

**PROPERTY AND PROBATE SECTION****SUBMISSION TO THE VICTORIAN LAW REFORM COMMISSION REVIEW OF THE FORFEITURE RULE.**

1. The Probate and Property Section (“PAP”) of the Commercial Bar Association of Victoria (CommBar) makes the following submission to the Victorian Law Reform Commission (VLRC) in respect of the Consultation Paper March 2014 and in relation to the review of the Forfeiture Rule.
2. The Forfeiture Rule as it applies in Victoria to succession of property pursuant to a will or on an intestacy is noted at 2.32 of the VLRC Consultation Paper and was stated by Gillard J in *Estate of Soukup* (1997) 97 A Crim R 103, 113 as follows:
  1. It is a rule of public policy that no person can enforce a right directly resulting to the person as a result of that person’s crime.
  2. The rule applies to situations where a person seeks to enforce a right to property arising under a will or as a result of legislation providing for distribution on an intestacy.
  3. That the rule applies in murder cases and manslaughter cases.
  4. It does not apply in cases where the beneficiary is insane at the time of the commission of the crime.
  5. In its application to manslaughter cases it does not depend upon moral culpability or any other factor.
  6. Whilst the beneficiary is precluded from taking under the will or on an intestacy nevertheless he or she may be able to establish a right to property pursuant to some other branch of the law and in circumstances where the person does not benefit from his or her crime.
3. At 2.33 of the paper it is noted that Gillard J addressed the issue of concerns about the inflexibility of the rule and that it can cause injustice and recommended consideration be given to changing the law
4. In the VLRC Consultation Paper at 2.25 -2.27 it is noted that in Victoria prior to *Soukup’s case* the Forfeiture Rule had been declined to be applied in *Re Keitley* [1992] 1 VR 583 per Coldrey J and *Milankos v Milankos* [1994] VSC 7993 per Nathan J, in both cases the court finding the level of moral culpability was of such a low order as to not warrant the application of the rule.

5. PAP agrees that a strict application of the forfeiture rule can in certain circumstances result in apparent injustice. Examples of such injustice include categories of manslaughter, killings arising from family violence, assisted suicides, negligent, reckless or dangerous acts or omissions as considered in the VLRC Consultation Paper in Chapter 3. PAP supports a proposal that there be legislative change which empowers judges to exercise a broad discretion as to whether or not the rule should be applied. Discussion of this proposed discretion is considered at 6.2 below.

6. The VLRC Consultation Paper has posed 16 questions for consideration and submissions. These are responded to as follows:

1. What has been the effect of the *Forfeiture Act 1991 (ACT)* on the application and operation of the Forfeiture Rule in the Australian Capital Territory?

The VLRC Consultation Paper notes at 2.47 that since its enactment there have been no cases of applications to modify the effect of the rule under this legislation placed on the public record.

Similarly, PAP is unaware of any applications to modify the rule under the ACT legislation and is unable to comment further.

2. In Victoria, should the Forfeiture Rule be applied equally to all types of unlawful killing? If not:

- (a) Which types of killing should be excluded from the operation of the rule?

- (b) On what basis should they be excluded?

The Forfeiture Rule should continue to be applied in all cases of murder.

It is noted the rule does not apply to cases of unlawful killing by reason of mental impairment.

In all other cases of unlawful killing the court should have a legislative discretion as to whether the circumstances of the killing and the level of moral culpability of the offender justify the exclusion of, or modification of the rule.

Consideration should then be given to the question of whether the Court exercising the discretion should be constituted by the sentencing Judge. PAPS is of the opinion that as a result of having applied an instinctive synthesis of all of the relevant matters including the offender's criminal history, the level of culpability and usually having heard the evidence and seen the witnesses give their evidence during the trial, the Sentencing Judge is in the best position to determine the discretion. This may also result in costs being reduced as a result of not having to adduce witness evidence. In the first instance the applicant seeking the exercise of the discretion should apply for directions to the Sentencing Judge.

The factors that should be taken into account should include:

- (a) The Sentencing Judge's sentence;

- (b) Any appellate decision in respect of any appeal from the Sentence;
- (c) Victim impact statements;
- (d) Whether the offence is committed involving aggravating factors;
- (e) The offenders conduct post the commission of the offence including whether there was a plea of guilty;
- (f) Whether it is likely that the offender will be released from prison during his life;
- (g) The matters in s 91(4)(e)-(p) of the *Administration and Probate Act 1958*.
- (h) Whether it would be the case that had the deceased not been killed by the offender, there would have been a responsibility on the part of the deceased to make adequate and proper provision for the offender meaning a moral duty to do so.

3. Should the forfeiture rule be applied equally to all unlawful killers? If not:

- (a) Should the courts be able to consider moral culpability?
- (b) What other factors should be taken into account?

Refer to response to 2.

4. Should the absolute exception to the forfeiture rule for persons found not guilty by reason of mental impairment be retained? If not:

- (a) In what circumstances should the exception apply?
- (b) Should the court have a discretion to apply the rule in circumstances of the case?

The absolute exception should be retained.

5. How should contingent gifts over be distributed upon the application of the forfeiture rule?

In 4.9 & 4.18 of the Consultation Paper it is noted that the application of the forfeiture rule where there is a contingent gift over has been considered by Young J in *Egan v O'Brien* [2006] NSWSC 1398 as producing 4 possible outcomes:

- The gift over fails;
- The gift over takes effect as if the condition of the gift was fulfilled;
- The gift over is interpreted according to the intention of the will-maker;
- The gift is held on constructive trust by the killer for the benefit of a person considered appropriate by the court, having regard to the relationships and intentions that might affect the result of the trust. Where there is insufficient evidence, and in an appropriate case, the court may treat the disentitled beneficiary as if they had predeceased the will-maker by holding the trust to be in favour of those entitled as on an intestacy.

In 4.21 of the Consultation Paper it is noted that England, New Zealand and most jurisdictions in the United States have legislation providing that an unlawful killer who loses any entitlement under a will as a result of the operation of the forfeiture rule is to be treated as having predeceased the victim.

PAP supports the legislative approach of deeming a killer to have predeceased a victim for the purposes of dispositions under a will or intestacy in cases where the forfeiture rule is applied to disentitle a killer to such disposition or entitlement under intestacy law. This deeming provision will avoid there being an unjust outcome for those entitled to claim through the killer such as his or her children, particularly minor children, who have no moral culpability in relation to the unlawful killing.

6. Should the courts have a discretion to rectify a will to fulfil the will-maker's probable intention?

In most cases where a will-maker has been unlawfully killed by a beneficiary PAP is of the opinion that the answer is No. There will be cases in which the discretion to rectify should exist. In *De Gois v Korp* [2005] VSC 326 (18 August 2005) Mandie J having found that it was inconceivable that Mrs Korp, having been attacked by her husband and having lost capacity, properly advised, would not have excluded her husband Mr Korp from her will and that a proposed will accurately reflected her likely intentions and that it was reasonable in all the circumstances to authorise the making of such will made the order accordingly. Although this authority may be distinguished there are matters which have some similarity and relevance to rectification. To overcome the common problem that those who should take cannot make an application of the type made in *De Gois*, discretion to rectify should exist.

7. Should Victoria's intestacy laws permit an unlawful killer's descendants to inherit from the victim, as representatives of the killer?

Yes. Refer response to 5.

8. Are there any circumstances in which an unlawful killer's descendants should be prevented from inheriting from the victim?

Where those descendants have no moral culpability in relation to the unlawful killing, No. If they were co-offenders and liable according to the laws of complicity in any degree in the offending or enterprise a discretion to apply forfeiture partial or total may be justified.

9. How should the courts distribute property subject to a joint tenancy once the forfeiture rule has been applied?

- (a) Should an unlawful killer be able to retain their interest in the property?

The approach applied in *Re Thorp* [1962] NSW 889 is favoured where there is a joint tenancy – namely that whilst the legal title vests in the killer he/she holds the victim's interest in the property on constructive trust for the benefit of the victim's estate. Otherwise consideration should be given to

there being a deemed severance of the joint tenancy at the time of death so that the victim hold their interests equally as tenants in common, subject to any other claim by them to hold a greater interest. The unlawful killer should not lose their interest. Once returned to society they need assets.

A victim may seek orders under the *Confiscation Act 1997* and forfeiture, compensation and restitution orders under the *Sentencing Act 1991*. This is sufficient to overcome any perceived injustice if the killer retains the interest as tenant in common.

- (b) Should the victim's estate be able to keep the victim's interest in the property where there are multiple joint tenants.

An approach whereby the victim's interest was severed and the benefit of that interest vested in the surviving joint tenants, with the killer's interest from such survivorship being held on a constructive trust for the victim's estate is favoured.

10. How should the forfeiture rule apply to other assets that are not within the deceased's estate?

The observations in the VLRC Consultation Paper at 4.56 are noted that once the forfeiture rule is applied an unlawful killer will also be barred from taking a benefit from insurance, superannuation and any pension rights that might accrue to them as a consequence of the death of the victim. Benefits flowing to the estate from a superannuation nomination will be covered by the State law, but those such as superannuation nomination in favour of the killer or benefits under a life policy are covered by Commonwealth law and outside the scope of the VLRC reference.

The proposed legislative discretion would cover superannuation funds in respect of which the trustees are directed by a binding nomination to pay to the estate, or which they pay pursuant to their discretion in the absence of such binding nomination.

This will have a consequential effect on the killer once returned to society having served a term of imprisonment. It may severely restrict the offender's chance of becoming a useful member of society.

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

No. Consistent with the view that strict application of the forfeiture rule has resulted in injustice and that there should be a legislative discretion as to whether to apply the rule, it follows there could well be circumstances where a deceased had a moral responsibility to make provision for their unlawful killer – examples such as manslaughter involving low levels of mortal culpability, suicide pacts, killings arising from family violence perpetrated by the victim, and negligent acts causing death

12. Should issues about the effect of the forfeiture rule on the property and benefits that the killer would otherwise have derived on the death of the victim be addressed by amending the existing legislation under which the property of a deceased person is distributed?

Yes as well as other legislation that presently covers forfeiture, compensation and restitution in the context of criminal offences.

Some helpful amendments to legislation would appear to be:

- The *Property Law Act 1958* in relation to the unlawful killer holding any interest he/she would acquire in jointly owned property with his/her victim to be held upon a constructive trust for the estate of the victim.
  - Sections of the *Confiscation Act 1997* and *Sentencing Act 1991* in respect of forfeiture, compensation and restitution orders.
13. Should Victoria introduce legislation, like that in the United Kingdom, Australian Capital Territory and New South Wales, that empowers a court to modify the effect of the forfeiture rule?

Yes.

14. If Victoria introduced legislation that empowers a court to modify the effect of the forfeiture rule:

- (a) Who should be able to apply for the rule to be modified?

Provision for an 'interested person' in line with s.5 of the *Forfeiture Act 1995 (NSW)* as noted at 5.22 of the VLRC Consultation Paper is preferred.

- (b) What should be the time limit for making an application?

Taking into consideration criminal process (or in rare cases a civil claim) and appeal process, a time frame of 6 months after conviction or conclusion of appeal process is suggested, with provision for extension of time if a court is satisfied it is just and equitable to extend time.

- (c) What principles, if any, governing the court's discretion should be stated in the legislation?

Refer consideration of discretionary issues in 6.2 above.

The primary principle should be that the Sentencing Judge exercise the discretion, if an application is made.

- (d) What guidance should the court be given in exercising its discretion?

Refer 6.2 above.

- (e) Which property and other interests should be able to be affected by the order?

All property interests and financial resources/entitlements of a victim, subject to conflicting Commonwealth legislation re superannuation etc.

15. Should Victoria codify the common law rule of forfeiture?

No – the preferred option is a legislative discretion to modify the application of the rule.

16. If Victoria introduced legislation that codified the common law rule of forfeiture:

- (a) How should it allow for exceptions, such as where the code would normally be applied but in view of the circumstances of the killing it would not be justified?

The legislation should provide that the Rule applies unless the Court otherwise orders. Then provide in exercising the discretion the Court must have regard to the following matters and set them out seriatim the last being, “any other matter the Court considers relevant”.

- (b) How should it provide for the code to be applied to a person who has not been prosecuted, or was found not guilty because of mental impairment?

Consistent with the existing Rule, it should be stated that it does not apply to persons found not guilty because of mental impairment. In respect of those who are not prosecuted, it should be stated that the Rule should not apply.

- (c) How should it accommodate changes in circumstances, such as where a crime is resolved many years after the event, or a person’s conviction is overturned?

Provision for a time frame in which applications can be made for a re-distribution of the estate after the resolution of the crime or overturning of the conviction – subject to discretion in the court not to order such re-distribution where to do so is impractical or impossible to achieve.

A specific provision that the Court may take into account supervening circumstances that have occurred since the commission of the offence and the date upon which the killer is found guilty. PAP considers that the Sentencing Judge exercise the discretion, because the changes in circumstances will be taken into account in the sentence.

- (d) What other matters should be addressed in a codified rule (and how)?

Given the view PAP’s view is that the rule ought not to be codified, no other recommendations are suggested.

DATED: 15 May 2014.

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