

The Forfeiture Rule

REPORT SEPTEMBER 2014



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Law Reform
Commission

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Contents

Preface	v
Terms of reference	vi
Glossary	vii
Executive summary	ix
Recommendations	xiii
1. Background	2
This reference	2
The forfeiture rule as it applies in Victoria	2
Legislative responses in other jurisdictions.....	3
Statutory judicial discretion.....	3
Codification of the rule	4
Previous reviews of the rule by law reform bodies	4
The Commission’s process	5
Structure of this report.....	6
2. The need for legislative reform in Victoria	8
Introduction	8
Lack of clarity about the scope of the rule	8
Concern about harsh outcomes in some cases	10
Uncertainty about the effect of the rule.....	11
A legislative rather than judicial responsibility	12
Model for legislative reform	13
Amendments to existing legislation.....	13
Statutory judicial discretion.....	14
Codification of the rule	14
Combining the options	15
Proposed reform	15

3. Scope of the forfeiture rule	18
Introduction	18
Defining the scope of the rule	18
The Commission’s approach	18
Offences to which the forfeiture rule should apply	20
Offences that should be excluded from the rule	23
Persons found not guilty by reason of mental impairment	30
Options	31
The Commission’s View	34
4. Judicial discretion to modify the effect of the rule	36
Introduction	36
The Commission’s approach	36
Scope of the discretion	37
Unlawful killings to which it would apply	37
Determining what the ‘justice of the case’ requires	38
Extent to which the rule can be modified	45
Forfeiture rule modification orders	46
Who may apply	46
Effect of forfeiture rule modification orders	47
Revocation and variation of forfeiture rule modification orders	48
Time limits for application	49
Evidentiary effect of conviction	51
Other procedural matters	52
5. Effect of the forfeiture rule	58
Introduction	58
Appointment of personal representative	59
Benefits from the estate	63
When an alternative beneficiary is unable to inherit	63
Entitlement to apply for family provision	71
Interests in property	73
Property owned in joint tenancy	73
Other issues arising prior to a determination that the rule applies	77
Acceleration of property entitlement	78
Other benefits	79
Non-estate assets	79
State superannuation schemes	80
Victim compensation	81
6. Conclusion	84
Appendices	86
Appendix A—Submissions	86
Appendix B—Consultations	87
Bibliography	90

Preface

The forfeiture rule is a common law rule of public policy. It is an expression of the fundamental principle that crime should not pay, and it conveys the community's strongest disapproval of the act of homicide. The rule disentitles an offender from benefits that, in normal circumstances, they would have received on the deceased person's death. It is not a punishment but it is a significant consequence that, in most cases, should not be disturbed.

At common law, the rule is hard and fast. If the rule applies, it applies without regard to the features of the particular homicide. While it rightly applies without exception to the offence of murder, the inflexible application of the rule in every other homicide is out of step with developments in the criminal law. Unlawful killings continue to attract the most severe penalties, but a range of substantive offences and sentencing options has emerged in recognition of the breadth of circumstances in which a death can occur.

In Australia as well as overseas, concern has been expressed about the harsh effects that the forfeiture rule can have. A driver of a car who causes an accident that kills their partner because of a momentary lapse in concentration is unable to receive anything the partner left them by will. A person who, as part of a suicide pact, assists a terminally ill loved one to commit suicide and then fails in their own suicide attempt, loses the right to the deceased person's interest in the house they bought together. An innocent child of an offender is unlikely to inherit the property that the offender forfeited upon killing the child's grandparents.

The response in some other jurisdictions has been to introduce legislation that either excludes particular homicides from the operation of the rule or gives the courts a discretion to modify the effect of the rule on a case-by-case basis.

The Commission has concluded that Victoria needs a Forfeiture Act that does both. It has reached this conclusion after consulting with members of the public, community organisations, legal practitioners, judges, academics, and organisations with valuable experience in administering estates. I thank those who contributed for their time and insights.

I would also like to thank my fellow Commissioners who worked on this reference. Dr Ian Hardingham QC and Bruce Gardner PSM—who were particularly generous in giving their time to the roundtable discussions and other consultations—His Honour David Jones AM, Eamonn Moran PSM QC, Alison O'Brien and the Hon. Frank Vincent AO QC constituted the reference Division which I chaired. They brought to the reference a wide range of perspectives and rich knowledge of the law.

Finally, I acknowledge and thank the research team, Lindy Smith and Megan Taylor, for their hard work on the reference.

I commend the report to you.



The Hon. Philip Cummins AM
Chair, Victorian Law Reform Commission

September 2014

Terms of reference

[Referral to the Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) on 29 October 2013.]

The Victorian Law Reform Commission is asked to review the common law rule of forfeiture and the circumstances in which it should no longer be appropriate for a person who has killed another person to benefit from that death, including by way of survivorship or as a beneficiary under a will or under intestacy rules.

The Commission should consider existing exceptions to the forfeiture rule, such as where a person is found not guilty of a killing because of mental impairment.

The Commission should make recommendations on the need for legislative or other reform in Victoria to clarify when and/or how the forfeiture rule should be applied, or to replace the common law.

If legislative reform is recommended, the Commission should propose specific legislative mechanisms for giving effect to these recommendations.

The Commission should consider judicial approaches and legislative developments in both Australian and overseas jurisdictions.

The Commission is to report by 15 September 2014.

Glossary

The ACT Act	<i>Forfeiture Act 1991 (ACT)</i>
Administrator	A person appointed by the court under letters of administration to administer a deceased estate that has no executor. This may be because there is no will, the will does not appoint an executor, or a named executor is unwilling or unable to act.
Executor	The person appointed by a will to administer a deceased person's estate.
Family provision	Refers to family provision law, set out in Part IV of the <i>Administration and Probate Act 1958 (Vic)</i> , which allows a person who believes that a deceased person had a responsibility to provide for them, and did not do so, to apply for a court order to redistribute the estate in their favour.
Intestacy	Occurs when a person dies without having made a valid will, or where their will fails to effectively dispose of all of their property. Intestacy can be partial, where only some of the deceased person's property is effectively disposed of by will, or total, where none of the deceased person's property is effectively disposed of by will.
Intestate	A person who dies without leaving a valid will.
Joint tenancy	Common ownership of property when all co-owners (or co-tenants) together own the whole piece of property, each having an undivided share. Property that is owned jointly passes to the surviving co-owner or co-owners on the death of one of the co-owners and does not become part of the deceased person's estate. See also survivorship and tenancy in common .
Mental illness	A medical condition that is characterised by a significant disturbance of thought, mood, perception or memory. It can include conditions such as depression, schizophrenic disorders, bipolar affective disorder, obsessive-compulsive disorder and post traumatic stress disorder.

Mental impairment	<p>Under the <i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Vic), the defence of mental impairment is established if, at the time of engaging in conduct constituting the offence, the person was suffering from a mental impairment with the effect that:</p> <ul style="list-style-type: none">• they did not know the nature and quality of their conduct, or• they did not know that the conduct was wrong (that is, they could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).
The NSW Act	<i>Forfeiture Act 1995</i> (NSW)
The NZ Act	<i>Succession (Homicide) Act 2007</i> (NZ)
Offender	For ease of expression, in this report (including the recommendations) ‘offender’ refers to the person who is responsible for an unlawful killing, whether or not they have been convicted.
Residuary estate	The remainder of the estate after debts and liabilities are paid and specific gifts and legacies are distributed.
Survivorship	A right in relation to property held by two or more people as joint tenants. Where a co-owner (or co-tenant) dies, their share in the property passes to the surviving co-owner(s). It cannot be given by will. See also joint tenancy .
Tenancy in common	A type of co-ownership where multiple parties own distinct interests in the same piece of property. The share owned by a tenant in common forms part of their estate and so can be given by will. See also joint tenancy .
The UK Act	<i>Forfeiture Act 1982</i> (UK)

Executive summary

The forfeiture rule

On 29 October 2013, the Attorney-General asked the Victorian Law Reform Commission to review the common law rule of forfeiture. The forfeiture rule prevents a person who has unlawfully killed another from inheriting from their victim or acquiring another financial benefit from the death. It is an unwritten rule of public policy enforced by the courts. It has no statutory basis yet overrides the words of a will, entitlements provided in legislation, and legally binding agreements to which the deceased person was a party.

The rule applies where the court is satisfied, in civil proceedings, that the person was responsible for an unlawful killing. A person acquitted in criminal proceedings, or not prosecuted for a criminal offence at all, may still be precluded from obtaining a benefit.¹ The only exception in Victoria is where the person is not guilty because of mental impairment.²

Emerging in the late 19th century from common law doctrines that stripped murderers and other felons of their property, the rule remains relevant today.³ It conveys the community's strongest condemnation of the act of unlawfully taking another human life.

The rule is not applied often, as it is directed to circumstances where the person responsible for the death stands to benefit from the deceased person's estate or otherwise as a result of their close relationship with the deceased person. However, of the 85 homicides in Victoria last year, 27 (33 per cent) were committed by a family member.⁴ It is likely that in many of these cases the forfeiture rule prevented the person responsible from obtaining a benefit.⁵

Need for reform

Although the public policy is sound, the rule requires reform for two reasons: clarity and fairness. The scope of the rule as it applies in Victoria is unclear. There is no doubt that it applies to murder, but the reach of the rule to all forms of unlawful killing, including inadvertent and involuntary acts, is unsettled. Where it does apply, the effect that the rule has on the subsequent distribution of forfeited benefits is uncertain.

The rule can operate unfairly because it is applied inflexibly and without regard to the moral culpability of the person responsible for the unlawful killing. This is at odds with changes in community attitudes, as reflected in the greater range of criminal offences and sentence options today compared to when the rule was first articulated.

1 *Helton v Allen* (1940) 63 CLR 691.

2 *Re Estate of Soukup* (1997) 97 A Crim R 103, 115.

3 The rule emerged after the statutory abolition of the common law doctrines of attainder, forfeiture, corruption of blood and escheat. Attainder and escheat provided for the property of a convicted murderer or any other felon to be forfeited to the Crown; corruption of blood prevented an attainted person from inheriting or transmitting land. For more on the development of the rule, see Victorian Law Reform Commission, *The Forfeiture Rule*, Consultation Paper No 20 (2014) 6–16.

4 Australian Bureau of Statistics, *Recorded Crime—Victims, Australia, 2013*, Cat No 4510.0.

5 This may have been in addition to any action taken by Victoria Police or the Office of Public Prosecutions under the *Confiscation Act 1997* (Vic), which provides a broadly applicable but unrelated means of confiscating the proceeds of crime.

The application of the forfeiture rule can also have unfair consequences for third parties as it can affect their potential rights to take a forfeited benefit. Those affected may include alternative beneficiaries named in a will, other beneficiaries of the deceased person's estate, the innocent descendants of the unlawful killer, and any person who co-owns property with the unlawful killer and the deceased person as joint tenants.

Legislative responses in other jurisdictions

Responding to similar concerns, other jurisdictions have introduced legislation to replace or augment the operation of the common law rule. New Zealand's *Succession (Homicide) Act 2007* (NZ) ('the NZ Act') codifies the rule. It sets out the homicides to which the rule applies, excises those to which it does not apply, and specifies its effect on the distribution of the benefits to which the person would have been entitled.

The United Kingdom has taken a minimalist approach. The *Forfeiture Act 1982* (UK) ('the UK Act') leaves the scope and effect of the rule at common law intact, but gives the court a discretion to modify its effect if required by the justice of the case. The Australian Capital Territory and New South Wales subsequently introduced legislation that is closely modelled on the UK Act: the *Forfeiture Act 1991* (ACT) ('the ACT Act') and the *Forfeiture Act 1995* (NSW) ('the NSW Act'). The key difference between the three statutes is that the NSW Act was amended in 2005 to give the court a discretion to apply the rule to a person who has been found not guilty by reason of mental illness.

There have been no recorded applications under the ACT Act to modify the effect of the rule. Five such applications have been made under the NSW Act, and a further three to apply the rule to a person found not guilty of an unlawful killing because of a mental illness. All applications under the NSW Act have been successful. However, most cases concerning the forfeiture rule are not made under the Forfeiture Act but involve applications seeking clarification of the effect of the rule and a determination as to where the offender's interest is to be redirected.

Proposed Forfeiture Act

The Commission released a consultation paper and sought submissions on possible options for reform, based on the approaches illustrated in the NZ, UK, ACT and NSW Acts. A recurring theme in submissions and consultations was that legislative reform is needed, to provide certainty about the scope and effect of the rule and to overcome concerns about the lack of regard to the offender's moral culpability.

The Commission concluded that Victoria should introduce a Forfeiture Act that draws both from the reforms in New Zealand that codified the rule in order to create greater certainty and from the reforms in New South Wales and elsewhere that introduced a discretion to ensure greater fairness in the application of the rule. The proposed Forfeiture Act would specify the unlawful killings to which the rule applies and, either directly or by consequential amendment to other legislation, clarify its effect. To overcome concerns about the harsh effects of the rule, certain offences would be excluded from its operation. In addition, the court would have a discretion, on application, to modify the effect of the rule on a case-by-case basis where required by the justice of the case.

Scope of the rule

The determining factor for the Commission in defining the scope of the rule for the purposes of the proposed Forfeiture Act is the moral culpability of the person responsible for the unlawful killing. For clarity, the Commission recommends establishing a nexus between the unlawful killings to which the rule applies and murder and other indictable homicide offences under the *Crimes Act 1958* (Vic).

In the interests of justice, the Commission recommends excluding from the scope of the rule a small number of homicide offences where any perpetrator is likely to be considered to have low moral culpability and the offence does not warrant a bar on the offender taking a benefit from the deceased person. These are:

- dangerous driving causing death
- manslaughter pursuant to a suicide pact with the deceased person or aiding or abetting a suicide pursuant to such a pact
- infanticide.

These offences were identified in submissions and consultations and have been excluded from the rule in other jurisdictions. Motor manslaughter is excluded at common law from the operation of the rule in the United Kingdom, and the NZ Act excludes killings caused by negligent acts or omissions, killings in pursuance of a suicide pact and infanticide. Given the nature of each of these offences and the low moral culpability of the offenders, any application to modify the effect of the rule in the circumstances of these offences would be likely to succeed. The exclusion of these offences will therefore create greater certainty and will reduce costs to the estate resulting from unnecessary litigation.

Judicial discretion

Under provisions similar to those in the UK, ACT and NSW Acts, the court in Victoria would have the discretion to modify the effect of the rule as required by the justice of the case. However, unlike the equivalent legislation, the proposed Forfeiture Act would expressly direct the court to consider the moral culpability of the person responsible for the unlawful killing and set out the evidence to which it should have regard.

An interested person—who could be the person responsible, the executor or administrator of the deceased person's estate, or any other person who in the opinion of the court has an interest in the matter—would be able to make an application for a forfeiture modification order. The procedural details of the scheme would be modelled on the UK, ACT and NSW Acts.

Unlike the NSW Act, however, the proposed Forfeiture Act would not empower the court to extend the scope of the rule beyond the limits of the common law to persons who have been found not guilty by reason of mental impairment. The Commission does not consider that the rule should apply to a person who is not morally culpable for the unlawful killing.

Effect of the rule

The deceased person may leave a will that appoints the person who is later responsible for their death as executor. If the deceased person does not leave a will, the court usually appoints a person who is a major beneficiary to administer the estate. The Commission recommends that the proposed Forfeiture Act should clearly preclude a person who is responsible for the death from taking up an appointment either as executor or administrator. This would be achieved by deeming them to have died before the deceased person.

As the person's responsibility for the death may not be established until some time after the death, the Commission also recommends that the court be given an express power to pass over a person who applies for probate or administration where there are reasonable grounds for believing that they committed an offence related to the deceased person's death.

The effect of the rule on the entitlements of innocent beneficiaries and third parties would also be clarified. In some circumstances, another beneficiary under a will, or a descendant of an offender, may stand to gain a share of the estate but only if the offender dies before or shortly after the deceased person. Even though they are innocent of any wrongdoing, they are unable to take a share if the offender is alive but precluded by the rule from inheriting. This will be the case even if it is likely that the deceased person would have wanted them to inherit or if they were the deceased person's closest living relative. To overcome this problem the Commission recommends deeming the offender to have predeceased the deceased person.

The Commission also recommends that a person who is responsible for the death of a person should be disentitled from making an application for family provision in order to obtain a larger share of the deceased person's estate.

If the deceased person and the offender owned property as joint tenants, perhaps in conjunction with one or more other people, the rule has consequences for the beneficiaries of the deceased person and any innocent joint tenants. In normal circumstances, the deceased person's interest in the property would vest in the surviving joint tenant or tenants in accordance with the law of survivorship. Where one surviving joint tenant is responsible for the death of another, courts have taken different approaches to determining the impact of the rule. The favoured approach has been to deem that the person responsible for the death holds the deceased person's share on constructive trust for the deceased person's estate. The Commission recommends that the interest of the person responsible for the death should be severed at the time of the death. This is clearer, simpler and fairer.

These clarifications would make it easier for an executor or administrator to distribute the deceased person's estate and reduce the associated legal costs. If the outcome is unfair in any particular circumstances, the court could, on application, modify the effect of the rule.

The Commission has made 27 recommendations, which appear on page xiii of this report.

Recommendations

- 1 Victoria should introduce a Forfeiture Act that defines the scope and effect of the common law rule of forfeiture and provides for the Supreme Court, on application, to modify the effect of the rule if the justice of the case requires it.
- 2 The purpose of the Forfeiture Act should be set out in the legislation and include:
 - (a) to reinforce the common law rule of public policy that a person who has unlawfully killed another person cannot acquire a benefit in consequence of the killing and, in so doing, to:
 - (i) manifest the community's denunciation of unlawful killing
 - (ii) deter persons from unlawfully killing others for financial gain
 - (b) to modify the application of the rule to exclude offences where justice requires
 - (c) to provide for the effect of the rule to be modified if the justice of the case requires it in view of an offender's moral culpability and responsibility for the offence
 - (d) to codify the effect of the rule on rights of succession.
- 3 The Forfeiture Act should specify that, subject to the exceptions in Recommendation 4, the forfeiture rule applies only where the killing, whether done in Victoria or elsewhere, would be murder or another indictable offence under the *Crimes Act 1958* (Vic).
- 4 The Forfeiture Act should specify that the forfeiture rule does not apply where the killing, whether done in Victoria or elsewhere, would be an offence under the *Crimes Act 1958* (Vic) of:
 - (a) dangerous driving causing death
 - (b) manslaughter pursuant to a suicide pact with the deceased person or aiding or abetting a suicide pursuant to such a pact, or
 - (c) infanticide.
- 5 The existing exception to the common law rule of forfeiture for persons found not guilty by reason of mental impairment should be retained.
- 6 The Supreme Court should be empowered to make a forfeiture rule modification order if satisfied that, having regard to the offender's moral culpability and responsibility for the unlawful killing and such other matters as appear to the Court to be material, the justice of the case requires the effect of the rule to be modified.

- 7 In determining the moral culpability of the offender, the Supreme Court should have regard to:
 - (a) findings of fact by the sentencing judge
 - (b) findings by the Coroner
 - (c) victim impact statements presented at criminal proceedings for the offence
 - (d) submissions on interests of victims
 - (e) the mental state of the offender at the time of the offence, and
 - (f) such other matters that in the Court's opinion appear to be material to the offender's moral culpability.
- 8 The Forfeiture Act should empower the Supreme Court to make a forfeiture rule modification order that modifies the effect of the rule in such terms and subject to such conditions as the Court thinks fit.
- 9 Where a person has unlawfully killed another person and is thereby precluded by the forfeiture rule from obtaining a benefit, and the unlawful killing does not constitute murder, that person, or another 'interested person', should be able to apply for a forfeiture rule modification order.
- 10 An 'interested person' should mean:
 - (a) the 'offender' (a person who has unlawfully killed another person) or a person applying on the offender's behalf
 - (b) the executor or administrator of a deceased person's estate, or
 - (c) any other person who in the opinion of the Court has an interest in the matter.
- 11 The property, entitlements and other benefits that may be affected by a forfeiture rule modification order should be specified in the Forfeiture Act and include:
 - (a) gifts to the offender made by the will of the deceased person
 - (b) entitlements on intestacy
 - (c) eligibility to make an application for family provision under Part IV of the *Administration and Probate Act 1958* (Vic)
 - (d) any other benefit or interest in property that vests in the offender as a result of the death of the deceased person.
- 12 On the making of a forfeiture rule modification order, the forfeiture rule should have effect for all purposes (including purposes relating to anything done before the order was made) subject to modifications made by the order.
- 13 On application by an interested person, the Supreme Court should be empowered to revoke or vary a forfeiture rule modification order if the justice of the case requires it.
- 14 An interested person (as defined in Recommendation 10) should be able to apply for revocation or variation of a forfeiture rule modification order if:
 - (a) the offender is pardoned
 - (b) the offender's conviction is quashed or set aside and there are no further avenues of appeal available in respect of the decision to quash or set aside the conviction, or
 - (c) in all other cases—if the Court considers it just in all the circumstances to give leave for such an application to be made.

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- 15 If a forfeiture rule modification order is revoked or varied, the forfeiture rule should have effect for all purposes (including purposes relating to anything done before the order was revoked or varied):
- (a) in the case of a revocation—subject to the terms on which the Court revokes the order, and
 - (b) in the case of a variation—subject to modifications made by the varied order.
- 16 The Forfeiture Act should provide that, unless the Supreme Court gives leave for a late application to be made, an application for a forfeiture rule modification order must be made by the later of:
- (a) if the forfeiture rule operates immediately on the death of a deceased person to prevent the offender from obtaining the benefit concerned—within six months from the date of the death of the deceased person
 - (b) if the forfeiture rule subsequently prevents the offender from obtaining a benefit—within six months from the date on which the forfeiture rule operates to preclude the offender from obtaining the benefit concerned
 - (c) six months after grant of probate of the will of the deceased person or letters of administration of the deceased person’s estate
 - (d) six months after all charges of unlawful killing laid against any beneficiary have been dealt with.
- 17 The Supreme Court should be permitted to give leave for a late application for a forfeiture rule modification order if:
- (a) the offender concerned is pardoned by the Governor after the expiration of the relevant period
 - (b) the offender’s conviction is quashed or set aside by a court after the expiration of the relevant period and there are no further avenues of appeal available in respect of the decision to quash or set aside the conviction
 - (c) the fact that the offender committed the unlawful killing is discovered after the expiration of the relevant period, or
 - (d) the Court considers it just in all the circumstances to give leave.
- 18 The Forfeiture Act should provide that a conviction in Victoria or another Australian state or territory is conclusive evidence that an offender is responsible for the unlawful killing.
- 19 The transitional provisions should be based on section 9 of the *Forfeiture Act 1995* (NSW).
- 20 The *Administration and Probate Act 1958* (Vic) should be amended to provide that, where a person appointed executor by a will or who is otherwise eligible to be appointed administrator is precluded by the forfeiture rule from acquiring an interest in the deceased’s estate, the person is to be treated as having died immediately before the deceased person.
- 21 The *Administration and Probate Act 1958* (Vic) should be amended to provide for the Court to pass over a person who applies for a grant of representation where there are reasonable grounds for believing that the person has committed an offence related to the deceased’s death. The provision should be based on section 348 of model legislation proposed in the December 2009 report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys-General on the administration of estates of deceased persons.

- 22 Part 4 of the *Wills Act 1997* (Vic) should be amended with the effect that:
- (a) where a will contains a devise or bequest to a person who:
 - (i) disclaims it, or
 - (ii) has been precluded by the common law rule of forfeiture from acquiring itthe person is, unless a contrary intention appears by the will, to be treated for the purposes of the Act as having died immediately before the will-maker, and entitled to the devise or bequest at the time of the deemed death.
 - (b) this amendment does not affect the Court's power under the Forfeiture Act to modify the effect of the forfeiture rule
- 23 The *Administration and Probate Act 1958* (Vic) should be amended with the effect that:
- (a) for the purposes of the distribution of an intestate's residuary estate, a person who:
 - (i) is entitled in accordance with section 52 to an interest in the residuary estate but disclaims it, or
 - (ii) would have been so entitled if not precluded from acquiring it by the common law rule of forfeitureis to be treated as having died immediately before the intestate, and entitled to the interest in the residuary estate at the time of the deemed death
 - (b) this amendment does not affect the Court's power under the Forfeiture Act to modify the effect of the forfeiture rule.
- 24 Part IV of the *Administration and Probate Act 1958* (Vic) should be amended to disentitle persons to whom the forfeiture rule applies from making an application for family provision in respect of the deceased person's estate.
- 25 The effect of section 50 of the *Transfer of Land Act 1958* (Vic) should be amended to provide that, where a joint proprietor has been unlawfully killed (within the meaning of the Forfeiture Act) by another joint proprietor, the property shall devolve at the death of the victim as follows:
- (a) where the offender and the victim were the only joint proprietors, as if the property were owned by each of them as tenants in common in equal shares
 - (b) where there were more than two joint proprietors, as if:
 - (i) the offender holds their interest as a tenant in common
 - (ii) the surviving innocent joint proprietor(s) take the victim's interest by survivorship
 - (iii) as between the offender on the one hand and the innocent joint proprietors on the other hand, a tenancy in common exists
 - (iv) as between the innocent joint proprietors, a joint tenancy exists.
- 26 If an offender obtains registration by survivorship under section 50 of the *Transfer of Land Act 1958* (Vic) before it becomes apparent that the forfeiture rule applies, the Registrar should be empowered to rectify the Register appropriately.
- 27 Payments that would have been made to a person who is responsible for unlawfully killing a person who is a member of a state statutory defined benefit superannuation scheme or who otherwise has pension entitlements under state legislation should be redirected as if that person had died before the victim.

Background

- 2 This reference**
- 2 The forfeiture rule as it applies in Victoria**
- 3 Legislative responses in other jurisdictions**
- 4 Previous reviews of the rule by law reform bodies**
- 5 The Commission's process**
- 6 Structure of this report**

1. Background

This reference

- 1.1 On 29 October 2013, the Attorney-General, the Hon. Robert Clark, MP, asked the Victorian Law Reform Commission, under section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic), to review the common law rule of forfeiture and to report by 15 September 2014. The terms of reference are on page vi.

The forfeiture rule as it applies in Victoria

- 1.2 The forfeiture rule is a rule of public policy that a person who unlawfully kills another cannot acquire a benefit as a consequence of the killing. The killer forfeits any entitlement to inherit from the victim, either under the victim's will or, if no will disposes of all of the estate, under intestacy law.¹ If the killer and victim were co-owners of property as joint tenants, the rule prevents the property from passing to the offender.²
- 1.3 The rule was created by the courts and has no statutory basis. It applies where the court is satisfied, in civil proceedings, that the killing was unlawful. There is no requirement for the person to have been convicted in criminal proceedings, where guilt must be proved beyond reasonable doubt. The rule may be applied to a person who has been acquitted, or has not been prosecuted at all, if it is proved to the court, on the balance of probabilities, that the person unlawfully killed the deceased person.³ The only exception is if the person responsible has been found not guilty because of mental impairment.⁴
- 1.4 If an unlawful killing falls within the scope of the forfeiture rule, it will apply regardless of the moral culpability of the person responsible. For example, both a premeditated murder carried out with the intention of obtaining a financial benefit, and a suicide pact in which one of the parties survived, would attract the application of the rule and have the same consequences for the offender in terms of their succession rights.
- 1.5 The forfeiture rule was first enunciated in the 1891 decision of the English Court of Appeal in *Cleaver v Mutual Reserve Fund Life Association*.⁵ Over time, courts have sought to clarify when it applies, how it operates and the consequences for the distribution of the deceased person's estate. In Victoria, concern has been raised about four aspects of the rule:
- There is doubt about whether the rule applies in Victoria to every unlawful killing that results from an inadvertent, involuntary or negligent act or omission.⁶

1 In Victoria, property is distributed on intestacy in accordance with a scheme established by pt 1 div 6 of the *Administration and Probate Act 1958* (Vic).

2 Normally, when a joint tenant dies, the property passes to the surviving co-owner or co-owners and does not form part of the deceased person's estate. See Chapter 5 for discussion of the effect of the rule on a joint tenancy.

3 *Helton v Allen* (1940) 63 CLR 691.

4 *Estate of Soukup* (1997) 97 A Crim R 103, 115.

5 [1892] 1 QB 147.

6 *Estate of Soukup* (1997) 97 A Crim R 103, 115.

- Applying the rule inflexibly, regardless of the moral culpability of the person responsible, is not always in the interests of justice.
- The effect of the rule on the forfeited benefit, and how it should be re-directed, can be unclear and lead to unjust consequences for third parties.
- The judiciary has not had either the power or the opportunity to address these problems.

Legislative responses in other jurisdictions

- 1.6 Similar concerns about the scope and effect of the forfeiture rule have arisen in other jurisdictions. In some cases, they have led to legislative reform.⁷ Legislation introduced in the United Kingdom, the Australian Capital Territory, New South Wales and New Zealand is of particular relevance to Victoria.
- 1.7 The legislative reform in these jurisdictions has taken either of two approaches:
- the introduction of a judicial discretion to modify the effect of the rule
 - codification of the common law rule.

Statutory judicial discretion

- 1.8 In 1982, the United Kingdom gave the court statutory power to modify the effect of the rule if required by the justice of the case, unless the offender was convicted of murder. The Australian Capital Territory and New South Wales later introduced similar legislation.
- 1.9 The relevant legislation is:
- the *Forfeiture Act 1982* (UK) ('the UK Act')
 - the *Forfeiture Act 1991* (ACT) ('the ACT Act')
 - the *Forfeiture Act 1995* (NSW) ('the NSW Act').
- 1.10 The legislation was introduced in response to concern about the harsh effect of inflexibly applying the forfeiture rule. It does not modify the rule itself, but it has been attributed with indirectly inhibiting any further judicial development of it. The passage of the legislation removed pressure on the courts to change the law, and has shifted focus from the scope of the rule to the effect of its operation.
- 1.11 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 violence⁸ and where there was a failed suicide pact.⁹ The New South Wales Supreme Court has used its statutory discretion to modify the effect of the rule in cases of diminished responsibility and dangerous driving.¹⁰ There are no reported applications under the ACT Act to modify the effect of the rule.
- 1.12 The NSW Act was amended in 2005¹¹ to 'prevent mentally ill murderers from profiting from their crime by applying the forfeiture rule'.¹²

7 See the Commission's consultation paper for more discussion about the development of the rule: Victorian Law Reform Commission, *The Forfeiture Rule*, Consultation Paper No 20 (2014) 6–16.

8 *Re K, decd* [1985] Ch 85; *Re K, decd* [1986] Ch 180 (Court of Appeal).

9 *Dunbar v Plant* [1998] Ch 412.

10 *R v R* (Unreported, Supreme Court of New South Wales, Hodgson CJ in Eq, 14 November 1997) (diminished responsibility); *Leneghan-Britton v Taylor* [1998] NSWSC 218 (28 May 1998) (diminished responsibility); *Straede v Eastwood* [2003] NSWSC 280 (2 April 2003) (dangerous driving).

11 By Schedule 4 of the *Confiscation of Proceeds of Crime Amendment Act 2005* (NSW).

12 New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 September 2005, 18042 (Graham West). Note that Acting Justice Lloyd observed in *Public Trustee of New South Wales v Fitter* [2005] NSWSC 1188 (24 November 2005) [49] that this statement does not confirm the meaning of the Act and may even be contrary to the plain meaning. A murderer is not permitted in any circumstances to benefit from their crime, even if the court has a statutory discretion to modify the effect of the forfeiture rule. The effect of the amendment was to allow the rule to be applied to a person who has not committed a crime.

- 1.13 Following the amendment, if a person who has killed another is not subject to the forfeiture rule because they have been found not guilty by reason of mental illness, any interested person may make an application to the Supreme Court of New South Wales for an order that the rule apply as if the person had been found guilty of murder.¹³ Three applications have been made for an order of this type; all have been successful.¹⁴

Codification of the rule

- 1.14 New Zealand has taken a quite different approach. The *Succession (Homicide) Act 2007* (NZ) ('the NZ Act') codifies and replaces the common law rule in a single statute. It specifies when the rule may apply and how it affects the distribution of property to which the person responsible would otherwise have been entitled upon the deceased person's death. It is based on draft legislation prepared by the New Zealand Law Commission.¹⁵
- 1.15 The NZ Act serves as a codified forfeiture rule, replacing the relevant 'rules of law, equity and public policy'.¹⁶ The Law Commission considered that a statute that codified the rule would be clearer and more workable than conferring a statutory discretion on the court.¹⁷
- 1.16 The legislation has been described as 'technical',¹⁸ but it is aimed at reducing the difficulty of the work of trustees, the number of disputed estates and the negative impact on victims' families.¹⁹ According to a member of the New Zealand House of Representatives who spoke during the parliamentary debates on the bill, the 'general principle' was to prevent killers profiting from their misdeeds but also 'not to adversely penalise them'.²⁰
- 1.17 The NZ Act provides exceptions for certain types of killings. Killings caused by a negligent act or omission, infanticide, killings in pursuance of a suicide pact, and assisted suicides are not included within the scope of the rule.²¹
- 1.18 The NZ Act came into force on 17 November 2007.²² As yet, there are no reported cases.

Previous reviews of the rule by law reform bodies

- 1.19 Although this reference is the first public review of the forfeiture rule in Victoria, the Commission is able to draw upon the results of earlier reviews by law reform bodies, both in this state and in other jurisdictions. These bodies include:
- the Law Commission of New Zealand²³
 - the Scottish Law Commission²⁴
 - the Law Commission for England and Wales²⁵
 - the Tasmania Law Reform Institute²⁶
 - the former Victorian Law Reform Advisory Council.²⁷
- 1.20 The reports and other papers that these bodies have produced provide a rich account of the law and are recommended reading for anyone who wishes to explore the issues.

13 *Forfeiture Act 1995* (NSW) s 11.

14 *Public Trustee v Fitter* [2005] NSWSC 1188 (24 November 2005); *Fitter v Public Trustee* [2007] NSWSC 1487 (13 December 2007); *Guler & Ors v NSW Trustee and Guardian & Anor* [2012] NSWSC 1369 (13 November 2012); *Hill v Hill* [2013] NSWSC 524 (7 May 2013).

15 Law Commission (New Zealand), *Succession Law: Homicidal Heirs*, Report No 38 (1997).

16 *Succession (Homicide) Act 2007* (NZ) s 5(1).

17 Law Commission (New Zealand), above n 15, 5.

18 New Zealand, *Parliamentary Debates*, House of Representatives, 8 May 2007, 8987 (Christopher Finlayson).

19 New Zealand, *Parliamentary Debates*, House of Representatives, 8 May 2007, 8988–9 (Lynne Pillay).

20 New Zealand, *Parliamentary Debates*, House of Representatives, 8 May 2007, 8994 (Charles Chauvel).

21 *Succession (Homicide) Act 2007* (NZ) s 4(1) (definition of homicide). Assisted suicide is also defined in s 4(1). Infanticide is as defined in *Crimes Act 1961* (NZ) s 178. Suicide pact is as defined in *Crimes Act 1961* (NZ) s 180(3).

22 *Succession (Homicide) Act 2007* (NZ) s 2.

23 Law Commission (New Zealand), above n 15.

24 Scottish Law Commission, *Report on Succession*, Scot Law Com No 124 (1989); *Report on Succession*, Scot Law Com No 215 (2009).

25 Law Commission (England and Wales), *The Forfeiture Rule and the Law of Succession*, Law Com No 295 (2005).

26 Tasmania Law Reform Institute, *The Forfeiture Rule*, Final Report No 6 (2004).

27 Richard Boaden, 'The "Forfeiture Rule"' (Discussion Paper, Law Reform Advisory Council, 1995).

The Commission's process

- 1.21 The Commission's review was led by the Hon. Philip Cummins AM and a Division which he chaired. The other Division members were Bruce Gardner PSM, Dr Ian Hardingham QC, His Honour David Jones AM, Eamonn Moran PSM QC, Alison O'Brien and the Hon. Frank Vincent AO QC.
- 1.22 On 18 March 2014, the Commission published a consultation paper that described the current law and identified possible reform options.²⁸ The consultation paper sought written submissions on possible reforms.
- 1.23 Submissions were invited by 28 April 2014, though the Commission accepted contributions after that date. Seventeen submissions were received and can be viewed on the Commission's website.²⁹ They are listed at **Appendix A**.
- 1.24 Throughout the reference, the Commission consulted with legal practitioners, academics, community-based organisations and relevant government agencies.
- 1.25 Following the publication of the consultation paper, the Commission held two roundtable conferences. The first, on 24 March 2014, considered the forfeiture rule in practice. Participants discussed how well the forfeiture rule is targeted and how effectively it prevents an offender from taking a benefit. The second was held on 26 May 2014 to consider reform options.
- 1.26 The roundtables were attended by academics and legal practitioners with particular expertise and experience in this area of law, and representatives of the following organisations: the Crime Victims Support Association; the Family Violence and Sexual Assault Unit of the Department of Human Services; Forensicare; Land Victoria; the Law Institute of Victoria; the Loddon Campaspe Community Legal Centre; the Office of Public Prosecutions; the Office of the Public Advocate; the Property and Probate Section of the Commercial Bar Association; Seniors Rights Victoria; State Trustees; Victoria Legal Aid; and Victoria Police.
- 1.27 The Commission also met separately with judges of the Supreme Court of Victoria.
- 1.28 In addition, as the options being considered by the Commission included reforms based on New South Wales legislation and practice, discussions were held in Sydney with members and staff of the New South Wales Supreme Court, the Elder Law and Succession Committee of the Law Society of New South Wales, and Professor Prue Vines from the University of New South Wales. The research team also held discussions with staff of the New South Wales Trustee and Guardian and various legal practitioners in New South Wales.
- 1.29 A number of other individuals and organisations were consulted during the course of the reference, and a full list is at **Appendix B**.

Structure of this report

- 1.30 Chapter 2 contains a broad overview of the need for legislative reform in Victoria, including the problems with the current law and options for reform. It concludes with the Commission's recommendation for the enactment of a Victorian Forfeiture Act that is based on the UK, ACT and NSW Acts and also draws upon the NZ Act. The remainder of the report discusses the content of the new legislation.
- 1.31 Chapter 3 addresses the need for the proposed Forfeiture Act to clarify the scope of the forfeiture rule. The Act would describe the unlawful killings to which the rule applies, and those to which it does not. The basis of the distinction would be whether, because of the nature of the killing, justice requires that the rule be applied.
- 1.32 In Chapter 4, the Commission's proposals for giving the court a discretion to modify the effect of the rule on a case-by-case basis, where required by the justice of the case, are discussed in detail.
- 1.33 Chapter 5 considers the effect of the forfeiture rule on the transfer of benefits on the death of the deceased person, including the consequences for innocent third parties. Various reforms are recommended. In most cases, they would take the form of consequential amendments to existing legislation and would be included in the package of reforms introduced by the Forfeiture Act.
- 1.34 Chapter 6 concludes the report.

The need for legislative reform in Victoria

- 8** Introduction
- 8** Lack of clarity about the scope of the rule
- 10** Concern about harsh outcomes in some cases
- 11** Uncertainty about the effect of the rule
- 12** A legislative rather than judicial responsibility
- 13** Model for legislative reform
- 15** Proposed reform

2. The need for legislative reform in Victoria

Introduction

- 2.1 This chapter discusses aspects of the operation and effect of the rule that have caused concern and which, in turn, indicate the most appropriate scope and content of any legislative reform in Victoria. These are:
- lack of clarity about the scope of the rule
 - concern about harsh outcomes in some cases
 - uncertainty about the effect of the rule
 - limits on the judiciary's ability to change the rule.
- 2.2 The Commission concludes that Victoria should introduce a Forfeiture Act that reinforces the rule, describes the unlawful killings to which it applies, clarifies its effect, and provides for the court to provide relief in individual cases where required by the justice of the case.

Lack of clarity about the scope of the rule

- 2.3 The principle that no one who unlawfully kills another can benefit financially from the death is a simple concept that is easily understood. How it relates in practice to a particular homicide is not always as clear.
- 2.4 The rule as it applies in Victoria is set out in *Estate of Soukup*.¹ In that case, Justice Gillard reiterated that:
- the rule applies in murder and manslaughter cases
 - the rule does not apply where the person responsible had a mental impairment at the time the crime was committed
 - the application of the rule to manslaughter cases does not depend upon moral culpability or any other factor.
- 2.5 However, Justice Gillard left open the question of whether the rule applies to every manslaughter case. He suggested that the rule does not apply if the person was not guilty of deliberate intentional and unlawful violence or threats of violence resulting in death.²

1 (1997) 97 A Crim R 103, 115.

2 Ibid. The question of whether the rule should apply to unlawful killings arising from inadvertent, involuntary or negligent acts or omissions is discussed in Chapter 3. The Commission concludes that, in many cases, it should.

- 2.6 Distilling the details of when and how the rule applies can be difficult and has challenged courts for a long time. As long ago as 1920, the rule was already causing confusion. After considering the authorities from the United Kingdom and concurrent developments in United States law, Justice Harvey observed in the New South Wales case *Re Tucker* that:
- The whole doctrine seems to me to be in a very unsatisfactory condition; it is an extraordinary instance of Judge-made law invoking the doctrine of public policy in order to prevent what is felt in a particular case to be an outrage; but I cannot distinguish, consistently with these judgments, one case from the other.³
- 2.7 Divergent views about the scope of the forfeiture rule have created controversy as well as confusion. Thirty years ago, courts began to make exceptions in view of the nature of the crime and the offender's moral culpability.⁴ This was a departure from the traditional formulation of the rule that the High Court had endorsed in the leading case of *Helton v Allen*.⁵ However, in Victoria the rule has applied inflexibly since Justice Gillard reaffirmed the traditional formulation in *Estate of Soukup*.⁶
- 2.8 Justice Gillard said that he did not share the concern of academics and some judges that the parameters, ambit and rationale of the rule are ill-defined and difficult to apply. He found the rationale clear and unambiguous and its application in homicide cases certain.⁷ Nevertheless, the concern to which he alluded remains evident today.
- 2.9 Participants at the Commission's roundtable on how the forfeiture rule operates in practice expressed different opinions as to whether the rule applies to unintentional, involuntary and inadvertent acts.⁸ They pointed out that the lack of certainty makes it difficult for legal practitioners to advise their clients. It encourages parties to litigate in order to ascertain inheritance rights in ambiguous cases, which increases costs to the estate, delays distribution to innocent beneficiaries and prolongs the emotional pressure on all concerned. Similar sentiments were conveyed in submissions.⁹
- 2.10 Cases to determine whether the forfeiture rule applies can be costly, most often to the deceased person's estate. The Elder Law and Succession Committee of the New South Wales Law Society estimates that proceedings to obtain judicial advice, including the costs of retaining a solicitor, obtaining counsel's opinion and filing fees amount to approximately \$10,000 to \$15,000.¹⁰
- 2.11 While views differ about the scope of the rule, the Commission found overwhelming support for providing clarity and certainty in legislation. None of the comments received in submissions and consultations expressed a preference to maintain the status quo, where the pace and extent of further clarification depends on the facts of the cases that come before the court.

3 *Re Tucker* (1920) 21 SR (NSW) 175, 181.

4 *Public Trustee v Evans* (1985) 2 NSWLR 188; *Public Trustee v Fraser* (1987) 9 NSWLR 433; *Permanent Trustee Co Ltd v Freedom from Hunger Campaign* (1991) 25 NSWLR 140; *Re Keitley* [1992] 1 VR 583; *Miliankos v Miliankos* (Unreported, Supreme Court of Victoria, Nathan J, 24 March 1994). For a discussion of these cases, see Victorian Law Reform Commission, *The Forfeiture Rule*, Consultation Paper No 20 (2014) 9–10. Divergent views about the scope of the rule can be seen in the first case in which the rule was enunciated, *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147: Anthony Dillon, 'When Beneficiary Slays Benefactor: The Forfeiture "Rule" Should Operate as a Principle of the General Law' (1998) 6 *Australian Property Law Journal* 254.

(1940) 63 CLR 691, 709 (Dixon, Evatt, McTiernan JJ).

6 *Estate of Soukup* (1997) 97 A Crim R 103.

7 Ibid 118. Justice Gillard cited in this regard: Justice Harvey in *Re Tucker* (1920) 21 SR (NSW) 175 (23 December 1920); T G Youdan, 'Acquisition of Property by Killing' (1973) 89 *Law Quarterly Review* 235; and Ken Mackie, 'Manslaughter and Succession' (1988) 62 *Australian Law Journal* 616.

8 Consultation 5 (Roundtable 1).

9 Submissions 6 (Office of Public Prosecutions); 9 (State Trustees).

10 Submission 13 (Elder Law and Succession Committee of the Law Society of New South Wales).

Concern about harsh outcomes in some cases

- 2.12 Discussion about the scope of the rule commonly arises in response to particular cases where the automatic and inflexible application of the rule is at odds with changes in community attitudes.
- 2.13 Professor Prue Vines highlighted these attitudinal changes in her submission:
- In the eighteenth century the death penalty was notoriously available for about 300 crimes, even though the prerogative of mercy was often exercised. Today we distinguish culpability for murder from manslaughter etc and views about the level of culpability have changed over time. It is clear that the idea that a wife who kills her husband after he has badly abused her over many years is regarded today as far less culpable than she would have been in the past. Assisting a suicide is also regarded as far less culpable, particularly when there is a terminal illness involved, than it was in the past. These differing ideas about culpability need to be reflected in the legislation in some way, especially in relation to the question of whether the forfeiture rule should be applied wholesale or modified.¹¹
- 2.14 Changes in community views towards family violence have had a marked influence on judicial decisions to depart from the traditional formulation of the rule. In *Public Trustee v Evans*,¹² the rule was not applied to a woman who had killed her husband after he had assaulted her and her daughter and then said that he was going to kill the children. It was also not applied in *Re Keitley*,¹³ where a woman killed her husband out of fear that he would kill her.
- 2.15 In *Troja v Troja*,¹⁴ the court held that a woman who had been convicted of manslaughter for killing her husband was precluded from benefiting under his will. The decision was not unanimous and, in his dissenting judgment, President Kirby stated that:
- 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.¹⁵
- 2.16 The unfair effects that the rule can have in family violence cases was a driving reason for introducing legislation that gives the court a discretion to modify the effect of the rule in the Australian Capital Territory and New South Wales: the *Forfeiture Act 1991* (ACT) ('the ACT Act') and the *Forfeiture Act 1995* (NSW) ('the NSW Act'). On tabling the Bill in the Legislative Assembly, the Attorney-General of the Australian Capital Territory said that the rule can operate harshly where a death occurs as a result of actions by a 'battered spouse'.¹⁶ Parliamentary debate on the New South Wales legislation also suggested that relief from the application of the rule could be warranted in cases of assisted suicide,¹⁷ suicide pacts,¹⁸ and culpable driving.¹⁹

11 Submission 1 (Professor Prue Vines).

12 (1985) 2 NSWLR 188.

13 [1992] 1 VR 583.

14 (1994) 33 NSWLR 269.

15 Ibid 285.

16 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 19 September 1991, 3526 (Terry Connolly, Attorney-General).

17 New South Wales, *Parliamentary Debates*, Legislative Council, 25 October 1995, 2257 (Jeffrey Shaw, Attorney-General); New South Wales, *Parliamentary Debates*, Legislative Council, 20 November 1995, 3481 (Meredith Burgmann); New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 December 1995, 4473 (Andrew Tink, Faye Lo Po').

18 New South Wales, *Parliamentary Debates*, Legislative Council, 25 October 1995, 2257 (Jeffrey Shaw, Attorney-General); New South Wales, *Parliamentary Debates*, Legislative Council, 20 November 1995, 3481 (Meredith Burgmann).

19 New South Wales, *Parliamentary Debates*, Legislative Council, 25 October 1995, 2257 (Jeffrey Shaw, Attorney General); New South Wales, *Parliamentary Debates*, Legislative Council, 20 November 1995, 3481–2 (Meredith Burgmann).

- 2.17 In its submission to the Commission, the Crime Victims Support Association maintained that the forfeiture rule should apply without exception.²⁰ Other submissions to the Commission conveyed two distinct levels of concern about the harsh effect that the rule can have.
- 2.18 The first level of concern is that applying the rule to some crimes is inappropriate and unnecessary because of the nature of the act. On this view, specific forms of homicide should be excluded from the scope of the rule. Those suggested included: assisted suicide and suicide pacts;²¹ accidental death, including where arising from negligence in a car accident;²² killings resulting from a negligent act or omission;²³ murders perpetrated within the context of family violence where the charge of defensive homicide would have later been available;²⁴ and infanticide.²⁵
- 2.19 The second level of concern is that sometimes a person has committed a crime to which the rule should normally apply but it is not in the interests of justice to apply it. A number of submissions proposed that the court should have a statutory discretion, such as provided by the ACT and NSW Acts, to allow modification of the effect of the rule on a case-by-case basis.²⁶ The Institute of Legal Executives (Victoria), for example, submitted that any exceptions to the rule should be made after judicial consideration of the circumstances:

There are many different forms of killing—some intentional, some intentional but without any intention to profit (ie suicide pacts), some accidental, some effected in self-defence (ie *Re Keitley*); and only a Court hearing all of the facts would be in a position to consider the relevance of all of the different applicable factors in deciding whether or not the rule should apply.²⁷

Uncertainty about the effect of the rule

- 2.20 Once the forfeiture rule has been applied, the court must determine how to dispose of the benefits that the person responsible for the death otherwise would have been entitled to receive. These may include inheritance or property rights transmitted by the deceased person's will, on intestacy or by survivorship. The offender may also have stood to benefit from the deceased person's superannuation fund or life insurance policy or could have been entitled to claim for family provision,²⁸ or a pension.
- 2.21 Courts have responded in a variety of ways. Their decisions have had consequences for the person responsible, the deceased person's estate, innocent third parties with an interest in the deceased person's property, and descendants of the person responsible whose interest in the estate derives from that person.
- 2.22 While solutions have been tailored to the circumstances of the case, this approach can create uncertainty, delay the distribution of the estate, and increase the legal expenses borne by the estate.

20 Submission 8 (Crime Victims Support Association).

21 Submissions 3 (Janine Truter); 9 (State Trustees).

22 Submission 1 (Professor Prue Vines).

23 Submission 9 (State Trustees).

24 Submission 11 (Loddon Campaspe Community Legal Centre).

25 Submission 9 (State Trustees).

26 Submissions 2 (Michael P Tinsley); 4 (Victoria Police); 10 (Law Institute of Victoria); 13 (Elder Law and Succession Committee of the Law Society of New South Wales); 14 (Property and Probate Section of the Commercial Bar Association); 16 (The Institute of Legal Executives (Victoria)); 17 (Carolyn Sparke QC). Consultation 15 (Supreme Court of Victoria—Judges).

27 Submission 16 (The Institute of Legal Executives (Victoria)).

28 A person for whom a deceased person had a responsibility to make provision can apply for a court order redistributing the deceased person's estate in their favour. This can occur whether or not the deceased person made a will: *Administration and Probate Act 1958* (Vic) s 91.

- 2.23 State Trustees stated in its submission that clarifying the rule in legislation would guide personal representatives in administering deceased estates.²⁹ The Office of Public Prosecutions noted that, if the effect of the rule were clearer, it could more accurately target the restraining orders obtained over property that a suspected unlawful killer stands to receive as a result of a homicide:

At the moment, when an offender jointly owns real property with the victim and inherits it pursuant to survivorship laws, it's unclear as to the extent of the offender's interest in that property given the uncertainty surrounding the application of the forfeiture rule. The current practical approach is to restrain the entire property and then deal with offender and beneficiaries' property claims later on.³⁰

- 2.24 When recommending that New Zealand introduce legislation that codifies the forfeiture rule, the New Zealand Law Commission highlighted the need to set out clearly the effect of the rule in order to relieve the burden on estates.

The Commission accepts that without legislation New Zealand courts would, considering each problem as it arises, decide eventually all the unanswered questions. But leaving it to the judges has its price. It would be preferable, if practicable, to spare estates (often of only modest value) the considerable expense of legal proceedings. Resolving these proceedings often requires the involvement of many legal counsel... There are also the problems of delay.³¹

- 2.25 The *Succession (Homicide) Act 2007* ('the NZ Act') codifies not only the application of the rule but its effect in a simple and accessible way. As such, it provides a point of reference in determining the most appropriate legislative response to uncertainty about the effect of the rule in Victoria.

A legislative rather than judicial responsibility

- 2.26 Because the forfeiture rule leaves the court no discretion to do other than apply the rule strictly and absolutely, any change to the rule is a matter for the legislature. Noting that the rule operated harshly in some cases, Justice Gillard directly called for legislative reform in *Estate of Soukup*:

I recommend to the Attorney-General that consideration be given to changing the law along the lines of the English Forfeiture Act and in this regard thought be given to authorising the courts to modify the rules to enable convicted persons to succeed to property on the principles set out in the Family Law Act or Pt IX of the Property Law Act 1958.³²

- 2.27 Although some judicial officers, legal practitioners and academics have argued that the court already has the power, and responsibility, to ensure that the common law rule adapts to the needs of modern society, this is not the prevailing interpretation of the law in Australia.³³

29 Submission 9 (State Trustees).

30 Submission 6 (Office of Public Prosecutions).

31 Law Commission (New Zealand), *Succession Law: Homicidal Heirs*, Report No 38 (1997) 2.

32 *Estate of Soukup* (1997) 97 A Crim R 103, 118. The reference is to the *Family Law Act 1975* (Cth) and Part IX of the *Property Law Act 1958* (Vic). Part IX of the *Property Law Act* dealt with property settlements between de facto partners. It was repealed in 2008 and this area of law is now also regulated by the *Family Law Act*.

33 The prevailing view has been challenged by those who consider it is within the court's power not to apply the rule. They see the rule as a principle of equity, where the court can decide whether it would be in accordance with good conscience to allow the killer to obtain a benefit in the circumstances. A view in a similar vein is that, as the rule is a creation of the common law, it is open to the courts to modify it as needed. See, for example: Chris Triggs, 'Against Policy: Homicide and Succession to Property' (2005) 68 *Saskatchewan Law Review* 117, 118; Phillip H Kenny, 'Forfeiture Act 1982' (1983) 46 *Modern Law Review* 66; Barbara Hamilton and Elizabeth Sheehy, 'Thrice Punished: Battered Women, Criminal Law and Disinheritance' (2004) 8 *Southern Cross University Law Review* 96, 97. Anthony Dillon has argued that it is a principle of general law that is not dependent on either the common law or equity jurisdictions: above n 4.

2.28 Even if it were, cases that would present the court with an opportunity to clarify or alter the scope and application of the rule are rare. Many are resolved before coming before a judge, with the offender choosing to disclaim any interest in the estate rather than press their claim in court.³⁴ Moreover, the circumstances in which the forfeiture rule should not be applied to a person who has unlawfully killed another, or who has unlawfully aided and abetted their death, are exceptional.

2.29 Certainly, submissions and comments made to the Commission convey the expectation that reform of the scope of the rule is a policy issue for Parliament.³⁵ Similar sentiments were expressed by the New Zealand Law Commission at the conclusion of its review of the forfeiture rule:

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 this reason it should be settled clearly and completely by Parliament.³⁶

Model for legislative reform

2.30 The concerns raised in submissions and consultations related to the operation of the rule in particular circumstances. The rule itself was not questioned. It follows that any legislative reform in Victoria should be targeted at resolving those concerns while preserving the public policy principle.

2.31 The Commission's consultation paper discussed three approaches to legislative reform and invited submissions on which option, combination of options, or other alternative is most suited to reforming the forfeiture rule in Victoria:

- Amend existing legislation to clarify the effect of the rule on the distribution of the killer's share of the deceased person's estate and other forfeited benefits arising from the victim's death.
- Empower the court to modify the effect of the rule by introducing legislation that is similar to the ACT and NSW Acts.
- Replace the common law rule with a statutory code that specifies the unlawful killings that would lead to forfeiture, and the impact that this would have on the benefits to which the person responsible would have been entitled. This is the model adopted in New Zealand.

2.32 Each option responds to one or more issues that underpinned calls for legislative reform, but none provides a complete response.

Amendments to existing legislation

2.33 The first option, to amend existing legislation, could co-exist with either of the other two. It would provide greater certainty to executors and administrators in administering the deceased person's estate and managing non-estate assets that would have passed to the offender on the deceased person's death. There was general support for this option and comments focused on specific amendments to the *Administration and Probate Act 1958* (Vic), the *Wills Act 1997* (Vic) and the *Transfer of Land Act 1958* (Vic).³⁷

2.34 This option is a partial response because, although it clarifies the effect of the rule, it does not provide relief when the effect is unfair and nor does it assist in identifying when the rule applies.

34 Consultation 9 (Elder Law and Succession Committee of the Law Society of New South Wales).
 35 Consultation 16 (Roundtable 2).
 36 Law Commission (New Zealand), above n 31, 5.
 37 See Chapter 5 for a discussion of these proposed amendments.

Statutory judicial discretion

- 2.35 Many submissions favoured this option. It would provide a means of preserving the common law rule while allowing for individual exceptions where required by the justice of the case. Members of the legal profession and the judiciary in New South Wales told the Commission that the NSW Act works well.³⁸
- 2.36 However, a disadvantage of this model is that it does not reduce uncertainty about the scope of the rule. The introduction of the NSW Act has not fostered development of the rule at common law, and has possibly created confusion. The issue in proceedings under the NSW Act is whether the rule should be modified in the circumstances, rather than whether it applies. It follows that the court is unlikely to examine the boundaries of the rule in its decision. Further, the introduction of the NSW Act has led executors and administrators of deceased estates to incorrectly believe that an application needs to be made under that Act to determine whether the rule applies, even if the relevant offence is clearly an unlawful killing for the purposes of the Act.³⁹
- 2.37 Another drawback is that the model does not clarify the effect of the rule. When the New South Wales Attorney-General's Department reviewed the NSW Act in 2002, the Public Trustee drew attention to the need for clarification:
- The Public Trustee comments that, at present, there is some uncertainty as to the effect that modification orders may have on the administration of an estate. It is noted that one interpretation is that the share forfeited by the operation of the Act passes as on intestacy. The opposing interpretation is that the will is "read down" so that the remaining beneficiaries take portions of the share forfeited by the offender. It is also noted that this uncertainty would ... usually be removed through specific substitutionary provisions in individual wills. However, these provisions are not found in all wills.⁴⁰
- 2.38 Additional concerns about this option were raised by the Crime Victims Support Association. In its submission, the Association said that judicial discretion would lead to subjective decisions, add to the costs of the deceased person's estate and place more demands on the court's resources.⁴¹

Codification of the rule

- 2.39 This option would remove uncertainty about the scope and effect of the rule. The community's views about which offences should attract the operation of the rule, and those which should not, would be conveyed in the legislation. The administration and distribution of the deceased person's estate would be simplified, saving costs and time.
- 2.40 None of the submissions called for Victoria to enact legislation that replicates the NZ Act. However, Loddon Campaspe Community Legal Centre expressed a preference for statutory exceptions to the rule, rather than relying on judicial discretion:
- Of those two approaches, we believe that codification and providing an exception is the most certain path and most likely to achieve consistency in Victoria, albeit at the cost of inconsistency with other Australian jurisdictions that provide for the exercise of judicial discretion in such cases.⁴²
- 2.41 A significant drawback of this option is that, alone, it would replace the inflexible common law rule with an inflexible statutory rule. There would continue to be no means of responding to individual cases where applying the rule would not be in the interests of justice.

38 Consultations 7 (Supreme Court of New South Wales—Judges); 9 (Elder Law and Succession Committee of the Law Society of New South Wales).

39 Tasmania Law Reform Institute, *The Forfeiture Rule*, Final Report No 6 (2004) 18. The comment was made by the New South Wales Public Trustee during a review of the NSW Act in 2002, and was cited in a submission to the Tasmania Law Reform Institute that was reproduced in the Institute's report.

40 New South Wales, *Report on the Review of the Forfeiture Act 1995: New South Wales Attorney-General's Department*, Parl Paper No 72 (2002) 9. The Public Trustee is now known as the NSW Public Trustee and Guardian.

41 Submission 8 (Crime Victims Support Association).

42 Submission 11 (Loddon Campaspe Community Legal Centre).

Combining the options

2.42 Some submissions identified a need for more statutory guidance than provided by the ACT and NSW Acts, but stopping short of codification. Professor Prue Vines said that, if the court were given a discretion to modify the effect of the rule, it may still be useful to specify where the rule should not apply, to save the few people who might be affected by significant costs.⁴³ Carolyn Sparke QC put the view that:

There is a clear need for a flexible regime in which a court can vary the strict application of the forfeiture rule. However, there is also a need for certainty. Therefore, there should be a clearly defined default position in any legislation rather than simply a broad-based discretion in the court.⁴⁴

2.43 A number of contributors to the Commission’s consultations recognised that elements of all three options could be incorporated into Victoria’s Forfeiture Act.⁴⁵ State Trustees called for legislation that codifies the rule but also provides for exceptions on a case-by-case basis:

Whilst setting the default outcomes for given types of cases, such codification should also include scope for applications to the court, in appropriate circumstances and within specified timeframes, to apply, or modify the application of, forfeiture in the particular case (including whether the killer should be treated as having predeceased the deceased).⁴⁶

2.44 The Commission agrees that any legislation that Victoria introduces should both clarify the boundaries of the rule and allow the court to modify the effect of the rule in the interests of justice. Its preferred model:

- sets out the scope and effect of the forfeiture rule
- excludes offences to which it is inappropriate and unnecessary to apply the rule because of the nature of the act
- provides for the court, on application, to modify the effect of the rule where the justice of the case requires
- provides for consequential amendments to related legislation concerning the disposition of a deceased person’s assets.

Proposed reform

2.45 The Commission proposes that Victoria enact a Forfeiture Act that is based primarily on the ACT and NSW Acts. There are obvious benefits to the community in building on a tested model and following a similar path of reform as that followed by other Australian jurisdictions.

2.46 Like the ACT and NSW Acts, the Victorian Forfeiture Act would give the court a discretion to modify the effect of the rule. However, the Victorian Act would also describe the scope of the rule and its effect on the distribution of the deceased person’s estate and other property. The package of reform would include consequential amendments to the Administration and Probate Act, Wills Act, Transfer of Land Act and other legislation that regulates the disposition of a person’s assets after death.

2.47 The Commission also considers that, to place the new legislation alongside the common law, and inform the court when exercising its discretion, the purpose of the Forfeiture Act should be specified in the Act.

43 Submission 1 (Professor Prue Vines).

44 Submission 17 (Carolyn Sparke QC).

45 Consultation 5 (Roundtable 1); 15 (Supreme Court of Victoria—Judges).

46 Submission 9 (State Trustees).

Recommendations

- 1 Victoria should introduce a Forfeiture Act that defines the scope and effect of the common law rule of forfeiture and provides for the Supreme Court, on application, to modify the effect if the justice of the case requires it.
- 2 The purpose of the Forfeiture Act should be set out in the legislation and include:
 - (a) to reinforce the common law rule of public policy that a person who has unlawfully killed another person cannot acquire a benefit in consequence of the killing and, in so doing, to:
 - (i) manifest the community's denunciation of unlawful killing
 - (ii) deter persons from unlawfully killing others for financial gain
 - (b) to modify the application of the rule to exclude offences where justice requires
 - (c) to provide for the effect of the rule to be modified if the justice of the case requires it in view of an offender's moral culpability and responsibility for the offence
 - (d) to codify the effect of the rule on rights of succession.

Scope of the forfeiture rule

18 Introduction

18 Defining the scope of the rule

30 Persons found not guilty by reason of mental impairment

3. Scope of the forfeiture rule

Introduction

- 3.1 As discussed in Chapter 2, the scope of the forfeiture rule in Victoria is uncertain and can lead to harsh outcomes that are at odds with community views and standards. The uncertainty also makes it difficult for executors and administrators to discharge their functions and for legal professionals to advise their clients.
- 3.2 The Commission's proposed Forfeiture Act would make the boundaries of the rule clear and reflect a distinction between unlawful killings that, by their nature, should attract the application of the rule and those that should not. These boundaries would not align with the scope of the rule that appears to have evolved at common law, though they would reflect community views and standards. They would be drawn by establishing a nexus between the application of the rule and identified homicide offences. All but four indictable offences under the *Crimes Act 1958* (Vic) would be included within the scope of the rule. All non-indictable offences that involve a death would be excluded.
- 3.3 Although the forfeiture rule may preclude a person who has not been convicted for the unlawful killing from obtaining a consequential benefit, the nexus between the rule and criminal offences would be relevant. A court determining in civil proceedings whether the rule applies would normally decide whether the person was responsible, on the balance of probabilities, for committing the relevant criminal offence.
- 3.4 This chapter discusses the Commission's reasoning in drawing the boundaries of the forfeiture rule and its recommendations for drafting the relevant legislative provisions.

Defining the scope of the rule

The Commission's approach

- 3.5 A homicide is the most serious of crimes with consequences that are final and irreversible. The community views the deliberate and intentional taking of life most severely; however, the community also recognises that there are circumstances in which the nature of the offence and the level of culpability of the offender require leniency. These community standards should be reflected in the scope of the rule at law.¹
- 3.6 In determining what the scope of the forfeiture rule should be, the question is whether a particular class of killing is sufficiently abhorrent that the interests of justice require that an offender² should be precluded from taking a benefit as a result of the death.³ Whether one class of killing is more abhorrent than another depends, at least in part, on the degree of moral culpability attributed to any person who commits the offence.

1 Submission 1 (Professor Prue Vines).

2 In this report, 'offender' refers to the person who is responsible for an unlawful killing, whether or not they have been convicted.

3 Law Commission (New Zealand), *Succession Law: Homicidal Heirs*, Report No 38 (1997) 5.

Inadvertent, involuntary or negligent offences

- 3.7 The forfeiture rule applies in Victoria to offenders responsible for murder and other intentional and reckless homicides.⁴ That it should continue to do so is uncontroversial. However, whether an inadvertent or involuntary act of manslaughter should be within the scope of the rule is not settled. In England, for example, the forfeiture rule does not apply in cases of manslaughter on the road by gross negligence,⁵ but this is not necessarily the law in Victoria.
- 3.8 In New Zealand, the *Succession (Homicide) Act 2007* (NZ) ('the NZ Act') excludes unlawful killings resulting from negligent acts or omissions from the application of the codified forfeiture rule.⁶ The New Zealand Law Commission recommended this exclusion on the grounds that, because of the unintended nature of the crime, allowing an offender to inherit is not likely to serve as an incentive for future such acts or omissions.⁷
- 3.9 The Commission received a range of submissions that suggested that the forfeiture rule should not apply to accidental, unintended or negligent unlawful killings.⁸ However, judges of the Supreme Court of New South Wales with whom the Commission met said that the rule is not intended to be punitive or serve as a deterrent but rather to convey the community's sense of abhorrence. Further, they stated that a death resulting from an inadvertent, involuntary or negligent act can be just as abhorrent as an intended one.⁹
- 3.10 The Commission's view is that an offence should not be excluded from the scope of the rule simply because the act or omission was inadvertent, involuntary or negligent. While many non-indictable offences fall within this category and should be excluded from the rule, lack of intention is not a robust basis on which to draw the boundaries.
- 3.11 Inadvertent, involuntary and negligent acts or omissions might result in charges for indictable offences such as manslaughter; culpable driving causing death;¹⁰ dangerous driving causing death;¹¹ or failure to control a dangerous, menacing or restricted breed dog that kills a person.¹² Generally, deaths resulting from these offences are unintended, although foreseeable, consequences of the offender's conduct.
- 3.12 Excluding negligent acts or omissions as a class from the application of the forfeiture rule would allow offenders who are responsible for very serious forms of criminal negligence to inherit from the deceased person. They would include offenders responsible for neglecting vulnerable relatives such as children, persons with disabilities and the elderly.

Intentional violence

- 3.13 In *Estate of Soukup*, Justice Gillard indicated that the rule should not apply if the offender was not guilty of deliberate intentional and unlawful violence or threats of violence resulting in death.¹³ On this view, the key issue in determining whether the rule applies is not whether the killing was intentional, but whether there was intentional violence.
- 3.14 The Commission agrees that the intentional use of violence is a strong indicator of an offender's moral culpability, though it is not the only factor to consider and nor can it alone provide a sufficient basis on which to decide whether an offence should attract the operation of the rule. An unlawful killing of a vulnerable person by neglect may not be characterised as violent but is nevertheless a serious crime that should attract the operation of the rule.

4 *Estate of Soukup* (1997) 97 A Crim R 103.

5 *Tinline v White Cross Insurance Association* [1921] 3 KB 327; *James v British General Insurance Co* [1927] 2 KB 311.

6 *Succession (Homicide Act) 2007* (NZ) s 4(1).

7 Law Commission (New Zealand), above n 3.

8 Submissions 1 (Professor Prue Vines); 9 (State Trustees); 16 (The Institute of Legal Executives (Victoria)).

9 Consultation 7 (Supreme Court of New South Wales—Judges).

10 *Crimes Act 1958* (Vic) s 318.

11 *Ibid* s 319.

12 *Ibid* s 319B.

13 *Estate of Soukup* (1997) 97 A Crim R 103, 115. Justice McMillan agreed with this view in *Re Edwards* [2014] VSC 392 (22 August 2014), [101].

Moral culpability

- 3.15 In determining whether or not an unlawful killing should be included in the class of killings to which the rule should apply, the Commission considered the degree of moral culpability that the community would attribute to any person committing an offence of that type. Where the degree is minimal, it is likely that applying the rule is against the interests of justice.
- 3.16 The Commission considers that murder and all other indictable homicide offences should be included within the scope of the rule unless there are cogent reasons to exclude them. Most, if not all, such offences are already within scope at common law. They are classified as crimes and offenders may be punished by a term of imprisonment. Even where the unlawful killing was unintended, the nature of the indictable offence usually conveys a high risk that another person could be killed as a result of the offender's conduct.
- 3.17 Offences that should be excluded have been identified in consultations and submissions and are discussed at [3.34]–[3.73]. Their exclusion would not detract from—and may in fact strengthen—the achievement of the public policy objectives of the rule. They share one or more of the following features that suggest that the moral culpability of anyone who committed the offence would be low:
- the act or omission is not directed towards the deceased person
 - the motive for the offence is not personal gain
 - the deceased person would be unlikely to object to the offender obtaining a benefit from their estate
 - the sentence for the offence is at the lower end of the scale
 - the offence is one of diminished responsibility because the offender has a form of mental impairment
 - the unlawful killing is committed at the instigation or with the agreement of the deceased person (for example, through a suicide pact)
 - a court would be unlikely to find that the forfeiture rule applied or otherwise would be likely to exercise a statutory discretion to modify the effect of the rule in all cases.
- 3.18 If an offence is one to which the rule should normally apply but in some cases it would not be in the interests of justice to apply it, the Commission proposes that an application could be made to the court to modify the effect of the rule. As discussed in Chapter 4, the proposed Forfeiture Act would provide the court with the discretion to modify the effect of the rule in the case of any unlawful killing within the scope of the rule, other than murder.

Offences to which the forfeiture rule should apply

Murder

- 3.19 In the Commission's view, the forfeiture rule should always apply in response to murder. The 'appropriateness of applying the forfeiture rule to murderers has never been questioned'.¹⁴
- 3.20 A murderer has intentionally or recklessly and without lawful justification killed someone or has inflicted serious injury and the victim has died as a result. The community's abhorrence of this offence is clear, with the maximum penalty for murder in Victoria being life imprisonment.¹⁵

Manslaughter

- 3.21 An unlawful killing is manslaughter if, in the circumstances, the offender's culpability is less than that required to constitute murder. The offender's degree of moral culpability, as well as the acts and circumstances of manslaughter offences, vary infinitely in seriousness and 'could come very near to murder or amount to little more than inadvertence'.¹⁶ The differing degrees of moral culpability for manslaughter are reflected in the variety and range of penalties: from 20 years imprisonment to a fine.¹⁷
- 3.22 Manslaughter is not confined to unlawful killings resulting from deliberate acts. A person may be found guilty of manslaughter if they are responsible for the death of another due to a failure to exercise a duty of care or because of their reckless or dangerous acts or omissions that a reasonable person would have foreseen might cause harm to another.
- 3.23 Offenders in Victoria have been convicted of manslaughter by negligence for a wide range of acts such as:
- the accidental discharge of a firearm due to inattentive handling¹⁸
 - the negligent use of a firearm by failing to properly identify their target while hunting¹⁹
 - burning the deceased person alive without forming any reasonable belief as to whether they were dead or alive²⁰
 - neglect of children by leaving them unattended in a motor vehicle.²¹
- 3.24 While in some circumstances it would be open to conclude that an individual offender should not be precluded from deriving a benefit from the death of the deceased person, the Commission considers that individual offenders responsible for these offences may have been so egregiously reckless or negligent in their actions that they ought not to benefit. Offences where the moral culpability of the offender can vary significantly are therefore more appropriately considered by the court on a case-by-case basis.

Culpable driving causing death

- 3.25 Culpable driving causing death is also a serious offence with a maximum sentence of 20 years imprisonment.²² Similar to manslaughter by negligence, the offender must have been criminally negligent but the degree of that negligence can vary. A person can be convicted of culpable driving causing death for driving a motor vehicle recklessly, negligently or while incapable of properly controlling the motor vehicle due to the influence of a drug or alcohol.²³ The minimum degree of negligence that needs to be proven is the same degree as that required to support a charge of manslaughter.²⁴
- 3.26 Victoria Police and the Elder and Succession Committee of the New South Wales Law Society observed that the circumstances in which motor manslaughter and culpable driving offences occur vary significantly.²⁵

16 *Gray v Barr* [1971] 2 QB 554, 581.

17 *Crimes Act 1958* (Vic) s 5.

18 *R v Sypott* [2003] VSC 327 (5 September 2003).

19 *R v Osip* (2000) 2 VR 595.

20 *R v Vandergulik* [2009] VSC 3 (13 February 2009).

21 *The Queen v Nguyen* [2013] VSC 46 (12 February 2013); *R v Jie Hua Yu* [2001] VSC 207 (1 June 2001).

22 *Crimes Act 1958* (Vic) s 318.

23 *Ibid* s 318(2).

24 *R v Shields* [1981] VR 717.

25 Submissions 4 (Victoria Police); 13 (Elder Law and Succession Committee of the Law Society of New South Wales).

- 3.27 In Victoria, there have been convictions for culpable driving causing death where:
- a person who was found to have levels of cannabis in their blood that would impair driving skills drove through a 'give way' sign into the path of a truck, killing both passengers²⁶
 - a drunk driver was driving while disqualified and at high speeds²⁷
 - a 19-year-old driver failed to allow enough time to stop at a 'give way' sign and sped through an intersection.²⁸
- 3.28 Culpable driving causing death is excluded from the application of the forfeiture rule under the common law in the United Kingdom.²⁹ However, the Commission considers the high degree of negligence in many of these cases to be sufficient to make the application of the forfeiture rule appropriate.

Failure to control a dangerous, menacing or restricted breed dog that kills a person

- 3.29 It is also an offence to fail to control a dangerous, menacing or restricted breed dog that kills a person.³⁰ The maximum penalty is 10 years imprisonment.
- 3.30 A person is guilty of the offence when a reasonable person would have realised that failing to keep the dog under control would expose others to an appreciable risk of death.³¹ This is a similar standard of negligence to that which applies to the offence of dangerous driving causing death, which is discussed at [3.42]–[3.49].
- 3.31 Whereas the Commission considers that the forfeiture rule should not apply to dangerous driving causing death, the offence of failing to control a dangerous dog that kills a person should be within the scope of the rule. There is a possibility that an offender in these circumstances may have created or encouraged the circumstances that caused the dog to be violent and thus bear responsibility for the existence of the danger in a way that a person in control of a motor vehicle does not.

Aiding and abetting

- 3.32 A person who aids, abets, counsels or procures another to commit an unlawful killing may be tried or indicted as a principal offender.³² They will also be subject to the forfeiture rule, although this may be unclear to administrators and executors of estates. The *Forfeiture Act 1982* (UK) ('the UK Act'), the *Forfeiture Act 1991* (ACT) ('the ACT Act') and the *Forfeiture Act 1995* (NSW) ('the NSW Act') define an unlawful killing as including aiding, abetting, counselling or procuring an unlawful killing.³³
- 3.33 The Commission considers that the rule should apply to anyone who aids and abets the commission of an offence that is within the scope of the rule. The Crimes Act does not distinguish between the principal offender and a person who aids, abets, counsels or procures them to commit the offence, and nor should the forfeiture rule. The inclusion of aiding, abetting, counselling and procuring an offence within the definition of unlawful killing in the proposed Forfeiture Act would reinforce this position.³⁴

26 *King v The Queen* (1986) 161 CLR 423.

27 *Pasznyk v The Queen* [2014] VSCA 87 (8 May 2014).

28 *DPP v Hill* [2012] VSCA 144 (29 June 2012).

29 *Tinline v White Cross Insurance Association* [1921] 3 KB 327; *James v British General Insurance Co* [1927] 2 KB 311.

30 *Crimes Act 1958* (Vic) s 319B.

31 Explanatory Memorandum, Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Bill 2011, 3–4.

32 *Crimes Act 1958* (Vic) s 323.

33 *Forfeiture Act 1982* (UK) s 1(2); *Forfeiture Act 1991* (ACT) s 2; *Forfeiture Act 1995* (NSW) s 3.

34 See [4.92].

Offences that should be excluded from the rule

- 3.34 Certain offences, by their nature, ought not to attract the application of the forfeiture rule as a matter of public policy. These are offences for which any person committing the offence would have a low level of moral culpability and responsibility.
- 3.35 The exclusion of some offences from the forfeiture rule was favoured by a wide range of submissions and parties consulted during the course of the reference, including judges of the Supreme Court of Victoria, participants in the Commission's roundtables, and submissions from State Trustees, Professor Prue Vines and Janine Truter.³⁵
- 3.36 The Crime Victims Support Association considered that the forfeiture rule should apply to all instances of an unlawful killing without exception, as long as the act that causes the death is a crime in Victoria.³⁶ The Commission does not agree, in view of the unfair consequences that applying the rule without exception can cause.

Offences outside the Crimes Act

- 3.37 A death may result from actions that are an offence but the offence involves such a low degree of culpability on the part of the person responsible that their actions would not be an indictable offence under the Crimes Act.
- 3.38 The potential for the forfeiture rule to apply to offences outside the Crimes Act was raised by participants at the Commission's first roundtable.³⁷ The example given was of an accident that kills a family member working on a family farm—and for which the owner of the farm may be responsible under the *Occupational Health and Safety Act 2004* (Vic)³⁸—but which would not amount to the level of negligence required to sustain charges for an indictable offence related to the death itself. The absolute and inflexible application of the forfeiture rule in these circumstances would be unduly harsh and only add to the family tragedy. In view of the lower level of culpability attached to such offences, there would also be little community objection to allowing the offender to inherit.
- 3.39 While the court is unlikely to apply the forfeiture rule in these circumstances, the Commission is also aware that forfeiture rule cases do not often appear before the court. Approximately half of all estates are administered informally by non-professional executors who would be responsible for applying the forfeiture rule in the first instance.³⁹ The majority of forfeiture rule cases also settle before litigation.⁴⁰ In the interests of clarity and certainty for non-professional executors, the Commission recommends that the proposed Forfeiture Act specify that the forfeiture rule apply only where the killing is or would be murder or another indictable offence under the Crimes Act, unless specifically excluded by the Forfeiture Act.

35 Consultations 5 (Roundtable 1); 15 (Supreme Court of Victoria—Judges). Submissions 1 (Professor Prue Vines); 3 (Janine Truter); 9 (State Trustees).

36 Submission 8 (Crime Victims Support Association).

37 Consultation 5 (Roundtable 1).

38 For example, s 26.

39 In Victoria in 2010, there were 35,764 registered deaths. For the financial year 2010–11, the Supreme Court made 17,979 grants of representation. This means that for this period, there were 17,785 deaths for which there were no grants of representation, and the Supreme Court only made grants in relation to approximately 50 per cent of all registered deaths.

40 Stated by legal practitioners in attendance at Consultation 5 (Roundtable 1).

Indictable offences

3.40 In the Commission's view, the forfeiture rule should apply as a general principle to all instances of murder and other indictable homicide offences under the Crimes Act, except for the following offences:

- dangerous driving causing death
- manslaughter in pursuance of a suicide pact or aiding or abetting a suicide in pursuance of such a pact
- infanticide.

3.41 These offences are characterised by:

- the offender's low degree of moral culpability
- less stringent penalties
- lack of conflict between the offender and deceased person as a contributing factor to the death
- the possibility that the deceased person would not object to the offender obtaining a benefit from their estate
- the likelihood that a court would not apply the rule if it had a discretion not to.

Dangerous driving causing death

3.42 Dangerous driving causing death was created as an offence in response to a community perception that there was a gap in seriousness between culpable driving causing death, which involves the same degree of negligence as manslaughter, and dangerous driving.⁴¹

3.43 While still a serious offence, dangerous driving causing death involves conduct that is less blameworthy than culpable driving causing death because an offender need not have operated the vehicle in either a reckless or criminally negligent manner.⁴² Rather, the offender will have driven at a speed or in a manner dangerous to the public, and by doing so, caused the death of another person.⁴³ The two offences attract significantly different penalties—the maximum penalty for culpable driving causing death is 20 years imprisonment, while the maximum penalty for dangerous driving causing death is 10 years imprisonment.⁴⁴

3.44 Dangerous driving causing death convictions in Victoria have included cases where:

- a driver killed his 97-year-old mother-in-law by colliding with another vehicle when driving while fatigued⁴⁵
- a motor vehicle crossed to the other side of the road without explanation but, although the vehicle was travelling within the legal speed limit, it was travelling over the advisory speed limit at that particular point in the road⁴⁶
- an 18-year-old driver who had held his licence for 12 days drove a high-powered vehicle in the rain and attempted to overtake another driver, crossed double lines and lost control of the vehicle and killed one of his passengers.⁴⁷

41 Victoria, *Parliamentary Debates*, Legislative Assembly, 3 June 2004, 1798 (Rob Hulls, Attorney-General).

42 *King v The Queen* (1986) 161 CLR 423.

43 *Crimes Act 1958* (Vic) s 319(1); *King v The Queen* (1986) 161 CLR 423.

44 *Crimes Act 1958* (Vic) ss 318(1), 319(1).

45 *DPP v Board* [2012] VCC 2133 (20 December 2012).

46 *Howton v The Queen* (2012) 62 MVR 207.

47 *DPP v Neethling* (2009) 22 VR 466.

- 3.45 Driving is a routine activity that can have deadly consequences when performed in a manner dangerous to the public. It is important that this activity be performed in accordance with the law and in a manner that minimises the danger to others.
- 3.46 However, there are times when even a person who is normally a careful and considerate driver can have a momentary lapse and make a fatal mistake. Participants at the Commission's roundtables noted that the application of the forfeiture rule can be particularly harsh in relation to driving offences that result in death.⁴⁸ The offence does not attract the application of the forfeiture rule in either New Zealand or the United Kingdom.⁴⁹
- 3.47 It is also important to remember that, where the forfeiture rule may apply, the offender and the deceased person were in a close, personal and often familial relationship. In cases involving a motor-vehicle collision they will have generally been travelling together in the same vehicle. Given the lack of intention and the lower level of culpability, it is far more likely that the deceased person would want the offender to be able to inherit in these circumstances than if the offender and the deceased person were unknown to one another.
- 3.48 It is likely that a court would exercise a judicial discretion to modify the effect of the rule in the vast majority of these cases. Because of this, Professor Prue Vines suggested that deaths resulting from negligence in a car accident are particularly appropriate offences to exclude from the application of the rule, as it would save on costs to the estate.⁵⁰ The New South Wales Supreme Court has modified the effect of the rule in relation to dangerous driving causing death in *Straede v Eastwood*.⁵¹ This case has been characterised as one involving 'hostile relatives seeking to take pecuniary advantage of a tragic accident' by opposing the application to modify the effect of the rule in a 'speculative action devoid of merit', thereby resulting in costs to the estate.⁵² Cases like this should not need to go to court and would not if dangerous driving causing death were excluded from the rule.⁵³
- 3.49 Therefore, given the lower level of culpability of the offender, and in the interests of certainty and reducing costs, the Commission considers that it is appropriate that the offence of dangerous driving causing death be excluded from the application of the forfeiture rule.

Deaths pursuant to a suicide pact

- 3.50 Participants in a suicide pact can be held responsible for either manslaughter by suicide pact or aiding or abetting a suicide. The survivor of a suicide pact who is responsible for the fatal act will be guilty of manslaughter,⁵⁴ and the forfeiture rule will preclude them from inheriting from the deceased person.
- 3.51 Suicide is no longer a criminal offence,⁵⁵ but it is an offence in Victoria to aid or abet another to commit suicide.⁵⁶ A person who aids or abets another to commit suicide in a suicide pact is also precluded by the forfeiture rule from inheriting or otherwise taking a benefit from another member of that pact.⁵⁷ The moral culpability of the offenders in these offences is similar.

48 Consultations 5 (Roundtable 1); 16 (Roundtable 2).

49 *Succession (Homicide) Act 2007* (NZ) s 4(1); *Tinline v White Cross Insurance Association* [1921] 3 KB 327; *James v British General Insurance Co* [1927] 2 KB 311.

50 Submission 1 (Professor Prue Vines). For example, legal costs would be saved by removing the need to undertake litigation.

51 [2003] NSWSC 280 (2 April 2003).

52 Andrew Hemming, 'Killing the Goose and Keeping the Golden Nest Egg' (2008) 8 *Queensland University of Technology Law and Justice Journal* 342, 358.

53 *Ibid* 359.

54 *Crimes Act 1958* (Vic) s 6B(1).

55 *Ibid* s 6A.

56 *Ibid* s 6B(2)(b).

57 *Dunbar v Plant* [1998] Ch 412.

- 3.52 A death in pursuance of a suicide pact may result from the fatal actions of one or all parties to the pact. What distinguishes these offences from other types of unlawful killings is that the decision to commit the offence is entered into by agreement with the intention that none of the parties to the pact will survive. Parliament has also recognised in the Crimes Act that manslaughter by suicide pact differs from other types of manslaughter, as the maximum sentence is reduced to 10 years imprisonment as opposed to 20 years.⁵⁸ The maximum sentence for a person guilty of aiding or abetting a suicide is five years imprisonment.⁵⁹
- 3.53 The NZ Act excludes unlawful killings pursuant to a suicide pact from the scope of the forfeiture rule.⁶⁰ State Trustees, The Institute of Legal Executives (Victoria) and Janine Truter all suggested that deaths in pursuance of a suicide pact should not result in the application of the forfeiture rule. Michael Tinsley commented that such offences are appropriate for the exercise of a judicial discretion to modify the effect of the rule.⁶¹ Janine Truter put the view that it is preferable to have laws that are clear, simple and unambiguous on the issue of aiding or abetting a suicide and suicide pacts so that the trauma of losing a loved one is not compounded by legal uncertainty, the cost of funding court action or the potentially random nature of judicial discretion.⁶²
- 3.54 Given the low moral culpability of the offender and the tragic circumstances in which a suicide pact generally occurs, the court would be likely to exercise any judicial discretion in favour of the offender in these cases. This occurred in *Dunbar v Plant*,⁶³ where Lord Justice Phillips indicated that the normal approach of the courts would be to provide total relief against forfeiture.⁶⁴ He further suggested that:
- The aiding or abetting of the suicide of another in pursuance of a suicide pact is an offence that is likely 'to fall into the category of those [offences] in respect of which the public interest does not require a penal sanction'.⁶⁵
 - Where 'people are driven to attempt, together, to take their lives and one survives, the survivor will normally attract sympathy rather than prosecution'.⁶⁶
- 3.55 Both Ms Plant and the deceased person (Mr Dunbar) were in their early twenties. Ms Plant was under suspicion of false accounting and theft from her employer. In fear of the potential consequences and the prospect of imprisonment, she decided to take her own life. Mr Dunbar did not want to live without her so decided to commit suicide alongside her. There were two failed attempts at suicide after which they attempted to hang themselves with bed sheets. The noose around Ms Plant's neck became untied and she survived, but Mr Dunbar died. She then tried to cut her throat and wrists and jumped out of a window.

58 *Crimes Act 1958* (Vic) s 6B(1A).

59 *Ibid* s 6B(2).

60 *Succession (Homicide) Act 2007* (NZ) s 4(1).

61 Submissions 2 (Michael P Tinsley); 3 (Janine Truter); 9 (State Trustees); 16 (The Institute of Legal Executives (Victoria)).

62 Submission 3 (Janine Truter).

63 [1998] Ch 412.

64 *Ibid* 438.

65 *Ibid* 437.

66 *Ibid* 438.

- 3.56 The tragic circumstances in which suicide pacts occur and the low moral culpability of the offender in these types of cases are further illustrated by two Victorian cases: *DPP v Rolfe*⁶⁷ and *The Queen v Marden*.⁶⁸ In *DPP v Rolfe*, an 81-year-old man was convicted of manslaughter by suicide pact following an attempted joint suicide with his wife. His wife was going to be placed in an aged care home and the couple did not want to be separated. The couple was found unconscious after attempting to gas themselves but only Mr Rolfe could be saved. The offender was found to have been suffering severe psychiatric distress and depression at the time of the offence.⁶⁹ In sentencing Mr Rolfe to a two-year suspended sentence, Justice Cummins accepted that the proper function of sentencing was to deter people from the unlawful taking of life; however, the principle of general deterrence was modified by Mr Rolfe's psychiatric condition of major depression.⁷⁰
- 3.57 In *The Queen v Marden* the offender also pleaded guilty to manslaughter by suicide pact. In that case, the offender and his wife suffered from a history of poor health. Mrs Marden suffered from severe rheumatoid arthritis that left her in chronic pain and unable to perform everyday tasks. Mr Marden was classified as an 'Extremely Disabled Veteran'. He suffered cardiac problems, was wrongly diagnosed with lung cancer and had fractured a vertebra at the base of his spine, which required hospitalisation and ongoing physiotherapy and pain management. Mr Marden felt that he could no longer look after his wife and home and decided he had reached the end of his useful life. Justice Vincent accepted that neither Mr Marden nor his wife could see any prospect of an enjoyable life ahead of them, regarded the future with anxiety and both wished to end their lives. The offender attempted to electrocute his wife. Upon the failure of this attempt, he then smothered her and tried to end his own life by overdosing on pills, but was kept alive by his pacemaker.
- 3.58 Justice Vincent pointed out that 'the entry into such an agreement reflects the extreme level of despair which it is reasonable to assume was experienced by the participants'.⁷¹ Justice Vincent also pointed out the limited role of specific or general deterrence in cases of this type when sentencing the offender to a two-year suspended sentence.⁷²
- 3.59 In *Dunbar v Plant*, Lord Justice Phillips stated that:
- A suicide pact may be rational, as where an elderly couple who are both suffering from incurable diseases decide to end their lives together, or it may be the product of irrational depression or desperation. In neither case does it seem to me that the public interest will normally call for either prosecution or forfeiture should one party to the pact survive.⁷³
- 3.60 Regardless of the reasoning for the decision to enter a suicide pact, it is clear that the circumstances that result in a suicide pact are tragic and that the offender does not intend to benefit from the death. Instead, the application of the forfeiture rule would have adverse consequences for the offender and compound the issues that led to them attempting suicide. Among the consequences of the forfeiture rule for the survivor of a suicide pact is the possible loss of a home they jointly owned with the deceased person, or their entitlement to other assets to which they may have contributed and which the deceased person would be likely to want them to have.

67 (2008) 191 A Crim R 213.

68 [2000] VSC 558 (21 November 2000).

69 (2008) 191 A Crim R 213, 216 [22].

70 Ibid 218 [29].

71 *The Queen v Marden* [2000] VSC 558 (21 November 2000) [16].

72 Ibid [17]–[18].

73 *Dunbar v Plant* [1998] Ch 412, 438.

- 3.61 The Commission sees little benefit in applying the forfeiture rule to the survivor and requiring them to litigate to have the effect of the rule modified, which would place a further financial and emotional burden on the offender, the estate, and the family members of the deceased person.
- 3.62 Although the Commission recognises the importance of protecting human life, it also recognises the unique and tragic circumstances faced by those who have entered a suicide pact and their families. Given the low level of moral culpability of the offender and the circumstances in which these offences occur, there is unlikely to be any significant level of public opposition to the survivor of a suicide pact inheriting from the deceased person.
- 3.63 The Commission therefore recommends that deaths in pursuance of a suicide pact, for both the offences of aiding or abetting a suicide pursuant to a suicide pact and for manslaughter by suicide pact, should not result in the application of the forfeiture rule.⁷⁴

Infanticide

- 3.64 Infanticide is an alternative verdict for murder in Victoria and occurs when a woman causes the death of her child within two years of giving birth in circumstances that would otherwise constitute murder.⁷⁵ It is an offence of diminished responsibility.⁷⁶ In order to be guilty of the offence of infanticide the offender must be disturbed because of a failure to recover from the effect of giving birth or must suffer a disorder consequent to giving birth.⁷⁷ The forfeiture rule would currently preclude them from inheriting any property held on trust for the deceased infant.
- 3.65 Women who are responsible for infanticide generally suffer from severe psychiatric difficulties that cause an altered state of mind at the time of the offence. In *The Queen v Azzopardi*⁷⁸ the offender was found to have suffered from post-partum depression when she put her five-week-old daughter in the bath face first, causing her to drown. The offender had sought the assistance of a government helpline and medical professionals had noted her depressed state prior to the offence. Expert evidence provided to the court put forward the opinion that this was:
- a tragic case where a mentally disordered woman with a vulnerable personality killed her child in the context of a situation which was beyond her limited capacities to manage.⁷⁹
- 3.66 The case of *DPP v QPX*⁸⁰ also demonstrates the altered state of mind experienced by offenders in infanticide cases. In that case a mother caused serious injuries to infant twins, one of whom subsequently died, and was unable to articulate how the injuries had been sustained, although she admitted to having slapped one of the twins, to be unable to cope with her inability to settle the twins and to going 'into a daze'. Justice Bongiorno found that the picture that emerged from her police interview was of a 'distracted, frightened, and possibly mentally ill woman'⁸¹ and that her moral culpability was 'either non-existent or of such a low degree as to be negligible'.⁸²
- 3.67 Neither of these offenders had any history of criminality or mental illness prior to the birth of their children. Nor did they present an ongoing risk to the community or receive a custodial sentence. Both were also likely to need ongoing treatment and would continue to suffer considerably mentally and in other ways as a result of their crime.

74 See [4.45] for discussion of aiding or abetting a suicide more generally.
75 *Crimes Act 1958* (Vic) s 6(1).
76 *DPP v QPX* [2014] VSC 189 (28 March 2014), [12].
77 *Crimes Act 1958* (Vic) s 6(1).
78 [2004] VSC 509 (6 December 2004).
79 *Ibid* [23].
80 [2014] VSC 189 (28 March 2014).
81 *Ibid* [10].
82 *Ibid* [27].

- 3.68 State Trustees recommended that the forfeiture rule should not apply to offenders who have committed infanticide.⁸³ Infanticide is excluded from the rule in New Zealand.⁸⁴ In recommending the exclusion of infanticide, the New Zealand Law Commission regarded infanticide as sufficiently analogous to an acquittal on the grounds of mental impairment to justify its exception from the rule.⁸⁵ The Victorian Law Reform Commission agrees with this opinion.
- 3.69 The blameworthiness and responsibility of the offender in infanticide cases are significantly reduced compared to other offenders under criminal law. The offence attracts, at the maximum, five years imprisonment,⁸⁶ as opposed to potential sentences of life imprisonment or 20 years imprisonment on conviction for murder or manslaughter.⁸⁷ In both *The Queen v Azzopardi* and *DPP v QPX* a non-custodial sentence was given.
- 3.70 In *The Queen v Azzopardi*, Justice Kellam emphasised the role of the offender's illness in the offence stating that:
- A person suffering from an illness such as that you suffered and which affected your responsibility for your action is not an appropriate person either to deter from acting in this fashion by the punitive sanctions of the law, or to be made an example of to others in order to deter them from acting in this way. There is no suggestion in this case of any lapse of behaviour of any culpable kind that arose otherwise than by reason of the illness from which you suffered at the time.⁸⁸
- 3.71 Further, the Commission notes that infanticide is a very rare crime that, like verdicts of not guilty by mental impairment, affects only a limited and specific category of offenders. Its intersection with the forfeiture rule is also likely to be a very rare occurrence given the age of the victim. Consequently, the application of the forfeiture rule to such offences would be unlikely to have any deterrent effect. This was observed by Justice Bongiorno in *DPP v QPX*:
- Apart from her lack of blameworthiness, no court could ever inflict a punishment on QPX more severe than that which this tragedy has itself imposed upon her and will continue to impose for many years, perhaps forever. She needs no deterrent from reoffending; nor is there much scope for the application of principles of general deterrence; that is to say, the deterrent effect of punishment on the general population. Infanticides and assaults by mothers on their babies are, fortunately, rare crimes in this community.⁸⁹
- 3.72 In addition, infanticide offenders often suffer continuing mental health issues and vulnerabilities after the offence. According to expert testimony at trial, QPX continued to suffer after the infanticide from 'an acute grief reaction with strong features of depression.'⁹⁰ It was considered that without significant support she would remain at risk of worsening depression and of suicide. The application of the forfeiture rule would only add to the distress experienced by offenders in these circumstances.
- 3.73 Given these factors, it is the view of the Commission that offenders responsible for infanticide should not be precluded, as a matter of public policy, from inheriting from their child. Infanticide should therefore be exempted from the common law rule of forfeiture.

83 Submission 9 (State Trustees).

84 *Succession (Homicide) Act 2007* (NZ) s 4(1).

85 Law Commission (New Zealand), above n 3, 10.

86 *Crimes Act 1958* (Vic) s 6(1).

87 *Ibid* ss 3, 5.

88 *The Queen v Azzopardi* [2004] VSC 509 (6 December 2004) [27].

89 *DPP v QPX* [2014] VSC 189 (28 March 2014) [28].

90 *Ibid* [19].

Recommendations

- 3 The Forfeiture Act should specify that, subject to the exceptions in Recommendation 4, the forfeiture rule applies only where the killing, whether done in Victoria or elsewhere, would be murder or another indictable offence under the *Crimes Act 1958* (Vic).
- 4 The Forfeiture Act should specify that the forfeiture rule does not apply where the killing, whether done in Victoria or elsewhere, would be an offence under the *Crimes Act 1958* (Vic) of:
 - (a) dangerous driving causing death
 - (b) manslaughter pursuant to a suicide pact with the deceased person or aiding or abetting a suicide pursuant to such a pact, or
 - (c) infanticide.

Persons found not guilty by reason of mental impairment

- 3.74 The forfeiture rule does not apply at common law to persons found not guilty of an unlawful killing by reason of mental impairment.⁹¹ The Commission recommends that this exception be retained in the public interest and in the interests of justice.
- 3.75 In order to be found not guilty by reason of mental impairment an offender must prove that, at the time of committing the causative act, they were labouring under such a defect of reason from disease of the mind as to not know the nature and quality of the act they were doing, or if they did know, then they must not have known that the act was wrong.⁹² They will therefore not have formed the mental intent that needs to be proved to be held criminally responsible for the offence and are not morally culpable for their actions.⁹³
- 3.76 An offender who was conscious that the act was one that they should not be doing will be held criminally responsible and will be subject to the application of the forfeiture rule despite any mental condition they might be suffering. For example, in *Clift v Clift*⁹⁴ an intellectually disabled woman suffering from a depressive illness and delusions murdered her aunt and then killed herself. Medical evidence showed that she knew what she was doing, and knew that it was wrong, even though her mental condition meant she was unable to refrain from killing her aunt. The forfeiture rule was therefore applied.
- 3.77 This exception only applies to a very specific class of offenders and does not provide an incentive for people to claim to have a mental impairment in order to inherit. While it is open to the court to infer that a perpetrator must have been mentally ill at the time of the offence,⁹⁵ it is difficult in practice to prove that a person has a mental impairment.⁹⁶ In addition, a finding of not guilty by reason of mental impairment has serious consequences and is not treated lightly by the courts.

91 *In the Estate of Hall* [1914] P 1; *Re Houghton* [1915] 2 Ch 173; *Re Plaister; Perpetual Trustee Company v Crawshaw* (1934) 34 SR (NSW) 547.
92 *R v M'Naghten* (1843) 8 ER 718.
93 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Consultation Paper No 17 (2013) 10–11.
94 [1964–5] NSWR 1896.
95 *Re Pitts* [1931] 1 Ch 546.
96 See *Clift v Clift* [1964–5] NSWR 1896.

- 3.78 Victoria Legal Aid noted the significant consequences to the offender of a finding of not guilty by reason of mental impairment or unfit to be tried.⁹⁷ Under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA), these consequences include a requirement that the offender undertake a supervision process that can be onerous and last for a significant period.⁹⁸ The length of a supervision order is always indefinite and can last the rest of a person's life.⁹⁹ The process involves continual assessment and review of the person's progress under the order. The length of time that people are ultimately detained can vary, and research has shown that detention under the CMIA in Victoria has ranged from three months to 36 years.¹⁰⁰
- 3.79 Retaining the exception from the rule for persons found not guilty due to their mental impairment is also in the public interest as it may ease the burden of care for individuals on the state. A 2010 study on persons found not guilty by reason of mental impairment in Victoria suggests that the typical person who meets the requirements of this verdict is unemployed, unskilled and has not completed secondary schooling.¹⁰¹ Many people with a mental impairment will be likely to have ongoing care needs. If the forfeiture rule were to be applied to them, they may be more likely to require state support to meet these needs.

Options

- 3.80 The Commission's terms of reference require it to consider this exception to the forfeiture rule. In doing so, the Commission has identified three options:
- no change to the law
 - apply the rule at the court's discretion
 - apply the rule without exception.

No change to the law

- 3.81 Not applying the forfeiture rule to persons found not guilty of an unlawful killing by reason of their mental impairment ensures that they are not held accountable for actions for which they have been proven not to be responsible.¹⁰²
- 3.82 This absolute exception exists in most common law jurisdictions, including every Australian state and territory other than New South Wales.¹⁰³ In New South Wales, the court has a discretion, on application, to apply the forfeiture rule to a person who is not guilty by reason of mental illness.¹⁰⁴
- 3.83 The majority of submissions received by the Commission and the majority of views expressed during consultations support the retention of the existing exception. These include comments made by judges of the Supreme Court of Victoria and most of the participants at the Commission's roundtables and submissions by the Property and Probate Section of the Commercial Bar Association, the Law Institute of Victoria, Victoria Legal Aid, the Victorian Institute of Forensic Mental Health (Forensicare) and Professor Prue Vines.¹⁰⁵

97 Submission 7 (Victoria Legal Aid).

98 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 26.

99 *Ibid* s 27(1).

100 Victorian Law Reform Commission, above n 93, 49.

101 Janet Ruffles, *The Management of Forensic Patients in Victoria: The More Things Change, The More They Remain the Same* (PhD Thesis, Monash University, 2010) 122, 160.

102 Submission 5 (Forensicare).

103 *Re Pitts* [1931] 1 Ch 546; *Re Plaister; Perpetual Trustee Company v Crawshaw* (1934) 34 SR (NSW) 547; *Dhingra v Dhingra* (2012) OR (3d) 641; *Ford v Ford* 512 A 2d 389, 399 (Md, 1986).

104 *Forfeiture Act 1995* (NSW) s 11(1).

105 Consultations 5 (Roundtable 1); 15 (Supreme Court of Victoria–Judges); 16 (Roundtable 2). Submissions 1 (Professor Prue Vines); 5 (Forensicare); 7 (Victoria Legal Aid); 10 (Law Institute of Victoria); 14 (Property and Probate Section of the Commercial Bar Association).

3.84 Forensicare's submission stated that:

The exception is generally accepted and flows from the long established criminal law principle that a person should not be held criminally responsible for an offence if, at the time the offence occurred, they did not have the capacity to form a guilty mind in committing the offence because of a mental impairment...

Retaining the exception is important to ensure that the rights of persons found not guilty by reason of mental impairment are safeguarded and that they are not held accountable for actions for which they are not morally or criminally responsible.¹⁰⁶

3.85 Forensicare also expressed concern that the exercise of any discretion to apply the forfeiture rule to a person found not guilty by reason of mental impairment 'implies a degree of scepticism about a finding that a person is not guilty of an offence by reason of mental impairment'.¹⁰⁷

Apply the rule at the court's discretion

3.86 New South Wales,¹⁰⁸ Ohio¹⁰⁹ and Indiana¹¹⁰ have legislation that allows the rule to be applied to persons found not guilty due to their mental impairment. The Commission is unaware of any other jurisdictions in which the rule can be applied to persons found not guilty by reason of mental impairment.

3.87 Under the NSW Act, an interested person can apply to the court for an order that the forfeiture rule apply to someone who has been found not guilty by reason of mental illness as if they were found guilty of murder.¹¹¹

3.88 Likewise, in Indiana, if the killer has been found 'not responsible because of insanity at the time of the crime', another person can launch a civil action to have them declared a constructive trustee of the property for the benefit of third parties who would have otherwise been entitled if the person responsible had predeceased the deceased person.¹¹² In Ohio, there is a reversal of this onus. Legislation in that state prohibits a person who has been found not guilty by reason of insanity from benefiting from the deceased person's estate,¹¹³ but they can file a complaint in probate court to declare their right to benefit from the death.¹¹⁴

3.89 The Institute of Legal Executives (Victoria) supported the introduction of legislation in Victoria along the lines of the NSW Act. They argued that the court should have the discretion to apply the rule to a person found not guilty by reason of mental impairment.¹¹⁵

3.90 The discretion to apply the rule under the NSW Act was introduced to 'prevent mentally ill murderers from profiting from their crime by applying the forfeiture rule'.¹¹⁶ These reforms were contentious and were opposed strongly within Parliament and by organisations such as the Council for Civil Liberties and the International Commission of Jurists.¹¹⁷ The Legislation Review Committee formed the view that 'treating a person who has been found not guilty of a crime as if they had been convicted of that crime is a trespass on their fundamental rights'.¹¹⁸

106 Submission 5 (Forensicare).

107 Ibid.

108 *Forfeiture Act 1995* (NSW) s 11(1).

109 Ohio Rev Code Ann § 2105.19(A) (LexisNexis 2013).

110 Burns Ind Code Ann § 29-1-2-12.1(a) (2013).

111 *Forfeiture Act 1995* (NSW) s 11(1).

112 Burns Ind Code Ann § 29-1-2-12.1(b) (2013). They will be a constructive trustee of the property for the benefit of those who would be legally entitled to the property if the slayer had predeceased the victim: § 29-1-2-12.1(c).

113 Ohio Rev Code Ann § 2105.19(A) (LexisNexis 2013).

114 Ibid 2105.19(C).

115 Submission 16 (The Institute of Legal Executives (Victoria)).

116 New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 September 2005, 18042 (Graham West).

117 New South Wales, *Parliamentary Debates*, Legislative Council, 18 October 2005, 18648–9 (Arthur Chesterfield-Evans).

118 Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest*, No 11 of 2005, 10 October 2005, 14.

- 3.91 The forfeiture rule has been applied against a person who had been found not guilty by mental illness on three occasions in New South Wales.¹¹⁹ Consultations undertaken with judges of the New South Wales Supreme Court, the Elder Law and Succession Committee of the New South Wales Law Society and other New South Wales-based legal professionals suggest that there have been no major issues resulting from the change in the law and that the application of the forfeiture rule in these cases was appropriate.¹²⁰
- 3.92 However, the rationale for applying the rule to a person who is not morally culpable for the offence was not well articulated in Parliament and has not been made clear in the cases. Factors that have been considered relevant in determining whether to apply the forfeiture rule to a person found not guilty by reason of mental illness in New South Wales have included the offender's prior history of violent behaviour and lack of remorse.¹²¹ Such behaviour could be a manifestation of the mental impairment itself.¹²² Any outcome in which the forfeiture rule would be applied to a person who has been found not guilty because of a mental impairment on the basis of the symptoms of that mental impairment would be inappropriate.
- 3.93 The impact of the death of the deceased person on third parties has also been taken into account. In *Hill v Hill*,¹²³ where a man was found not guilty of the killing of his de facto spouse because of mental illness, the court considered the effect that the application of the forfeiture rule would have on their children. The Commission considers this to be an extension of the rule beyond its purpose in Victoria, which is to prevent an offender from benefiting from their crime rather than to distribute assets to the most deserving beneficiary. Family provision legislation is available to innocent beneficiaries who wish to increase their share of the deceased estate.¹²⁴

Apply the rule without exception

- 3.94 The Crime Victims Support Association supported the automatic application of the rule to persons found not guilty by reason of mental impairment without exception because:
- the killer might still have understood that they could benefit financially by their actions even if they didn't understand that the act itself was wrong
 - where the killer is likely to spend the bulk of their life institutionalised, the victim may have wanted their wealth directed to another beneficiary who might use that wealth more productively
 - there is nothing fundamentally wrong with denying an innocent person an inheritance.¹²⁵
- 3.95 However, Professor Prue Vines expressed concern that removal of the exception would suggest that the verdict is meaningless, is wrong or that the mental illness is fraudulent or not real.¹²⁶ The Commission holds similar concerns to Professor Vines.
- 3.96 The forfeiture rule is a rule of public policy that prevents an offender from benefiting from their crime. It should not be used in opposition to legal standards that determine an offender's moral culpability or responsibility for an offence.

119 *Re Fitter* [2005] NSWSC 1188 (24 November 2005); *Guler v NSW Trustee and Guardian* [2012] NSWSC 1369 (13 November 2012); *Hill v Hill* [2013] NSWSC 524 (7 May 2013).

120 Consultations 7 (Supreme Court of New South Wales–Judges); 9 (Elder Law and Succession Committee of the Law Society of New South Wales).

121 *Re Fitter* [2005] NSWSC 1188 (24 November 2005); *Guler v NSW Trustee and Guardian* [2012] NSWSC 1369 (13 November 2012).

122 Information provided by mental health professionals at Consultation 5 (Roundtable 1).

123 [2013] NSWSC 524.

124 *Administration and Probate Act 1958* (Vic) pt IV.

125 Submission 8 (Crime Victims Support Association).

126 Submission 1 (Professor Prue Vines).

The Commission's View

- 3.97 The Commission recommends that the existing exception to the forfeiture rule for persons found not guilty by reason of their mental impairment be retained. This exception is a generally accepted principle of long standing that safeguards the rights of persons with a mental impairment.¹²⁷
- 3.98 Few jurisdictions apply the forfeiture rule to persons found not guilty by reason of mental impairment. Those that do have departed from well-settled principles of law that a person who is not guilty by reason of mental impairment is not, and cannot, be held morally culpable for their actions.
- 3.99 While the Commission recognises the views and concerns of victims, the purpose of the forfeiture rule is not to provide a de facto form of compensation to victims of crime or another avenue to punish an offender when they have been found not to be responsible for an act. The Commission agrees with the views of Victoria Legal Aid that the competing interests of other parties in claiming a benefit from an estate should not form 'a basis for removing existing protections from a special category of persons that the civil and criminal law treat differently in other ways in recognition of their vulnerability'.¹²⁸
- 3.100 It would also ensure that there is a consistent approach to the issue of mental impairment in Victorian legislation. Under the *Confiscation Act 1997 (Vic)*, a forfeiture order to relinquish tainted property cannot be sought against someone found not guilty by reason of mental impairment.¹²⁹
- 3.101 The Commission shares the view of the Law Institute of Victoria, that retaining the exception also supports the underlying public policy rationale of the CMIA that seeks to achieve a therapeutic aim by promoting an increased understanding and tolerance of mental illness that can give rise to a mental impairment.¹³⁰ Exempting persons found not guilty of an unlawful killing by reason of their mental impairment from the forfeiture rule is consistent with this policy aim.
- 3.102 Given these reasons, the Commission sees little benefit in extending the application of the forfeiture rule to persons found not guilty by reason of mental impairment. The existing exception should therefore continue to apply.

Recommendation

- 5** The existing exception to the common law rule of forfeiture for persons found not guilty by reason of mental impairment should be retained.

127 *In the Estate of Hall* [1914] P 1; *Re Houghton* [1915] 2 Ch 173; *Re Plaister; Perpetual Trustee Company v Crawshaw* (1934) 34 SR (NSW) 547.
128 Submission 7 (Victoria Legal Aid).
129 *Confiscation Act 1997 (Vic)* ss 4, 32(1).
130 *Re LN (No 2)* [2000] VSC 159R (19 April 2000); Submission 10 (Law Institute of Victoria).

Judicial discretion to modify the effect of the rule

- 36** Introduction
- 36** The Commission's approach
- 37** Scope of the discretion
- 46** Forfeiture rule modification orders

4. Judicial discretion to modify the effect of the rule

Introduction

- 4.1 As discussed in Chapter 3, the proposed Forfeiture Act would set out the unlawful killings to which the forfeiture rule applies. Although promoting certainty, this reform would not address concern about the unfair consequences that can arise from applying the rule inflexibly. For this reason, the Commission proposes that the Forfeiture Act also provide the court with the discretion to modify the effect of the rule where the justice of the case requires.
- 4.2 The consequences of the forfeiture rule are significant—and are intended to be—because the rule conveys the community’s condemnation of anyone who unlawfully takes the life of another. However, the rule can operate unfairly in some cases. The introduction of a judicial discretion will provide an appropriate balance between preventing offenders from benefiting from their crime and allowing those who are less morally culpable or responsible in the circumstances to maintain their right to certain benefits and entitlements.
- 4.3 This chapter explores the details of how the discretion would be exercised. Relevant legislative provisions are identified and most are drawn from the *Forfeiture Act 1982* (UK) (‘the UK Act’); the *Forfeiture Act 1991* (ACT) (‘the ACT Act’); and the *Forfeiture Act 1995* (NSW) (‘the NSW Act’).

The Commission’s approach

- 4.4 The United Kingdom, the Australian Capital Territory and New South Wales provided the court with the discretion to modify the effect of the forfeiture rule so that it could ameliorate the consequences for an offender with a low degree of moral culpability. At the time, the court was expected to exercise its discretion in circumstances such as when the unlawful killing occurred in response to ongoing family violence¹ or pursuant to a suicide pact² or was an assisted suicide³ or was caused by culpable driving.⁴ In practice, courts in these jurisdictions have rarely been called on to exercise this discretion. The Commission expects that the exercise of the discretion would similarly be confined to exceptional cases in Victoria.

1 New South Wales, *Parliamentary Debates*, Legislative Council, 25 October 1995, 2257 (Jeffrey Shaw, Attorney-General); New South Wales, *Parliamentary Debates*, Legislative Council, 20 November 1995, 3481 (John Hannaford, Meredith Burgmann).

2 New South Wales, *Parliamentary Debates*, Legislative Council, 25 October 1995, 2257 (Jeffrey Shaw, Attorney-General); New South Wales, *Parliamentary Debates*, Legislative Council, 20 November 1995, 3481 (Meredith Burgmann).

3 New South Wales, *Parliamentary Debates*, Legislative Council, 25 October 1995, 2257 (Jeffrey Shaw, Attorney-General); New South Wales, *Parliamentary Debates*, Legislative Council, 20 November 1995, 3481 (Meredith Burgmann); New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 December 1995, 4473 (Andrew Tink, Faye Lo Po’).

4 New South Wales, *Parliamentary Debates*, Legislative Council, 25 October 1995, 2257 (Jeffrey Shaw, Attorney-General); New South Wales, *Parliamentary Debates*, Legislative Council, 20 November 1995, 3481–2 (Meredith Burgmann).

- 4.5 The proposed Forfeiture Act would provide the court with the discretion in respect of all offences to which the forfeiture rule applies except murder. An offender or other interested person would be able to make an application for a forfeiture modification order. The court would make the order if satisfied that it would be in the interests of justice to modify the effect of the rule.
- 4.6 In determining whether justice requires the effect of the rule to be modified, the court would have regard to the offender's moral culpability and responsibility for the unlawful killing and other matters that it considers relevant. The court would also have a broad discretion to modify the effect of the rule as appropriate in the circumstances.
- 4.7 A forfeiture rule modification order would be able to be made in respect of any or all of the property, entitlements or other benefits that the forfeiture rule prevents the offender from obtaining.

Scope of the discretion

Unlawful killings to which it would apply

- 4.8 On application, the court would have the discretion to modify the effect of the forfeiture rule whenever it applies, except when the offender has committed murder. The UK Act, the ACT Act and the NSW Act also exclude murder from the scope of the discretion.⁵
- 4.9 The court would not have the discretion to apply the rule where it would not otherwise apply. In this respect, the scope of the discretion would align with that provided by the UK and ACT Acts. The NSW Act uniquely provides for the court to apply the rule to persons who have been found not guilty because of mental illness.⁶

Exclusion of murder

- 4.10 The consultation paper stated that the Commission did not propose to open debate about whether the rule as it applied to convicted murderers should be modified in any way.⁷ A murderer has intentionally or recklessly and without lawful justification killed their victim or has inflicted serious injury that caused their victim's death. It is the most serious of homicides and attracts the strongest penalty.
- 4.11 Some submissions made in response to the consultation paper suggested that the Commission's position should be revisited. It was argued that the effect of the rule should be modifiable for an offender with a low degree of moral culpability, particularly when the murder was a response to ongoing and long-term family violence.⁸
- 4.12 Most organisations and individuals consulted during the course of the reference supported the general proposition that the forfeiture rule should always apply to murder⁹ and the Commission's view remains unchanged. Murder is the most serious of homicides and it would be contrary to the interests of public policy to allow the way in which the forfeiture rule applies to this offence to be modified in any way. In Victoria, a murderer is always morally culpable for their actions and, regardless of whether a difficult history might explain their actions, there can be no excuse for their crime or any justification for allowing them to benefit from that crime.

⁵ *Forfeiture Act 1982* (UK) c 34, s 5; *Forfeiture Act 1991* (ACT) s 4; *Forfeiture Act 1995* (NSW) s 4(2).

⁶ As discussed in Chapter 3, the Commission recommends that the common law not be modified regarding persons who are not guilty by reason of mental impairment in Victoria: Recommendation 5.

⁷ Victorian Law Reform Commission, *The Forfeiture Rule*, Consultation Paper No 20 (2014) 20.

⁸ Submission 1 (Professor Prue Vines).

⁹ Consultation 16 (Roundtable 2).

- 4.13 Loddon Campaspe Community Legal Centre proposed that any person convicted of murder before the offence of defensive homicide was introduced, in circumstances where the charge of defensive homicide was later available, should be able to apply to the court to have the effect of the rule modified.¹⁰ The Government subsequently introduced into Parliament a Bill to abolish the offence of defensive homicide.¹¹
- 4.14 Even if the offence were retained, the Commission does not consider it in the public interest to re-open historic cases so that an alleged or convicted offender can be retried in a civil court for an offence that did not exist at the time. The retrospective application of the forfeiture rule in this way could also put into question the distribution of estates that have long since been resolved.
- 4.15 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.¹² 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.

Determining what the 'justice of the case' requires

- 4.16 The introduction of a judicial discretion allows the law to be adaptable to the particular circumstances of the case. It follows that the court should be given broad discretion in order to respond to the unusual circumstances that would require a departure from the normal application of the rule.
- 4.17 At the same time, the legislation should direct the court's attention to the purposes of the discretion, which is to consider the circumstances of the case. The UK and NSW Acts have been criticised for giving the court insufficient guidance in exercising the discretion and because no clear principle dictates when the bar on profiting should apply.¹³ The Commission is concerned to ensure that forfeiture rule modification orders are made in view of the offender's moral culpability and responsibility for the unlawful killing.
- 4.18 The UK and ACT Acts state that the court may make an order that modifies the effect of the forfeiture rule if 'the justice of the case requires' the effect of the rule to be modified.¹⁴ The criterion in the NSW Act is that 'justice requires the effect of the rule to be modified'.¹⁵ Although the wording is similar, the Commission prefers the text of the UK and ACT Acts because it draws attention to the circumstances of the particular case.
- 4.19 The NSW Act allows the court to take a broader view of the circumstances of the offender and other beneficiaries and aim to achieve equitable outcomes between these beneficiaries. The Commission disagrees with this approach being taken in Victoria. Forfeiture rule modification orders should not be sought or made for the purpose of redistributing property to the person the court considers the most deserving. Part IV of the *Administration and Probate Act 1958* (Vic) already provides an avenue for beneficiaries to apply for a deceased person's estate to be redistributed in their favour.

10 Submission 11 (Loddon Campaspe Community Legal Centre).

11 The Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 was tabled in the Legislative Council on 25 June 2014. At the time of writing this report, the Bill had not been passed.

12 Consultation 15 (Supreme Court of Victoria—Judges).

13 Andrew Hemming, 'Killing the Goose and Keeping the Golden Nest Egg' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342, 356; New Zealand Law Commission, *Succession Law: Homicidal Heirs*, Report No 38 (1997) 5; Phillip H Kenny, 'Forfeiture Act 1982' (1983) 46 *Modern Law Review* 66, 68–72; Paul Matthews, 'Property, Pensions and Double Punishment: The Forfeiture Act 1982' (1983) *Journal of Social Welfare Law* 141, 147.

14 *Forfeiture Act 1982* (UK) c 34 s 2(2); *Forfeiture Act 1991* (ACT) s 3(2).

15 *Forfeiture Act 1995* (NSW) s 5(2).

- 4.20 Three factors to which the court should have regard in determining whether the effect of the rule should be modified appear in similar form in each of the UK, ACT and NSW Acts: the conduct of the offender, the conduct of the deceased, and any other circumstances that the court considers material.¹⁶
- 4.21 The NSW Act adds a fourth factor: ‘the effect of the application of the rule on the offender or any other person’.¹⁷ As this factor draws the court into reviewing how the deceased person’s estate is distributed among the beneficiaries, the Commission does not recommend that it appear in the Victorian Forfeiture Act.
- 4.22 The Commission therefore considers that Victoria’s Forfeiture Act should expressly direct the court’s attention to the offender’s moral culpability and responsibility for the unlawful killing. The court would still consider the three factors that are common to the UK, ACT and NSW Acts but it would be in the context of assessing culpability and responsibility.
- 4.23 For these reasons, the Commission recommends below that the court should be empowered to make a forfeiture rule modification order if satisfied, having regard to the offender’s moral culpability and responsibility for the unlawful killing and such other matters as appear material, that the justice of the case requires the effect of the rule to be modified.

Moral culpability

- 4.24 In its consultation paper, the Commission sought submissions on the guidance that the court should be given in exercising its discretion.¹⁸ Victoria Police suggested that the following factors could be considered relevant in determining moral culpability:
- the degree of the offence
 - the relationship between the offender and the deceased person prior to the offence
 - the public interest
 - any interactions with the Prisoner Compensation Quarantine Fund.¹⁹
- 4.25 Victoria Police added that the court could consider victim impact statements or input from other family members and interested parties when making a decision on whether to make a forfeiture rule modification order.²⁰
- 4.26 The Crime Victims Support Association proposed that the views of the deceased person should be a relevant consideration where it can be demonstrated that they forgave the offender.²¹
- 4.27 The Property and Probate Section of the Commercial Bar Association suggested that the sentencing judge should exercise the discretion in the first instance because they would have synthesised all the relevant matters. The judge would have regard to:
- the sentence
 - any appellate decision
 - victim impact statements
 - aggravating factors involved with the offence
 - the offender’s conduct after the commission of the offence
 - the responsibility of the deceased person to provide for the offender
 - the likelihood of the offender’s release from prison.²²

16 *Forfeiture Act 1982* (UK) c 34 s 2(2); *Forfeiture Act 1991* (ACT) s 3(2); *Forfeiture Act 1995* (NSW) ss 5(3)(a), 5(3)(b), 5(3)(d).

17 *Forfeiture Act 1995* (NSW) s 5(3)(c).

18 Victorian Law Reform Commission, above n 7, 54–5.

19 Submission 4 (Victoria Police).

20 Ibid.

21 Submission 8 (Crime Victims Support Association).

22 Submission 14 (Property and Probate Section of the Commercial Bar Association).

- 4.28 The idea that the sentencing judge could exercise the discretion generated interest at the Commission's second roundtable,²³ but there are significant practical barriers to intervening in the administration of the court list in order to have the sentencing judge decide on a forfeiture rule modification order. The parties to the criminal proceedings are not necessarily the same as those who would have an interest in an application for a forfeiture rule modification order. In addition, the sentencing judge may not be in a position to assess the responsibility of an offender to a civil standard. The evidentiary standards of a criminal trial are higher than in a civil trial and some evidence that is relevant at this standard may have been excluded from the criminal trial.
- 4.29 Nevertheless, it is important that the views of the sentencing judge are taken into account in assessing the offender's moral culpability. A simpler solution would be to require the court, in considering an application for a forfeiture rule modification order, to have regard to the findings of fact by the sentencing judge. Similarly, the findings of the coroner would also have relevance, particularly where there has not been a criminal trial or conviction.
- 4.30 The court should also have regard to the offender's state of mind at the time of the offence. The forfeiture rule is invoked to prevent an offender from taking a benefit arising from the death of the deceased person because of the conduct that caused the death. Any conduct or characteristics of the offender that are unrelated to the offence would be irrelevant to this assessment. For example, in *Straede v Eastwood*,²⁴ relatives of the deceased person asked the court to consider the offender's conduct in being involved in a *ménage à trois* with the deceased person and a third party over a 20-year period. The court declined to have regard to this conduct in making its decision as to whether to modify the effect of the rule.
- 4.31 The impact of the offence on victims is also a relevant consideration in this process. The Commission agrees with the views of Victoria Police and the Property and Probate Section of the Commercial Bar Association that the court should have regard to victim impact statements in assessing whether the effect of the forfeiture rule should be modified.
- 4.32 Victim impact statements will inform the court about cases where the deceased person forgave the offender, which the Crime Victims Support Association considers a relevant consideration. They could also provide information about the views of families that may have come to some agreement or reconciliation, such as in *R v R*,²⁵ where the offender's application to have the effect of the rule modified was supported by surviving family members.
- 4.33 However, given the varying circumstances in which unlawful killings occur, it would not be prudent to provide an exhaustive list of factors for the court to take into account.

23 Consultation 16 (Roundtable 2).

24 [2003] NSWSC 280 (2 April 2003).

25 (Unreported, Supreme Court of New South Wales, Hodgson CJ in Eq, 14 November 1997).

Recommendations

- 6 The Supreme Court should be empowered to make a forfeiture rule modification order if satisfied that, having regard to the offender's moral culpability and responsibility for the unlawful killing and such other matters as appear to the Court to be material, the justice of the case requires the effect of the rule to be modified.
- 7 In determining the moral culpability of the offender, the Supreme Court should have regard to:
 - (a) findings of fact by the sentencing judge
 - (b) findings by the Coroner
 - (c) victim impact statements presented at criminal proceedings for the offence
 - (d) submissions on interests of victims
 - (e) the mental state of the offender at the time of the offence, and
 - (f) such other matters that in the Court's opinion appear to be material to the offender's moral culpability.

Cases and examples

- 4.34 Courts in the United Kingdom and New South Wales have modified the forfeiture rule in a range of circumstances where the offender had a low level of moral culpability. These and other circumstances were identified in submissions in support of providing relief against the effect of the rule in Victoria. They include circumstances where:
- the unlawful killing was unintentional and non-violent
 - the offender was the victim of ongoing family violence
 - the offender was motivated by compassion
 - the offender had reduced responsibility
 - the offender was a minor.
- 4.35 They are summarised below and illustrate the need for the court to have a broad discretion in determining what the justice of the case requires and how to modify the effect of the rule.

When the unlawful killing was unintentional and non-violent

- 4.36 Submissions from Professor Prue Vines, State Trustees, the Property and Probate Section of the Commercial Bar Association and The Institute of Legal Executives (Victoria) suggested that the application of the forfeiture rule to unintentional killings may be unjust.²⁶ In addition, some participants at the Commission's roundtables said that the application of the forfeiture rule can be particularly unfair in negligent homicide or culpable driving cases.²⁷

²⁶ Submissions 1 (Professor Prue Vines); 9 (State Trustees); 14 (Property and Probate Section of the Commercial Bar Association); 16 (The Institute of Legal Executives (Victoria)).
²⁷ Consultations 5 (Roundtable 1); 16 (Roundtable 2).

- 4.37 The forfeiture rule has been modified in one such case in New South Wales. In *Straede v Eastwood*, Mr Straede applied to have the effect of the rule modified after pleading guilty to dangerous driving and being sentenced to two years imprisonment.²⁸ His wife had been killed in a car accident when he was at the wheel. Justice Palmer agreed to modify the effect of the rule, noting that there had been no suggestion that Mrs Straede's death was premeditated or that Mr Straede sought to profit from it.²⁹

When the offender was the victim of ongoing family violence

- 4.38 In the United Kingdom, courts have exercised the discretion to modify the effect of the rule in some cases involving family violence.³⁰ In the English case of *Re K Deceased*³¹ 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.
- 4.39 Victoria Police, the Property and Probate Section of the Commercial Bar Association and Professor Prue Vines made submissions proposing that a judicial discretion be available to modify the effect of the rule in situations where a victim of family violence kills their abuser.³²
- 4.40 Family violence is a serious problem in Victoria and the community is generally sympathetic to victims. The law in Victoria recognises that unlawful killings that take place in the context of family violence may differ from other types of homicide. This indicates that in individual cases the offender's culpability may be such that it would be unduly harsh to prevent them from taking a benefit from the deceased person.
- 4.41 In Victoria, women have been found guilty of the manslaughter of an abusive partner in cases where:
- a woman stabbed her partner in the course of a violent dispute, and received a wholly suspended sentence³³
 - a woman disarmed her partner and then shot him as he moved toward her during a violent dispute, and received a five-year custodial sentence³⁴
 - 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.³⁵
- 4.42 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.

When the offender was motivated by compassion

- 4.43 There are circumstances in which an offender is responsible for an unlawful killing and yet their motivation was not to profit or to cause harm to the deceased person, but to relieve them of their suffering from a medical condition. The application of the forfeiture rule in some of these cases can produce harsh results.

28 [2003] NSWSC 280 (2 April 2003).

29 Ibid [45].

30 *Re K Deceased* [1985] Ch 85; *Paterson (Freda), Petitioner* 1986 SLT 121.

31 [1985] Ch 25.

32 Submissions 1 (Professor Prue Vines); 4 (Victoria Police); 14 (Property and Probate Section of the Commercial Bar Association).

33 *R v Tran* [2005] VSC 220 (24 June 2005).

34 *R v Uttley* [2009] VSC 79 (16 March 2009).

35 *R v Gazdovic* [2002] VSC 588 (20 December 2002).

- 4.44 The aiding or abetting of a suicide is one such offence. While suicide is no longer a criminal offence,³⁶ it is an offence in Victoria to aid or abet another in the commission of a suicide.³⁷ Aiding or abetting a suicide is distinguished from other unlawful killings in that the offence is committed at the choice of the deceased person. However, the forfeiture rule will still preclude an offender who is responsible for this offence from inheriting from the deceased person.³⁸
- 4.45 Aiding or abetting a suicide was identified in consultations as an offence of potentially lower moral culpability that may appropriately be excluded from the application of the forfeiture rule, either fully or at the discretion of the court in individual cases.³⁹ Janine Truter preferred to have laws that are clear, simple and unambiguous so that the trauma of losing a loved one is not compounded by legal uncertainty, the cost of funding court action or the potentially random nature of judicial discretion.⁴⁰
- 4.46 Parliament has recognised that, as an offence, aiding or abetting a suicide has characteristics that distinguish it from the more abhorrent acts of unlawful killing that warrant a bar on inheritance. The maximum penalty for aiding or abetting a suicide in Victoria is five years imprisonment.⁴¹ However, in recognition of the usually tragic circumstances in which these crimes take place, the sentences imposed are often more lenient. In both *R v Hood*⁴² and *R v Maxwell*⁴³ the court imposed wholly suspended sentences on the offenders.
- 4.47 Generally, these cases involve a great deal of personal tragedy for all involved and are motivated by compassion and a desire to end the suffering of the deceased person. For example, in *R v Maxwell*, Mr Maxwell had assisted his wife to commit suicide to relieve her suffering from terminal cancer.⁴⁴ Mr Maxwell had attempted on numerous occasions to dissuade his wife from committing suicide and had sought herbal remedies to cure her. Mrs Maxwell had decided that she wished to die using a method she read about and required her husband's assistance to procure the materials and assist in performing the fatal acts.
- 4.48 Those who aid or abet a suicide are often close to the deceased, as in *R v Maxwell*, and it is likely that, rather than wishing to disinherit a beneficiary who helped them to commit suicide, a deceased person may appreciate their assistance and perhaps even want to reward them.⁴⁵ It may therefore be appropriate in some circumstances for the court to modify the effect of the forfeiture rule.
- 4.49 Another offence that might be motivated by compassion is a 'mercy killing' where the offender kills the victim in order to end the deceased person's suffering as a result of a medical condition. Criminal prosecutions of mercy killings are rare, although they have occurred in Victoria. In *R v Klinkermann*,⁴⁶ an elderly man was convicted of attempting to murder his wife, who had a significant disability and was dying, but was unable to communicate that she wanted to end her life.

36 *Crimes Act 1958* (Vic) s 6A.

37 *Ibid* s 6B(2)(b).

38 *The Public Trustee of Queensland v The Public Trustee of Queensland & Ors* [2014] QSC 47 (21 March 2014).

39 Consultation 16 (Roundtable 2). Submissions 3 (Janine Truter); 9 (State Trustees); 14 (Property and Probate Section of the Commercial Bar Association).

40 Submission 3 (Janine Truter).

41 *Crimes Act 1958* (Vic) s 6B(2).

42 (2002) 130 A Crim R 473.

43 [2003] VSC 278 (24 July 2003).

44 *Ibid* [4].

45 Jeffrey G Sherman, 'Mercy Killing and the Right to Inherit' (1993) 61 *University of Cincinnati Law Review* 803, 863.

46 [2013] VSC 65 (25 February 2013).

4.50 In *Re Dellow's Will Trusts*,⁴⁷ the offender suffered from depression as a result of her husband's helplessness following a number of strokes. She had turned on the gas taps on the kitchen stove and remained in the kitchen with her husband until they both died. The court found she had unlawfully killed her husband and was not entitled to his estate, but said:

It is in these circumstances that I find it somewhat repellent to have to hold that the wife was guilty of a crime which ranks amongst the most serious that can possibly be committed. The law in its concern for the protection of human life must be strong and, indeed, severe, but I cannot refrain from saying that, in its bearing on such a case as this, it is clumsy, crude and indeed, nowadays, if the case is regarded sympathetically, somewhat uncivilised... This is clearly a case for compassion rather than condemnation.⁴⁸

4.51 However, unlike the situation where someone has committed manslaughter in pursuance of a suicide pact, or has aided or abetted a suicide in pursuance of such a pact, an offender who aids or abets a suicide or claims to have committed a mercy killing may be primarily motivated to benefit in some way from the deceased person. The motivation of an offender is open to interpretation and it is important that vulnerable persons are protected from those who would prey upon their vulnerabilities for financial gain. For this reason, the Commission has not recommended that these offences be excluded from the operation of the forfeiture rule. Under the proposed Forfeiture Act, the court may agree to an application to modify the effect of the rule in view of the circumstances of an individual case.

When the offender had reduced responsibility

4.52 The strict application of the forfeiture rule can likewise produce unjust outcomes when the offender has some form of mental impairment. While the forfeiture rule does not apply to an offender who is found not guilty by reason of mental impairment, an offender who is found guilty of the offence may have a mental impairment that reduces the level of their moral culpability and responsibility for the crime. This impairment might be taken into account in sentencing,⁴⁹ but the forfeiture rule would still preclude the offender from taking a benefit from the deceased person's estate.

4.53 Courts in New South Wales and the United Kingdom have modified the effect of the forfeiture rule because of the reduced responsibility of the offender.⁵⁰ For example, in *R v R*,⁵¹ the forfeiture rule applied to a 13-year-old boy who had killed his mother and sister and was found by the court to have diminished responsibility as a result of physical, sexual and emotional abuse by his father. He successfully applied to the court to have the effect of the rule modified in New South Wales and was supported in his application by his grandmother and older brother.

When the offender was a minor

4.54 The forfeiture rule will prevent offenders who were minors at the time of their offence from inheriting.⁵² However, minors are not regarded as having the same level of criminal responsibility or culpability as adult offenders in the criminal justice system, particularly if they are within the younger age range of offenders, and are subject to the special protections of the *Children, Youth and Families Act 2005* (Vic).

47 [1964] 1 WLR 451.

48 Ibid 455.

49 *R v Verdins* (2007) 16 VR 269.

50 *R v R* [1997] (Unreported, Supreme Court of New South Wales, Hodgson CJ in Eq, 14 November 1997); *Leneghan-Britton v Taylor* [1998] NSWSC 218 (28 May 1998); *Jans v Public Trustee* [2002] NSWSC 628 (2 July 2002); *Re H (Deceased)* [1990] 1 FLR 441.

51 (Unreported, Supreme Court of New South Wales, Hodgson CJ in Eq, 14 November 1997).

52 See *Re Fitter*; *Public Trustee v Fitter* [2005] NSWSC 1188 (24 November 2005); *Fitter v Public Trustee* [2007] NSWSC 1487 (13 December 2007).

- 4.55 Minors are nevertheless held responsible for their crimes and many who commit unlawful killings are aware that what they are doing is wrong. However, their reduced responsibility and moral culpability could be relevant to an assessment by the court as to whether the effect of the forfeiture rule should be modified in the interests of justice in a particular case.

Extent to which the rule can be modified

- 4.56 The court would be able to modify any of the benefits that the forfeiture rule prevents the offender from obtaining. For example, the rule could preclude an offender who was responsible for the death of their spouse from taking the jointly owned matrimonial home by survivorship as well as a number of gifts made by her will. In the circumstances, the court may decide that losing the interest in the home is unjust but the loss of other benefits is not.
- 4.57 The UK, ACT and NSW Acts contain similar provisions that enable the court to modify some or all of the property interests affected by the forfeiture rule.⁵³ For example, section 3(3) of the ACT Act provides that:
- (3) An order ... may be made in respect of any interest in property that the offender would have acquired but for the operation of the forfeiture rule and may modify the effect of the rule in either or both of the following ways:
 - (a) in respect of any 1 interest in property affected by the rule—by excluding the application of the rule in respect of all of the property or any part of it;
 - (b) where more than 1 interest in property is affected by the rule—by excluding the application of the rule in respect of all of the interests or any of them.
- 4.58 However, the equivalent provision in the NSW Act is presented only as an example of how the effect of the rule can be modified. In a separate provision that does not appear in the other Acts, the court's discretion is more broadly expressed:

6 Forfeiture modification orders may be moulded to suit circumstances

- (1) The Supreme Court may make a forfeiture modification order in such terms and subject to such conditions as the Court thinks fit.
- 4.59 The Commission considers that the court should have this breadth of discretion in Victoria. Like the NSW Act, the proposed Forfeiture Act would not confine the subject of the forfeiture rule modification to interests in property. The modifications—and combinations of modifications—that the court may order could be greater than those encompassed by the ACT and UK Acts.
- 4.60 As discussed in Chapter 5, the Commission recommends that existing relevant legislation be amended to set out the effect of the rule on property and other benefits, including the offender's eligibility to apply for family provision. The court's discretion should extend to modifying the effect of the rule as set out in the amended legislation. It follows that the Forfeiture Act should provide a broadly expressed power.

Recommendation

- 8** The Forfeiture Act should empower the Supreme Court to make a forfeiture rule modification order that modifies the effect of the rule in such terms and subject to such conditions as the Court thinks fit.

Forfeiture rule modification orders

- 4.61 A range of procedural issues related to the making of forfeiture rule modification orders needs to be addressed in the legislation.
- 4.62 The Commission is required by the terms of reference to propose specific legislative mechanisms for giving effect to the legislative reform that it recommends. In providing the following details of the proposed Forfeiture Act, it has drawn from the equivalent provisions in the ACT and NSW Acts in the interests of providing consistency where practicable.

Who may apply

- 4.63 The proposed Forfeiture Act should define who has standing to apply for a forfeiture rule modification order. In New South Wales an 'interested person' may apply to the court for a forfeiture modification order.⁵⁴ An 'interested person' is defined as:
- (a) an offender
 - (b) the executor or administrator of the estate of a deceased person
 - (c) a beneficiary under the will of a deceased person or a person who is entitled to any estate or interest on the intestacy of a deceased person
 - (d) a person claiming through an offender
 - (e) any other person who has a special interest in the outcome of an application for a forfeiture modification order.⁵⁵
- 4.64 In its examination of the forfeiture rule, the Tasmania Law Reform Institute endorsed this approach and observed that, if the offender cannot or does not wish to apply for an order, an application can be made by someone who could inherit through the offender, or by the offender's creditors.⁵⁶
- 4.65 The Law Institute of Victoria supports the adoption of this definition of 'interested person' in any equivalent Victorian legislation.⁵⁷ The Institute considers it to be suitably wide and to confer on the court the appropriate discretion 'to consider a broad range of circumstances in which a person may have a special interest in making an application for an order to modify the ordinary operation of the rule'.⁵⁸ The Institute also notes that a child of the offender who is also the grandchild of the deceased person could then apply for a forfeiture rule modification order in order to be able to inherit from their grandparent's estate.
- 4.66 However, there would be no need for the Victorian Forfeiture Act to provide express rights for innocent beneficiaries and persons claiming through the offender to apply for a forfeiture rule modification order. The Commission makes several recommendations addressing the effect of the forfeiture rule on innocent third parties in Chapter 5. These reforms would allow persons claiming through the offender and the beneficiaries of a gift over in a will to inherit where, in effect, the rule may currently prevent them from doing so. It is therefore not necessary to define them as an 'interested person' in order to ensure their interests can be advanced. An innocent third party who can otherwise demonstrate to the court that they have an interest would still be able to apply for a forfeiture rule modification order on that basis.

54 *Forfeiture Act 1995* (NSW) s 5.

55 *Ibid* s 3.

56 Tasmania Law Reform Institute, *The Forfeiture Rule*, Final Report No 6 (2004) 25–6.

57 Submission 10 (Law Institute of Victoria).

58 *Ibid*.

- 4.67 Applications for a forfeiture rule modification order should not be viewed as an alternative avenue for making a claim for family provision or recovering a debt owed by the disentitled beneficiary by drawing on the deceased person's estate. The purpose of forfeiture rule modification orders should be confined to addressing injustice caused to individual offenders by the application of the forfeiture rule.

Recommendations

- 9 Where a person has unlawfully killed another person and is thereby precluded by the forfeiture rule from obtaining a benefit, and the unlawful killing does not constitute murder, that person, or another 'interested person', should be able to apply for a forfeiture rule modification order.
- 10 An 'interested person' should mean:
- (a) the 'offender' (a person who has unlawfully killed another person) or a person applying on the offender's behalf
 - (b) the executor or administrator of a deceased person's estate, or
 - (c) any other person who in the opinion of the Court has an interest in the matter.

Effect of forfeiture rule modification orders

- 4.68 The proposed Forfeiture Act should clarify the benefits that will be affected by a forfeiture rule modification order.
- 4.69 The ACT Act enables the court to modify the effect of the rule in respect of 'any interest in property that the offender would have acquired but for the operation of the forfeiture rule'.⁵⁹ 'Property' includes 'any thing in action or incorporeal moveable property'.⁶⁰
- 4.70 However, in New South Wales, an order modifying the effect of the rule may apply to anything that comes within the broader category of a 'benefit', which includes any interest in property and any entitlement under Chapter 3 of the *Succession Act 2006* (NSW) (which concerns applications for family provision).⁶¹
- 4.71 At common law, the forfeiture rule affects all rights of the offender to property, entitlements and other benefits that may flow to the offender as a result of the death of the deceased person. As discussed in Chapter 5, this should include the right to make a claim for family provision under Part IV of the *Administration and Probate Act 1958* (Vic).
- 4.72 Any forfeiture rule modification order needs to be able to be applied to all property, entitlements and other benefits to which the forfeiture rule applies and over which the court has jurisdiction, as in the NSW Act. Neither an offender's appointment as executor of the deceased person's estate, nor their eligibility to be appointed administrator, is a benefit. This issue is discussed in Chapter 5.

59 *Forfeiture Act 1991* (ACT) s 3(3).
 60 *Ibid* Dictionary.
 61 *Forfeiture Act 1995* (NSW) s 3.

Recommendations

- 11 The property, entitlements and other benefits that may be affected by a forfeiture rule modification order should be specified in the Forfeiture Act and include:
 - (a) gifts to the offender made by the will of the deceased person
 - (b) entitlements on intestacy
 - (c) eligibility to make an application for family provision under Part IV of the *Administration and Probate Act 1958* (Vic)
 - (d) any other benefit or interest in property that vests in the offender as a result of the death of the deceased person.
- 12 On the making of a forfeiture rule modification order, the forfeiture rule should have effect for all purposes (including purposes relating to anything done before the order was made) subject to modifications made by the order.

Revocation and variation of forfeiture rule modification orders

- 4.73 There may be circumstances where the court will need to revoke or vary a forfeiture rule modification order. Section 8 of the NSW Act sets out the circumstances in which an order can be revoked or varied.⁶² These circumstances include when an offender is pardoned, when their conviction is quashed or set aside and there are no further avenues of appeal, or in all other circumstances in the interests of justice.
- 4.74 The Commission considers such a provision essential to allow for the court to consider new evidence that may exonerate an offender. A forfeiture rule modification order previously made by the court may enable the applicant to obtain only some, but not all, of their entitlements. Such an order would therefore need to be revoked to enable an exonerated person to make a claim on the rest of the property to which they may be entitled.

Recommendations

- 13 On application by an interested person, the Supreme Court should be empowered to revoke or vary a forfeiture rule modification order if the justice of the case requires it.
- 14 An interested person (as defined in Recommendation 10) should be able to apply for revocation or variation of a forfeiture rule modification order if:
 - (a) the offender is pardoned
 - (b) the offender's conviction is quashed or set aside and there are no further avenues of appeal available in respect of the decision to quash or set aside the conviction, or
 - (c) in all other cases—if the Court considers it just in all the circumstances to give leave for such an application to be made.

Recommendation

- 15 If a forfeiture rule modification order is revoked or varied, the forfeiture rule should have effect for all purposes (including purposes relating to anything done before the order was revoked or varied):
- (a) in the case of a revocation—subject to the terms on which the Court revokes the order, and
 - (b) in the case of a variation—subject to modifications made by the varied order.

Time limits for application

- 4.75 The proposed Forfeiture Act should specify a time limit within which an application for a forfeiture rule modification order can be made. This will provide certainty to the offender, the executor or administrator of the estate and other beneficiaries.
- 4.76 In the United Kingdom and the Australian Capital Territory, proceedings to modify the effect of the rule for a person convicted of an unlawful killing (or of aiding, abetting, counselling or procuring the death of the victim) must be brought within three months of the conviction.⁶³ In New South Wales, the application must be made within 12 months of the date on which the forfeiture rule takes effect and the court may give leave for a late application.⁶⁴

Suggested time limits

- 4.77 The Law Institute of Victoria suggested that there be a 12-month limit, as in New South Wales.⁶⁵ The Institute also considers it important to provide for the court to be able to extend the time limit or to grant leave for a late application:

It is foreseeable that there will be circumstances where parties may not become immediately aware of a death, for example, in missing persons cases or where a body is found long after a disappearance or where the cause of death may change some time later, for example, as the result of a cold case finding. It would be appropriate for the court to have discretion to extend the time limit on making an application in these circumstances so as not to disadvantage any interested person entitled to apply for the rule to be modified.⁶⁶

- 4.78 The Law Institute of Victoria added that an application for an extension of time should not be able to be made after the estate has been distributed.⁶⁷ This is in line with the approach taken for applications for family provision under Part IV of the Administration and Probate Act.⁶⁸ The Institute observed that, in practice, the court would be unlikely to grant an extension in such circumstances.⁶⁹

63 *Forfeiture Act 1982* (UK) c 34, s 2(3); *Forfeiture Act 1991* (ACT) s 3(4).

64 *Forfeiture Act 1995* (NSW) s 7.

65 Submission 10 (Law Institute of Victoria).

66 Ibid.

67 Ibid.

68 *Administration and Probate Act 1958* (Vic) s 99.

69 Submission 10 (Law Institute of Victoria).

- 4.79 State Trustees, the Property and Probate Section of the Commercial Bar Association and The Institute of Legal Executives (Victoria) suggested that the time limit for bringing an application for a forfeiture rule modification order should be the same as for a Part IV application,⁷⁰ which is currently within six months of the grant of representation.⁷¹ However, criminal proceedings will generally extend beyond six months, so more time will be needed if the offender is being prosecuted.

Proposed reforms

- 4.80 The Commission agrees that the time limit for an application for a forfeiture rule modification order should be as consistent as possible with applications under Part IV of the Administration and Probate Act. However, to accommodate the length of criminal proceedings, the court should be able to grant leave to make a late application and the time limit for making an application should have greater flexibility. To achieve the flexibility required, the Commission suggests the adoption of a provision similar to that in the NSW Act but with a time limit of six months (rather than 12) for consistency with Part IV of the Administration and Probate Act.

Recommendations

- 16 The Forfeiture Act should provide that, unless the Supreme Court gives leave for a late application to be made, an application for a forfeiture rule modification order must be made by the later of:
- (a) if the forfeiture rule operates immediately on the death of a deceased person to prevent the offender from obtaining the benefit concerned—within six months from the date of the death of the deceased person
 - (b) if the forfeiture rule subsequently prevents the offender from obtaining a benefit—within six months from the date on which the forfeiture rule operates to preclude the offender from obtaining the benefit concerned
 - (c) six months after grant of probate of the will of the deceased person or letters of administration of the deceased person's estate
 - (d) six months after all charges of unlawful killing laid against any beneficiary have been dealt with.
- 17 The Supreme Court should be permitted to give leave for a late application for a forfeiture rule modification order if:
- (a) the offender concerned is pardoned by the Governor after the expiration of the relevant period
 - (b) the offender's conviction is quashed or set aside by a court after the expiration of the relevant period and there are no further avenues of appeal available in respect of the decision to quash or set aside the conviction
 - (c) the fact that the offender committed the unlawful killing is discovered after the expiration of the relevant period, or
 - (d) the Court considers it just in all the circumstances to give leave.

70 Submissions 9 (State Trustees); 14 (Property and Probate Section of the Commercial Bar Association); 16 (The Institute of Legal Executives (Victoria)).

71 *Administration and Probate Act 1958* (Vic) s 99. The court may extend this timeframe.

Evidentiary effect of conviction

Current law

- 4.81 The benefit of establishing a statutory nexus between a conviction for an indictable offence under the *Crimes Act 1958* (Vic) and the application of the forfeiture rule would be enhanced by strengthening the connection in civil proceedings.
- 4.82 Currently, a person found guilty of unlawfully killing the deceased person may be able to challenge the correctness of the conviction in subsequent civil proceedings regarding the forfeiture rule.
- 4.83 Evidence of the conviction is generally admissible⁷² and may be given by a certificate signed by a judicial officer or other authorised officer of the court concerned.⁷³ However, this evidence can only prove that the person was convicted of the offence. It does not prove the facts on which the conviction was based. Section 91(1) of the *Evidence Act 2008* (Vic) provides that:
- Evidence of the decision or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.
- 4.84 In *Gonzales v Claridades*,⁷⁴ Justice Campbell examined how equivalent provisions in the *Evidence Act 1995* (NSW) can affect civil proceedings regarding the application of the forfeiture rule. Sef Gonzales had been charged with the murder of his sister and both of his parents. His father had died last and all of his mother's assets had passed to his father's estate. Mr Gonzales sought an order that the executor pay him sufficient money from his father's estate to finance his defence of the criminal charges.
- 4.85 Justice Campbell traced the history of changes to the admissibility and significance, in civil proceedings, of a conviction for an offence involving unlawful killing. He then observed that:
- If the outcome of Sef's trial were to be a conviction, that conviction would be admissible in any civil proceedings to which he was a party in which there was an issue about whether he had forfeited the benefit under his father's estate. However anyone who was contending, in such proceedings, that a forfeiture had occurred would still bear the legal onus of so proving, and it would be open to Sef to call evidence, if he wished, with a view to showing that any such conviction was erroneous.
- It follows that, whether the outcome of Sef's trial is a conviction or an acquittal, that outcome will not be determinative of any civil proceedings to which he is a party in which there is an issue about whether Sef's benefit under his father's will has been forfeited.⁷⁵
- 4.86 In practice, the case is rarely retried entirely for the purpose of determining whether the forfeiture rule applies, although there was a complete rerun of the criminal trial in *Troja v Troja*⁷⁶ where evidence was adduced by the police and experts.⁷⁷ A complete rerun of a trial can be very expensive for parties to the case and potentially to the estate.

72 There are exceptions for evidence of a conviction that is under review or appeal, has been quashed or set aside, or in respect of which a pardon has been given: *Evidence Act 2008* (Vic) s 92(2).

73 *Ibid* s 178.

74 (2003) 58 NSWLR 188.

75 *Ibid* 206.

76 (1993) 33 NSWLR 269.

77 Lindsay Ellison SC, "'The Money or the Gun': Death, Killing, Forfeiture and Inheritance' (Paper presented at the Conference on Inheritance Disputes and Family Provision Claims, Grace Hotel, 77 York St, Sydney, 28 March 2012) 26.

Proposed reform

- 4.87 By clarifying the scope of the forfeiture rule, the proposed Forfeiture Act will reduce the need for litigation to determine whether the rule applies to a person who has been convicted of the unlawful killing. However, it will not remove it. An offender who has been convicted of an offence in another Australian state or territory that does not directly align with a relevant indictable offence under the Crimes Act could seek an order from the court to determine whether the forfeiture rule applies. In addition, it will be possible for a person who has been convicted to apply to the court for a forfeiture rule modification order.
- 4.88 Proceedings to determine the application or effect of the forfeiture rule with respect to a convicted offender should not provide an avenue to reopen the question of whether they committed the offence at all. It would lengthen the proceedings, causing further costs and delays in distributing the deceased person's estate, and would increase the emotional toll on the innocent members of the deceased person's family.
- 4.89 In proceedings under the *Succession (Homicide) Act 2007* (NZ) ('the NZ Act'), an offender's conviction is conclusive proof that they are guilty of the unlawful killing:

14 Evidential effect of conviction in New Zealand

(1) The conviction in New Zealand of a person for the homicide of another person or a child that has not become a person is conclusive evidence for the purposes of this Act that the person is guilty of that homicide, unless that conviction has been quashed.

- 4.90 The Commission considers that the Victorian Forfeiture Act should contain a provision to the same effect. Precluding the offender from putting the question of their guilt to the court in its civil jurisdiction would not be an injustice because their guilt has already been established to the criminal standard of proof beyond reasonable doubt. Logically, it follows that they would be found guilty on the lower civil standard of balance of probabilities.

Recommendation

- 18 The Forfeiture Act should provide that a conviction in Victoria or another Australian state or territory is conclusive evidence that an offender is responsible for the unlawful killing.

Other procedural matters

Definitions

- 4.91 Although the choice of terminology is a matter for Parliamentary Counsel, there is merit in adopting terms and definitions used in the ACT and NSW Acts. Any arbitrary distinctions could take on an unintended significance and create real or apparent complexity.

4.92 Key terms that are likely to appear in the Victorian legislation, and the Commission's preferred definitions, are set out below.

- **Forfeiture Rule**

The ACT and NSW Acts define the rule in terms that are almost identical and are taken from the UK Act.⁷⁸ The Commission can see no advantage in departing from the established definitions. The definition in the NSW Act is:

the unwritten rule of public policy that in certain circumstances precludes a person who has unlawfully killed another person from acquiring a benefit in consequence of the killing.⁷⁹

- **Unlawful killing**

The definition of unlawful killing in the Victorian Forfeiture Act will not be the same as in the ACT and NSW Acts, as those Acts do not exclude any offences from the application of the forfeiture rule. However, both include within their definitions aiding, abetting, counselling or procuring a homicide to which the rule applies.

The Commission considers that the definition in the Victorian Forfeiture Act should:

- refer to the offences specified in Recommendation 3
- exclude those set out in Recommendation 4
- encompass aiding, abetting, counselling or procuring an offence to which the rule applies.

- **Deceased person**

While the ACT Act avoids directly referring to the person who has been unlawfully killed, the NSW Act refers to that person as 'the deceased person' and the NZ Act refers to 'the victim'.

The Commission considers that there is no compelling reason not to adopt the terminology of the NSW Act. The deceased person is certainly a victim, but there can be multiple victims of a crime and the focus of the legislation is on succession on death.

- **Property**

Property is not defined in the NSW Act. The definition in the ACT Act simply states:

Property includes any thing in action or incorporeal moveable property.⁸⁰

The definition used in the Victorian legislation should similarly encompass real and personal property, and tangible and intangible property, to ensure that the net is cast wide enough to encompass the different assets that may be forfeited under the rule. The Commission prefers the definition used in the NZ Act because it is expressed more simply:

Everything that is capable of being owned, whether it is real or personal property, and whether it is tangible or intangible property, and includes any estate or interest in property.⁸¹

78 *Forfeiture Act 1991 (ACT) Dictionary; Forfeiture Act 1995 (NSW) s 3; Forfeiture Act 1982 (UK) c 34, s 1.*
 79 *Forfeiture Act 1995 (NSW) s 3.*
 80 *Forfeiture Act 1991 (ACT) Dictionary.*
 81 *Succession (Homicide) Act 2007 (NZ) s 4.*

- **Will**

The ACT and NZ Acts specify that a reference to a will includes a codicil.⁸² The distinction between a will and a codicil would be of no significance to the interpretation or application of the Victorian Forfeiture Act. For the avoidance of doubt, it would be prudent to include in the new legislation a statement that a will includes a codicil.

Application of the Act

- 4.93 The Commission has recommended that the scope of the forfeiture rule should encompass unlawful killings in Victoria or elsewhere that would be murder or another indictable offence under the Crimes Act, unless excepted by Recommendation 4.⁸³ The scope of the Act will need to be commensurate.
- 4.94 The property affected by the operation of the Act will need to be specified as well, and be confined to the reach of the jurisdiction of the courts of Victoria.
- 4.95 The Commission expects that the provision in the Victorian Forfeiture Act could be based on section 4(1) of the NSW Act:

4 Application of Act

- (1) This Act applies to the following:
- (a) an unlawful killing whether occurring inside or outside the State
 - (b) property:
 - (i) located within the State, or
 - (ii) located outside the State, but only to the extent to which courts of the State have jurisdiction to make orders concerning the property.

Transitional provisions

- 4.96 The transitional provisions in the proposed Forfeiture Act will need to specify:
- the unlawful killings to which the Act will apply, with regard to determining when a person who has committed an offence that falls within the defined scope of the rule is subject to the Act and may apply for a forfeiture rule modification order, and
 - the property regarding which a forfeiture rule modification order may be made.
- 4.97 Relevant provisions on which the Victorian provision could be based include section 9 of the NSW Act and section 5(2) of the NZ Act.

NSW Act

9 Transitional provisions

- (1) A forfeiture modification order may be made in respect of:
- (a) an unlawful killing occurring before or after the commencement of this Act, or
 - (b) the application of the forfeiture rule in proceedings commenced but not determined before the commencement of this Act.
- (2) A forfeiture modification order is not to be made modifying the effect of the forfeiture rule in respect of any interest in property that, in consequence of the rule, has been acquired before the commencement of this Act by a person other than the offender or a person claiming through the offender.

- (3) However, nothing in this Act affects any determination of a court concerning the application of the forfeiture rule in any proceedings that was made before the commencement of this Act.

NZ Act

5 Effect and application

- (1) ...
- (2) This Act applies to interests in and claims against property resulting from the death of a victim after the commencement of this Act but does not affect—
- (a) any interest in or claim against property that is the subject of a proceeding commenced before the commencement of this Act, whether or not judgment has been delivered in that proceeding or an appeal against judgment was commenced before that time; or
 - (b) any interest in property a person (other than a killer) acquired for value; or
 - (c) the entitlement of any person under a contract.
- (3) Subsection (2) overrides subsection (1).

4.98 The Commission prefers the adoption of a provision equivalent to that in the NSW Act in the interests of consistency between Australian jurisdictions.

Recommendation

19 The transitional provisions should be based on section 9 of the *Forfeiture Act 1995* (NSW).

Effect on probate proceedings

- 4.99 The Commission acknowledges that the introduction of a Forfeiture Act affords an opportunity to set out procedures for personal representatives and others with an interest in the deceased person's estate to apply to the court to determine whether the forfeiture rule applies to a person who has not been convicted for the unlawful killing.
- 4.100 In its report on the forfeiture rule,⁸⁴ the Tasmania Law Reform Institute recommended that its proposed Forfeiture Act expressly provide for a beneficiary to apply to the court for an order as to whether the forfeiture rule applies. The Institute recommended that the application be made within three months of either the grant of representation being made, or all charges against any beneficiary being finally dealt with, whichever is the later.⁸⁵
- 4.101 There is currently no specific procedure for applying to the court in Victoria to determine whether the forfeiture rule applies. While the idea of setting out a path in the new Forfeiture Act appears sensible for completeness and ease of reference, the Commission has concluded that it would ultimately not serve a useful purpose in practice.

⁸⁴ Tasmania Law Reform Institute, above n 56.
⁸⁵ Tasmania Law Reform Institute, above n 56, 21, 27.

- 4.102 The *Administration and Probate Act 1958* (Vic) and statutory procedural rules of the court⁸⁶ provide various pathways by which the court may be asked to determine questions relating to the administration and distribution of the deceased person's estate, including questions about whether the forfeiture rule disentitles a beneficiary from receiving a benefit under a will or on intestacy. The Commission is not aware of any concern that there are insufficient options available.
- 4.103 Further, any new procedural rules would rarely be used, as the introduction of the proposed Forfeiture Act should decrease the need for the court to determine whether the rule applies. Even now, the Probate Office rarely comes across the forfeiture rule in granting representation⁸⁷ and most cases concerning the rule are settled before being brought before a judge.⁸⁸
- 4.104 The new Forfeiture Act is not intended to replace existing procedures of the court in determining whether the rule applies, and nor should it duplicate them.
- 4.105 For these reasons, the proposed Forfeiture Act should not disturb current arrangements by which an application may be made to the Supreme Court for a declaration of whether the forfeiture rule applies to a person who has not been convicted of an unlawful killing.

86 *Supreme Court (Administration and Probate) Rules 2004* (Vic); *Supreme Court (General Civil Procedure) Rules 2005* (Vic); *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* (Vic);

87 Correspondence with the Registrar of Probates, 7 March 2014.

88 Information provided by legal professionals at Consultation 5 (Roundtable 1).

Effect of the forfeiture rule

- 58** Introduction
- 59** Appointment of personal representative
- 63** Benefits from the estate
- 73** Interests in property
- 79** Other benefits

5. Effect of the forfeiture rule

Introduction

- 5.1 In preventing an offender¹ from receiving property or other benefits to which they would be entitled, the forfeiture rule—an unwritten public policy—modifies provisions in Acts of Parliament, the deceased person’s will, trust deeds, contracts of insurance, and other legally binding agreements. Many questions about how the rule applies can arise for the executor or administrator, the offender, innocent beneficiaries or anyone else with an interest in the deceased person’s estate. The *Forfeiture Act 1982* (UK) (‘the UK Act’), the *Forfeiture Act 1991* (ACT) (‘the ACT Act’) and the *Forfeiture Act 1995* (NSW) (‘the NSW Act’) have been criticised for only providing ‘partial coverage’ of the forfeiture rule, by giving the court a discretion to alter its effect but failing to deal with what the effect would normally be.²
- 5.2 The proposed Forfeiture Act would not only provide for the court to modify the effect of the rule but would also amend existing legislation to provide greater certainty about the effect of the rule on the distribution of a deceased person’s assets, whether within their estate or outside it.
- 5.3 The amendments to existing legislation are discussed in this chapter and concern the following matters:
- whether the offender can act as executor or administrator of the deceased person’s estate
 - what to do with a forfeited gift in a will that requires it to be given to another named beneficiary in the event that the offender dies before the will-maker
 - the effect of the rule on the ability of the offender’s children to inherit a share of the deceased person’s estate
 - whether the offender may make an application for family provision under Part IV of the *Administration and Probate Act 1958* (Vic)
 - the effect of the rule on the deceased person’s interest in property that they and the offender owned as joint tenants.
- 5.4 The amendments will not address all of the issues that arise for those affected by the rule, but they should reduce the financial and emotional costs of resolving them.

¹ ‘Offender’ in this report refers to a person who unlawfully kills another, whether or not they are convicted of an offence.

² Andrew Hemming, ‘Killing the Goose and Keeping the Golden Nest Egg’ (2008) 8 *Queensland University of Technology Law and Justice Journal* 342, 354.

Appointment of personal representative

- 5.5 The forfeiture rule is usually expressed in terms of disqualifying the offender from receiving a share of the deceased person's estate. In practice, the rule also disqualifies the offender from acting as a personal representative—either as executor or administrator of the estate. However, the provisions of the Administration and Probate Act and associated court rules regarding the appointment and removal of personal representatives do not readily accommodate this outcome.

Appointment of executors

- 5.6 The executor is appointed by the will—it is the will-maker's decision. Often, at least two are appointed, in case one of them dies before the will-maker or is unwilling or unable to take on the role. Any person appointed as executor may apply for a grant of probate and exercise all the powers that the grant confers.³

- 5.7 It is common practice for the will to appoint at least one person who is also a beneficiary, such as a partner, child or sibling, as executor. If the person who is responsible for the deceased person's death is appointed, logically the rule should disentitle them not only from their share of the estate but disqualify them from acting as executor as well.

- 5.8 Certainly, courts will not grant probate to a person to whom the forfeiture rule applies.⁴ The leading authority is the English case of *Re Crippen*.⁵ Cora Crippen was murdered by her husband and did not leave a will. Her husband was executed for the crime. The executor of his estate applied for a grant of administration, on the basis that the estate would be entitled to the wife's property. The court passed over the applicant because of the operation of the forfeiture rule:

It is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights.⁶

- 5.9 However, it appears that the rule itself does not empower the court to pass over an executor and grant administration of the estate to someone else. While the forfeiture rule provided the reason for the decision in *Re Crippen*, the court relied on a statutory power that enabled it to pass over an executor in 'special circumstances'.⁷ The court subsequently relied on an equivalent statutory power in *Re S*,⁸ a case concerning a woman who had killed her husband and was the sole executor and beneficiary of his estate. The court passed her over because she was serving a sentence of life imprisonment for his manslaughter and it was 'quite impossible' for her to act as executor.

3 *Administration and Probate Act 1958* (Vic) s 18. A grant of probate provides certainty that the appointed person is authorised to administer the estate.

4 See, eg, *Re Pedersen* (Unreported, Supreme Court of New South Wales, Holland J, 17 June 1977); *Re Weinstock* [2007] NSWSC 193 (12 March 2007).

5 [1911] P 108.

6 *Ibid* 112.

7 *Court of Probate Act 1857* (UK) 20 & 21 Vict, c 77, s 73.

8 [1968] P 302. The court relied on s 162 of the *Supreme Court of Judicature (Consolidation) Act 1925* (UK) 15 & 16 Geo 5, c 49.

- 5.10 Few cases address this question, but the forfeiture rule may not provide the court with the necessary power because an appointment as executor does not give the person a beneficial interest in the estate. Justice Holland noted this possibility in the New South Wales case of *Re Pedersen*:
- The office of executor does not necessarily give the appointee a beneficial interest in the estate and it may be a question whether the murder or manslaughter of a testator is an automatic disqualification from the office of executor of the testator's estate as well as being a disqualification from taking any interest in it. Whatever be the answer to that question, it is unthinkable that a court could exercise its powers so as to permit a testator's murderer to administer his victim's estate.⁹
- 5.11 In Victoria, the Administration and Probate Act does not expressly give the court the power to pass over an executor because the executor caused the will-maker's death. The court may pass over an executor who has failed to either apply for or renounce probate of the will within six weeks of the death, and this discretion could be applicable where the offender is in custody and unable to act. Otherwise, the court appears to rely on its inherent power to make all necessary orders for the due administration of the assets of estates.¹⁰
- 5.12 In any event, there have been few opportunities to test the court's power in Victoria. The Registrar of Probates has observed that, in his experience, where an executor has been convicted of manslaughter they have renounced their executorship and disclaimed any interest in the estate.¹¹
- 5.13 The Commission considers that it would assist beneficiaries and others with an interest in the estate if there were a clear link, on the face of the Administration and Probate Act, between the application of the forfeiture rule and disqualification from acting in the office of executor. It would confirm the court's power to bypass the offender in making a grant of representation, strengthen the grounds for innocent beneficiaries in lodging a caveat against probate being granted to the offender, and reduce the complexity of the process and the costs to all parties.

Removal of executors

- 5.14 The court's power to discharge an executor who has already been granted probate is more fully described in the legislation. Section 34(1)(c) of the Administration and Probate Act allows the court, on application, to replace an executor or administrator who 'refuses or is unfit to act in such office or is incapable of acting therein'.
- 5.15 The court will not lightly remove an executor, as it means setting aside the will-maker's intention. It needs to be satisfied that it has the authority to remove the executor before deciding that, for the beneficiaries' welfare and the protection of their interests, the executor should be removed.¹² A decision under section 34(1)(c) to remove an executor because of their known or suspected involvement with the will-maker's death would turn on a finding that the executor is 'unfit to act'. There are no reported cases dealing with the question of whether the term could be applied to such circumstances but the prevailing interpretation of the provision does not exclude the possibility.¹³

9 *Re Pedersen* (Unreported, Supreme Court of New South Wales, Holland J, 17 June 1977) 2–3.

10 For discussion of the court's power to bypass the will-maker's appointment, see *Re Pedersen* (Unreported, Supreme Court of New South Wales, Holland J, 17 June 1977). See also *Bar-Mordecai v Rotman* (Unreported, Supreme Court of New South Wales, Einstein J, 4 September 1998).

11 Correspondence with the Registrar of Probates, 7 March 2014.

12 *Dimos v Skafitourous* (2004) 9 VR 584, 593.

13 The breadth of discretion afforded by s 34(1)(c) is explored fully by President Winneke in *Dimos v Skafitourous* (2004) 9 VR 584, 586–93. President Winneke clarified that the provision should not be interpreted narrowly when considering an executor's conduct after a grant of probate has been made. He did not address whether it applied to conduct before the grant was made but nor did he rule it out. He said (at 593) 'It is unnecessary, and I think unhelpful, for this court to seek to exhaustively state the limits of the court's discretionary power to remove executors.'

- 5.16 Although section 34(1)(c) may provide a sufficient basis for applying to remove an executor who is implicated in the will-maker's death, the procedure would be more accessible, simpler and less costly to all parties if the legislation provided grounds that expressly accommodated these circumstances.

Appointment of administrators

- 5.17 The court may appoint an administrator when:
- the deceased person has not left a valid will
 - the will does not appoint an executor
 - the executor is unwilling, unable or unfit to act.¹⁴
- 5.18 The court may also appoint an administrator pending litigation on the validity of the will or for obtaining, recalling or revoking any grant of representation.¹⁵
- 5.19 Unlike equivalent legislation in other states and territories, the Administration and Probate Act does not guide the court's discretion in selecting an administrator.¹⁶ The general rule at common law is that the grant should be made to the beneficiary with the most substantial interest in the estate.¹⁷ However, *Re Crippen*¹⁸ provides authority for the court not to grant administration on the ground that the forfeiture rule disqualifies the applicant from obtaining a benefit from the estate.
- 5.20 In the next section of this chapter, the Commission recommends that a person who has been precluded by the forfeiture rule from a share of the estate should be deemed, for the purposes of distributing the estate, as having died before the deceased person. The effect of this recommendation is that an offender would not have an interest in the estate that could form the basis of an application for a grant of administration. This will indirectly preclude an offender from being eligible to apply, though does not provide grounds for not appointing a person who is suspected of being responsible for the deceased person's death.¹⁹

Removal of administrators

- 5.21 Should it become apparent, after a grant of administration has been made, that the administrator is responsible for unlawfully killing the deceased person, the court may remove the administrator under the same provisions of the Administration and Probate Act that provide for removal of an executor who refuses to act, is unfit to act or is incapable of doing so.²⁰

14 *Administration and Probate Act 1958* (Vic) ss 15, 26, 34(1). The estate of a person who dies without leaving a will is administered by State Trustees until a grant of administration is made: s 19.

15 *Ibid* s 22(1).

16 *Administration and Probate Act 1929* (ACT) s 12; *Administration and Probate Act 1989* (NSW) s 63; *Administration and Probate Act 1969* (NT) s 22(1); Supreme Court of South Australia, *The Probate Rules 2004*, 1 April 2014, r 30.

17 *Re Slattery* (1909) 9 SR (NSW) 577 (6 September 1909).

18 [1911] P 108.

19 If an offender applies for a grant of administration, an objector could lodge a caveat against the grant being made. The court rules specify a non-exhaustive list of possible grounds for caveats, including that the proposed administrator is disqualified. The Commission's recommendations would disqualify a convicted offender from applying, but not someone who is only suspected of an unlawful killing. The caveators would need to make other grounds: *Administration and Probate Act 1958* (Vic) s 58; *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 8.06(2). Note that a caveat may be lodged against making a grant of probate to an executor but the possible grounds listed in the rules do not include disqualification: *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 8.06(1).

20 *Administration and Probate Act 1958* (Vic) s 34(1).

Proposed reform

Disqualification from office

- 5.22 The Administration and Probate Act does not expressly prevent a person from acting as executor or administrator of an estate even though the forfeiture rule has, or might, disentitle them from taking a benefit from that estate. This does not appear to have stopped the court from declining to grant such a person probate or administration, or removing them from office. The court may rely on its inherent jurisdiction and the common law to resist an application from such a person for a grant and, if they have received a grant, arguably the court may remove them under section 34(1)(c).
- 5.23 However, for an innocent beneficiary or other interested person to bring the matter before the court, the processes are indirect and the grounds uncertain.
- 5.24 The Commission considers that it should be clear on the face of the relevant legislation that a person who stands to benefit from the death of a person that they unlawfully killed is disentitled from obtaining a grant of representation.
- 5.25 For consistency with recommendations made later in this chapter concerning benefits from the estate, the effect of the forfeiture rule on a person who is appointed executor by the deceased person's will, or would have been eligible to apply for a grant of administration, should be that they are treated as if they had predeceased the deceased person. However, unlike benefits from the estate, the offender's disqualification from acting as a personal representative would not be able to be modified by a forfeiture rule modification order.

Recommendation

- 20 The *Administration and Probate Act 1958* (Vic) should be amended to provide that, where a person appointed executor by a will or who is otherwise eligible to be appointed administrator is precluded by the forfeiture rule from acquiring an interest in the deceased's estate, the person is to be treated as having died immediately before the deceased person.

Court's power to refuse grant

- 5.26 There may be a substantial period of time between when the deceased person dies and when the person responsible for the death is established. It would be sensible to expressly provide for the court, in its discretion, to refuse a grant to a person where there are reasonable grounds for concluding that the applicant is implicated in causing the death.
- 5.27 In 2009, the National Committee for Uniform Succession Laws recommended model legislation for the administration of estates.²¹ It identified a need to expressly authorise courts to pass over a person who would otherwise be entitled to a grant of representation if there are reasonable grounds for believing that the person has committed an offence related to the deceased person's death. It proposed the following provision, as clause 348 of the model legislation:

348 Offences relating to the deceased's death

This section applies if the Supreme Court, on application, considers there are reasonable grounds for believing that a person otherwise entitled to a grant of probate or letters of administration of a deceased person's will or estate has committed an offence relating to the deceased's death.

The Supreme Court may refuse to make a grant of probate or letters of administration of the will or estate to a person otherwise entitled to the grant and make the grant of probate or letters of administration to—

- (a) without limiting paragraph (b), if there is more than one person entitled to the grant—any or all of the other persons entitled; or
- (b) any person the court considers appropriate.²²

- 5.28 The Commission considers there is merit in the proposal. Such a provision would provide directly relevant grounds for an interested person to object to the making of a grant to a suspected offender, and would underpin the court's authority not to make a grant in the circumstances where there are reasonable grounds for believing that the person seeking the grant is responsible for unlawfully killing the deceased person.

Recommendation

- 21 The *Administration and Probate Act 1958 (Vic)* should be amended to provide for the Court to pass over a person who applies for a grant of representation where there are reasonable grounds for believing that the person has committed an offence related to the deceased's death. The provision should be based on section 348 of model legislation proposed in the December 2009 report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys-General on the administration of estates of deceased persons.

Benefits from the estate

When an alternative beneficiary is unable to inherit

- 5.29 The application of the forfeiture rule to an offender can have implications for the rights of others to inherit under a will or on intestacy. The offender to whom the forfeiture rule applies is excluded from inheriting from the deceased person, but an alternative beneficiary who is innocent of the offence may also be unable to inherit because the transfer of this benefit is predicated on the offender dying before or soon after the deceased person. This may occur in circumstances where:

- There is a provision in a will, called a gift over, that if the beneficiary of a gift (the principal beneficiary) predeceases the will-maker, the gift goes to another beneficiary.
- A will-maker leaves a gift to a direct descendant. The direct descendant is responsible for the will-maker's death and survives the will-maker by 30 days or more.
- A person dies without making a will and the offender would have inherited from the deceased person according to intestacy laws.

Gifts over

- 5.30 It is common for wills to contain provisions that provide for a gift over to another beneficiary in the event that the principal beneficiary dies before the will-maker.²³ When a will includes such a provision, the will-maker is likely to have wanted the beneficiary of the gift over to take the gift in most circumstances in which the principal beneficiary is unable to inherit.²⁴
- 5.31 However, it is a well-settled principle of the law that the court cannot give effect to an intention that is neither expressed nor implied in the language of the will when read with the circumstances in which the will was made.²⁵ When a will provides for a gift over in the event that the principal beneficiary of a gift predeceases the will-maker, courts will generally interpret the will literally.²⁶ Consequently, a gift over to a third party contingent on the principal beneficiary predeceasing the will-maker is likely to fail when the forfeiture rule prevents the offender from taking the gift. The property subject to the gift over would then be distributed to the residuary beneficiaries or on intestacy. The same outcome will occur when a beneficiary disclaims a gift.
- 5.32 This outcome can prevent an innocent person from inheriting even though it may be reasonably predictable that the will-maker would want the beneficiary of the gift over to inherit in place of the offender.²⁷ For example, in *Davis v Worthington*,²⁸ a gift was left to a friend, but the will also provided that, if the friend failed to survive the will-maker by 14 days, the gift was to go to the Muscular Dystrophy Research Association. The friend later unlawfully killed the will-maker. Because the offender had survived the will-maker by 14 days, the gift failed and the Muscular Dystrophy Research Association was unable to take the gift.
- 5.33 Although the court generally interprets the will literally, it does not always do so.²⁹ Alternative approaches that have been taken in Australia are:
- interpreting the condition of the gift over as having been fulfilled so that the gift over is successfully distributed as if the offender had predeceased the will-maker³⁰
 - interpreting the will according to the imputed intention of the will-maker, which may result in the gift over succeeding³¹
 - interpreting the gift to the killer as having failed but requiring that the offender hold that gift on constructive trust for the benefit of an appropriate person, who may or may not be the beneficiary of the gift over.³²
- 5.34 These alternative approaches potentially enable the court to ensure that the gift is distributed as the will-maker is likely to have wanted, while also ensuring that an inappropriate person does not take the benefit.

23 Ken Mackie, 'The Forfeiture Rule: The Destination of Property Interests on Homicide' (1997) 2 *Newcastle Law Review* 30, 33.

24 Law Commission (England and Wales), *The Forfeiture Rule and the Law of Succession*, Report No 295 (2005) 28; *ibid.*

25 See *Perrin v Morgan* (1943) AC 399; *Re McIlrath* [1959] VR 720, 724.

26 *Ekert v Mereider* (1993) 32 NSWLR 729 (Windeyer J); Ken Mackie, *above n 23*, 35.

27 Law Commission (England and Wales), *above n 24*; Ken Mackie, *above n 23*.

28 [1978] WAR 144.

29 Ken Mackie, *above n 23*, 36; Charles Rowland, 'The Construction or Rectification of Wills to Take Account of Unforeseen Circumstances Affecting their Operation: Part I' (1993) 1 *Australian Property Law Journal* 87, 113.

30 *Re Barrowcliff* [1927] SASR 147.

31 *Re Keid* [1980] Qd R 610.

32 *Public Trustee v Hayles* (1993) 33 NSWLR 154.

- 5.35 In *Public Trustee v Hayles*,³³ for example, the deceased person gifted his estate to a friend and, in the event that the friend predeceased him, to the friend's mother, Mrs Hayles. The friend murdered the will-maker and the forfeiture rule applied to deny him any entitlement to the estate. At issue was whether Mrs Hayles should inherit as a consequence of the gift over. There was no evidence that the deceased person knew her. The court applied a constructive trust to the gift and sought to determine who would be the correct beneficiary of that trust. The court found that it was appropriate for the estate to be held on trust for the deceased person's next of kin. The issue of whether it would be appropriate for the mother of the offender to inherit was not pursued; however, given the relationship between the beneficiary and the offender, the will-maker may not have wanted her to inherit in the circumstances.
- 5.36 However, when the court has adopted an alternative approach to interpreting the will, sometimes the beneficiary of a gift over has been able to inherit. Even if the alternative approaches were used more frequently, the existence of multiple approaches can create inconsistency in outcomes and consequent uncertainty. This in turn makes it difficult for executors to determine how to distribute an estate and for legal practitioners to provide advice. Determining the intention of the will-maker can also present practical difficulties for the court.³⁴

Gifts left to the will-maker's descendants

- 5.37 When a will-maker leaves a gift to a direct descendant who does not survive the will-maker by 30 days, then the direct descendants of that beneficiary take the gift in their place by representation.³⁵ However, if a gift is left to a direct descendant to whom the forfeiture rule applies, not only is the offender precluded from receiving the gift, the offender's descendants will be unable to take the gift in the offender's place. The same issue will arise when a person disclaims the gift.
- 5.38 For example: a woman leaves a gift by will to her son, and the residue of her estate to her daughter. The son kills his mother and the forfeiture rule prevents him from taking the gift. If he then dies within 30 days of his mother, his children can take the gift in his place. However, if he survives his mother by more than 30 days, his children cannot take the gift in his place by representation and it will go to his sister along with the rest of the estate.

When the offender is eligible to inherit on intestacy

- 5.39 At common law, an offender is precluded from inheriting from the deceased person on intestacy.³⁶ Under the Administration and Probate Act, an intestate estate is distributed among the surviving children of the intestate and the living representatives of any children who predeceased the intestate.³⁷
- 5.40 This has implications for the rights of innocent descendants of an offender who claim a benefit through the offender. A literal interpretation of the Administration and Probate Act, when combined with the effect of the forfeiture rule, precludes them from an inheritance that they otherwise would have expected to receive from the offender when the offender died. The same issue will arise when a person disclaims their right to a share in an intestate estate.

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Ibid.
Submission 17 (Carolyn Sparke QC).
Wills Act 1997 (Vic) s 45.
Helton v Allen (1940) 63 CLR 691; *Re Sangal* [1921] VLR 355.
Administration and Probate Act 1958 (Vic) s 52(f).

- 5.41 In the English case of *Re DWS (deceased)*,³⁸ an only son was convicted of murdering his parents, who both died intestate. The offender's two-year-old son, the deceased couple's only grandchild, claimed the estate. If the offender had predeceased his parents, ordinarily their grandchild would have inherited under intestacy laws. However, the court held that the forfeiture rule did not require that the offender be treated as predeceasing the deceased person and the intestacy rules under the *Administration of Estates Act 1925* (UK) were to be given their literal meaning. The deceased couple's only grandchild was therefore precluded from inheriting the estate, which went to other relatives.
- 5.42 The Law Commission of England and Wales strongly criticised the effect of the forfeiture rule, when combined with this interpretation of intestacy provisions, in effectively disentitling those claiming through the offender. It considered that the decision in *DWS (deceased)* unfairly punished the descendants of the offender, particularly as it is likely that the deceased couple in that case may have preferred their grandchild to inherit.³⁹
- 5.43 This consequential effect of the forfeiture rule produces an arbitrary distinction between the rights of the descendants of an offender and other relatives and may be inconsistent with the general policy of intestacy law, which gives preference to descendants over siblings and other relatives.⁴⁰

Options for reform

- 5.44 No theory has yet been accepted for determining who becomes entitled to forfeited benefits upon application of the forfeiture rule.⁴¹
- 5.45 In most circumstances, the beneficiary of a gift over that depends on the principal beneficiary predeceasing the will-maker will be prevented from taking the gift. This is often unfair for the beneficiary of the gift over. It may also seem contrary to the will-maker's intention.
- 5.46 Innocent persons claiming through an offender are likewise generally unable to take the offender's share once the forfeiture rule has been applied. This is due to the literal interpretation of legislation that provides that the descendants of the beneficiary can only take in that beneficiary's place if the beneficiary predeceased the deceased person or died within 30 days of the deceased person. It produces an arbitrary distinction between the rights of the offender's descendants and their relatives.
- 5.47 The Commission invited submissions on the effect that the forfeiture rule should have on gifts over and whether the intestacy laws should permit an offender's descendants to inherit, as representatives of the offender. Two possible reforms were proposed:
- deeming the offender to have died before the deceased person, so that an alternative named beneficiary can benefit from a gift over under a will, and the innocent descendants can take by representation under intestacy laws
 - broadening the court's rectification power to enable it to ascertain the hypothetical intention of the will-maker in unforeseen circumstances and construe the will accordingly.

38 [2001] Ch 568.
39 Law Commission (England and Wales), above n 24, 2.
40 Ibid.
41 Ken Mackie, above n 23, 32.

Offender deemed to have predeceased the deceased person

- 5.48 The National Committee for Uniform Succession Laws recommended that, where the forfeiture rule prevents a person from sharing in an intestate estate, that person should be deemed to have died before the intestate.⁴² This is the case in New South Wales and Tasmania, but all other Australian jurisdictions are yet to give effect to this recommendation.⁴³
- 5.49 England and Wales have introduced legislation that deems the offender to have predeceased the deceased person not only for the purposes of intestacy law but also when interpreting a will. The *Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011* (UK) amended the law in England and Wales so that if a person is entitled to an interest in an intestate estate, or a under a will, and forfeits it under the forfeiture rule, the person is treated as having died immediately before the deceased.⁴⁴ This reform was also extended to the circumstance in which a person disclaims an interest. New Zealand and some jurisdictions in the United States have adopted a similar approach.⁴⁵
- 5.50 In submissions and during consultations, support was expressed for this option as a default solution for both gifts under a will and dispositions on intestacy.⁴⁶ The Property and Probate Section of the Commercial Bar Association pointed out that deeming the offender to have died before the deceased person for the purposes of dispositions under a will or intestacy would:
- 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.⁴⁷
- 5.51 The Crime Victims Support Association also supported this approach, but only in relation to gifts over under a will.⁴⁸ It was concerned 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.⁴⁹
- 5.52 Although it is possible that an offender could be motivated to kill a person in the expectation that the forfeited benefits could flow to the offender's descendants, it is improbable due to the personal cost of a conviction.⁵⁰ Furthermore, it is not necessary. Killing does not create or enlarge the entitlements of the offender or anyone claiming through the offender; on the contrary, it jeopardises them.
- 5.53 The possibility that the offender will benefit indirectly from other beneficiaries is not necessarily confined to intestacies. The Institute of Legal Executives (Victoria) expressed concern that the beneficiary of a gift over could choose to benefit the offender.⁵¹ However, it put the view that it would be 'particularly harsh to automatically disinherit those persons due to the unlawful actions of another' and suggested that the court be granted a discretion to modify the effect of the rule in favour of alternative beneficiaries.⁵²

42 New South Wales Law Reform Commission, above n 21, 210.

43 *Succession Act 2006* (NSW) s 139(b); *Intestacy Act 2010* (Tas) s 40(b).

44 *Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011* (UK) c 7, s 1 (inserting s 46A into the *Administration of Estates Act 1925* (UK) 15 & 16 Geo 5, c 23), s 2 (inserting s 33A of the *Wills Act 1837* (UK) 7 Will 4 & 1 Vic, c 26).

45 *Succession (Homicide) Act 2007* (NZ) s 7(3); American Law Institute, *Restatement (Third) of Property: Wills and Other Donative Transfers* (2003) § 8.4 cmt (k).

46 Consultations 5 (Roundtable 1); 7 (Supreme Court of New South Wales—Judges); 15 (Supreme Court of Victoria—Judges); 16 (Roundtable 2). Submissions 1 (Professor Prue Vines); 9 (State Trustees); 14 (Property and Probate Section of the Commercial Bar Association); 17 (Carolyn Sparke QC).

47 Submission 14 (Property and Probate Section of the Commercial Bar Association).

48 Submission 8 (Crime Victims Support Association).

49 Ibid.

50 Callie Kramer, 'Guilty by Association: Inadequacies in the Uniform Probate Code Slayer Statute' (2003) 19 *New York Law School Journal of Human Rights* 697, 716.

51 Submission 16 (The Institute of Legal Executives (Victoria)).

52 Ibid.

- 5.54 Judges of the Supreme Court of New South Wales expressed the view that it would be difficult to find a sound policy that could cover every possible scenario in which the offender might derive an indirect benefit. They also suggested that, if a gift goes to a person of free will, subject to special circumstances this would not be a matter in which the court should intervene in how it is ultimately distributed.⁵³
- 5.55 The Commission agrees. It is not the role of the court to dictate what individuals do with their own property. The beneficiary of a gift over or 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.
- 5.56 Carolyn Sparke QC suggested that it cannot be assumed that a will-maker who is killed by a descendant beneficiary would want the beneficiary's children to benefit.⁵⁴ However, this outcome is no different to what would happen in a range of other scenarios including on intestacy. The Commission considers it preferable that beneficiaries are treated consistently and equally before the law. The descendants of an offender are innocent of the offender's crimes and should not be required by the effect of the law to forfeit a claim or interest in the deceased person's estate. If a will-maker or intestate wished to benefit another in preference to the offender's descendants in particular, then they could have provided for this scenario in a will.

Rectification of a will

- 5.57 If a will does not carry out the will-maker's intentions because of a clerical error or because it does not give effect to the will-maker's instructions, the Supreme Court of Victoria may make an order to rectify the will.⁵⁵ It may modify the actual text as necessary to ensure that the will actually contains the provisions that the will-maker intended it to contain. The intention needs to be expressed in or implied by the words of the will: the court cannot give effect to what the will-maker would have intended had they considered unforeseen circumstances which have since arisen.⁵⁶
- 5.58 A broad statutory power to rectify a will could enable the court to ascertain the hypothetical intention of the will-maker in unforeseen circumstances—including when a beneficiary kills the will-maker—and construe the will accordingly.⁵⁷ This would provide the court with the power to give effect to a gift over as well as to prevent a beneficiary who might provide the offender with an indirect benefit from taking the gift.
- 5.59 The Supreme Court of the Australian Capital Territory has a broad statutory power to rectify a will.⁵⁸ However, the National Committee for Uniform Succession Laws did not recommend that the Australian Capital Territory's rectification power be adopted nationally.⁵⁹ It suggested that the rectification power, as expressed in the Australian Capital Territory legislation, may be too broad and may have the potential to destabilise the accepted rules for construing a will.⁶⁰ This does not appear to have been the case in the Australian Capital Territory, where the provision has existed since 1991.

53 Consultation 7 (Supreme Court of New South Wales—Judges).

54 Submission 17 (Carolyn Sparke QC).

55 *Wills Act 1997* (Vic) s 31.

56 Charles Rowland, above n 29, 91.

57 *Ibid* 87; Charles Rowland, 'The Construction or Rectification of Wills to take Account of Unforeseen Circumstances Affecting their Operation: Part II' (1993) 1 *Australian Property Law Journal* 193.

58 *Wills Act 1968* (ACT) s 12A.

59 National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys-General on the Law of Wills*, Queensland Law Reform Commission Miscellaneous Paper 29 (1997) 59–61.

60 National Committee for Uniform Succession Laws, *Uniform Succession Laws for Australian States and Territories: First Issues Paper: The Law of Wills*, Queensland Law Reform Commission Working Paper 46 (1994) 44–5.

- 5.60 There was some support for conferring on the court a rectification power such as that in the Australian Capital Territory. Among the supporters was The Institute of Legal Executives (Victoria).⁶¹ Professor Prue Vines and Carolyn Sparke QC also recommended that Victoria provide the court with a rectification power in addition to deeming an offender to have predeceased the will-maker as a default position.⁶²
- 5.61 While noting the support expressed in submissions, the Commission does not favour this option because it does not provide the certainty for executors that a deeming provision would. It would increase the legal costs to the estate and delay distribution of the assets. Perhaps for this reason the court does not appear to have had the opportunity to exercise this power in the Australian Capital Territory. Moreover, this option would create a discretion that is not confined to circumstances where the deceased person was unlawfully killed by a beneficiary. Broader consultation would therefore be needed if any such provision were to be introduced in Victoria.

Proposed reforms

- 5.62 The effect of the forfeiture rule on the succession rights of third parties should be clarified to ensure certainty and avoid unjust outcomes. The problems with the current law arise because of the way relevant legislation is constructed and due to a common drafting approach to gifts over in wills. It is therefore appropriate that lawmakers intervene to address the issue.
- 5.63 The simplest solution, which also provides the greatest certainty, is to treat an offender as having predeceased the deceased person when the forfeiture rule applies, in line with the approach taken in England and Wales. This solution provides an appropriate balance between respecting the expressed intention of the will-maker and a general policy that gives preference to linear descendants on the one hand, and ensuring that innocent parties are not deprived of entitlements that they might otherwise receive on the other. It is also the solution supported by the majority of those consulted by the Commission in the course of this review. Accordingly, the Commission considers that, once the forfeiture rule has been applied, an offender should be treated as having predeceased the will-maker or the intestate.
- 5.64 Further, in the interests of legislative and conceptual consistency, the Commission considers that the deeming provision should apply where a beneficiary under a will or a person entitled to an interest in an intestate estate disclaims their interest. Currently, a disclaimer has the same effect as the forfeiture rule on the ability of third parties to take a benefit under a will or on intestacy. Unless the effect of a disclaimer is modified in the same way, deeming an offender to have predeceased a will-maker or intestate upon the application of the forfeiture rule would create an inconsistency. It would also create a disincentive for offenders to disclaim because their descendants would be disadvantaged. Voluntary resolution of the matter by the offender disclaiming their interest would be preferable to litigation. It would alleviate strain on family relationships and reduce costs to the estate.
- 5.65 The Commission agrees with the reasoning of the Law Commission of England and Wales that it would be illogical to treat a disclaimer differently from where a beneficiary is precluded from inheriting due to the forfeiture rule.⁶³ Instead, the same rules of succession should apply, notwithstanding the reason that a gift has failed. For these reasons, the Commission considers it important to make a recommendation even though this issue is outside the terms of reference.

61 Submission 16 (The Institute of Legal Executives (Victoria)).
 62 Submission 1 (Professor Prue Vines).
 63 Law Commission (England and Wales), above n 24, 30.

- 5.66 The legislative reform should ensure that persons claiming through the offender are able to take the share of the estate that would have gone to the offender had the forfeiture rule not applied or to the person disclaiming had they not disclaimed that interest. Where an interest in some, but not all, benefits has been forfeited or disclaimed, the offender or the person disclaiming should be treated as having predeceased the deceased person for those benefits only and not for other interests that they still stand to inherit.
- 5.67 Any person who stands to take a share in a deceased person's estate by representation is only eligible to inherit the value of the interest of the beneficiary in whose place they take. If the offender's interest is considered to be nothing due to the effect of the forfeiture rule, it follows that those claiming through the offender are also entitled to nothing. For this reason, the offender should be deemed to have been entitled to the forfeited or disclaimed share of the estate at the time of their deemed death.
- 5.68 This reform will require amendments to the *Wills Act 1997* (Vic) and the *Administration and Probate Act 1958* (Vic). Similar amendments have been made to the equivalent legislation in the United Kingdom.⁶⁴

Recommendations

- 22 Part 4 of the *Wills Act 1997* (Vic) should be amended with the effect that:
- (a) where a will contains a devise or bequest to a person who:
 - (i) disclaims it, or
 - (ii) has been precluded by the common law rule of forfeiture from acquiring itthe person is, unless a contrary intention appears by the will, to be treated for the purposes of the Act as having died immediately before the will-maker, and entitled to the devise or bequest at the time of the deemed death.
 - (b) this amendment does not affect the Court's power under the Forfeiture Act to modify the effect of the forfeiture rule.
- 23 The *Administration and Probate Act 1958* (Vic) should be amended with the effect that:
- (a) for the purposes of the distribution of an intestate's residuary estate, a person who:
 - (i) is entitled in accordance with section 52 to an interest in the residuary estate but disclaims it, or
 - (ii) would have been so entitled if not precluded from acquiring it by the common law rule of forfeitureis to be treated as having died immediately before the intestate, and entitled to the interest in the residuary estate at the time of the deemed death.
 - (b) this amendment does not affect the Court's power under the Forfeiture Act to modify the effect of the forfeiture rule.

Entitlement to apply for family provision

Common law

- 5.69 In Victoria, a person for whom a deceased person had a responsibility to make provision can apply under Part IV of the Administration and Probate Act for a court order redistributing the deceased person's estate in their favour.⁶⁵ This can occur whether or not the deceased person made a will.⁶⁶
- 5.70 At common law, unlawful killers have been precluded from claiming family provision or equivalent entitlements from the estate of their victim where the forfeiture rule applies.
- 5.71 In the English case of *Re Royse (deceased)*,⁶⁷ a woman who had been convicted of her husband's manslaughter, with a finding of diminished responsibility, had applied for provision out of her husband's estate. She had been the sole beneficiary of his estate under his will but had lost her entitlement because of the effect of the forfeiture rule. The court found that, because the effect of the forfeiture rule, she was disqualified from applying for family provision. Lord Justice Ackner said:
- The absence of a reasonable financial provision for the plaintiff cannot be attributed either to her deceased husband's will or to the intestacy laws if these had been relevant. It is solely the result of the rule of public policy which precludes her from acquiring a benefit under his will, or upon his dying intestate if he had so died, because she had unlawfully killed him.⁶⁸
- 5.72 The decision of the English Court of Appeal in *Re Royse (deceased)* was endorsed by the Supreme Court of New South Wales in *Troja v Troja*.⁶⁹ Mrs Troja had sought an order that she was entitled to provision out of her husband's estate pursuant to the *Family Provision Act 1982* (NSW). She was serving a term of imprisonment for killing him, and it had already been established that the forfeiture rule disentitled her from a share of the estate. Master McLaughlin declined the application:
- Waddell CJ in Equity and the Court of Appeal of New South Wales having held that the effect of the forfeiture rule is to deprive [Mrs Troja] of any beneficial interest in the estate, it would be totally inconsistent with that decision and totally inconsistent with public policy and, indeed, an affront to the public attitude which is the basis for the forfeiture rule, were [she] now to be able to avail herself of the provisions of the *Family Provision Act 1982* and to seek to obtain an order for provision for her maintenance out of the estate of the husband whom she killed.⁷⁰
- 5.73 Although there is no case law in Victoria on this point, these precedents indicate that the forfeiture rule prevents an offender from claiming family provision under Part IV of the Administration and Probate Act. It could also be argued, as it was in *Re Royse (deceased)*,⁷¹ that the family provision legislation was passed against the background of the forfeiture rule and it would be strange to deny a person a share of an estate under the rule and then enable them to apply for a share under family provision legislation.
- 5.74 Even if the rule does not preclude them from applying, the conduct that caused the rule to be invoked could well deter the court from agreeing to the claim. In making a decision on a family provision application, the court is required to have regard to a number of statutory factors including the character and conduct of the applicant.⁷² An unlawful killing is conduct that is likely to be viewed negatively by the court in any application for family provision.

65 *Administration and Probate Act 1958* (Vic) s 91(1).
 66 *Ibid* s 91(4).
 67 [1985] Ch 22.
 68 *Ibid* 27.
 69 (1994) 35 NSWLR 182.
 70 *Ibid* 186–7.
 71 [1985] 1 Ch 22, 27–8.
 72 *Administration and Probate Act 1958* (Vic) s 91(4)(o).

Legislative responses

- 5.75 The UK, ACT, NSW and NZ Acts convey different responses to this issue.
- The UK Act specifies that the forfeiture rule does not preclude anyone from making an application for family provision.⁷³
 - The NSW Act allows an application to be made for an order modifying the effect of the rule, if the rule precludes a person from any entitlement under family provision legislation.⁷⁴
 - The NZ Act expressly provides that the offender is not entitled to apply for family provision.⁷⁵
 - The ACT Act does not refer to family provision at all.

Consultation

- 5.76 Professor Prue Vines observed that family provision provides a way for a person who is unable to inherit a share of an intestate estate through an offender to make a direct claim. However, she noted that deeming the offender to have died before the deceased person in these circumstances (as recommended above) will remove the need for their descendants to rely on family provision.⁷⁶
- 5.77 No one called for a strict disqualification without power of modification, as in New Zealand. The Probate and Property Section of the Commercial Bar Association said that it could lead to injustice:
- 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 that 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 moral culpability, suicide pacts, killings arising from family violence perpetrated by the victim, and negligent acts causing death.⁷⁷
- 5.78 Some of the roundtable participants did not consider that an offender should be disqualified from making a family provision application.⁷⁸ The submission from State Trustees pointed out that a court weighing up the merits of the claim would take into account the fact that the applicant had unlawfully killed the deceased person. Any application in relation to the forfeiture rule could be dealt with at the same time as the family provision claim.⁷⁹
- 5.79 Broader support was expressed, at the roundtable and in submissions, for precluding a person to whom the rule applies from applying for family provision, but giving the court a discretion to modify this effect of the rule.⁸⁰ This would be consistent with the NSW Act. Carolyn Sparke QC, for example, noted that:
- It is likely that overlapping considerations will apply to modifying the rule as would apply in any provision application. A similar approach could be taken, that the default position is that a person who causes the unlawful death of another is precluded from making application for provision, unless modified by Court.⁸¹

73 *Forfeiture Act 1982* (UK) c 34, s 3(2)(a).

74 The NSW Act provides that, if the forfeiture rule precludes a person from obtaining a benefit, an application can be made for an order modifying the effect of the rule. The definition of 'benefit' includes 'any entitlement under Chapter 3 of the *Succession Act 2006* (NSW)'. Chapter 3 of that Act deals with family provision: *Forfeiture Act 1995* (NSW) ss 3, 5(1).

75 *Succession (Homicide) Act 2007* (NZ) s 9.

76 Submission 1 (Professor Prue Vines).

77 Submission 14 (Property and Probate Section of the Commercial Bar Association).

78 Consultation 16 (Roundtable 2).

79 Submission 9 (State Trustees).

80 Submissions 14 (Probate and Property Section of the Commercial Bar Association); 16 (The Institute of Legal Executives (Victoria)); 17 (Carolyn Sparke QC). Consultation 15 (Supreme Court of Victoria—Judges).

81 Submission 17 (Carolyn Sparke QC).

Proposed reform

- 5.80 The Commission considers that, where the forfeiture rule disentitles a person from receiving a benefit from a deceased person's estate, that person should also be precluded from claiming family provision. However, this effect of the rule should be able to be modified by a forfeiture rule modification order under the proposed Forfeiture Act.
- 5.81 Currently, the forfeiture rule already appears to prevent an offender from making a family provision application. If a person who is responsible for the deceased person's death does apply for family provision, the court will take the cause of death into account when considering the claim. It is reasonable to expect that the claim would be unlikely to succeed. However, this may not be clear to personal representatives of deceased estates, beneficiaries and other interested parties.
- 5.82 During its recent reference on succession laws, the Commission noted that many family provision claims that may not have succeeded at trial are settled.⁸² Unmeritorious claims are made in the expectation that the personal representative will settle rather than incur greater legal costs to the estate in proceeding to trial. Among the reasons for this practice are that the law does not limit who can apply and it is difficult for legal practitioners to advise their clients about the strength and validity of their claim. The Commission has recommended reforms to Part IV of the Administration and Probate Act to address these and other issues. As part of the consequential amendments to the legislation, it would be prudent to specify the effect of the forfeiture rule on family provision applications.
- 5.83 The proposed Forfeiture Act would then provide for the effect of the forfeiture rule on an offender's eligibility to apply for family provision to be modified, by specifying that eligibility to make an application for family provision is a benefit that may be affected by a forfeiture rule modification order.⁸³

Recommendation

- 24 Part IV of the *Administration and Probate Act 1958* (Vic) should be amended to disentitle persons to whom the forfeiture rule applies from making an application for family provision in respect of the deceased person's estate.

Interests in property

Property owned in joint tenancy

- 5.84 Succession rights give beneficiaries an expectation of obtaining an interest in a property. In contrast, when the deceased and the offender are joint tenants, the offender already has a stake in, and existing rights over, the property. In a joint tenancy between two people, the surviving joint tenant's existing rights are enlarged by the death of the other joint tenant, as the entirety of the property vests in the survivor through the right of survivorship. Where there are more than two joint tenants, a victim's interest would ordinarily vest jointly in the survivors.

Current law

- 5.85 The approach preferred by Australian courts in determining ownership over a joint tenancy once the forfeiture rule applies is that taken in *Rasmanis v Jurewitsch*.⁸⁴ In that case, the Supreme Court of New South Wales applied the forfeiture rule where there were two joint tenancies, for separate properties. The offender had held one property with the deceased person, and the second property with the deceased person and a third joint tenant.
- 5.86 When the offender and the deceased person are the only joint tenants, legal title in the property vests in the offender upon the death of the other joint tenant. A half interest in the property is then held on constructive trust by the offender for the benefit of the deceased person's estate.⁸⁵ The remaining half interest is held by the offender for his or her own benefit.
- 5.87 Should the representatives of the deceased person's estate want to obtain access to their beneficial interest by selling the property but the offender will not agree to the sale, they may apply to the Victorian Civil and Administrative Tribunal for an order for sale under the *Property Law Act 1958* (Vic).⁸⁶
- 5.88 Where more than two people own a property as joint tenants, then a severance in equity would be necessary. In *Rasmanis v Jurewitsch*, the court held that an equitable interest equivalent to the share of the deceased person vested in the innocent joint tenant so that the offender could never benefit from the deceased person's share of the property if the surviving joint tenant predeceased the offender.
- 5.89 For example, if there were five joint tenants and one of those joint tenants killed another, the interest of the deceased person would be held on trust for the benefit of the three remaining innocent joint tenants. The joint tenancy would remain between the offender and the innocent joint tenants over eighty per cent of the property (which excludes the interest of the victim). However, it is likely that any innocent joint tenants would no longer wish to continue as joint tenants with the offender. They would then have to take steps to effect a severance of the joint tenancy.

Problems with the current approach to ownership

- 5.90 A beneficial interest in a constructive trust cannot be reflected in the land titles register.⁸⁷ Thus, either the deceased person's estate or the innocent joint tenant(s), whichever takes the deceased person's interest, would need to lodge a caveat to protect their interest in the property.⁸⁸ A caveat notifies others of a pre-existing interest in the property so that subsequent buyers are aware of that interest. However, often executors and administrators of estates do not know to lodge a caveat to preserve their interest and, according to Land Victoria, a caveat does not guarantee the protection of an interest and can be removed from the register on application.⁸⁹
- 5.91 In the Deputy Registrar of Titles' assessment, property in Victoria is rarely held by more than two joint tenants.⁹⁰ When there are more than two joint tenants and the forfeiture rule applies, the deceased person's interest in the property vests in the innocent joint tenants rather than in the deceased person's estate. The estate receives nothing while the offender is able to retain enjoyment of their interest in the property.⁹¹ This outcome is reflective of the risk undertaken when entering into a joint tenancy arrangement yet could lead to a perception that the law is inconsistent, unnecessarily complex and unjust.

84 [1970] 1 NSW 650.

85 Ibid.

86 *Property Law Act 1958* (Vic), pt IV.

87 *Transfer of Land Act 1958* (Vic) s 37. However, trusts may be declared by any document and an attested copy deposited with the Registrar, and the Registrar may protect the rights of the beneficiaries in any way the Registrar deems advisable: s 37.

88 Ibid ss 58, 59.

89 Ibid s 89A; Submission 12 (Land Victoria).

90 Consultation 16 (Roundtable 2).

91 John Tarrant, 'Unlawful Killing of a Joint Tenant' (2008) 15 *Australian Property Law Journal* 224, 236.

Reform options

- 5.92 At the Commission's two roundtables, there were differing views among participants as to the best approach to determining the effect of the forfeiture rule on a joint tenancy.⁹² However, there was general agreement that the effect of the rule needs clarification.
- 5.93 Support was expressed for the current common law approach in submissions from the Property and Probate Section of the Commercial Bar Association and The Institute of Legal Executives (Victoria).⁹³

Property distributed as if owners were tenants in common

- 5.94 A number of other common law jurisdictions treat the property subject to the joint tenancy between the offender and the deceased person as if the owners were tenants in common. This was the dominant approach adopted by Australian courts prior to the decision in *Rasmanis v Jurewitsch*.
- 5.95 Under the *Succession (Homicide) Act 2007* (NZ), a property owned as a joint tenancy between an offender, the deceased person and any other party devolves at the death of the deceased person as if the property were owned by each as tenants in common in equal shares.⁹⁴ As a result, innocent joint tenants lose their right to take the deceased person's interest by survivorship.
- 5.96 Under the Uniform Probate Code in the United States, a felonious and intentional killing severs the interests of the deceased person and the offender, transforming these interests into a tenancy in common in equal shares.⁹⁵ This approach has been adopted in a number of United States jurisdictions, although not uniformly applied.⁹⁶ In Florida, for example, the deceased person's interest is severed and is distributed along with the rest of their assets. In Connecticut, the joint tenancy is converted into a tenancy in common between the offender and the deceased person but does not affect the interests of any other remaining joint tenants.
- 5.97 Land Victoria, State Trustees and Professor Prue Vines support the introduction of reforms to treat joint tenants as having been tenants in common when the forfeiture rule applies.⁹⁷ Land Victoria suggested that this approach would address the uncertainty of title caused by the prohibition on recording notice of any trusts on the register. The Property and Probate Section of the Commercial Bar Association favoured the current common law approach but, in the alternative, would also support the introduction of legislation that would treat the joint tenants as tenants in common.⁹⁸

Offender deemed to have predeceased the deceased person

- 5.98 Legislation in Massachusetts and West Virginia provides that a person who kills their fellow joint tenant is treated as though they predeceased the deceased person.⁹⁹ This approach would result in the deceased person's estate receiving the entirety of the property if there were no other joint tenants. However, where there are multiple joint tenants, the deceased person's estate would have no interest in the property, as it would vest in the surviving joint tenants through the right of survivorship.¹⁰⁰ The offender would lose any interest in the property.

92 Consultations 5 (Roundtable 1); 16 (Roundtable 2).

93 Submissions 14 (Property and Probate Section of the Commercial Bar Association); 16 (The Institute of Legal Executives (Victoria)).

94 *Succession (Homicide) Act 2007* (NZ) s 8(3).

95 UPC § 2-803(c)(2) (2010).

96 American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2011) § 45, reporter's note (h). Statutes taking this approach include: Iowa Code § 633.535(2) (2013) (as interpreted by the Supreme Court of Iowa in *In re estate of Thomann* 649 NW 2d 1 (Iowa, 2002)); Ala Code § 43-8-253(b) (2013); Cal Prob Code § 251 (LexisNexis 2014); Conn Gen Stat § 45a-447(a)(3) (2013); Fla Stat § 732.802(2) (2013); Nev Rev Stat Ann § 41B.320(2)(a) (2013).

97 Submissions 1 (Professor Prue Vines); 9 (State Trustees); 12 (Land Victoria).

98 Submission 14 (Property and Probate Section of the Commercial Bar Association).

99 John Tarrant, above n 91, 230; W Va Code § 42-4-2 (2013) (as interpreted in *Lakatos v Billotti* 509 SE 2d 594 (W Va, 1998)); Robert F Hennessy, 'Property Note—The Limits of Equity: Forfeiture, Double Jeopardy, and the Massachusetts "Slayer Statute"' (2009) 31 *Western New England Law Review* 159, 160; Mass Gen Laws ch 265 § 46 (2013).

100 Law Commission (England and Wales), above n 24, 33.

- 5.99 The Property and Probate Section of the Commercial Bar Association was opposed to any approach that results in stripping an offender of their assets.¹⁰¹ It was noted that the offender might require these assets when re-entering society upon their release from custody.

Proposed reforms

- 5.100 The Commission considers that an offender's interest in a joint tenancy should be severed from that of the other joint tenants upon application of the forfeiture rule. When there are two joint tenants, this would result in the offender and the deceased person's estate taking the property as tenants in common in equal shares. When there are more than two joint tenants, the joint tenancy would continue between any innocent joint tenants who would take the deceased person's interest by survivorship, but the offender would hold their interest as a tenant in common.
- 5.101 There would be neither a gain nor a loss for any of the joint tenants. The advantages of the current common law approach would be preserved while the disadvantages would be addressed. The offender would be prevented from enlarging their share while not being stripped of their existing legal interest. The rights of any innocent joint tenants to take the deceased person's interest by survivorship and to retain rights of survivorship among themselves would be untouched. Innocent joint tenants, who are unlikely to want to continue in a joint tenancy with the offender, would obtain an automatic severance of the joint tenancy with the offender and not be required to take further steps to achieve this outcome.
- 5.102 This reform also addresses Land Victoria's concern that a beneficial interest arising pursuant to a constructive trust lacks certainty under the current arrangements for land title registration. Treating the joint tenants as if they were tenants in common therefore has the additional advantage of creating greater certainty and reducing the need for litigation to determine property ownership.

Recommendation

- 25 The effect of section 50 of the *Transfer of Land Act 1958 (Vic)* should be amended to provide that, where a joint proprietor has been unlawfully killed (within the meaning of the Forfeiture Act) by another joint proprietor, the property shall devolve at the death of the victim as follows:
- (a) where the offender and the victim were the only joint proprietors, as if the property were owned by each of them as tenants in common in equal shares
 - (b) where there were more than two joint proprietors, as if:
 - (i) the offender holds their interest as a tenant in common
 - (ii) the surviving innocent joint proprietor(s) take the victim's interest by survivorship
 - (iii) as between the offender on the one hand and the innocent joint proprietors on the other hand, a tenancy in common exists
 - (iv) as between the innocent joint proprietors, a joint tenancy exists.

Other issues arising prior to a determination that the rule applies

Preservation of property

- 5.103 There may be a delay between the death of the deceased person and the application of the forfeiture rule upon the court determining responsibility for the death. This delay means there is a period of time in which an offender who jointly owned a property with the deceased person would be able to register as the sole owner and transfer the property to an innocent third party or use the property as security for a loan.
- 5.104 Normally, in order to prevent any dealings with land a person with an interest in the property would lodge a caveat.¹⁰² However, a caveat cannot be lodged in order to prevent the transfer of title by survivorship following the death of a joint tenant,¹⁰³ and there remains doubt as to whether a deceased person's estate would have an interest in land for the purposes of lodging a caveat.
- 5.105 It is the general practice of the Office of Public Prosecutions to freeze the assets of offenders once they have been charged with a homicide offence to preserve those assets for future claims for victim's compensation.¹⁰⁴ The offender may therefore not be able to dispose of the property pending a determination of their criminal responsibility by the court. However, this process will not assist in preserving the assets in cases where the offender has not been charged with an offence or has been acquitted.
- 5.106 New Zealand has a special caveat to prevent dealing with the land while the matter is determined,¹⁰⁵ and Carolyn Sparke QC recommended that Victoria introduce a statutory caveat to preserve property interests. The Commission raised with Land Victoria the possibility of introducing a statutory caveat such as in New Zealand, but Land Victoria opposed the idea. It would not want to see a caveat that would normally not be recordable approved through legislation, and it would cause administrative difficulties.¹⁰⁶
- 5.107 Despite the concerns raised by Land Victoria, the Commission sees 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. The Commission is confident that any administrative difficulties can be resolved.
- 5.108 Nevertheless, the Commission is not recommending any specific amendments to the Land Transfer Act. The forfeiture rule is rarely applied and legislative amendments for this specific purpose would be more appropriately considered as part of any broader property law reform process, which is beyond the scope of this review. This would ensure consistency in removing barriers to the preservation of different beneficial interests in property in Victoria.
- 5.109 If a surviving joint tenant is registered as the sole owner of a property and it is subsequently determined that the forfeiture rule applies, the Registrar of Titles should be empowered to rectify the Land Titles Register to reflect the consequences of the rule.

102 *Transfer of Land Act 1958 (Vic)* s 89.

103 *Ibid* s 50.

104 Consultation 17 (Office of Public Prosecutions).

105 *Succession (Homicide) Act 2007 (NZ)* s 13.

106 Correspondence with Deputy Registrar of Titles, 6 June 2014.

Recommendation

- 26 If an offender obtains registration by survivorship under section 50 of the *Transfer of Land Act 1958* (Vic) before it becomes apparent that the forfeiture rule applies, the Registrar should be empowered to rectify the Register appropriately.

Offender's access to property of the deceased person

- 5.110 Currently an offender is unable to access an inheritance prior to a determination of whether the forfeiture rule applies.¹⁰⁷ However, an offender is able to access their existing legal interests in as far as such access is not restrained by court order.¹⁰⁸
- 5.111 Carolyn Sparke QC in her submission to this reference put the view that an offender should be allowed access to their potential inheritance or any joint assets to fund their defence.¹⁰⁹
- 5.112 The Commission does not recommend allowing an offender access to any benefits from the deceased person to pay legal costs for their defence. Should the forfeiture rule be found to apply, there would be little prospect of recovering the value of that interest.
- 5.113 The Commission considers such an outcome contrary to the public policy of the forfeiture rule as the offender would have obtained a benefit from the death of the deceased person. It would also be contrary to the interests of innocent third parties who would otherwise be entitled to that interest.

Acceleration of property entitlement

- 5.114 The forfeiture rule can affect a person's benefit under a will even though they did not cause the will-maker's death. This may occur where the offender is responsible for the death of another person who is not the will-maker or outright owner of a property but from whose death they would benefit. The deceased person may be someone else in a 'chain of gifts'.¹¹⁰ For example, the deceased person and the offender might both be beneficiaries of a trust, where the deceased person's entitlements under that trust would transfer to the offender. Alternatively, the deceased person might have a lifetime interest in a property that will vest in the offender upon the deceased person's death.
- 5.115 Justice Gzell in *Batey v Potts*¹¹¹ stated that:
- The public policy against benefiting from one's crime is not limited to fixed categories. Nor does it focus upon the manner in which the felony results in benefit to the perpetrator.¹¹²
- 5.116 The forfeiture rule will therefore apply to prevent these entitlements, which would not have gone to the offender but for the unlawful killing, from being transferred to the offender.
- 5.117 In *Batey v Potts*, the will-maker granted her husband a right to reside in the matrimonial home for the term of his life. Upon his death, the residential property was to be held on trust with the residue of her estate to pay the net income to her son until he turned 35 and thereafter to pay the capital and income to him. If that trust were to fail, then the property was to go to other relatives.

107 *Gonzales v Claridades* (2003) 58 NSWLR 211.

108 *Ryan v Ryan* [2012] NSWSC 636 (8 June 2012).

109 Submission 17 (Carolyn Sparke QC).

110 Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013), 544.

111 (2004) 61 NSWLR 274.

112 *Ibid* 278 [21].

- 5.118 The son killed his father. The killing had the effect of accelerating his interest in the residential property under his mother's will and it was the benefit of that acceleration that the forfeiture rule prevented.
- 5.119 The court found that in such circumstances the appropriate remedy is to deprive the killer of the enjoyment of their interest for the period of the victim's life expectancy. However, the court used its discretion under the NSW Act to modify the effect of the rule.
- 5.120 In the Commission's view, it is neither possible nor desirable to prescribe in legislation the effect of the rule in such rare cases. Should a similar case arise in Victoria, the discretion provided under the proposed Forfeiture Act would enable the court to modify the effect of the rule.

Other benefits

Non-estate assets

- 5.121 Apart from affecting an offender's right to survivorship when they unlawfully kill another joint proprietor, the forfeiture rule will bar the offender from taking other benefits that do not fall within the deceased person's estate.¹¹³
- 5.122 Superannuation, life insurance and other financial services are regulated by Commonwealth legislation. However, modifications made to the common law by the proposed Forfeiture Act would have a broad effect on the disposition of these assets. Courts exercising federal jurisdiction in Victoria will apply the modified common law, including modifications to the forfeiture rule, where it is not inconsistent with Commonwealth legislation.¹¹⁴
- 5.123 Other benefits that the offender may have stood to gain are rarer but will still be affected by the forfeiture rule. An example is a gift that the deceased person gave the offender in contemplation of death, which is governed by the common law.
- 5.124 Under the NZ Act, a person who has unlawfully killed the deceased person is explicitly disentitled to any property interests in the 'non-probate assets' of their victim.¹¹⁵ These include the nomination of a bank account or superannuation benefits, gifts the victim made in contemplation of death, trusts settled by the victim that were revocable by the victim in his or her lifetime, beneficial powers of appointment that were exercisable by the victim in his or her lifetime and joint tenancies. These assets, with the exception of joint tenancies, are distributed as though the offender had died before the deceased person.¹¹⁶
- 5.125 In its consultation paper, the Commission sought submissions on how the forfeiture rule should apply to benefits that are not within the deceased person's estate. The responses received said that the rule should apply consistently with benefits that are within the estate, as in the NZ Act.¹¹⁷ This would mean deeming the offender to have predeceased the deceased person.
- 5.126 Although the approach taken in New Zealand is simple and clear, the Commission has concluded that it would not be possible or prudent to include a similar provision in Victorian legislation. In Australia, the non-estate benefits that an offender would most likely stand to gain are regulated by the Commonwealth. The benefits over which Victoria has jurisdiction are less frequently encountered. Circumstances in which they arise are unusual and are better dealt with on a case-by-case basis than by a standard statutory response. An exception, discussed below, is the payment of defined benefits under state legislation.

113 *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147; *Re Field and the Commonwealth of Australia* (1983) 5 ALD 571, 574–5; *R v National Insurance Commissioner, Ex parte Connor* [1981] 1 QB 758.

114 *Judiciary Act 1903* (Cth) s 80.

115 *Succession (Homicide) Act 2007* (NZ) s 8(1).

116 *Ibid* s 8(2).

117 Submissions 1 (Professor Prue Vines); 16 (The Institute of Legal Executives (Victoria)).

5.127 Under the proposed Forfeiture Act, the court would have a discretion to modify the effect of the rule on non-estate benefits as well as those within the estate. This would be provided by the broad definition of property, entitlements and other benefits that may be affected by a forfeiture rule modification order (Recommendation 11). Non-estate benefits have been affected by the court in exercising its discretion under the NSW Act. In *Re Fitter*,¹¹⁸ Justice Lloyd ordered that benefits from the deceased person's superannuation fund be held by the offenders on constructive trust for the deceased person's sister.¹¹⁹ The validity of this order was not considered in a collateral proceeding, as the trustees of the superannuation account exercised their discretion not to pay once the forfeiture rule had been applied.¹²⁰

State superannuation schemes

5.128 Thousands of Victorians are members of defined benefit superannuation funds established by state legislation. Most are members of two major public sector funds:

- the Emergency Services Superannuation Scheme, which is for emergency services employees and is open to new members
- the State Superannuation Fund, which comprises the remaining members of a number of closed public sector schemes.¹²¹

5.129 Both are administered by the Emergency Services Superannuation Board, which operates under its business name ESSSuper (Emergency Services and State Super). The funds are governed by the *Emergency Services Superannuation Act 1986* (Vic); the *State Superannuation Act 1988* (Vic); the *State Employees Retirement Benefits Act 1979* (Vic); the *Transport Superannuation Act 1988* (Vic).¹²²

5.130 ESSSuper currently provides benefits for around 145,000 members.¹²³ As well as administering the Emergency Services Superannuation Scheme and the former funds of the State Superannuation Fund, it administers the statutory defined benefit scheme for members of Parliament under the *Parliamentary Salaries and Superannuation Act 1968* (Vic).

5.131 ESSSuper is also responsible for paying defined pensions to a number of former office holders entitled by statute to receive them. Defined pensions have specifically been created by statute for the following office holders:

- the Governor¹²⁴
- Judges of the Supreme¹²⁵ and County Courts¹²⁶
- the Chief Magistrate¹²⁷
- the Director of Public Prosecutions¹²⁸
- the Chief Crown Prosecutor and Senior Crown Prosecutors¹²⁹
- the Solicitor-General¹³⁰

118 *Re Fitter; Public Trustee v Fitter* [2005] NSWSC 1188 (24 November 2005).

119 In this case, the forfeiture rule did not apply at common law because the persons responsible for the killing had been found not guilty by reason of mental illness. Justice Lloyd exercised the court's discretion under s 11 of the NSW Act to apply the forfeiture rule to prevent them from benefiting from the deceased person's estate, interest in a joint tenancy, and proceeds of a superannuation policy.

120 See *Fitter v Public Trustee* [2007] NSWSC 1487 (13 December 2007).

121 The Original Scheme; the Revised Scheme; the New Scheme; the State Employees Retirement Benefits Scheme; the Transport Scheme; the Metropolitan Transit Authority Superannuation Scheme; and the Melbourne Water Corporation Employees Superannuation Scheme.

122 ESSSuper, *Annual Report 2013* (2013) 4.

123 Ibid.

124 *Constitution Act 1975* (Vic).

125 Ibid; *Supreme Court Act 1986* (Vic).

126 *County Court Act 1958* (Vic).

127 *Magistrates' Court Act 1989* (Vic).

128 *Constitution Act 1975* (Vic).

129 *Public Prosecutions Act 1994* (Vic).

130 *Attorney-General and Solicitor-General Act 1972* (Vic).

- the Commissioner of the Independent Broad-based Anti-corruption Commission¹³¹
- the Victorian Inspector.¹³²

5.132 The Commission consulted ESSSuper about whether it would be useful to set out the effect of the forfeiture rule in legislation and, in particular, to deem that a person who is responsible for unlawfully killing a fund member died before the fund member. ESSSuper expressed support for any moves to clarify the effect of the rule, noting that it would require legislative amendments. It added that:

We note that any change would have to take into account the practical considerations, for example, where does the onus of proof sit? As a trustee, we often do not know about any other circumstances. We would be concerned if an onerous level of investigation was placed upon the trustee or some other form of administrative burden was placed upon us.¹³³

5.133 The Commission considers that a deeming provision would clarify the effect of the rule and not add to the obligations that already exist at common law.

Recommendation

- 27 Payments that would have been made to a person who is responsible for unlawfully killing a person who is a member of a state statutory defined benefit superannuation scheme or who otherwise has pension entitlements under state legislation should be redirected as if that person had died before the victim.

Victim compensation

5.134 The Commissioner for Children and Young People has brought to the Commission's attention instances in which a parent who has allegedly caused their child to sustain serious injury through abuse or neglect has, upon the child's death some time later, received the balance of any compensation payment that the child received for the injury.

One of the issues in this process is that the child dies intestate (without a will) as he/she is unlikely to have capacity to make a will or express their own wishes. In addition, the child may have been removed from the care of his/her parents and placed under the guardianship of the Department of Human Services (DHS) and/or have been cared for by foster, permanent or kinship carers, and had little contact with his/her parents prior to their death.¹³⁴

5.135 The Commissioner for Children and Young People has called for an examination of the application of the forfeiture rule to the estates of children whose deaths are connected to abuse or neglect by a parent.

131 *Independent Broad-based Anti-Corruption Commission Act 2011* (Vic).

132 *Victorian Inspectorate Act 2011* (Vic).

133 Correspondence with Chris Tay, Manager Legal Services, Emergency Services and State Super, 13 June 2014.

134 Submission 15 (Commission for Children and Young People).

- 5.136 This issue was also raised by the New South Wales Public Trustee (now the New South Wales Trustee and Guardian) in 2002 in response to a review of the NSW Act by the New South Wales Attorney-General's Department.¹³⁵ In that review, the New South Wales Public Trustee suggested it may be desirable to extend the operation of the forfeiture rule to include depriving a parent of a benefit from an estate where that benefit arises from an unlawful action that did not result in the immediate death of the deceased. The Department dismissed the idea as it considered the scenario unlikely to occur.¹³⁶
- 5.137 The forfeiture rule would prevent a parent from inheriting any assets of the child, including criminal injuries compensation, where the parent's abuse or neglect caused the death of the child and amounted to an unlawful killing. However, where the death did not result from the parent's unlawful actions but from some other cause, the forfeiture rule would not apply.
- 5.138 In the situation where an award of monetary compensation to a child for injury unlawfully caused by a parent has been made, and later the child dies from some other cause, the Commission considers it inappropriate that the award of monetary compensation should flow to the offending parent through the child's intestacy. In such circumstances, it would appear just that the monetary award should flow on intestacy as if the non-innocent parent had predeceased the child.
- 5.139 The Commissioner for Children and Young People put forward possible solutions. They are directed to ensuring that a will is made on the child's behalf by the processes available under Part 3 of the *Wills Act 1997* (Vic), and ensuring better oversight of the payment of the balance of the money on the child's death.
- 5.140 This is a matter beyond the terms of reference of this review. It is a matter small in compass but morally significant and is one which government could address directly, including in ways identified by the Commissioner for Children and Young People in his submission to the Commission.

135

New South Wales, *Report on the Review of the Forfeiture Act 1995: New South Wales Attorney-General's Department*, Parliamentary Paper No 72 (2002) 8.

136

Ibid.

Conclusion

6. Conclusion

- 6.1 Without doubt, the forfeiture rule is a fundamental principle of public policy, and should continue to be so. It is consistent with the legal maxim that no one can derive an advantage from their own wrongdoing, and it conveys the community's highest condemnation of the act of unlawfully taking another person's life.
- 6.2 Nevertheless, the need for legislative reform in Victoria is clear. The rule has not evolved in step with changes to the criminal law and sentencing practices. It has remained inflexible while the number and types of homicide offences and sentencing options have diversified in response to shifts in community attitudes and behaviour.
- 6.3 The Commission is pleased to have had the opportunity to consider, and make constructive proposals on, the application and implications of the rule.
- 6.4 The new Forfeiture Act and legislative amendments that the Commission recommends in this report are a proportionate and targeted response to uncertainty about when, and with what effect, the rule applies, and the injustice it can cause in some cases. Experience in the jurisdictions from which the proposed legislation is drawn indicates that introducing a Forfeiture Act in Victoria will not lead to an upsurge in litigation. This is as it should be, as exceptions to the rule will be rare.
- 6.5 The recommended reform will refine and strengthen the rule. It will refine it by aligning it with developments in criminal law and sentencing practices. It will strengthen it by expressing it in an Act of Parliament and making its effect clearer and fairer for the personal representatives and innocent beneficiaries of the victim's estate.
- 6.6 The Commission commends this report to you.

Appendices

86 **Appendix A: Submissions**

87 **Appendix B: Consultations**

Appendix A: Submissions

- 1 Professor Prue Vines
- 2 Michael P Tinsley
- 3 Janine Truter
- 4 Victoria Police
- 5 Forensicare (Victorian Institute of Forensic Mental Health)
- 6 Office of Public Prosecutions Victoria
- 7 Victoria Legal Aid
- 8 Crime Victims Support Association
- 9 State Trustees
- 10 Law Institute of Victoria
- 11 Loddon Campaspe Community Legal Centre
- 12 Land Victoria
- 13 Elder Law and Succession Committee of the Law Society of New South Wales
- 14 Property and Probate Section of the Commercial Bar Association
- 15 Commission for Children and Young People
- 16 The Institute of Legal Executives (Victoria)
- 17 Carolyn Sparke QC

Appendix B: Consultations

Discussions about the questions raised in the consultation paper were held with the people and organisations listed below in chronological order.

- 1 New South Wales Supreme Court—Probate Office
- 2 Charles Rowland
- 3 Supreme Court of Victoria—Registrar of Probates
- 4 New South Wales Department of Attorney-General and Justice
- 5 Roundtable 1 (on how well the rule is targeted and how effectively it prevents an offender from deriving a benefit). Attended by the Commercial Bar Association, Crime Victims Support Association, Department of Human Services, Forensicare, Land Victoria, Law Institute of Victoria, Office of Public Prosecutions, Office of the Public Advocate, Seniors Rights Victoria, Victoria Legal Aid, Victoria Police, Richard Boaden, Dr Matthew Groves, Jim Robinson, Carolyn Sparke QC and Kathy Wilson.
- 6 Richard Neal
- 7 Supreme Court of New South Wales—Judges
- 8 Professor Prue Vines
- 9 Elder Law and Succession Committee of the Law Society of New South Wales
- 10 Michelle Maynard
- 11 Pam Suttor
- 12 Financial Services Council
- 13 Lindsay Ellison SC
- 14 New South Wales Trustee and Guardian
- 15 Supreme Court of Victoria—Judges
- 16 Roundtable 2 (on the scope and effect of the rule and procedural issues involved in any reform). Attended by the Commercial Bar Association, Crime Victims Support Association, Forensicare, Land Victoria, Law Institute of Victoria, Loddon Campaspe Community Legal Centre, Office of Public Prosecutions, Seniors Rights Victoria, State Trustees, Victoria Police, Jim Robinson, Professor Prue Vines and Kathy Wilson.
- 17 Office of Public Prosecutions
- 18 ESSSuper (Emergency Services and State Super)
- 19 Land Victoria

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