**SUBMISSION TO VICTORIAN LAW REFORM COMMISSION ON FORFEITURE RULE**

**Prue Vines**

This submission considers some issues raised by the forfeiture rule in the light of its history and recent legislation in NSW.

My concerns are about

(1) The interaction of the forfeiture rule with family provision law
(2) Changes in social attitudes to culpability in relation to homicides and how these should be taken into account in legislation
(3) The increasing treatment of victims as significant and whether that should be taken into account or is affecting the operation and consideration of the forfeiture rule.
(4) The effect of the Forfeiture Act (NSW) or how legislation should be considered
(5) Section 11 of the NSW Forfeiture Act and whether or how it should be followed.

I also answer some of the questions set out in the Consultation Paper of March 2014.(Question numbers are in bold type).

## (**1)The interaction of the forfeiture rule with family provision law: consequences of the forfeiture rule**

Since *Barns v Barns* it has been clear that agreements /contracts etc to pass property should not be regarded as taking property out of the estate but always as subject to family provision. One thing that is not clear is how family provision and the forfeiture rule will interact.

Consider *Re DWS* where the killer murdered his parents who died intestate. The court held that their grandson, the killer's son could not take their estate because the grandson claimed through the killer and the forfeiture rule precluded this. This problem is solved if the killer is treated as having predeceased the deceased; however if that rule is not used there is a situation where the grandson is precluded on intestacy but it could be argued that the grandson could claim as an eligible applicant in family provision – that is, in his own right, regardless of the fact that he is also descended from the killer. The question here is whether the family provision jurisdiction is allowed and whether it can co-exist with the forfeiture rule. Dal Pont and Mackie say the forfeiture legislation must be taken to have been enacted against the background of the FP legislation and therefore that one should not be able to deny a person under the forfeiture rule but then give under FP as was stated in *Re Royce* . Despite the view in *Troja* that this would be an affront to the forfeiture rule it could be argued that the forfeiture legislation was enacted to modify the rule and it might be that some provision could be made in the legislation so that FP did not alter the modification with respect to the killer but only with respect to those taking through or independently of the killer as in the case of *DWS* above.

**(2)Changes in social attitudes to culpability in relation to homicides and how these should be taken into account in the legislation**

The original forfeiture rule only appeared after the abolition of the traditional rules of forfeiture for felonies, particularly where death was the penalty since that meant the estate was forfeit to the crown and there was no possibility of a killer inheriting as he or she had been put to death. Forfeiture of estate is a very big sanction. However views about culpability change. 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.

**So, my answer to questions 2 and 3** would be that the forfeiture rule should always be modifiable in relation to culpability. I don't think excluding murder, as the NSW legislation does, is useful, because it seems to me that there are issues of culpability in relation to all such matters. The murders where modification seems to me to be reasonable were those where a person killed their spouse after a very long time of serious physical and psychological abuse.

**(3)The increasing treatment of victims as significant and whether that should be taken into account or is affecting the operation and consideration of the forfeiture rule.**

*Re Fitter* is an example of a case where the sister of the deceased ran a campaign based on the victim's rights where the killer had been found; at present we are seeing many examples of people emphasising the rights of victims and victim's families in relation to offences including murder. The general public seems to forget that there is a reason why we don't allow victims to determine what will happen to offenders: it is that victims cannot be expected to feel anything except vengeful, and the State has stepped in to the criminal law in order to prevent feuds and vengeance killings etc.

This is a background point to considering whether victims should be able to apply to prevent the forfeiture rule from being modified as in s 11 of the NSW Act. This is discussed further below.

**(4) The effect of the Forfeiture Act (NSW) or how legislation should be considered**

The Act is unclear. In particular section 3 definition of unlawful killing:

> ' (a) any homicide committed in the State that is an offence, and(b) any homicide that would be an offence if committed within the State, and includes aiding, abetting, counselling or

procuring such a homicide and unlawfully aiding, abetting counselling or procuring a suicide.'

It is not clear whether the homicide is to be an offence of which the person has been convicted or not.

Traditionally in the probate court the question of homicide was re-decided according to the civil standard and possibly with different evidence. This does not seem to happen often now, if at all, and the assumption appears to be made that if there has been a conviction that the killing is sufficient for the rule to apply.

One scenario that needs to be considered is this: Husband drives car and negligently has an accident in which wife is killed. Police charge husband with dangerous driving. Presumably this is an unlawful killing and the Act applies to it. Most people would agree that the forfeiture rule should be modified in this case. Is it necessary that this case go to court? That is, is this a case where the default position should be that the forfeiture rule applies and that a court order is needed to avoid it.

It may be useful to specify some situations where forfeiture should not apply in order to make it clear that there is no need to apply for a modification order. This would save costs significantly for those few people who might be in this position. Forfeiture should not apply in cases of accidental death including where accidental death arising from negligence in a car accident has occurred.

**(5) Section 11 of the NSW Forfeiture Act and whether or how it should be followed.**

Section11 of the NSW Forfeiture Act allows any interested person (except the offender or persons taking through the offender) to apply to have the forfeiture modification revoked in the situation where a person has been found not guilty of murder by reason of insanity.

There are a number of issues here:

Allowing this to be re-opened suggests that the verdict is meaningless. That is, it appears to suggest that either the verdict is wrong or that the mental illness at issue is fraudulent or even that mental illness is not real. Otherwise it could not be reasonable to interfere with a judgment that the killer was not really culpable. The factors which the judge is allowed to take into account in such cases are extremely wide and the cases seem to extend to a complete overall examination of the conduct of the deceased and the killer throughout their lives and/or relationship. This means that the question of forfeiture is being dealt with not purely on the basis of the killing, but actually on a much wider basis (see s 11(3)…'such other matters as to the Court appear material') ; a basis which I would submit does not amount to the proper use of the forfeiture rule which should only be applied to the issue of the murder itself.

The persons most likely to want to re-open this issue are the victim's family; they are also very likely to believe that the killer is culpable despite the court's ruling that they are not guilty by reason of insanity. This is the impression I have from *Fitter.* This section is a very good example of the shift to

an emphasis on victims' rights which is not necessarily a useful or fitting addition to criminal justice since it is likely to maintain and support campaigns of vengeance.

I believe that if s 11 is to be followed s 11 the court should be limited to the assessment of culpability in relation to the murder itself. Other factors in life could be taken into account in a family provision claim, but I think s 11 is misconceived at present.

Also, s 10's definition of 'interested person' so that offenders or a person claiming through an offender to have the rule applied without modification seems unnecessary. Such applications would be extremely rare, but there seems no good reason to prevent an offender or a person claiming through an offender from making such an application.

**So my answer to question 4** would be that the absolute exception to the forfeiture rule for persons found not guilty by reason of mental impairment should be maintained, but that if it is not the Court should be limited to a consideration of the question of culpability on the civil standard of proof in relation to the murder, not in relation to everything to do with victim and killer.

**Questions 5 and 6**

Contingent gifts over should be distributed by deeming the killer predeceased the testator and then by using a rectification power like that of the ACT to rectify the will according to the testator's probable intention where there are unforeseen circumstances (that is, a broader sense of rectification than is used in, eg the current NSW Act). This would solve problems like that in *Hayles.*

**Questions 7 and 8**. Where the intestacy laws apply the forfeiture rule about an unlawful killer's descendants inheriting should be modified so that situations like *DWS* cannot occur. In my opinion the rule should be modified so that where the unlawful killer's descendants are also descendants of the deceased, they should not forfeit. This could also be done through family provision.

I see no reason to extend this to descendants of the killer who are not also descendants of the deceased.

**Question 9**

I also think that where property is held in joint tenancy the better way to proceed is to deem that the killer predeceased the victim. This has the advantage of applying in the same way where there are more than two joint tenants. The fact that with multiple joint tenants the victim will lose the estate to the other joint tenants reflects the risk that the victim has always had that the other joint tenants will take. I prefer this to the position where the killer retains the legal title and holds in constructive trust for the victim's estate because I prefer that the killer does not get anything, including a bare legal title.

**Question 10**

It follows from what I have said above that I think the forfeiture rule should apply to all assets coming from the deceased whether they are technically part of the deceased's estate so that it covers superannuation. I think the approach of the NZ Act is the preferable one.

**Question 11**

No. Family provision should be claimable, even by the unlawful killer, where the rule has been modified – and in my view it should be modifiable in regard to murder as well as lesser killings.

That view is based on the cases where the victim of domestic violence over a long period has murdered the abuser.

**This is respectfully submitted by:**

**Prue Vines,**

**Professor, Faculty of Law, University of New South Wales**

**4th April 2014.**