



INSTITUTE OF LEGAL EXECUTIVES®

The Institute of Legal Executives (Victoria)

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20 May 2014

Victorian Law Reform Commission
By email: lawreform@lawreform.vic.gov.au

Dear Sirs,

Re: *The Forfeiture Rule* – Consultation Paper March 2014

The Institute thanks the Commission for this opportunity to make a submission concerning the above, and we apologise for our delay in forwarding this to you.

By way of introduction to our following comments in relation to specific questions in the Consultation Paper, we agree that the current operation of the rule in Victoria, applying 'equally and inflexibly in all circumstances', can result in 'harsh' outcomes. We are in favour of the Court having discretion to modify the effect of the rule 'if required by the justice of the case', as is noted in respect to the United Kingdom, Australian Capital Territory and New South Wales legislation referred to in the Consultation Paper, other than in the case of the offender being convicted of murder.

We prefer this position to codification of the rule, as is noted in respect to the New Zealand legislation referred to. The reason for this is that there are many different forms of killing – some intentional, some intentional but without any intention to profit (i.e. suicide pacts), some accidental, some effected in self-defence (i.e. *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.

We have not addressed all questions in the Paper, and the above informs those questions which are addressed.

Question 2 – Should the forfeiture rule be applied equally to all types of unlawful killing?

We believe not:

- (a) A premeditated murder and an accidental death are different matters. It could be argued that in the case of an accidental death, the ‘killer’ is being punished twice: first by the loss of a loved one, and then by the strict application of the forfeiture rule.
- (b) The rule should be applied to premeditated murder (excepting ‘genuine’ suicide pacts, notwithstanding that this is an offence).
- (c) As noted above, the position in the United Kingdom, Australian Capital Territory and New South Wales is to be preferred, noting also the New South Wales legislation in respect to joint tenancies.
- (d) It would seem appropriate, as in New South Wales, that an interested person be able to make an application.

Question 3 – Should the forfeiture rule be applied equally to all unlawful killers?

No, the Courts ought to be able to exercise their discretion, being in the best position to ascertain moral culpability and mitigating or other relevant factors.

Question 4 – Should the absolute exception to the forfeiture rule be maintained in respect to those with mental impairment? If not, in what circumstances should the exception not apply, and should the Court have a discretion to apply the rule in the circumstances of the case?

No, there should not be an absolute exception. The Courts should have discretion to apply the rule in the circumstances of the case – there are many different levels of ‘mental impairment’, some where wrongdoing is understood and others not, and therefore many different levels of culpability.

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

Question 6 – Should the Courts have a discretion to rectify a Will to fulfil the Willmaker’s probable intent?

The most straightforward application would appear to be if the killer were treated as predeceasing the victim.

However, application of the gift over is a difficult issue to determine. On the one hand, if the gift is applied as if the original beneficiary (killer) predeceased, it is noted that in some cases this might result in the original beneficiary still indirectly obtaining some benefit. On the other hand, it could be said that it is interfering with the Willmaker’s freedom of testation to not apply the gift over.

Again, this is a situation where it might be more appropriate to give discretion to the Court to decide whether in the circumstances the gift over should take effect, or whether in the circumstances the Willmaker would wish the whole gift to fail; in other words, allow the Court to rectify the Will accordingly.

Questions 7 and 8 – Should Victoria’s intestacy laws permit an unlawful killer’s descendants to inherit from the victim as the killer’s representatives, and should there be any exceptions?

These are difficult questions. On the one hand, the unlawful killer’s descendants are innocent persons who might, in the fullness of time, inherit in any event. It would seem

particularly harsh to automatically disinherit those persons due to the unlawful actions of another.

Giving the Court the discretion to apply or modify the forfeiture rule in conjunction with the effect of the statutory scheme of distribution would appear appropriate, in a similar manner to which the Court currently considers relevant matters and competing interests in determining family provision claims.

Question 9 - Should the courts distribute property subject to a joint tenancy once the forfeiture rule has been applied?

- (a) Should an unlawful killer be able to retain their interest in the property?
- (b) Should the victim's estate be able to keep the victim's interest in the property where there are multiple joint tenants?

Again, the Court should have the discretion to decide whether or not a severance has been effected, and whether or not the unlawful killer should be able to retain an interest. The victim's estate should be able to keep the victim's interest in the property, at the Court's discretion.

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

In the same manner as those within the deceased's estate.

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

Not necessarily – as noted above, this should be at the Court's discretion regarding the circumstances of the case.

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

Yes, but only to the extent that it gives the Court (and others) guidance, and discretion to apply the rule in the circumstances of the case.

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?

Yes.

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?
 - (b) What should be the time limit for making an application?
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- (a) The 'unlawful killer' and any other person interested in the estate (the difficulty will be in defining an 'interested person', given that some may not be directly affected but may seek to intervene for purely altruistic reasons in the interests of justice).
 - (b) Six months from the date of the Grant, with the Court having the power to stay proceedings pending the outcome of any criminal trial.

Question 15 (and Question 16) - Should Victoria codify the common law rule of forfeiture?

No, for the reasons stated above.

Yours sincerely,



(Miss) Roz Curnow
Chief Executive Officer
On behalf of the Council of the Institute

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Everyone employed in the legal profession is *important*;
every task done well, whether it be mundane or carried out at a high level of responsibility,
contributes to a better profession.

Experientia Docet Sapientiam: Experience Teaches Wisdom.