SOUTH AUSTRALIAN LAW REFORM INSTITUTE

Response to consultation questions for review of the common law forfeiture rule

Dr Andrew Hemming

Senior Lecturer in Law

University of Southern Queensland

Overview

In the headlong rush to embrace equitable solutions in the application of the forfeiture rule and to try to anticipate every conceivable permutation, there is a real danger that the reason for the rule will be overlooked, namely, that an unlawful killing has occurred and that the killer stands to benefit. Perhaps, the advocates of relaxation of the rule need to be reminded that 'money is the root of all evil'. Once the door to 'killing the goose and keeping the golden nest egg' has been opened, two outcomes can safely be anticipated: (1) beneficiaries will have a greater motivation to kill; and (2) lawyers will take advantage of legislation that allows modification of the rule upon application under the rubric of 'in the interests of justice'. If the rule is to be relaxed, it needs to be narrow and codified, so that administrators and trustees of estates, wills and bequests are provided with certainty. Keeping the operation of the forfeiture rule out of the courts should be a principal objective of any reform to the rule. It should not be a model that sets up a contest, as it is under the *Forfeiture Act 1995* (NSW). South Australia should be instead looking to the *Succession (Homicide) Act 2007* (NZ) which codifies the forfeiture rule, and under s 5(1) replaces the rules of law, equity and public policy.

The current rule

1. *Should the common law forfeiture rule remain in South Australia?*

It is easy to attack the common law forfeiture rule as being too draconian. However, it has the great advantage of being clear-cut. The answer to this question needs to be seen in the context of the options for reform listed in question 22. The common law forfeiture rule (Option A) is a better option than either of Options B or D which both empower a court to modify the effect of the rule as in the ACT and NSW, and as recommended in Victoria by the Victorian Law Reform Commission (VLRC). For reasons to be developed in this response, any option that involves court discretion to modify the effect of the rule is to be avoided as this is a recipe for uncertainty and will encourage speculative claims. The only option superior to Option A is Option C, which codifies the forfeiture rule with no scope for modification of the rule. The seductive option, which was recommended in Victoria, namely, Option D, which both codifies the rule and also empowers court modification of the rule still fails the clarity test albeit with slightly less scope for judicial discretion, although the VLRC is to be commended

for considering other relevant legislation such as the *Wills Act 1997* (Vic), the *Administration and Probate Act 1958* (Vic) and the *Transfer of Land Act 1958* (Vic), unlike the NSW legislation which ignored other relevant legislation.

One way of placing this question in context is to ask: 'Has there been a case in South Australia where the application of the common law forfeiture rule has been so unjust that ordinary reasonable South Australians would feel the rule requires modification (a sense of outrage)?' Neither of the cases *Rivers v Rivers*[1] (on point with *Helton v Allen*[2]) or *Re Luxton*[3] would qualify (both cases to be discussed in Q 8). Indeed if Stephen Evans had been acquitted of Lynne Luxton's murder or manslaughter and secured her estate valued at $1.47 million, the public outrage would have been directed at the court that had deprived the victim's daughter, Angela Bell, of her mother's estate.

2. *What are the primary concerns with respect to the application of the common law forfeiture rule?*

The primary concern with the common law rule is that it is too inflexible, and that in certain limited circumstances is inequitable and unjust in the sense of having unintended consequences, by depriving benefits to either the perpetrator or children of the perpetrator that the victim(s) would not have wished to occur (assuming it is possible to reasonably identify those wishes). Most typically this situation occurs when the unlawful killing has been manslaughter rather than murder. However, even in a murder case, the victim(s) may well have wished the young children of the murderer to benefit rather than other relatives or charities, as in *Re DWS (dec'd)*,[4] for which see Q 26. The real challenge is in specifying the exclusions to the rule without opening up a Pandora's box.

Codification of the rule

3. *Should the forfeiture rule apply to all cases of murder, and if not, which should be excluded and on what basis? What of situations such as a 'mercy killing' or euthanasia or where the killer has a major cognitive impairment (often called diminished responsibility)?*

The short answer to this question is 'yes'. The fault element for murder, depending on the jurisdiction, is intention or reckless disregard for human life. As such there can be no room for the perpetrator (as opposed to his or her children, for which see answer to Q 26) benefitting from such an unlawful killing.

This would include a killer where the defence of diminished responsibility has reduced the verdict from murder to manslaughter. There are three reasons for making this statement. First, the fault element for murder is present but the successful 'defence' of diminished responsibility on the balance of probabilities has led to a manslaughter conviction. Secondly,

[1] [2002] SASC 437.
[2] (1940) 63 CLR 691.
[3] [2006] SASC 371.
[4] [2001] 1 AER 97.

the defence of diminished responsibility is seriously flawed.[5] Thirdly, it would anomalous for South Australia to allow this defence for the purpose of the forfeiture rule, while not providing for such a defence in the *Criminal Law Consolidation Act 1935* (SA).

The case of *Lenaghan-Britton v Taylor*[6] provides an example of (1) the inappropriateness of allowing the defence of diminished responsibility to breach the forfeiture rule, and (2) the dangers of allowing judicial discretion in the application of the forfeiture rule for manslaughter cases under the rubric of 'in the interests of justice'.

In *Lenaghan-Britton v Taylor*[7] the plaintiff killed her grandmother and then with her husband took steps to make it appear that the deceased had been killed by an intruder by giving false accounts. Eight months after the killing the pair for the first time admitted involvement, and the Crown subsequently accepted a plea of manslaughter on the grounds of diminished responsibility. The plaintiff was sentenced to 11 years penal servitude. One might have thought this was 'very near to murder'.[8]

However, Hodgson CJ in Equity whilst acknowledging 'this was a crime of extreme seriousness' and 'the attempt to cover up the crime was deliberate and serious', nevertheless found for the plaintiff because 'there was no premeditation … the plaintiff had no intention to profit by the crime … [and there would be] at most a very short acceleration of an entitlement under the deceased's will'.[9]

Peart has delivered a telling critique of his Honour's judgment calling it 'rather surprising' and a 'very liberal application of the court's power', rightly pointing out that some of the factors relied upon were of 'questionable relevance' (profit motive) and 'quite improper' (deceased's impending death from cancer).[10] Peart sums up by observing 'the plaintiff's conduct after the killing militated against leniency, as the criminal sentence suggests'.[11]

As to a 'mercy killing' or euthanasia, it is difficult to conceive of a genuine case where a murder verdict would be brought in by the jury as opposed to manslaughter. However,

---

[5] See Andrew Hemming, 'It's Time to Abolish Diminished Responsibility, the Coach and Horses' Defence Through Criminal Responsibility for Murder' (2008) 10 *University of Notre Dame Australia Law Review* 1. The Model Criminal Law Officers Committee (MCLOC) correctly identified the critical issue when it stated that: 'The practical problems with the partial defence of diminished responsibility will not be remedied by further changes to the test. This is because the concept of this partial defence is fundamentally confused … Diminished responsibility is inherently vague. All three elements of the defence are immersed in uncertainty': Model Criminal Law Officers Committee (MCLOC), Model Criminal Code Chapter 5 *Fatal Offences Against the Person - Discussion Paper* (1998) 123. The Victorian Law Reform Commission (VLRC) in its *Defences to Homicide*, Final Report (2004), at 5.132, concluded in similar terms to the MCLOC as follows: 'Not only is the current formulation vague and therefore open to manipulation, the defence of diminished responsibility mixes two separate concepts that do not sit easily together. These include the notion of the 'mind' which may be the subject of expert psychiatric opinion, and 'responsibility' which is essentially an ethical notion which psychiatrists have no expertise in.'

[6] (1998) 100 A Crim R 565.

[7] (1998) 100 A Crim R 565.

[8] *Gray v Barr* [1971] 2 QB 554, 581 (Salmon LJ).

[9] *Lenaghan-Britton v Taylor* (1998) 100 A Crim R 565, 571.

[10] Nicola Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31(1) *Common Law World Review* 1, 27.

[11] Ibid.

irrespective of the classification of an unlawful killing, it is open to Parliament (as in New Zealand) to exclude from the definition of homicide both a killing of a person by another in pursuance of a suicide pact, and an assisted suicide.[12]

Victoria has legislated to make euthanasia legal under strict circumstances, but only to persons normally resident in Victoria.[13] It is open to South Australia to follow suit, and thereby obviate any need for a euthanasia exception to the forfeiture rule.

4. *Should the forfeiture rule apply to all cases of manslaughter, and if not, which should be excluded and on what basis? Should such cases include those where the killer is convicted of manslaughter, but the court has acknowledged that his or her responsibility for the killing may be reduced, such as:*

> *a. Manslaughter by gross negligence and/or dangerous driving causing death.*
>
> *b. Manslaughter pursuant to a suicide pact with the deceased person or assisting the deceased to commit suicide.*
>
> *c. Infanticide.*
>
> *d. Manslaughter where the killer has a relevant cognitive impairment (often called 'diminished responsibility').*
>
> *e. Any other case?*

The short answer to this question is 'no'. In manslaughter cases, where the fault element is negligence as opposed to recklessness, it is open to Parliament to specify the types of manslaughter that should be exempted from the forfeiture rule. In this regard, the starting point or benchmark is the exceptions to the definition of homicide set out in s 4(1) of the *Succession (Homicide) Act 2007* (NZ).

> **homicide** means the killing of a person or a child who has not become a person, by another person, intentionally or recklessly by any means that would be an offence under New Zealand law, whether done in New Zealand or elsewhere, but does not include—
>
> (a) a killing caused by negligent act or omission; or
>
> (b) infanticide under section 178 of the Crimes Act 1961; or
>
> (c) a killing of a person by another in pursuance of a suicide pact; or
>
> (d) an assisted suicide.

The most important point to note about this definition is that the broad dividing line is the fault element. An intentional or reckless killing comes within the forfeiture rule, while a killing caused by negligent act or omission is excluded. However, the offence of dangerous

[12] See 4(1) Homicide ss (c) and (d) of the *Succession (Homicide) Act 2007* (NZ) which exclude from the definition of homicide both a killing of a person by another in pursuance of a suicide pact, and an assisted suicide.
[13] *Voluntary Assisted Dying Act 2017* (Vic).

driving causing death straddles both elements of culpable negligence or recklessness under s 19A of the *Criminal Law Consolidation Act 1935* (SA).

> 19A—Causing death or harm by use of vehicle or vessel
>
> (1) A person who—
>
> (a) drives a vehicle or operates a vessel in a culpably negligent manner, recklessly, or at a speed or in a manner dangerous to any person; and
>
> (b) by that culpable negligence, recklessness or other conduct, causes the death of another,
>
> is guilty of an indictable offence.

Thus, assuming the South Australian Parliament considered a conviction under s 19A of the *Criminal Law Consolidation Act 1935* (SA) should be excluded from the definition of homicide for the purposes of the forfeiture rule, if killing caused by negligent act or omission is to excluded from the forfeiture rule, it would be necessary to either (1) qualify the definition of recklessness to exclude an offence where culpable negligence was an alternative fault element to recklessness; or (2) only apply the forfeiture rule where the charge under s 19A specifically applied the fault element of recklessness; or (3) abandon the distinction between recklessness and culpable negligence; or (4) simply make dangerous driving causing death a separate exception to the rule. Option 4 appears the best solution.

A case on point can be found in *Straede v Eastwood*[14] which was decided under the *Forfeiture Act 1995* (NSW), where under s 5(1) an interested person may make an application to the Supreme Court for an order modifying the effect of the rule.[15] In *Straede v Eastwood* the plaintiff's wife was killed in a car accident and the plaintiff pleaded guilty to dangerous driving causing death. He was sentenced to one year's periodic detention. In this case hostile relatives were seeking to take pecuniary advantage of a tragic accident, and in a speculative action devoid of merit the defendant's costs in opposing the application made by the plaintiff were met by the estate. Cases like *Straede v Eastwood* should not have come to court, and can be properly dealt with under a comprehensive code solution sanctioned by Parliament.

This case example serves to illustrate the dangers of breaching the forfeiture rule with a broad based judicial exclusion for manslaughter cases rather than specifying the particular offence as an exclusion or using a litmus test such as 'a killing caused by negligent act or omission'. The former is a recipe for leaving the working out of the legislation to the courts, which is at odds with a principal objective of forfeiture rule legislation to provide clarity to lawyers and trustees seeking probate of a will or bequest. The 'ruinously strict'[16] forfeiture rule is then

[14] Unreported, Supreme Court of New South Wales, Palmer J, 2 April 2003.
[15] Section 5(1) of the *Forfeiture Act 1995* (NSW) states: 'If a person has unlawfully killed another person and is thereby precluded by the forfeiture rule from obtaining a benefit, any interested person may make an application to the Supreme Court for an order modifying the effect of the rule.'
[16] Anthony Dillon, 'When Beneficiary Slays Benefactor: The Forfeiture "Rule" Should Operate as a Principle of General Law' (1998) 6(3) *Australian Property Law Journal* 254, 254.

transformed into a 'wilderness of single instances'.[17] The latter, the negligent act or omission litmus test, leaves open to doubt what offences are covered. A better solution would be for Parliament to list the offences as exceptions to the definition of homicide.

As to the 'wilderness of single instances', such an undesirable outcome is illustrated by s 4 and s 5 of the *Forfeiture Act 1995* (NSW). Section 4(2)(a) excludes murder from the operation of the Act. However, s 5(1) leaves open all types of manslaughter (unlawful killing) to come within the rubric of an interested person being able to apply for an order modifying the effect of the forfeiture rule. The test under s 5(2) is 'that justice requires the effect of the rule to be modified'. The factors the court is to have regard under s 5(3) are (a) the conduct of the offender; (b) the conduct of the deceased person; (c) the effect of the application of the rule on the offender or any other person; (d) such other matters as appear to the Court to be material. (To make matters even worse, this list of factors is replicated in s 11 which allows any interested person to apply to the Supreme Court for an order that the forfeiture rule apply as if the offender had been found guilty of murder, where an offender has been found not guilty of murder by reason of mental illness: see Q 20.)

Thus, the *Forfeiture Act 1995* (NSW) answers Q 4 above with a clear 'no', and allows all types of manslaughter to come with the ambit of modification of the forfeiture rule, thereby giving maximum rein to judicial discretion. This is Option B in Q 22 and is plainly the worst option judged by the criterion of clarity.

The better view is to seek to identify the types of manslaughter that a bystander might say under the circumstances of the case, 'there but for the grace of God go I'. In other words, specify a short list of offences that do not offend the public conscience in modifying the forfeiture rule. A useful measuring rod is one where the forfeiture outcome offends the public conscience, and a pre-condition is the killing was caused by negligent act or omission. This measuring rod would exclude domestic violence killings (see answer to Q 5).

In this context, it is important to distinguish between a reckless killing and a culpably negligent killing. A viable option is to use the definition of 'recklessness' and 'negligence' in Chapter 2 of the *Criminal Code 1995* (Cth).

> 5.4 Recklessness
>
> (1) A person is reckless with respect to a circumstance if:
>
> (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
>
> (2) A person is reckless with respect to a result if:
>
> (a) he or she is aware of a substantial risk that the result will occur; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

[17] 'Mastering the lawless science of our law, That codeless myriad of precedent, That wilderness of single instances, Thro' which a few, by wit or fortune led, May beat a pathway out to wealth and fame': Alfred, Lord Tennyson, *Aylmer's Field* (1864).

5.5 Negligence

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

(b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.

It can be seen that for 'recklessness' there is a combination of a subjective test (awareness) and an objective test (unjustifiable to take the risk), while for 'negligence' is it a purely objective test (a great falling short of the standard of care a reasonable person would exercise and a high risk).

The South Australian parliament would have two choices: (1) to specify a closed list of offences excluded from the forfeiture rule; or (2) to specify a list of offences excluded from the forfeiture rule along with a generic measuring rod of 'the killing was caused by negligent act or omission'. If the parliament chose the second option, it would be necessary for clarification purposes to use definitions of 'recklessness' and 'negligence' that brook no debate as to which offences are excluded from the rule. It would be simpler to adopt option 1, in the same manner as the *Crimes Act 1900* (NSW) sets out a table of offences of specific intent in s 428B for the purpose of the application of Part 11A Intoxication.

As for infanticide, essentially it is a species of mental impairment as to fall within s 178(1) of the *Crimes Act 1961* (NZ), the balance of the woman's mind was disturbed at the time of the offence.[18] South Australia does not have a separate offence of infanticide under the *Criminal Law Consolidation Act 1935* (SA), and therefore such an exemption to the forfeiture rule would not be appropriate for South Australia unless the *Criminal Law Consolidation Act 1935* (SA) was amended.

As to manslaughter pursuant to a suicide pact with the deceased person, this is more troublesome as it is clearly open to abuse. The survivor can claim there was a pact while the deceased is unable to contradict the survivor's version of events. It obviously does not come within the definition of 'a killing caused by negligent act or omission'. Tragic cases like *DPP v Rolfe*[19] and the *Queen v Marden*,[20] where elderly people with severe physical and mental illnesses had little quality of life, are not examples of the offender intending to benefit from the death. Cases like these explain the humanitarian desire to exclude suicide pacts from the reach of the forfeiture rule, but exceptions can have unintended consequences and such an exception should be approached with caution. For example, the exception could be qualified

[18] Section 178(1) of the *Crimes Act 1961* (NZ) states: 'Where a woman causes the death of any child of hers under the age of 10 years in a manner that amounts to culpable homicide, and where at the time of the offence the balance of her mind was disturbed, by reason of her not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation, or by reason of any disorder consequent upon childbirth or lactation, to such an extent that she should not be held fully responsible, she is guilty of infanticide, and not of murder or manslaughter, and is liable to imprisonment for a term not exceeding 3 years.'

[19] (2008) 191 A Crim R.

[20] [2000] VSC 558 (21 November 2000).

by specifying the circumstances and type of scenario in the *Rolfe* and *Marden* cases that the exception was designed to address.

Of interest is the Victorian Law Reform Commission's (VLRC) recommendation 4 setting out the list of exceptions to the forfeiture rule which were: (a) dangerous driving causing death; (b) manslaughter pursuant to a suicide pact with the deceased person or aiding and abetting a suicide pursuant to such a pact; or (c) infanticide.[21]

However, the above list was rendered practically superfluous by recommendation 6 which stated the Victorian Supreme Court should be empowered to make a forfeiture modification order if satisfied the offender's moral culpability and responsibility and such other matters as appear to the Court to be material that the justice of the case requires the effect of the rule to be modified.[22] This is of course the NSW legislation, and it has to be asked why bother with recommendation 4? With respect, it would appear that the VLRC put the task of specifying a definitive list of exceptions to the forfeiture rule in the 'too hard' basket, and fell back on the open ended NSW legislation as a last resort. Effectively, the VLRC substituted the NZ generic litmus test of specifying a killing caused by negligent act or omission for a court determined benchmark of 'the justice of the case'. Fortunately, this misguided VLRC report has not yet led to forfeiture legislation in Victoria.

5. *Should the presence of domestic violence affect the operation of the forfeiture rule and if so, how and in what circumstances?*

The short answer to this question is 'no', if the killer intended to kill or possessed a reckless disregard for human life and was convicted of murder. However, as the VLRC pointed out, in the United Kingdom, the courts have modified the effect of the rule where the unlawful killing formed part of the offender's response to ongoing domestic violence.[23]

In *Troja v Troja*, Kirby P in dissent stated:

> The knowledge of domestic violence allowed to judges, and of the circumstances in which conduct, although manslaughter, can sometimes be morally virtually blameless, requires of them a rule of sufficient flexibility which accords with the justice of the case. Otherwise, the law becomes a vehicle for serious injustice.[24]

Kirby P's dissent to the strict application of the Forfeiture Rule in *Troja v Troja* became the catalyst for the NSW Government's decision to 'import' the *Forfeiture Act 1982* (UK) which took the form of the *Forfeiture Act 1995* (NSW), and as previously mentioned gave judicial discretion to modify the rule in all cases other than murder.

The VLRC endorsed the view of Kirby P in *Troja v Troja* in the context of the abolition of the offence of defensive homicide in the *Crimes Act 1958* (Vic) in 2014.

---

[21] Victorian Law Reform Commission, *The Forfeiture Rule* (2014), Recommendation 4, xiii.
[22] Ibid, Recommendation 6.
[23] Ibid, 3 [1.11], citing *Re K, decd* [1985] Ch 85; *Re K, decd* [1986] Ch 180 (Court of Appeal). In this case, a woman unintentionally shot and killed her husband who, in a rage, had followed her into a room. She had picked up a loaded shotgun and taken off the safety catch with the intention of threatening him.
[24] (1994) 33 NSWLR 269, 285.

> Concern was expressed about the effect that the abolition of the offence of defensive homicide would have on the ability of offenders who kill in response to ongoing family violence to apply for relief from the effect of the rule. If an offender in these circumstances is charged with murder instead, they would be unable to apply for a forfeiture modification order. The Commission shares this concern. Victoria's Forfeiture Act should accommodate any realignment of homicide offences upon the abolition of defensive homicide so that victims of domestic violence are able to apply for relief from the operation of the rule.[25]

The VLRC cited three Victorian cases in support of this recommendation.[26]

- a woman stabbed her partner in the course of a violent dispute, and received a wholly suspended sentence[27]
- a woman disarmed her partner and then shot him as he moved toward her during a violent dispute, and received a five-year custodial sentence[28]
- a woman who experienced 50 years of domestic violence from her alcoholic partner killed him in fear that he was about to attack her with an axe, and received a non-custodial sentence.[29]

The VLRC justified its recommendation that victims of domestic violence should be able to apply for relief from the operation of the rule on the grounds of financial hardship.

> The forfeiture rule, as it currently stands, would prevent these offenders from inheriting from their deceased partner. They could lose their home, if they owned it jointly with the deceased person, as well as other assets to which they may have been entitled.

This is a misunderstanding of the nature of the forfeiture rule, which is based on an abhorrence of killing and is thus unconscionable. Meagher JA rightly pointed out in a case where the wife had shot the husband, 'there is something a trifle comic in the spectacle of Equity judges sorting felonious killings into conscionable and unconscionable piles'.[30] See also the discussion of *Re Edwards; State Trustees Ltd v Edwards*,[31] a domestic homicide case involving four defendants, in Q 8.

There is no offence of defensive homicide in the *Criminal Law Consolidation Act 1935* (SA), and the killer in a domestic violence situation would have to rely on the justification of self-defence under s 15 of the *Criminal Law Consolidation Act 1935* (SA), which requires reasonable proportionality except for home invasion (s 15C). Self-defence is an 'all or nothing' defence. If the Crown can negative self-defence beyond reasonable doubt, then the killer will be convicted of murder (assuming no other defence such as diminished responsibility or provocation is available).

Thus, the question of whether the presence of domestic violence should affect the operation of the forfeiture rule only becomes relevant where the conviction is manslaughter. In Q 3 above, it was argued that diminished responsibility should not be excluded from the forfeiture

[25] Victorian Law Reform Commission, above n 21, 38 [4.15].
[26] Ibid, 42 [4.41].
[27] *R v Tran* [2005] VSC 220 (24 June 2005).
[28] *R v Uttley* [2009] VSC 79 (16 March 2009).
[29] *R v Gazdovic* [2002] VSC 588 (20 December 2002).
[30] *Troja v Troja* (1994) 33 NSWLR 269, 299. The wife was convicted of manslaughter on the grounds of diminished responsibility and sentenced to eight years imprisonment.
[31] [2014] VSC 392.

rule, and there is even less justification for the partial defence to murder of provocation to be an exception to the rule.[32] This argument leads to the conclusion that unless the South Australian Parliament introduces an offence of domestic homicide reducing murder to manslaughter where the response has not been proportionate, then the presence of domestic violence will not affect the operation of the forfeiture rule if the killer intended to kill or possessed a reckless disregard for human life.

Assuming that the Crown accepted a plea of manslaughter or the jury brought in a verdict of manslaughter instead of murder, the question is whether the Parliament should exclude a manslaughter conviction where the victim abused the killer. The VLRC appears to have based its recommendation on the sentencing outcomes in the three Victorian cases cited above, where self-defence was either not run or was unsuccessful. Of course, because the VLRC recommended judicial discretion be exercised in all cases of manslaughter (other than those included in the proposed legislation such as infanticide), it was a logical step for the VLRC to include victims of domestic violence being able to apply for relief from the operation of the rule given judicial opportunity to weigh the seriousness of the criminal responsibility (see answer to Q 6).

Clearly those advocating judicial discretion in the operation of the forfeiture rule see this flexibility, based on the circumstances of the case, as a significant strength of the legislation in NSW. With respect, this is a mistake. As mentioned in the Overview to this submission, 'money is the root of all evil', and allowing victims of domestic violence to be a special exception to the forfeiture rule opens up a dangerous road in light of: (1) the killer is often the only witness; (2) the opportunity for the killer to stain the victim's character; (3) the opportunity to be rid of a troublesome partner and secure his or her assets; (4) the number of killings involving family violence; and (5) the possibility that the male killer will allege the female victim was being violent to him.[33]

6. *In determining whether the forfeiture rule should apply, should the courts be able to consider moral culpability? What other factors should be taken into account? Is there benefit in a statutory list of relevant considerations?*

It follows from the previous answers that this submission does not support judicial discretion in the application of the forfeiture rule, let alone the consideration of moral culpability. Consideration of moral culpability falls squarely within the previously quoted observation of Meagher JA that 'there is something a trifle comic in the spectacle of Equity judges sorting felonious killings into conscionable and unconscionable piles'.[34]

---

[32] Andrew Hemming, 'Provocation: A totally flawed defence that has no place in Australian criminal law irrespective of sentencing regime (2010) 14 *University of Western Sydney Law Review* 1.

[33] See *R v Middendorp* [2010] VSC 202 (19 May 2010), where the jury found Middendorp not guilty of murder, but guilty of the lesser offence of defensive homicide after stabbing his former female partner four times in the back (by reaching over her shoulder), after she 'came at [him] with a raised knife in her right hand' (at [10] per Byrne J). This was the case that triggered the abolition of s 9AD Defensive Homicide of the *Crimes Act 1958* (Vic) in 2014.

[34] *Troja v Troja* (1994) 33 NSWLR 269, 299.

The more factors taken into account and the longer the statutory list of relevant considerations, the greater the uncertainty for any lawyer charged with determining the distribution of assets under a will. In any event, such considerations are usually only guidelines and are rarely closed, leading to the inevitable judicial expansion as novel cases come to court supported by arguments of hardship.

A rule of thumb can reasonably be stated: 'The more open ended the judicial discretion and the larger the value of the estate, the greater the likelihood of a forfeiture contest in the courts'. The main objective of any modification of the forfeiture rule is to avoid contests and provide certainty.

7. *How should the forfeiture rule be applied to a person who has not been prosecuted?*

The forfeiture rule has no application to a person who has not been prosecuted or been the subject of civil proceedings (see answers to Q 8 and Q 10).

8. *Should the forfeiture rule continue to apply to cases where the unlawfulness of the killing is only in civil proceedings on the civil standard of proof?*

Yes. The seminal case of *Helton v Allen*[35] is still good law. It will be recalled in that case Helton was acquitted of murder but a civil action was then brought by Isabella Allen the mother of the deceased. The jury found that Helton had unlawfully killed the deceased. On the basis of this finding, the court then declared that Helton was not entitled to take under the deceased's will and any right or benefit passed to those person(s) who would have been entitled if there had been a lapse of Helton's interest under the will.[36]

Helton's appeal was considered by the High Court who accepted that the verdict of unlawful killing could not 'be set aside on the ground that there was no sufficient evidence to support it'.[37] The joint judgment went on to consider whether Helton's acquittal on the murder charge was a complete answer to the coming into operation of the forfeiture rule.

> [I]t may be said that to retry as a civil issue the guilt of a man who has been acquitted on a criminal inquest is so against policy that a rule drawn from public policy ought not to authorise it. There is, however, no trace of any such conception in the history of the principle that by committing a crime no man could obtain a lawful benefit to himself. To *qualify the rule* in the manner suggested would, we think, amount to *judicial legislation*.[38] [emphasis added]

The decision in *Helton v Allen* has two dimensions. There is the weighty obiter acceptance of the absolute forfeiture rule by the High Court of Australia.[39] Then there is the de jure endorsement in the widest possible form of the rule by upholding a verdict of 'unlawfully

[35] (1940) 63 CLR 691.
[36] Ibid 697 (Starke J).
[37] Ibid 709 (Dixon, Evatt and McTiernan JJ).
[38] Ibid 710 (Dixon, Evatt and McTiernan JJ).
[39] Ibid 709 (Dixon, Evatt and McTiernan JJ) where the joint judgment approves Hamilton LJ's statement in *In the Estate of Hall* [1914] P 1, 7 'that the principle could only be expressed in the wide form'.

killed' in a civil action was sufficient to trigger the forfeiture rule and make the acquittal in the murder trial irrelevant.[40]

It is contended that the joint judgment represents unequivocal endorsement of the scope of the absolute forfeiture rule, a view which is supported by Rolfe J who observed '[t]heir Honours did not indicate any proviso to this rule',[41] and by Mahoney JA who stated that '[t]he legal principle has been affirmed and the application of it to circumstances of the present kind [a wife killed her husband and was convicted of manslaughter] has been approved by the High Court'.[42]

A civil action was necessary in *Helton v Allen* because of Helton's acquittal of murder against the standard of beyond reasonable doubt. In the civil action to prevent Helton from taking under the will, the standard was on the balance of probabilities.[43] It is worthy of repetition that High Court accepted that the verdict of unlawful killing could not 'be set aside on the ground that there was no sufficient evidence to support it'.[44]

Helton v Allen was followed in *Rivers v Rivers*[45], where the Full Court of the Supreme Court of South Australia decided a case exactly on point with *Helton v Allen*, as Mrs Rivers who had shot and killed her husband was acquitted of murder and manslaughter. Having noted that the High Court had specifically directed its attention to the aspect of double jeopardy, Duggan J did not think 'that this court should depart from the decision of the High Court'.[46]

Donald Rivers (the deceased) died from a bullet wound. In the civil proceedings after the criminal trial, which was a contest between the deceased's son by a previous marriage and his second wife, it was not disputed that the bullet was fired from a rifle held by the deceased's second wife, Mrs Ma Gina Rivers. Mrs Rivers admitted that she was holding the rifle at the time, but asserted that she did not deliberately point it at the deceased. She admitted applying pressure to the trigger, but she denied that she had any intention to kill her husband or that she was acting recklessly at the time. She claimed she thought the rifle was unloaded.

Given the Full Court of the Supreme Court of South Australia followed *Helton v Allen*, the Court found for the son. If South Australia had adopted the NSW model at the time, then there would have been a contest where it would have been open for the trial judge to find for the second wife who killed her husband in ambiguous circumstances.

---

[40] *Helton v Allen* (1940) 63 CLR 691 was followed in *Rivers v Rivers* (2002) 84 SASR 426.
[41] *Permanent Trustee Company Ltd v Freedom from Hunger Campaign* (1991) 25 NSW LR 140, 148.
[42] *Troja v Troja* (1994) 33 NSWLR 269, 294.
[43] The same outcome resulted when OJ Simpson was acquitted of a double murder in the United States and the victims' families successfully brought a wrongful death suit against Simpson in a civil court.
[44] Ibid 709 (Dixon, Evatt and McTiernan JJ). Mrs Roche, a widow, was conducting an adulterous affair with Helton who was her executor and trustee when she died of strychnine poisoning. Mrs Roche had already lent Helton £500 with further loans amounting to a grand total of £1,400. Apart from a few small bequests, Mrs Roche had left her entire estate to Helton.
[45] [2002] SASC 437.
[46] Ibid 442.

Similarly, in *Re Luxton,*[47] if Stephen Evans had been acquitted of Lynne Luxton's murder or manslaughter, then the contest for her $1.47 million estate under a NSW model would have been between her lover Evans and the victim's daughter, Angela Bell. The costs would likely have come out of the estate, as they did in *Straede v Eastwood*.[48] Much of the evidence in the criminal trial would be have reprised, and the trial judge would have run the gamut of public opprobrium in the glare of media publicity and salacious reporting (the public outrage test referred to previously).

A further example can be found in the case of *Re Edwards; State Trustees Ltd v Edwards*,[49] where McMillan J in the Victorian Supreme Court accepted that in a case of a domestic homicide the absolute forfeiture rule applied. Mrs Edwards had stabbed her husband to death. She pleaded guilty to defensive homicide under s 9AD of the *Crimes Act 1958* (Vic). At trial it was conceded there were no reasonable grounds for believing her actions were necessary to defend herself from death or serious injury. Mrs Edwards was sentenced to seven years imprisonment, with a non-parole period of four years and nine months. But for the presence of s 9AD, she would have been found guilty of murder. In any event, the sentence itself is testimony to the seriousness of the offence.

In *Edwards* the vultures were circling: there was the killer (the deceased's widow), the mother-in-law, the brother-in-law, the mother and Peter MacCallum Cancer Institute, but happily the result was properly settled under the intestacy rules and the deceased's daughter from a previous marriage, Megan, was awarded the estate.[50] It is worth noting in passing that in both *Rivers* and *Edwards* the killer was the second wife, and the ultimate beneficiary was the child of the deceased's previous marriage. This submission argues that even if Mrs Edwards had been able to successfully run self-defence and therefore have been acquitted, the result should have been the same if Megan Edwards had brought a civil action.

There is every reason to avoid such contests by adopting a narrow code model. This was the view of the New Zealand Law Commission whose objective was 'a statute that in most cases would enable administrators and trustees to carry out their functions *without the need for recourse to court proceedings*'[51] (emphasis added).

The Commission instanced the case of *Re Pechar*[52] which involved a triple slaying, six different interests separately represented and a judgment delivered four years after the killings. In *Re Lenjes*[53] a similar period elapsed between the killing and the judgment.[54]

[47] [2006] SASC 371.
[48] Unreported, Supreme Court of New South Wales, Palmer J, 2 April 2003.
[49] [2014] VSC 392.
[50] This outcome was confirmed by the Victorian Court of Appeal in *Edwards v State Trustees Ltd* [2016] VSCA 28.
[51] New Zealand Law Commission, *Succession Law: Homicidal Heirs* (1997) Report No 38, 3-4.
[52] [1969] NZLR 575.
[53] [1990] 3 NZLR 193.
[54] New Zealand Law Commission, above n 51, 2.

9. *Should any property or any other interest which may be affected by the operation of the forfeiture rule be protected until civil or criminal proceedings have ascertained whether the alleged killer unlawfully killed the victim? If so, by what means should it be protected?*

New Zealand has a special caveat to prevent dealing with the land while the matter is determined: *Succession (Homicide) Act 2007* (NZ) s 13.

> **13 Caveat against dealing with land**
>
> (1) If an interested person claims that an owner of an undivided estate or interest in land as a joint tenant with a victim is the killer of that victim, the interested person may lodge a caveat in accordance with section 138 of the Land Transfer Act 2017 in respect of that estate or interest.
>
> (2) For as long as a caveat under this section remains in force, the Registrar-General of Land must not register a transmission on survivorship to the alleged killer, or the alleged killer and any other joint tenant, of any estate or interest affected by the caveat.

The VLRC, taking its lead from NZ, saw 'merit in creating standing for a legal personal representative to be able to prevent the transfer of title to the surviving joint tenant when the forfeiture rule might affect that person's right to take by survivorship'.[55]

New Zealand's approach should be followed in SA.

10. *How should the forfeiture rule accommodate changes in circumstances, such as where a crime is resolved many years after the event, or a person's conviction is overturned?*

Where the crime is resolved many years after the killing, the retrospective application of the forfeiture rule puts into question the distribution of estates that have previously been determined. As such it is impractical, especially where innocent third parties have become involved. As to the person's conviction being overturned, distribution of the deceased's estate could be delayed until all avenues of appeal have been exhausted. Where the conviction is overturned many years later after a judicial review and the Crown has decided not to re-try the person, then the same impracticality argument applies regarding the retrospective undoing of the forfeiture rule.

11. *Who should decide how the forfeiture rule is to apply under the new law?*

This submission argues that there is no role of the courts to play in the application of the forfeiture rule, and recommends a code solution as per s 5(1) of the *Succession (Homicide) Act 2007* (NZ).

> **5 Effect and application**
>
> (1) This Act replaces the rules of law, equity, and public policy that prevent a killer from receiving, becoming entitled to, or claiming interests in property as a result of the death of the killer's victim.

As such, the above question is not applicable.

[55] Victorian Law Reform Commission, above n 21, 77 [5.107].

If the courts are to have a role in modifying the forfeiture rule, it would be better to have the judge who tried the criminal charges arising from the killing and who sentenced the offender to determine the potential modification of the rule as a separate civil application.

12. *Are there any other matters that should be addressed in a codified solution (and how)?*

Essentially, the codified solution should address the effect of the homicide on all aspects of the rights of succession, as with the *Succession (Homicide) Act 2007* (NZ). For example, s 9 of the *Succession (Homicide) Act 2007* (NZ) specifically excludes the killer from applying under the *Family Protection Act 1955* (NZ) for provision out of the estate of the killer's victim.

Thus, all relevant provisions under South Australian legislation should be covered by any Forfeiture Act, with the purpose of ensuring that the executor of the estate of the deceased can confidently distribute the estate (and be protected from claims against the estate) without recourse to the courts.

In passing, it should be noted that the enactment of the *Succession (Homicide) Act 2007* (NZ) also led to an amendment of the *Administration Act 1969* (NZ), whereby the inserted s 5A ensures that the killer is not competent to be granted administration of the victim's estate which includes a person awaiting trial for an offence of homicide.

Modification of the Forfeiture Rule

The current rule

13. *Should South Australia introduce legislation, like that in the United Kingdom, Australian Capital Territory, New South Wales and as recommended by the Victorian Law Reform Commission, that empowers a court to modify the effect of the forfeiture rule?*

It follows from the previous answers that the answer to this question is a categorical 'no', for the reasons already stated.

The New Zealand Law Commission considered the discretionary system under the English and Australian statutes but was unimpressed because there were no guidelines beyond 'the justice of the case'.

> Ultimately the question whether a particular class of killing is sufficiently abhorrent to attract the application of the bar on profits is one of policy, rather than one of legal technique. For that reason it should be settled clearly and completely by Parliament.[56]

The Commission's view was that the vexed question of exemptions involves complex policy considerations more properly dealt with by Parliament than by judges.

Mr Justice PW Young was critical of this approach claiming 'it was disappointing to see that the Commission sidestepped the social issues involved and merely said that these were policy

[56] New Zealand Law Commission, above n 51, 5.

matters to be dealt with by Parliament'.[57] With respect, the better view is that these are matters for Parliament whose role is to weigh community interests against the individual interest instead of being left in the hands of the judiciary to decide based on an undefined criterion of the interests of justice.

Modifying the effect of the Forfeiture Rule

14. *Who should be able to make an application seeking an order to modify the effects of the forfeiture rule?*

Under a code solution this question is irrelevant, as all the exemptions to the rule would be stated in the Forfeiture Act.

15. *What should be the time limit for making an application.*

Under a code solution this question is irrelevant, as no application would be necessary.

16. *Should modification only be allowed for certain types of unlawful killings? If so, which types of unlawful killings?*

The only modifications should be spelt out by parliament in the legislation. For the types of unlawful killings, please see previous answers.

17. *Should the court have to take certain factors into account when exercising its discretion?*

Under a code solution this question is irrelevant. Under the judicial model adopted by NSW and the ACT, the broad brush of 'determining whether justice requires the effect of the rule to be modified'[58] is adopted. So unless a narrower focus is introduced with a list of certain factors that is closed, and the generic 'in the interests of justice' approach abandoned, then the question even under a judicial model is academic.

18. *What principles, if any, governing the court's discretion should be stated in the legislation?*

Please see answer to Q 17 above.

19. *Which property and other interests should be able to be affected by the order?*

The use of the word 'order' implies a judicial order. Under a code solution, the only orders that would be required are designed to ensure that the killer is not deprived of benefits to which the killer is entitled for services or other economic benefits he or she provided to the killer's victim. See for example, ss 10(2) and (5) Restriction of killer's claims to matrimonial property, testamentary promises and restitution of the *Succession (Homicide) Act 2007* (NZ).

Note also, that under s 13(2) Caveat against dealing with land of the *Succession (Homicide) Act 2007* (NZ), the Registrar-General of Land must not register a transmission on

[57] Mr Justice PW Young, 'Current Issues' (1997) 71 *Australian Law Journal* 659.
[58] See for example *Forfeiture Act 1995* (NSW) s 5(3).

survivorship to the alleged killer of an interest affected by the caveat of an interested person. No order is required as the legislation has anticipated the possibility and provided the means accordingly.

20. *Where a killer is found not guilty of a killing on the ground of mental impairment, the forfeiture rule would not normally apply to that killer. Should a court be able to make an order that the forfeiture rule is to apply as if that killer had been found guilty of murder?*

> *a. In what circumstances should the exception not apply?*
>
> *b. What considerations do you consider important to the application of the forfeiture rule to a killer who has been found not guilty by reason of mental impairment?*
>
> *c. Should the court have a discretion to apply the rule in the circumstances of the case?*
>
> *d. How should the forfeiture rule apply or not in the case of an alleged offender who is found unfit to plead?*

The common law has always treated a killer found not guilty of murder on the grounds of insanity as unaffected by the forfeiture rule and therefore still able to take the victim's estate.[59] However, an amendment to the *Forfeiture Act 1995* (NSW), which commenced on 28 October 2005, altered the common law such where an offender who has been found not guilty of murder by reason of mental illness, any interested person may apply to the Supreme Court for an order that the forfeiture rule apply as if the offender had been found guilty of murder: s 11(1). The Court may make an order applying the forfeiture rule if it is satisfied that justice requires the rule to be applied: s 11(2).

Under s 11(3) the court is to have regard to certain matters, although sub-section (d) is entirely open-ended.

> (3) In determining whether justice requires the rule to be applied, the Court is to have regard to the following matters:
>
> (a) the conduct of the offender,
>
> (b) the conduct of the deceased person,
>
> (c) the effect of the application of the rule on the offender or any other person,
>
> (d) such other matters as to the Court appear material.

As a result, the Forfeiture Act 1995 (NSW) now also provides for 'forfeiture application orders' in addition to 'forfeiture modification orders'. The first test of the operation of a forfeiture application order occurred in the case of *In the Estate of the late Fiona Ellen Fitter*.[60]

---

[59] *Re Houghton; Houghton v Houghton* [1915] 2 Ch 173, at 178.

[60] *In the Estate of the late Fiona Ellen Fitter and the Forfeiture Act 1995; Public Trustee of New South Wales v Fitter and (3) Ors* (Unreported, Supreme Court of New South Wales, Lloyd AJ, 24 November 2005).

In 2001, Fiona Fitter was killed when she was attacked with a knife by her husband and her son. The attackers were charged with murder but found not guilty by reason of mental illness. The Public Trustee as administrator of the intestate estate of Fiona Fitter sought a ruling from the Supreme Court as to whether the Forfeiture Rule applied,[61] whilst the deceased's sister (Ann Robb) made a 'forfeiture application order' under s 11(1).[62] The Court (Lloyd AJ) upheld Ms Robb's cross claim for a forfeiture application order thereby preventing Fiona Fitter's attackers from sharing in the deceased's estate.[63]

There have been three further cases decided under s 11 of the *Forfeiture Act 1995* (NSW): *Guler v NSW Trustee and Guardian* [2012] NSWSC 1369; *Hill v Hill* [2013] NSWSC 524; and the *Estate of Raul Novosadek* [2016] NSWSC 554.

In Guler, White J held, at [2], that 'having regard to the second defendant's conduct, the absence of any provocation by the deceased, the lack of contrition, and the prior history of violent behaviour, that notwithstanding that the second defendant was found not guilty of murder on the grounds of mental illness, the forfeiture rule should apply'.

In the *Estate of Raul Novosadek*, Young AJ, at [71], applied the matters listed in s 11(3) above as follows:

> Putting all these factors together, I consider that in all the circumstances which I have outlined and in particular the public abhorrence of what occurred, justice requires that I make an order under s 11 of the *Forfeiture Act* that the *Forfeiture Act* apply to the killings by the Defendant of his mother, step-father and brother Raul as if the Defendant had been found guilty of their murders.

Thus, the *Forfeiture Act 1995* (NSW) now provides for competing mechanisms under s 5(1) and s 11(1) where the killer has been found not guilty of murder by reason of mental illness, to determine who may benefit from the deceased's estate. Such a contest does nothing to clarify the law for administrators of estates where the application of the Forfeiture Rule is relevant.

A far better solution would be for parliament to make the decision as to whether a killer found not guilty of murder on the grounds of mental illness be precluded from taking the estate. This decision would be reflected in the definition of homicide. Given the public abhorrence of these types of killings, where the victims are often multiple family members, as in the *Estate of Raul Novosadek* (three killings),[64] then it would be proper to include in the definition of homicide any person found not guilty of murder on the grounds of mental illness. The definition of homicide should also include an alleged offender who is found unfit to plead, otherwise distribution of the estate could be delayed indefinitely.

21. *Are there any incidental or other changes you would propose in relation to any law which modifies the effect of the forfeiture rule?*

---

[61] Ibid [3].
[62] Ibid [46].
[63] Ibid [57].
[64] For example, see the South Australian case of Michael Glen Phillips who in 2014 killed his parents, Elizabeth and Maurice Phillips, and was found not guilty of murder on the grounds of mental incompetence. At common law, Michael Glen Phillips was able to inherit one third of his parents' estate, shared with his two other siblings.

Only that the modifications should be made by parliament and should be as few as possible.

Options for Reform

22. *Which of the Proposed Models should we adopt in South Australia?*

See answer to Q1.

Option A – the common law forfeiture rule remains as it is in South Australia with no legislative scope for the modification of the rule.

This is the second best option after Option C. It is better to have the common law rule than legislation empowering a court to modify the rule for all the reasons previously stated.

Option B – the common law rule remains as it is in South Australia but introduce legislation that empowers a court to modify the effect of the rule.

This the model adopted in NSW and is the worst of the four options for all the reasons previously stated.

Option C – introduce legislation codifying the forfeiture rule as it is to apply in South Australia with no scope for the modification of the rule.

This the model adopted in New Zealand and is the best of the four options for all the reasons previously stated.

Option D - introduce legislation codifying the forfeiture rule as it is to apply in South Australia which also empowers a court to modify the effect of the rule.

This is the model recommended by the VLRC and is the third best option for all the reasons previously stated. There is little to choose between Option B and Option D, although Option D is marginally better because there will be clarity concerning those types of killings listed as exceptions to the rule, and presumably (depending on the extent of the codification) clarity as to the effect of the homicide on rights of succession.

Effect of the Forfeiture Rule

Overview

A workable and practicable model is provided by Part 2 of the *Succession (Homicide) Act 2007* (NZ) which deals with the effect of homicide on rights of succession. In addition, the Schedule to the Act lists the consequent enactments that amend associated legislation. This is a comprehensive code solution, and is why Option C is clearly superior to the other three Options.

23. *How should the forfeiture rule affect the killer's entitlement to assets or property he or she would otherwise have inherited from or through the victim?*

See s 7 Disentitlement of killers under will or intestacy, s 8 Disentitlement of killer to victim's non-probate assets, s 9 Disentitlement to apply under *Family Protection Act 1955* (NZ), s 10 Restriction of killer's claims to matrimonial property, testamentary promises, and restitution, and s 11 Disentitlement of killer to enhanced benefits generally of the *Succession (Homicide) Act 2007* (NZ).

The purpose of the above sections is to restrict the killer's benefits to those that the killer would have otherwise been entitled to as a result of the death of the victim.

See further Q 24.

24. *How should any new law address the situation where the killer is a principal beneficiary of the victim's will and there are gift overs contingent on the killer predeceasing the victim?*

See s 7 of the *Succession (Homicide) Act 2007* (NZ), in particular s 7(3) which states that any interest in property that a killer is not entitled is to pass or be distributed as if the killer had died before the killer's victim.

> **7 Disentitlement of killers under will or intestacy**
>
> (1) A killer is not entitled to any interest in property arising under a will of the killer's victim.
>
> (2) A killer is not entitled to any interest in property arising on the intestacy, or partial intestacy, of the killer's victim.
>
> (3) Subject to any express testamentary direction to the contrary, any interest in property that a killer is not entitled to under subsection (1) or subsection (2) is to pass or be distributed as if the killer had died before the killer's victim.
>
> (4) Subsections (1) and (3) are subject to section 10(3) to (5).

Section 10 is designed to ensure that the killer is not deprived of benefits to which the killer is entitled for services or other economic benefits he or she provided to the killer's victim. (See Q 19). Sub-sections 10(3) and (5) referred to in s 7(4) above are set out below.

> (3) A killer who is not entitled under section 7 to any interest in property arising under a will of the killer's victim—
>
> (a) may make an application under the Law Reform (Testamentary Promises) Act 1949 in respect of the victim's estate; and
>
> (b) must be treated for the purposes of that application as if the victim had failed to make testamentary provision for the killer.
>
> (4) A killer who has a valid claim against the estate of a victim of the killer under the *Law Reform (Testamentary Promises) Act* 1949 is entitled in respect of that claim only to a benefit calculated in accordance with subsection (5).
>
> (5) The benefit referred to in subsection (4) must be calculated to ensure that the killer's benefit is no more certain or more valuable than the killer would have been entitled to if the victim of the killer had continued to live for the period reasonably expected before the victim was killed.

As one would expect with a comprehensive code solution, all the linkages to other relevant enactments have been covered. In this regard, the comparison with the *Forfeiture Act 1995* (NSW) is startling in that the NSW legislation makes no reference at all to other relevant legislation, and is solely concerned with forfeiture modification orders and forfeiture application orders.

25. *Should the courts have a discretion to rectify a will to fulfil the will-maker's probable intent?*

No, as this will open up a Pandora's box of speculation and speculative claims. It is also inconsistent with the code solution being championed in this submission.

26. *Should South Australia's intestacy laws permit an unlawful killer's descendants to inherit from the victim, as representatives of the killer? If so, are there any circumstances in which an unlawful killer's descendants should be prevented from inheriting from the victim?*

See answer to Q 24.

In *Re DWS (dec'd)*,[65] RS was convicted of murdering his parents, neither of whom left a will. At the time of the murders, RS had a two-year old son who subsequently claimed to be entitled to his grandparents' estates by virtue of s 47(1)(i) of the Administration of Estates Act 1925 (UK). To succeed under this section the court would have been required to treat RS as having predeceased the plaintiff's grandfather. This, in giving the section its plain meaning, the court declined to do.[66]

The England and Wales Law Commission considered the outcome in *Re DWS (dec'd)* to be unsatisfactory because it was unjust to penalise the grandson for the crime of his parent; it was more likely that the deceased would have wished to benefit their grandchild than the other relatives; and the result contradicted the general policy of the intestacy legislation which is to prefer descendants to siblings and other relatives.[67]

The England and Wales Law Commission proposed the solution that in situations where a person forfeits the right to inherit by killing an intestate, the rules of intestate succession should be applied as if the killer had died immediately before the intestate.[68]

Significantly, the National Committee for Uniform Succession Laws with all States and Territories has very recently endorsed the England and Wales Law Commission position that 'where the forfeiture rule prevents a person from sharing in the intestate estate … that person should be deemed to have died before the intestate'.[69] The National Committee, having noted that the English position was consistent with recommendations made by the New Zealand Law Commission in 1997, went on to conclude that 'the option of extending constructive

[65] [2001] 1 AER 97.
[66] R Kerridge, 'Visiting the Sins of the Fathers on their Children' (2001) 117 Law Quarterly Review 371, 374-5.
[67] England and Wales Law Commission, The Forfeiture Rule and the Law of Succession, Report No 295 (2005) 1.8.
[68] Ibid 3.33.
[69] Law Reform Commission of New South Wales, Uniform Succession Laws: Intestacy, Report No 116 (2007) 12.46.

trusts to these situations would not be productive of certainty, which is one of the aims of the proposed intestacy rules'.[70]

It is contended the above two Law Reform Commission recommendations that the statutory rules of intestate succession should be applied as if the killer had died immediately before the intestate and the consequent rejection of the constructive trust doctrine, lend weight to the codified solution recommended by the New Zealand Law Commission.[71]

As to any circumstances in which an unlawful killer's descendants should be prevented from inheriting from the victim, as the VLRC noted there is a concern 'that offenders may obtain an indirect benefit from those claiming through them or could be motivated to kill in order to financially benefit their family or take sole responsibility for an offence that they did not commit alone'.[72]

However, the better view taken by the VLRC is that 'the innocent descendant of the offender should be treated no differently from other beneficiaries. A beneficiary who is entitled to property by law should therefore have the same rights to use that property for any purpose, as does any other beneficiary'.[73]

27. *In circumstances where the forfeiture rule applies, when should an administrator or trustee be able to distribute a benefit to the appropriate beneficiary in accordance with the application of the rule?*

As soon as the accused's last possible appeal has been rejected, or after any civil case has been determined.

28. *Should the forfeiture rule prohibit an unlawful killer from applying for a share of the victim's estate under family provision legislation?*

Yes, otherwise the rule is circumvented. See s 9 of the *Succession (Homicide) Act 2007* (NZ) which states that 'a killer is not entitled to apply under the *Family Protection Act* 1955 for provision out of the estate of the killer's victim'.

29. *How should the forfeiture rule apply to family property that was the subject of property division proceedings between the killer and the victim in the Family Court at the time the victim died?*

As per s 10 of the *Succession (Homicide) Act 2007* (NZ) which deals with the restriction of the killer's claims as to matrimonial property, testamentary promises, and restitution. See Q 19 and Q 24.

30. *In which circumstances, if any, should the victim's estate's interest in these assets or property be able to be used by the killer to pay for his or her defence to an unlawful homicide charge?*

[70] Ibid 12.45.
[71] New Zealand Law Commission, above n 51, 13.
[72] Victorian Law Reform Commission, above n 21, 67 [5.51].
[73] Ibid, 68 [5.55].

None.

In *Gonzales v Claridades*[74] the appellant, who was charged[75] with the murder of his parents and sister, appealed against Campbell J's refusal to order that the executrix of the estate (the respondent) pay him sufficient money from his father's estate to enable him to fund his defence in the committal proceedings. The NSW Court of Appeal dismissed the appeal since the administration of the estate was incomplete and therefore the appellant had no present right in law or equity to the property which it comprised.[76] Mason P held that nothing in the Forfeiture Act 'presently applies'.[77]

There is no reason for any future South Australian Forfeiture Act to allow the killer access to the victim's estate to fund a defence, as the killer will have his or her own resources or be able to rely on Legal Aid.

The effect on the killer's entitlement to the victim's other assets

31. *How should the forfeiture rule apply to:*

> *a. assets or property the killer jointly owned with the victim at the time the victim died? What if the property was also jointly owned by someone else too (who had nothing to do with the killing)?*
>
> *b. trust assets where the victim or the killer is an appointer of the trust?*
>
> *c. the victim's superannuation benefits?*
>
> *d. the victim's life insurance payout?*
>
> *e. social security or other public benefits deriving from the killer's association with the victim?*

See Q 23 and Q 24.

More particularly see s 8 and s 11 below.

> **8 Disentitlement of killer to victim's non-probate assets**
>
> (1) A killer is not entitled to any property interest in any non-probate assets of the killer's victim which, but for this subsection, would have passed to the killer on the death of the victim.
>
> (2) Any property interest that a killer is not entitled to under subsection (1) is to pass or be distributed as if the killer had died before the victim.

[74] *Gonzales v Clarides* (Unreported, Supreme Court of New South Wales, Court of Appeal, Mason P, Beazley JA, Foster AJA, 18 August 2003).
[75] Sef Gonzales was subsequently convicted of the triple murder.
[76] *Gonzales v Clarides* (Unreported, Supreme Court of New South Wales, Court of Appeal, Mason P, Beazley JA, Foster AJA, 18 August 2003) [19]. Mason P gave the leading judgment (with whom Beazley JA and Foster AJA agreed) and relied on *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694.
[77] *Gonzales v Clarides* (Unreported, Supreme Court of New South Wales, Court of Appeal, Mason P, Beazley JA, Foster AJA, 18 August 2003) [46] per Mason P.

(3) Despite subsection (2), property that is owned in joint tenancy by the victim, the victim's killer, and any other person (if any) devolves at the death of the victim as if the property were owned by each of them as tenants in common in equal shares.

Section 7 (property under a will or intestacy) and s 8(3) (non-probate assets) provide the answer to Q 31(a) which combined prevent the survivorship rule applying to a joint tenancy, and therefore if there was a third innocent party who jointly owned the property then he or she would be unaffected.

11 Disentitlement of killer to enhanced benefits generally

(1) This section applies only in respect of property of a victim that is not—

(a) within the victim's estate; or

(b) a non-probate asset of the victim.

(2) A killer whose interest in or claim against property to which this section applies is affected by the death of the killer's victim is not entitled to any more certain or more valuable interest in the property as a result of the death of the victim than the killer would otherwise have been entitled to.

(3) Without limiting subsection (2), a killer is not entitled to benefit in respect of any property to which this section applies as a result of the death of the killer's victim if—

(a) the killing prevented the birth of the victim; or

(b) the killing altered the order in which it could reasonably have been expected that the killer and the victim would have died; or

(c) the killing prevented the victim from reaching any particular age or satisfying any other condition; or

(d) the killing reduced or closed the membership of a class of beneficiaries that included the victim; or

(e) the killing shortened the period during which the victim could reasonably have been expected to possess an interest in property in which the killer has an interest in remainder.

Essentially, s 11 is designed to further disentitle the killer to any benefit not already covered by s 7, s 8, and s 9 of the *Succession (Homicide) Act 2007* (NZ).

32. *Are there any incidental or other changes you would propose that impact on the effectiveness of the forfeiture rule?*

Only that every relevant piece of legislation in South Australia should be covered as to the effect of the homicide on the rights of succession and the Schedule of consequent enactments amended.

33. *Should the effect of the forfeiture rule on the matters concerned in questions 23-31 be introduced into legislation to clarify how the law operates in these areas?*

Yes. It follows from all previous answers advocating a code solution that clarity and comprehensiveness are essential to provide guidance to administrators of estates caught up in the application of the forfeiture rule.

Conclusion

'Thou shalt not kill' (6th Commandment).

This submission has advocated a code solution (Option C), with the *Succession (Homicide) Act 2007* (NZ) as a template. There is no need for the South Australian Law Reform Institute (SALRI) to re-invent the wheel. The key decision is to determine what types of unlawful killing (such as dangerous driving causing death) are not to be included in the definition of homicide for the purpose of the application of the forfeiture rule. After that, it is necessary to specify the effect of the homicide on rights of succession by comprehensively listing the disentitlement of killers, along with a Schedule of the consequent amendments to other South Australian enactments, such as the *Administration and Probate Act 1919* (SA), the *Wills Act 1936* (SA) and the *Law of Property Act 1936* (SA). The whole purpose is for parliament to decide and to keep the operation of the forfeiture rule out of the courts.