The Forfeiture Rule

SUBMISSION TO THE VICTORIAN LAW REFORM COMMISSION

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[redacted]

Table of Contents

Introduction

The Law Institute of Victoria (LIV) is pleased to make this submission to the Victorian Law Reform Commission (the Commission) in relation to the operation of the forfeiture rule in Victoria. This submission has been prepared based on comments provided by the LIV's Succession Law Section. In this submission the LIV responds to select questions in the Consultation Paper.

The need for legislative reform

The LIV agrees with comments in the consultation paper that there are a number of complexities and ambiguities in applying the forfeiture rule (the rule) in Victoria. We are particularly concerned that the strict application of the rule can lead to harsh outcomes, and note the cases contemplated in the consultation paper in this respect, including a suicide pact where one party survives or where a person is convicted of murder of a spouse following years of domestic abuse by the spouse.

A leading judgment on the operation of the rule in Victoria is *Estate of Soukup.*[1] In that case Justice Gillard adopted the rigid approach of the New South Wales Court of Appeal in *Troja v Troja* which provides that the rule is absolute and inflexible and will operate regardless of the circumstances of the killing.[2] The LIV considers that this is problematic in that it fails to recognise the varying degrees of culpability that accompany the unlawful killing of a person. Further, the consequence of this decision has been to effectively stymie the development of the rule at common law in Victoria. We consider that legislative change is now required to overcome these issues and allow the rule to be developed so that it may operate flexibly and appropriately in response to different factual scenarios that necessarily arise in cases of unlawful killing.

Options for legislative reform

Part Five of the consultation paper sets out options for reforming the rule in Victoria. As detailed below, the LIV supports option two (empower the courts to modify the effect of the rule).

Consultation Paper Question 13: Should Victoria introduce legislation like that in the United Kingdom, Australian Capital Territory and New South Wales, that empowers a court to modify the effect of the forfeiture rule?

The LIV considers that legislation should be introduced in Victoria allowing the courts to modify the effect of the rule in appropriate circumstances. We note that this model was favoured by the Victorian Attorney-General's Law Reform Advisory Council and has been adopted in the United Kingdom, Australian Capital Territory and New South Wales.

The LIV does not consider option one (amend existing legislation to clarify the effect of the rule) or option three (codify the rule) to be viable alternatives. We consider that the first option would not go far enough to address the problems with the application of the rule, such as the very unusual factual situations that have

[1] (1997) 97 A Crim R 103.
[2] (1994) NSWLR 269.

arisen and may arise in the future, as outlined in the Consultation Paper, and the number of Acts to be amended and consequent multitude of reference points.

Similarly, the LIV does not consider codification to be an effective approach. It is unlikely that any legislative code could fully contemplate the sphere of moral culpability and we do not consider it possible that Victorian legislation could contemplate the many and varied factual situations in which an unlawful killing may occur, to ensure a just result for the parties. We consider that it is more appropriate for these matters to be dealt with by a judge on a case by case basis. Further, the development of a full statutory code would be out of step with legislative reform in other Australian jurisdictions and would be a disproportionate response to the small number of cases in which the rule is invoked each year.[3]

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

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

The LIV has considered in detail the *Forfeiture Act 1995* (NSW) (the NSW Act). The LIV considers that any 'interested person' should be entitled to apply for an order to modify the effect of the rule, as defined in the NSW Act to include the offender, the executor or administrator of the estate of a deceased person, 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, a person claiming through an offender, and any other person who has a special interest in the outcome of an application for a forfeiture modification order.[4] The LIV feels that this definition is suitably wide and confers the appropriate discretion on the courts 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.

Some concerns have been noted around the scope of 'a person claiming through an offender' and how this could be misused or misapplied to benefit a person responsible for a death who would not otherwise make a successful application for modification of the rule. We note, by way of example, the circumstances in which a grandmother is killed by her child and the grandchild seeks to have the rule modified as 'a person claiming through an offender'. Appropriate safeguards should be in place to ensure that the grandchild is entitled to apply for an order without a flow-on benefit to the murderer if the murderer was not otherwise entitled to modification of the rule.

The LIV would support an exemption for those found not guilty of an unlawful killing by reason of mental impairment. As noted in the consultation paper, this is consistent with other relevant legislation including *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) and the *Confiscation Act 1997* (Vic) and the underlying public policy of such legislation that a person suffering from mental impairment needs treatment rather than punishment. Alternatively, we note that this could possibly be covered by such a person being entitled to apply for an order for modification of the rule as an interested person, with the Court to see that equity is done in granting the application.

[3] Figures are difficult to locate in the Victorian context. We note that the Commission reports in the consultation paper that less than 20 cases have been reported under the *Forfeiture Act 1995* (NSW). There does not appear to be any reported application of the *Forfeiture Act 1991* (ACT).
[4] S3 of the NSW Act.

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

The LIV supports a 12 month limit on an application from the date on which the rule takes effect. We consider it important that provision be made for the court to grant leave for a late application where the Court considers it just in the circumstances, as provided in s7 of the NSW Act. 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.

In such cases, it might transpire that the benefit is distributed prior to the application for an extension of time being made. Where this occurs, a question arises as to whether the distribution of the benefit should be a bar to any extension of time to apply for modification of the rule. We refer the Commission to Part IV of the *Administration and Probate Act 1958* (Vic), which governs the law relating to family provision in Victoria. Part IV provides that the prior distribution of the estate should not be disturbed by any later application for extension of time to make a maintenance order.[5] The LIV would support similar provisions in relation to late applications for modification of the rule. We note that in any case it is unlikely that the Court would consider it 'just' to grant an extension in such circumstances.

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

Again the LIV supports the relevant provisions in the NSW Act. Section 5(3) of the NSW Act provides that in determining whether justice requires the effect of the rule to be modified, the Court is to have regard to the conduct of the offender, the conduct of the deceased person, the effect of the application of the rule on the offender or any other person, and such other matters as appear to the Court to be material. We note that a similar provision in Victoria would reflect the matters taken into account by the courts in determining whether to apply the rule, prior to *Estate of Soukup*. For example the conduct of the deceased person was taken into account by Justice Coldrey in declining to apply the rule in *Re Keitley,* where a wife's level of moral culpability was considered to be markedly diminished given the violence and threats of violence committed against her by her husband.[6] In *Leneghan-Britton v Taylor,* the court took into account the conduct of the offender, where a daughter had sold her home in order to move in and assist with the care of her mother, and later under considerable stress and deteriorating mental health, killed her.[7]

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

See the LIV's response to question 14(c) above.

[5] S99 of the *Administration and Probate Act 1958* (Vic).
[6] [1992] 1 VR 583.
[7] [1998] NSWSC218.

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

The LIV submits that any Victorian legislation should protect a 'benefit', being any interest in property. We note this is the relevant definition in the NSW Act. This should encompass jointly-owned property and the common law interpretation of property such as insurance, superannuation and pension rights.

We note that these comments also address the issues raised in questions nine and ten of the consultation paper.

Conclusion

The LIV concludes that the Commission should investigate options for the introduction of legislation in Victoria to allow the courts to modify the effect of the rule in appropriate circumstances. We look forward to further contributing to this inquiry and participating in the upcoming roundtable consultation with the Commission and other stakeholders.