the above reasons, I am satisfied that a person who is detained or liable to be detained within an approved hospital (as gazetted under the *Mental Health Act*) must be so detained or liable to be detained under the *Mental Health Act* and not otherwise.

Did Mr Callinan and Mr Kirk suffer “mental illness” under the *Mental Health Act*?

34. Involuntary assessment and treatment orders permitting detention of a person under the *Mental Health Act* may only be made in respect of a person who has a mental illness.¹⁸
35. ‘Mental illness’ is defined in s 4 of the *Mental Health Act* as follows:
- (1) For the purpose of this Act -
 - (a) A person is taken to have a mental illness if he or she experiences, temporarily, repeatedly or continually –
 - (i) A serious impairment of thought (which may include delusions); or
 - (ii) A serious impairment of mood, volition, perception or cognition;
 and
 - (b) Nothing prevents the serious or permanent physiological, biochemical or psychological effects of alcohol use or drug-taking from being regarded as an indication that a person has a mental illness
 - (2) However, under this Act, a person is not taken to have a mental illness by reason only of the person’s –
 - (a) ...
 - (m) Acquired brain injury; or
 - (n) Dementia; or ...

¹⁸ *Mental Health Act 2013* ss 25 and 40.

36. At the time of his death, Mr Callinan was suffering from glioblastoma, a cancerous brain tumour. While this caused serious impairment to his mood and cognition, Mr Callinan was not taken to have a mental illness within the meaning of the *Mental Health Act*.
37. Prior to his death, Mr Kirk also experienced serious impairment of mood. This was caused by dementia.¹⁹ Similarly, Mr Kirk was not taken to have a mental illness within the meaning of the *Mental Health Act*.
38. Therefore, neither Mr Callinan nor Mr Kirk could have properly been subject to, or satisfy the criteria for, an assessment or treatment order under the *Mental Health Act*. They were therefore not persons held in care under the Act. This is the case notwithstanding that they were both accommodated within an approved hospital under that Act and they were both subject to orders that permitted the use of force or restraint to keep them accommodated there.

Conclusion

39. In the circumstances specific to both deaths, I find that:
 - (a) the deaths were not in fact reportable only on the basis that they were deaths of 'persons held in care';
 - (b) A public inquest into either death is not mandatory under the *Coroners Act*;
 - (c) There is no mandatory requirement to report upon the care, supervision and treatment of either deceased; and
 - (d) A public inquest into either death is not desirable.

Meaning of 'detained or liable to be detained'

¹⁹ Kirk Exhibit C1, p. 5.

40. A further issue should be noted, which was the subject of Counsel Assisting's submissions. This concerns the meaning of the term 'detained or liable to be detained' within the definition of 'a person held in care' under the *Coroners Act*. The remaining issue on this point is whether persons with mental illness who satisfy the criteria for involuntary orders, but who were not subject to such orders, can be said to be 'detained or liable to be detained'.
41. 'Detained' and 'liable to be detained' are not defined terms in the *Coroners Act* nor the *Mental Health Act*.
42. In the *Molly Smith* finding, I reasoned as follows:²⁰

"In considering these provisions, it is evident that an involuntary patient detained under an order under that Act is a "person held in care" within the meaning of that term in the *Coroners Act* as they are either detained or liable to be detained. The death of such a person must be reported and an inquest held.

The important question in the context of this inquest is whether, in the absence of being subject to an order under the *Mental Health Act* at the time of her death, Ms Smith was "detained or liable to be detained".

The public policy rationale for the requirement in section 28(5) of the Act to report on the care, supervision or treatment is to ensure that the death of every person who is coercively held in any state-run institution is carefully, independently and transparently examined. Usually, such a person will be detained by virtue of an order of a court or tribunal.

However, the Act does not envisage that this is necessarily the case if, in fact, the state (or a prescribed state officer) had control over the person at the time of death. For example, under the Act, "person held in custody" means, inter alia, (a) a person in the custody or control of a police officer, correctional officer or mental health officer; and (b) a person detained in a prison as defined in the *Corrections Act 1997*. In this latter instance, it may be that due to an administrative error, a prisoner remains incarcerated beyond the conclusion of his lawful sentence. In such situation, the prisoner remains detained as a matter of fact and the coroner is not relieved from either holding an inquest or commenting upon his/her care, treatment and supervision. Similarly, if a police officer exerts force or threats over a person outside the formal custodial setting such that the person is not free to leave, then this would fall within the definition of a "person held in

²⁰ Pages 13 and 14.

custody". The essence of the provisions is the element of state control over a person, whether lawful or not.

This approach is in accordance with the authorities. In *Smith v The Queen* (1957) 97 CLR 100 Williams J stated at page 129 that the term "in custody" is not to be seen as a term of art. In the context of police custody, His Honour stated that it is not confined to a person who has been arrested after a charge has been formally preferred against him; it includes the situation where a person believes that he must stay with the police and not leave, particularly if the police intended him to believe that he had to remain with them and that they would have taken steps to prevent him leaving if he had attempted to do so. The assessment of whether such a person is "in custody" of the police depends upon the state of mind, intelligence and understanding of the person and the actions and behaviour of the police officers towards that person.

In relation to the term "detain", the Oxford dictionary definition includes, relevantly, the following: "place or keep in confinement; withhold, retain; keep in a certain place or condition, hold; keep from proceeding; hold back, delay, stop; restrain from action."

The decision of *Paul v Paul* [1954] VLR 331 dealt with the meaning of "detained in any hospital for the insane", being relevant to Mr Paul's petition for a dissolution of his marriage on the ground of insanity of his wife, Mrs Paul. It was held by Dean J that, notwithstanding that Mrs Paul had the status of either a temporary or voluntary patient pursuant to the relevant legislation, she was nevertheless "detained" in the hospital. The rationale of the decision was that Mrs Paul would have been certified as an involuntary patient had she attempted to leave. The evidence clearly indicated that she would "unquestionably have been certified as a person of unsound mind." He stated that the authorities would be justified in holding her against her will until the expiration of the 72 hours' notice is required by the legislation. She was therefore not entitled to freely depart, and she could lawfully have been prevented from doing so.

This decision is persuasive and the circumstances in which Dean J considered the meaning of "detained" were not dissimilar to the present circumstances albeit not in the coronial context.

It is therefore a question of fact as to whether the aspects of control or compulsion are present such that a person can be found to be detained, notwithstanding the absence of a formal order legitimising that detention".

43. I do not intend to revisit the above reasoning in this ruling as it has insufficient connection to the deaths of Mr Callinan and Mr Kirk and there is no need to do so.