



South Australian Law Reform Institute

**RIDDLES, MYSTERIES AND ENIGMAS:
THE COMMON LAW FORFEITURE RULE**

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the Adelaide University Law School.

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Terms of reference

In September 2011, the then South Australian Attorney-General, the Hon John Rau MP, asked the South Australian Law Reform Institute (SALRI) to review the role and application of the common law forfeiture rule and any need for legislative intervention in South Australia. The Attorney-General drew the attention of SALRI to a suggestion that there was for a need for a new law to permit the common law forfeiture rule to be mitigated. The present Attorney-General, the Hon Vickie Chapman MP, supported SALRI undertaking this reference.

SALRI has not been able until now to undertake this reference owing to other commitments and the need to first complete its major references into various aspects of succession law, as well as provocation and other defences to murder and related issues (notably the domestic violence implications of the present law in this area). These references provide the necessary background and context to this review of the common law forfeiture rule.

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SALRI is grateful for the many insightful submissions received in relation to this reference.

Disclaimer

This Report deals with the law as of 29 February 2020 and may not necessarily represent the current law.

Any views expressed in this Report are those of the South Australian Law Reform Institute and no other agency.

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Abbreviations and Glossary

ACT Act	<i>Forfeiture Act 1991</i> (ACT).
Administrator	A person appointed by the Court to carry out the duties of a personal representative in cases where the deceased dies without a will, or there is a will but no executor is appointed, or the appointed executor is unable or unwilling to act.
ALRC	Australian Law Reform Commission.
BDBN	Binding Death Benefit Nomination.
CLCA	<i>Criminal Law Consolidation Act 1935</i> (SA).
Culpable driving	The offence of causing death by culpable driving is similar to the test for manslaughter by gross negligence. ¹ It exceeds tort or civil negligence and means that an individual's driving falls greatly short of the standard of care a reasonable person would have exercised, and involved a high risk that death or serious injury would result. This is an objective test. A reasonable person in the accused's situation must have realised that his or her driving created a high risk of death or serious injury and it does not need to be established that the individual intended to cause death or serious injury or that he or she realised that his or her conduct was negligent. ² The precise offence differs throughout Australia. ³ In Victoria, causing death by culpable driving is a distinct and separate offence. In South Australia, the relevant offence under s 19A of the <i>CLCA</i> is a combined offence of causing death through driving 'in a culpably negligent manner, recklessly, or at a speed or in a manner dangerous to any person.' ⁴
Dangerous driving	The offence of causing death by dangerous driving exceeds tort or civil negligence. ⁵ The speed or manner in which an individual drove must involve a serious breach of the proper management or control of the vehicle. This test will only be satisfied if the speed or manner in which the individual drove posed a real, and not just speculative, danger that members of the public who may have been in the vicinity may have been killed or seriously injured. ⁶ It is unnecessary to establish that the individual intended to drive dangerously, or was aware that his or her conduct was dangerous to the public. The test is objective in that a reasonable person in the accused's situation must have realised that his or her driving posed

¹ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 21 [3.25]. The VLRC noted that this offence is similar to manslaughter by gross negligence and the minimum degree of negligence that needs to be made out is the same degree as that required to support a charge of manslaughter. See also *R v Shields* [1981] VR 717; *King v The Queen* (2012) 245 CLR 588. See further below [6.1.40]–[6.1.77], [6.2.27]–[6.2.37].

² See *King v The Queen* (2012) 245 CLR 588; *Bouch v R* [2017] VSCA 86.

³ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 2nd ed, 2005) 486.

⁴ *R v Mayne* (1975) 11 SASR 583; *King v The Queen* (2012) 245 CLR 588.

⁵ See, for example, *McBride v The Queen* (1966) 115 CLR 44; *R v Mayne* (1975) 11 SASR 583; *R v Hendrikson* [2007] SASC 304; *King v The Queen* (2012) 245 CLR 588.

	a real, and not just speculative, danger to other members of the public. ⁶ The offence of dangerous driving, though a serious offence, involves conduct that is less blameworthy than culpable driving. ⁷ The precise offence differs throughout Australia. ⁸ In Victoria, causing death by dangerous driving is a distinct and separate offence. In South Australia, the relevant offence under s 19A of the <i>CLCA</i> is a combined offence of causing death through driving ‘in a culpably negligent manner, recklessly, or at a speed or in a manner dangerous to any person.’
DPP	Director of Public Prosecutions.
Executor	A person appointed by the will of a testator to administer the property of the testator and to carry into effect the provisions of the will.
Family provision	The <i>Inheritance (Family Provision) Act 1972</i> (SA) confers a discretion on the Supreme Court, upon application by certain specified members of the deceased’s family who show they have been left without adequate provision for their proper maintenance, education or advancement in life, to order such provision as the court thinks fit to be made out of the deceased’s estate for the proper maintenance, education or advancement in life of the applicant. ⁹
Family Provision Act	<i>Inheritance (Family Provision) Act 1972</i> (SA).
Gift-over	A ‘gift-over’ can be likened to a security. If for example a gift in a will reads, ‘I leave all my estate to my husband, but if he dies before me then to my children’, the gift-over is the gift to the children.
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. ¹⁰
Intestate	A victim who dies with no will or, in the case of a partial intestacy, where the victim has failed to bequest part of her estate. An intestacy could arise on a technicality.
Joint tenancy See also Survivorship and Tenancy in common .	Co-owned assets held as joint tenants do not form part of a person’s estate and in normal circumstances, the rules of Survivorship will apply.

⁶ See *R v Coventry* (1939) 59 CLR 633; *McBride v The Queen* (1966) 115 CLR 44; *R v Mayne* (1975) 11 SASR 583; *R v Hendrikson* [2007] SASC 304.

⁷ *King v The Queen* (2012) 245 CLR 588.

⁸ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 2nd ed, 2005) 486.

⁹ See also SALRI, ‘*Distinguishing between the Deserving and the Undeserving*’: *Family Provision Laws in South Australia* (Report No 9, December 2017).

¹⁰ See also SALRI, *Cutting the Cake: South Australian Rules of Intestacy* (Issues Paper No 7, December 2015); SALRI, *South Australian Rules of Intestacy* (Report No 7, July 2017).

Mental impairment	Under Part 8A of the <i>CLCA</i> , the defence of mental impairment (previously insanity) 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 they either did not know the nature and quality of their conduct, or they did not know that the conduct was wrong.
MP	Member of Parliament.
NSW Act	<i>Forfeiture Act 1995</i> (NSW).
New Zealand Act	<i>Succession (Homicide) Act 2007</i> (NZ).
NZLC	New Zealand Law Commission.
NZLC Report	New Zealand Law Commission, <i>Succession Law: Homicidal Heirs</i> (Report No 38, 15 July 1997).
SACAT	South Australian Civil and Administrative Tribunal
SALRI	South Australian Law Reform Institute.
SAPOL	South Australian Police.
SCT	Superannuation Complaints Tribunal.
SISA	<i>Superannuation Industry (Supervision) Act 1993</i> (Cth).
STEP	The Society of Trust and Estate Practitioners Australia.
Survivorship See also Joint tenancy	In normal circumstances, a person's interest in jointly owned property does not become part of his or her estate upon death. Instead, that person's interest is extinguished and the interests of the other joint tenants are correspondingly enlarged.
Tenancy in common See also Joint tenancy	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.
TASLRI	Tasmania Law Reform Institute.
TASLRI Report	Tasmania Law Reform Institute, <i>The Forfeiture Rule</i> (Report No 6, December 2004).
Tenancy in common	One co-owner's share does not automatically vest in a surviving co-owner upon death. Each co-owner holds a distinct share that then forms part of their estate upon their death.
UK Act	<i>Forfeiture Act 1982</i> (UK).
Unlawful killer	Used throughout this Report to objectively describe the person who unlawfully causes another's death; the word is not used to provoke emotion. This Report recognises that there are many terms to describe a person who kills another and many circumstances where this may happen.

VLRC	Victorian Law Reform Commission.
VLRC Report	Victorian Law Reform Commission, <i>The Forfeiture Rule</i> (Report No 20, September 2014).

Preface

The venerable common law forfeiture rule prevents an unlawful killer from receiving any profit or benefit as a result of their crime. The rule stems from a longstanding and powerful maxim of public policy — that no person should benefit from his or her wrongdoing. The premise of the rule remains sound, but its scope and operation are uncertain and problematic in various respects. The famed words of Winston Churchill have recently been used to characterise the current extent and application of the common law forfeiture rule in unlawful homicide as ‘a riddle wrapped in a mystery inside an enigma’.¹¹

The rule dates back to Jewish and Roman law and various medieval English doctrines that were only formally abolished in 1870.¹² The rule in its current modern form was first stated in the 1892 decision of the English Court of Appeal in *Cleaver v Mutual Reserve Fund Life Association*¹³ where a wife (the famous Florence Maybrick who had been convicted of the murder of her husband by poison) was held ineligible to claim the proceeds of her husband’s life insurance policy. Lord Esher MR stated that ‘the rule of public policy in such a case prevents the person guilty of the death of the insured, or any person claiming through such person, from taking the money’.¹⁴ Fry LJ agreed: ‘It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person.’¹⁵

In the famous *Crippen* case, Evans P observed:

It is clear law 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. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence.¹⁶

The forfeiture rule was extended in 1914 to both murder and manslaughter in *Re Hall*, notably in the observations of Hamilton LJ.¹⁷ This principle was approved and the forfeiture rule effectively endorsed by the joint judgment of the High Court of Australia in *Helton v Allen*¹⁸ of Dixon, Evatt and McTiernan JJ (though the status and effect of this decision is still debated and unresolved).¹⁹

The forfeiture rule has apparent absolute operation in South Australia²⁰ to any example of murder and manslaughter. South Australia has followed the majority approach of the NSW Court of Appeal in

¹¹ Darryl Brown and Ruth Pollard, ‘Where From and Where to With the Forfeiture Rule’ (2018) 148 *Precedent* 14.

¹² Arie Freiberg and Richard Fox, ‘Fighting Crime with Forfeiture: Lessons from History’ (2000) 6(1–2) *Australian Journal of Legal History* 1.

¹³ [1892] 1 QB 147 (*Cleaver*).

¹⁴ *Ibid* 155.

¹⁵ *Ibid* 156.

¹⁶ *Re Crippen* [1911] P 108.

¹⁷ [1914] P 1 (*Hall*).

¹⁸ (1940) 63 CLR 69

¹⁹ *State Trustees Ltd v Edwards* [2014] VSC 392; *Edwards v State Trustees Limited* (2016) 257 A Crim R 529.

²⁰ *Rivers v Rivers* (2002) 84 SASR 326; *Re Luxton* (2006) 98 SASR 218.

*Troja v Troja*²¹ (though note Kirby P's dissent) and there is no discretion to modify the operation of the rule.²² The rule has been held to apply to other forms of unlawful homicide such as assisting suicide and the survivor of a suicide pact.²³

The forfeiture rule has no statutory force, a fact that attracted some surprise in SALRI's consultation. The rule nevertheless has drastic effect and provides that any person who has unlawfully caused the death of another is precluded from taking any benefit that arises as a result of the victim's death. The rule has been held to preclude a killer from acquiring a benefit via a will, distribution on intestacy, the victim's share in jointly owned property, other benefits such as insurance policies or even a statutory pension. The killer is also barred from making a claim under family provision laws.

SALRI considers that the rationale of the forfeiture rule remains applicable and accords with public policy, as an unlawful killer should be generally unable to profit or benefit from his or her crime. However, the scope and operation of the rule are contentious and uncertain. In particular, the application of the forfeiture rule to unlawful killings in various situations where a lesser degree of culpability is widely recognised has shown that strict application of the rule may lead to unfair outcomes. The rule may lead to potential unfair implications in such situations as the survivor of a suicide pact, assisted suicide, infanticide, euthanasia or a 'mercy killing', where the offender has a major cognitive impairment (also termed 'diminished responsibility') or especially in a context of domestic violence where a victim of domestic violence kills an abusive spouse and is convicted of manslaughter on the basis of excessive self-defence or provocation. The strict application of the rule in such circumstances has been described as 'unnecessarily harsh, inconsistent and ... irrational'²⁴ and 'injudicious and incongruous'²⁵ with its public policy foundations. The automatic and inflexible application of the rule is at odds with changes in community attitudes,²⁶ which is 'reflected in the greater range of offences and sentence options today compared to when the rule was first articulated.'²⁷

The rule may produce particularly unfair consequences in the context of family or domestic violence, where the typically (though not inevitably) female²⁸ victim of such violence kills an abusive spouse and

²¹ (1994) 33 NSWLR 269.

²² See for example, *Batey v Potts* (2004) 61 NSWLR 274; *Permanent Trustee Co Ltd v Gillett* (2004) 145 A Crim R 220, 224; *Pike v Pike* [2015] QSC 134, [22]; Tasmanian Law Reform Institute, *The Forfeiture Rule* (Issues Paper No 5, December 2003) 3, 9–10. This was also the overwhelming view expressed to SALRI in consultation.

²³ *Dunbar v Plant* [1998] Ch 412.

²⁴ Nicola Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31(1) *Common Law World Review* 1, 20.

²⁵ Anthony Dillon, 'When Beneficiary Slays Benefactor: The Forfeiture "Rule" Should Operate as a Principle of the General Law' (1998) 6(3) *Australian Property Law Journal* 1, 1; Nicola Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31(1) *Common Law World Review* 1, 6.

²⁶ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 9.

²⁷ Ibid ix. Professor Prue Vines, Submission No 1 to Victorian Law Reform Commission, *The Forfeiture Rule* (5 May 2014) highlighted these changes in social attitudes in her submission where she stated: 'In the 18th century, the death penalty was notoriously available for about 300 crimes ... Today we distinguish culpability for murder from manslaughter etc and views about the level of culpability have changed over time ... Assisting a suicide is also regarded as far less culpable, particularly when there is a terminal illness involved, than it was in the past.' at 2.

²⁸ Parliament of South Australia, *Report of the Social Development Committee into Domestic and Family Violence* (Report No 39, April 2016) 33 [4.2] ('SA Social Development Committee'); Government of South Australia, *Domestic Violence* (Discussion paper, July 2016) 19, 26–27. Intimate partner violence is also a very real problem within LGBTIQ communities as in heterosexual relationships. See Monica Campo and Sarah Tayton, Australian Institute of Family

is convicted of manslaughter.²⁹ The problematic operation of the rule in an assisted suicide context has arisen recently in the UK³⁰ (and with ‘mercy killing’ proved a major theme in SALRI’s consultation).

SALRI also notes that, on close scrutiny, the modern forfeiture rule rests on an insecure historical foundation, notably in its present form as applying to murder and all forms of manslaughter. *Cleaver* was decided against the backdrop of the relatively recent abolition of the feudal doctrines relating to forfeiture in 1870. Both *Cleaver* and *Hall* are also arguably explicable by their particular facts and should not be understood as necessarily applying to murder and all forms of manslaughter. It is important to appreciate the historical context to *Cleaver* and *Hall*, the precise reasoning of all the judges (not just Fry LJ and Hamilton LJ) and the extraordinary, if not sensational,³¹ facts of both cases.

The technical application of the modern forfeiture rule in various property, succession and inheritance situations is also unclear and problematic. The focus of past law reform references and academic commentary has tended to be on the scope of the forfeiture rule and what categories of unlawful homicide, if any, should be excluded from the operation of the rule and the role and operation of any judicial discretion to modify the operation of the rule. The practical implications and consequences of the potential operation of the forfeiture rule arise in a wide variety of succession situations such as when the victim dies with a will or intestate, holds property as a joint tenant, holds trust assets, holds life insurance, is a member of a superannuation fund or is in receipt of other benefits. The practical implications and consequences that arise from the potential operation of the rule are significant but have been often overlooked.³² In particular, in various property, succession and inheritance situations the present rule may result in the ‘sins of the unlawful killer been visited upon their blameless children’.³³

SALRI’s Recommendations

Although the underlying policy or rationale of the rule remains sound, SALRI is of the view that the rule requires reform for two reasons: clarity and fairness.³⁴

SALRI has made a total of 67 recommendations relating largely to the scope, operation and effect of the forfeiture rule. SALRI acknowledges that there is a strong public policy to prevent an unlawful killer from profiting from their crime. SALRI considers that, whilst the underlying premise of the

Studies, *Intimate Partner Violence in Lesbian, Gay, Bisexual, Trans, Intersex and Queer Communities: Key Issues* (Practitioner Resource, December 2015) <<https://aifs.gov.au/cfca/publications/intimate-partner-violence-lgbtqi-communities>>. See also *Royal Commission into Family Violence* (Summary and Recommendations, March 2016) 35 (‘Victorian Royal Commission’). See also below n 165.

²⁹ Barbara Hamilton and Elizabeth Sheehy, ‘Thrice Punished: Battered Women, Criminal Law and Disinheritance’ (2004) 8 *Southern Cross University Law Review* 96.

³⁰ See *Ninian v Findlay* [2019] EWHC 297 (Ch).

³¹ Mrs Maybrick’s case has been described as one of the most sensational and controversial criminal case of the 19th century.

³² Though see the Law Commission of England and Wales, *The Forfeiture Rule and the Law of Succession* (Consultation Paper No 172, 30 September 2003).

³³ See, for example, *Re DWS (dec’d)* [2001] Ch 568. See also Roger Kerridge, ‘Visiting the Sins of the Fathers on their Children’ (2001) 117 (July) *Law Quarterly Review* 371; Law Commission of England and Wales, *The Forfeiture Rule and the Law of Succession* (Consultation Paper No 172, 30 September 2003).

³⁴ See also Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) ix.

forfeiture rule should be retained, the rule in its present form is inflexible, potentially unfair, unclear and uncertain in scope and operation and is in need of legislative reform. It is preferable for Parliament to clarify and reform the forfeiture rule, rather than relying on judicial reformulation of the rule.

SALRI recommends that South Australia should introduce a standalone *Forfeiture Act* for clarity and certainty as the preferred vehicle for reform. England, New South Wales and the ACT have introduced Forfeiture Acts to modify the operation of the forfeiture rule.

SALRI is of the view that the forfeiture rule should apply in South Australia to murder, all forms of manslaughter, assisting suicide, causing the death of a child or vulnerable adult by criminal neglect under s 14 of the *CLCA* and the offence of causing death by culpable or dangerous driving. These are all offences of unlawful homicide within the *CLCA*. The forfeiture rule should also apply to aiding or abetting any of these offences under s 267 of the *CLCA*.³⁵ Any other offences of unlawful homicide such as causing death by careless driving or under work health safety laws outside the *CLCA* should fall outside the forfeiture rule.

SALRI notes ‘manslaughter is a crime which varies infinitely in its seriousness’³⁶ which may range from ‘mere inadvertence’ to just short of murder. SALRI considers that it is impracticable and inappropriate to distinguish between the different categories of manslaughter as to the application of the forfeiture rule and it should apply to both voluntary manslaughter (where murder is reduced to manslaughter for whatever reason) and involuntary manslaughter (manslaughter by an unlawful and dangerous act or manslaughter by gross negligence) as well as the survivor of a suicide pact (see s 13A(3) of the *CLCA*).

The question of whether the forfeiture rule should apply to the offence of causing death by culpable or dangerous driving was a prominent theme in SALRI’s consultation. There was strong support for the application of the rule in such cases, reflecting the gravity with which causing death by culpable or dangerous driving is now widely regarded. The Victorian Law Reform Commission recommended that the forfeiture rule should apply to causing death by culpable but not dangerous driving.³⁷

SALRI considers it is illogical to treat death by culpable or dangerous driving differently from manslaughter by gross negligence. Mr Boucaut QC and others highlighted to SALRI in consultation the gravity of many examples of causing death by culpable or dangerous driving and that it is very rare for manslaughter to be charged in such circumstances. It is also relevant that culpable and dangerous driving causing death in South Australia are a single combined offence and not separate offences as elsewhere in Australia such as Victoria.

SALRI accepts that there will be certain unlawful killings, even murder, where it will be unduly harsh to apply the forfeiture rule. SALRI has therefore recommended that any *Forfeiture Act* should provide a court with the discretion to modify the rule’s application where a court finds that it is in the interests of justice to do so and crucially there are ‘exceptional circumstances’. The concept of exceptional

³⁵ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 22 [3.33].

³⁶ *Gray v Barr* [1971] 2 QB 554, 581. See also *R v Lavender* (2005) 222 CLR 67, 77 (Gleeson CJ, McHugh, Gummow and Hayne JJ); Mervyn D Finlay, *Review of the Law of Manslaughter in New South Wales* (Report, April 2003) 24–25 [6.1]–[6.4], 66–73 [11.7].

³⁷ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 21–22 [3.25]–[3.28].

circumstances is a familiar statutory and judicial expression.³⁸ It is a phrase that is impossible to exhaustively define. The possible exercise of this discretion should arise in cases of murder, manslaughter and the other offences of unlawful homicide within the *CLCA*. SALRI endorses the powerful public policy reasons to prevent an unlawful killer from profiting from their crime, which is why a court would need to be satisfied that there are ‘exceptional circumstances’ to modify the rule.

In the case of murder, the application of the forfeiture rule is said to be ‘clear and uncontroversial’.³⁹ The UK, NSW and ACT *Forfeiture Acts* retain the rule in its absolute form for murder and allow no judicial discretion to modify the rule. However, a cogent (though far from universal) view to emerge in SALRI’s consultation was that, even for murder, there may be very rare circumstances where it would be unfair and harsh to apply the forfeiture rule. The example was given of where a spouse kills their terminally ill spouse at their request to relieve them of severe suffering. Another example given was where a victim of prolonged family violence kills their abusive spouse but no partial defence such as excessive self-defence arises and the killer is convicted of murder.

SALRI accepts that murder has a unique gravity and culpability but there may be ‘exceptional circumstances’ in which it is appropriate for a court to modify the operation of the rule. It is likely that any such case will be very rare.

SALRI notes the uncertainty of the present law and that, even post *Troja*, it is ‘unsettled’⁴⁰ what offences or situations fall within the forfeiture rule or not. For example, it is unclear whether manslaughter by gross negligence⁴¹ or causing death by culpable or dangerous driving or even aiding and abetting murder (at least after the event)⁴² fall within the rule or not. This is unsatisfactory. SALRI considers it is preferable for clarity and certainty that any *Forfeiture Act* clearly details those offences to which the forfeiture rule applies (namely those within the *CLCA*) and those which it does not (namely those outside the *CLCA*). However, SALRI is of the view that the forfeiture rule should not be absolute. SALRI has concluded that a court should be able to modify the application of the forfeiture rule for an offence involving unlawful killing within the *CLCA* in limited situations if a court is satisfied that it is in the interests of justice to do so and there are ‘exceptional circumstances’.

The overall rationale for SALRI’s suggested reforms is to allow for consideration of individual circumstances in an appropriate instance of reduced culpability, while ensuring that the strong underlying principle that an unlawful killer should not profit or benefit from their crime is not unduly diminished or eroded.

³⁸ See also David Plater, David Bleby, Megan Lawson, Lucy Line, Amy Teakle, Katherine O’Connell and Kate Fitz-Gibbon, South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 2* (Report No 11, April 2018) 70–104, especially 101–103 [11.11.1]–[11.11.7].

³⁹ *Re Rattle* [2018] VSC 249, [42] (McMillan J).

⁴⁰ Victorian Law Reform Commission, *The Forfeiture Rule*, Report, (2014) ix. See also at: 9 [2.7]–[2.10]. These uncertainties were also widely raised in SALRI’s consultation.

⁴¹ *Ibid* 19 [3.7].

⁴² Fiona Pepper and Damien Carrick, ‘A Murderer Can’t Inherit the Estate of Their Victim. What About Someone Who Covers Up the Crime?’ *ABC News* (online, 11 January 2019) <<https://www.abc.net.au/news/2019-06-11/tiffany-wan-annabelle-chen-case-estate-of-victim-forfeiture-law/11177022>>.

The common law forfeiture rule presently does not apply to an individual found not guilty of homicide by reason of mental impairment (previously termed insanity). The NSW *Forfeiture Act* allows a court the discretion to apply the rule where a person is found not guilty of murder on the basis of mental impairment.⁴³ This proved a difficult and finely balanced issue in SALRI's consultation. SALRI acknowledges the legitimate concerns in the community raised to it over the prevalence of drug induced psychosis in relation to serious crimes of violence and the potential successful use of the mental impairment defence by persons whose mental impairment has been caused, or at least contributed to, by the use of illicit drugs or alcohol.

However, the solution to such concerns lies with the scope of the defence of mental impairment (as pointed out to SALRI by Professor Prue Vines) and not the role and scope of the forfeiture rule.

The various issues relevant to the application of the forfeiture rule to persons found not guilty by reason of mental impairment were discussed by the VLRC.⁴⁴ In particular, the VLRC recognised that the exception for those found not guilty by reason of insanity or mental impairment applies only to a very specific class of killers. These individuals must be able to establish that, at the time of the offence, 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 did not know that the act was wrong.⁴⁵ It is onerous for a person to establish that they were labouring under such a defect, and a finding of not guilty by reason of mental impairment is not treated lightly by either the DPP or the courts.⁴⁶ The VLRC was of 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'.⁴⁷ The VLRC emphasised that extending the forfeiture rule to an individual found not guilty of murder on the basis of mental impairment undermines the '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'.⁴⁸

SALRI does not support the NSW provision and is of the view that the existing exception to the operation of the forfeiture rule for persons found not guilty by reason of mental impairment should be retained. SALRI on this issue agrees with the reasoning of the VLRC.

Under SALRI's recommendations, a person who has been precluded by the forfeiture rule from obtaining a benefit, or another 'interested person', should be able to apply for a forfeiture modification

⁴³ SALRI has heard in consultation that one reason for the expansion of the forfeiture rule to persons found not guilty of murder on the basis of mental impairment may be perceived disquiet over the prevalence of drug induced psychosis and the successful use of the mental impairment defence by persons whose mental impairment has been caused, or at least contributed, by the use of drugs or alcohol. 'Statistics collected from a case file review undertaken by the Attorney-General's Department indicated that almost a quarter of offenders who successfully used the mental incompetence defence were suffering from an impairment caused by drug induced psychosis or from substance abuse and dependence': at South Australia, *Parliamentary Debates*, House of Assembly, 4 August 2016, 6642 (Hon John Rau, Attorney-General). See also *Criminal Law Consolidation (Mental Impairment) Amendment Act 2017* (SA); South Australia, *Parliamentary Debates*, House of Assembly, 4 August 2016, 6640–6646; South Australia, *Parliamentary Debates*, House of Assembly, 30 May 2017, 9882–9883.

⁴⁴ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 30–34 [3.74]–[3.102].

⁴⁵ *Ibid* 25 [3.49], 30 [3.74]–[3.77].

⁴⁶ *Ibid*.

⁴⁷ *Ibid* 32 [3.90].

⁴⁸ *Ibid* 34 [3.98].

order. SALRI's preferred position is that modification of the forfeiture rule should be available by the exercise of judicial discretion. Whilst SALRI accepts that the introduction of a judicial discretion to modify the rule will result in uncertainty in some cases, it will nonetheless mean that justice can be achieved in all cases, by providing courts the power and crucial flexibility to deal with each case on its individual merits rather than by the application of a blanket or rigid rule. In order to address the uncertainty that may arise in the exercise of judicial discretion in some cases, SALRI recommends that any proposed *Forfeiture Act* should contain a list of statutory considerations for a court to have regard to and the primary factor should be the culpability of the unlawful killer.⁴⁹

SALRI's view is that, whilst the codified approach under the New Zealand *Forfeiture Act*, which excludes some categories or situations of unlawful killing from the operation of the forfeiture rule, might reduce the number of instances in which the application of the forfeiture rule is unjust, it is too inflexible to do so in all cases. For example, for victims of family violence who kill, a codified approach may cause injustice, either by continuing to apply the rule rigidly where modification is justified, or by excluding all such killings, including cases where it is appropriate that the rule apply. The judicial discretionary approach is a preferable model to flexibly respond to cases of family violence victims who kill an abusive domestic partner in response to ongoing family violence. This approach most effectively allows a court to consider the context and circumstances of the conduct in each case and recognise where the level of culpability of the killer is reduced. Further, SALRI is of the view that it would impractical, if not impossible, to seek to formulate codified legislation in relation to the forfeiture rule that could cover the infinite variety of cases that will arise.

There was considerable discussion in SALRI's consultation about the need for urgent orders to be made in cases where the killer controls the deceased's estate and could dissipate it before a preserving order or injunction is granted. This was seen as a real practical omission under the current law. SALRI has made a number of recommendations aimed at protecting the assets of the deceased from dissipation until proceedings have been finalised. These recommendations include giving a court the power to make whatever interim or incidental orders are necessary from time to time to preserve the deceased's property, expressly providing the Attorney-General with standing to apply for preserving orders in a suitable case,⁵⁰ the formulation of a protocol for the disclosure of information to the Attorney-General by other government agencies with a relevant interest or role in the case and the introduction of a statutory caveat which can be served by any person claiming an interest in property which would prevent the accused person being able to seize the assets of the deceased person.

In terms of the effects of the rule, SALRI has recommended that the proposed *Forfeiture Act* codify the effect of the forfeiture rule on the killer and on the succession rights of third parties. SALRI considers that this is required to provide greater clarity and certainty about the effects of the rule on the killer and other parties, as the current law in respect to the effects of the forfeiture rule lacks clarity.

Some of SALRI's main recommendations regarding the effect of the forfeiture rule include clarifying that, in cases where there are reasonable grounds to suspect a person has unlawfully killed the deceased,

⁴⁹ Some parties in consultation, consistent with case law and academic commentary, preferred the term 'moral culpability' of the offender. The term 'moral culpability' is useful but it was pointed out to SALRI that the inclusion of the word 'moral' is problematic and subjective and may prove unnecessarily distracting. SALRI therefore favours the expression 'culpability'.

⁵⁰ This can be seen as an extension of the Attorney-General's existing powers in relation to the Supreme Court's inherent *parens patriae* power.

they shall be disqualified from acting as a personal representative of that deceased person's estate. SALRI has also made recommendations as to the process that the personal representative must follow before they distribute the estate of the deceased person in accordance with the forfeiture rule.

It is further recommended that where a deceased victim dies with a will or intestate and a share of their estate is to pass to a person who is precluded by the forfeiture rule from acquiring it, the killer is deemed to have predeceased the victim. This reform was considered particularly important, as it means that the killer's actions have no impact on the benefits under a will or on intestacy passing to the descendants of the killer. As a result, this reform prevents the unsatisfactory situation of the sins of the unlawful killer being visited upon their blameless children.

SALRI has also made specific recommendations about the forfeiture rule in the context of the *Family Provision Act 1972* (SA), property interests including property held as joint tenants between the victim and the killer and third parties, trust assets, life insurance proceeds, superannuation death benefits and social security benefits and other public benefits.

SALRI is of the view that its recommendations, including placing the forfeiture rule on a clear statutory basis, will clarify and improve the role and operation of the present law by retaining the underlying rationale of the rule that an unlawful killer should not profit from their crime, but providing a limited degree of flexibility to modify its effect in an appropriate case where there are 'exceptional circumstances' and further resolve at least some of the practical issues and implications that presently arise. In short, it will help unravel 'the riddle wrapped in a mystery inside an enigma'.⁵¹

SALRI would like to express its appreciation to all parties who generously contributed to this reference.

⁵¹ Darryl Brown and Ruth Pollard, 'Where From and Where to With the Forfeiture Rule' (2018) 148 *Precedent* 14.

Summary of Recommendations

Recommendation 1

SALRI notes that the underlying rationale of the forfeiture rule in relation to unlawful homicide remains sound and therefore recommends that the rule should be preserved in one form or another in South Australia.

Recommendation 2

SALRI recommends that South Australia should introduce a standalone *Forfeiture Act* to respond to cases of reduced culpability in relation to unlawful homicide and address practical issues of clarity and certainty with respect to the effect of the present law.

Recommendation 3

SALRI recommends that the aim of the proposed *Forfeiture Act* should be to allow for consideration of individual circumstances, while ensuring that the underlying rationale of the forfeiture rule is not unduly diminished.

Recommendation 4

SALRI recommends that the proposed *Forfeiture Act* should draw on the common law forfeiture rule, but explicitly provide that the forfeiture rule should apply to offences involving unlawful homicide in the *Criminal Law Consolidation Act 1936* (SA), namely murder (s 11);⁵² all forms of manslaughter⁵³ (s 13, s 13A and s 268(3)); to aid, abet or counsel the suicide of another (s 13A(5)); causing the death of a child or vulnerable adult by criminal neglect (s 14) and causing death by driving in a culpably negligent manner, recklessly, or at a speed or in a manner dangerous to any person (s 19A). SALRI also recommends that, for consistency and completeness, this recommendation should also apply to anyone who aids, abets, counsels or procures the commission of one of these offences.⁵⁴ However, the proposed *Forfeiture Act* should explicitly provide that the forfeiture rule should not apply to other forms of unlawful homicide outside the *Criminal Law Consolidation Act 1936* (SA) such as causing death by driving without due care or attention or without reasonable consideration for other persons using the road (s 45 of the *Road Traffic Act 1961* (SA)) or under employment or work safety laws (see the *Work Health and Safety Act 2012* (SA)).

⁵² Murder and manslaughter are also sometimes said to be common law offences, but the forfeiture rule should apply regardless of its precise status.

⁵³ SALRI is of the view that it is impracticable and inappropriate to distinguish between different categories of manslaughter as to the application of the forfeiture rule and it should apply to both voluntary manslaughter (where murder is reduced to manslaughter for whatever reason) and involuntary manslaughter (manslaughter by an unlawful and dangerous act and by gross negligence) as well as the survivor of a suicide pact (see s 13A(3) of the *CLCA*) and where death results as a result of criminal negligence in the context of self-induced intoxication to the point of criminal irresponsibility (s 268 of the *CLCA*).

⁵⁴ See also *CLCA* s 267; Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 22 [3.33]. See further Fiona Pepper and Damien Carrick, 'A Murderer Can't Inherit the Estate of Their Victim. What About Someone Who Covers Up the Crime?' *ABC News* (online, 11 January 2019) <<https://www.abc.net.au/news/2019-06-11/tiffany-wan-annabelle-chen-case-estate-of-victim-forfeiture-law/11177022>>.

Recommendation 5

SALRI recommends that a limited discretion should be included in the proposed *Forfeiture Act* to allow a court to modify the forfeiture rule in the cases of unlawful homicide described in Recommendation 4 where a court finds that it is in the interests of justice to do so and there are ‘exceptional’ circumstances’. The term ‘exceptional’ should not be defined.⁵⁵

Recommendation 6

SALRI recommends that the proposed *Forfeiture Act* should include the existing exception to the operation of the forfeiture rule for persons found not guilty by reason of mental impairment (previously termed insanity) and the NSW provision allowing a court to apply the forfeiture rule to a person found not guilty of murder on the basis of mental impairment should not be adopted in South Australia.

Recommendation 7

SALRI recommends that the proposed *Forfeiture Act* should provide that where a person is found not guilty of murder by reason of insanity or mental impairment and that person receives a benefit out of the estate of their deceased victim, that benefit should be held on trust by the Public Trustee of South Australia. The Public Trustee of South Australia should use the income and capital of the trust to fund the person’s medical expenses and reasonable living expenses.

Recommendation 8

SALRI recommends that the proposed *Forfeiture Act* should provide that, where a killer’s conviction in relation to an unlawful homicide is overturned, a court should be given the power to order the beneficiaries who have benefited from the death of the victim to relinquish their inheritance to the extent that it is practicable and reasonable in the circumstances, having regard, in particular, to the intervening interests of innocent third parties.

Recommendation 9

SALRI recommends that the proposed *Forfeiture Act* should provide that, where a killer is convicted (or found to have committed the unlawful act in a civil court) long after the unlawful killing, a court should be given the power to order the unlawful killer who has benefited from the death of the victim, to relinquish their inheritance to the extent that it is practicable and reasonable in the circumstances, having regard, in particular, to the intervening interests of innocent third parties.

Recommendation 10

SALRI recommends that the proposed *Forfeiture Act* should provide that, where a killer’s conviction in relation to an unlawful homicide is overturned or where a killer is convicted (or found to have committed the unlawful act in a civil court) long after the unlawful killing, any person who has a financial interest in the deceased’s estate or would have had such an interest had the rule been applied earlier, should have standing to make an application for the court to rectify the wrong that has been done.

⁵⁵ See *R v Kelly* [2000] 2 QB 198, 208; *Nikac v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 65, 81; *Hicks v Aboriginal and Torres Strait Islander Commission* (2001) 110 FCR 582, 586–587; *MLC Investments Ltd v Commissioner of Taxation* [2003] FCA 1487, [76]–[77]; *R v Fowler* (2006) 243 LSJS 285; *R v Skinner* [2016] SASCFC 106, [77]–[104].

Recommendation 11

SALRI recommends that the proposed *Forfeiture Act* should provide that a person charged with an unlawful killing within Recommendation 4 who is found unfit to plead should not be exempt from the operation of the forfeiture rule.⁵⁶

Recommendation 12

SALRI recommends that the proposed *Forfeiture Act* should provide that a person charged with an unlawful killing who is found unfit to plead (or any other interested person) should be able to apply for a forfeiture modification order under the *Forfeiture Act*.

Recommendation 13

SALRI recommends that the proposed *Forfeiture Act* should provide that the common law forfeiture rule should operate as a rule of the civil law and not of the criminal law.

Recommendation 14

SALRI recommends that the proposed *Forfeiture Act* should provide that a conviction in South Australia or another Australian State or Territory is conclusive (or at least prima facie) evidence that an offender is responsible for the unlawful killing.⁵⁷

Recommendation 15

SALRI recommends that the proposed *Forfeiture Act* should not allow conditions to be imposed in a forfeiture modification order.

Recommendation 16

SALRI recommends that the proposed *Forfeiture Act* should provide that a court should have the power to make whatever interim orders are necessary from time to time to preserve the deceased's property and/or protect the interests of third parties until a finding of guilt is made and any application made by or on behalf of the killer for relief from the forfeiture rule has been finalised.

⁵⁶ SALRI favours the approach taken in *Re Pechar* [1969] NZLR 574.

⁵⁷ *Hollington v Hewthorn* [1943] KB 587, in which the English Court of Appeal held (at 594–595, 601–602) that the criminal conviction of the driver of a motor vehicle for negligent driving was inadmissible in a civil action by a passenger in that vehicle to recover damages for injuries received as a result of the driver's negligence. The Court overruled the decision of Sir Samuel Evans P in *Crippen* admitting the conviction of the legal personal representative of a deceased person for murdering the deceased as proof that he had murdered her. *Hollington v Hewthorn* has been widely criticised. See, for example, *Demeter v British Pacific Life Insurance Company* (1983) 150 DLR (3d) 249; *Mickelberg v Director of Perth Mint* [1986] WAR 365; *Nicholas v Bantick* (1993) 3 Tas R 47, 72. The rule has been overruled in this respect in South Australia. Section 34A of the *Evidence Act 1929* (SA) provides: 'Where a person has been convicted of an offence or found by a court exercising criminal jurisdiction to have committed an offence and the commission of the offence is in issue or relevant to an issue in a civil proceeding, the conviction or finding is evidence of the commission of the offence and admissible in the proceeding against the person or a party claiming through or under the person.' The rule in *Hollington v Hewthorn* has also been overruled in the *Uniform Evidence Act* jurisdictions: s 92.

Recommendation 17

SALRI recommends that the proposed *Forfeiture Act* should provide that a court should not have to wait until a formal charge is laid to make such an interim order and that it should be sufficient that there are reasonable grounds to suspect an unlawful killing has taken place.

Recommendation 18

SALRI recommends that the proposed *Forfeiture Act* should provide that a court should have the power to discharge an interim order if no prosecution is instituted within a reasonable time.

Recommendation 19

SALRI recommends that the proposed *Forfeiture Act* should provide that any person who has a financial or other interest in the deceased's estate or could have such an interest if the rule were to apply, should have standing to make an application for interim preserving orders.

Recommendation 20

SALRI recommends that the proposed *Forfeiture Act* should confirm that the Attorney-General has the standing to apply for preserving orders if the Attorney-General (or the office holder or agency to which the Attorney-General may choose to delegate such a role) considers it is appropriate.

Recommendation 21

SALRI recommends that a protocol be formulated for the Director of Public Prosecutions, the South Australian Police and any other government agency with a relevant interest or role in the case to disclose to the Attorney-General any information that the Attorney-General (or the office holder or agency to which the Attorney-General may choose to delegate such a role) might need about the case to assist in bringing any application.

Recommendation 22

SALRI recommends a statutory form of caveat able to be served by any person claiming an interest in property held by another, being a bank account, the interest of a nominated beneficiary in a superannuation fund, an interest in a unit, discretionary or other trust or other property for which no grant of probate is necessary. The caveat would prevent any dealings with the property without an order of the Court, or until expiry of the caveat if no order of the Court is served within one month of service of the caveat.

Recommendation 23

SALRI recommends that the proposed *Forfeiture Act* should provide that the primary consideration the Supreme Court should have regard to in exercising its discretion to modify the forfeiture rule, must be the culpability of the unlawful killer and that, in determining the culpability of an offender, the Supreme Court must have regard to the:

- (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) The mental state of the offender at the time of the offence;

- (e) The nature and gravity of the offence;
- (f) The offender's relevant conduct;⁵⁸
- (g) The victim's relevant conduct; and
- (h) Such other matters that in the court's opinion appear to be material to the offender's culpability.

The *Forfeiture Act* should provide that the Supreme Court may have regard to:

- (a) The relationship between the deceased and the killer;
- (b) The deceased's intentions;
- (c) The size of the estate and the value of the property in dispute;
- (d) The financial position of the killer;
- (e) The more general claims of those whose benefits would be assured if the forfeiture rule was applied; and
- (f) Any other circumstances that appear to the court to be material.

Recommendation 24

SALRI recommends that the proposed *Forfeiture Act* should provide that all of the property in which the deceased had a proprietary interest, or an equitable interest vested either in interest or in possession at their death should come within the scope of the forfeiture rule.

Recommendation 25

SALRI recommends that the proposed *Forfeiture Act* should provide that all of the property in which the deceased had a proprietary interest, or an equitable interest vested either in interest or in possession at their death should come within the scope of a forfeiture modification order.

Recommendation 26

SALRI recommends that the proposed *Forfeiture Act* should provide that, where a person has unlawfully killed another person and is therefore precluded by the forfeiture rule from obtaining a benefit, that person or another 'interested person' should be able to apply to the Supreme Court for a forfeiture modification order.

Recommendation 27

SALRI recommends that the proposed *Forfeiture Act* should provide that an 'interested person' should mean either the 'offender' or a person applying on the offender's behalf, the executor or administrator of a deceased person's estate or any other person who in the opinion of a court has a valid interest in the matter.

⁵⁸ See *Straede v Eastwood* [2003] NSWSC 280. See also below n 1232.

Recommendation 28

SALRI recommends that the proposed *Forfeiture Act* should provide that, if the forfeiture rule operates immediately on the death of a deceased person, then unless a court gives leave for a late application to be made, an application for an order that the forfeiture rule applies should be made within six months from the date of death of the deceased person.

Recommendation 29

Where there is uncertainty as to whether the forfeiture rule will apply because there is an undetermined charge of unlawfully killing against the accused, the proposed *Forfeiture Act* should provide that the time for making any application should be extended to three months after such a charge is finally determined.

Recommendation 30

SALRI recommends that the proposed *Forfeiture Act* should provide that, unless a court gives leave for a late application to be made, an application for a forfeiture rule modification order must be made within three months of a court determining that the forfeiture rule applies.

Recommendation 31

SALRI recommends that the proposed *Forfeiture Act* should provide that a court should be able to give leave for a late application for a forfeiture rule modification order if:

- (a) 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;
- (b) the fact that the offender committed the unlawful killing is discovered after the expiration of the relevant period; or
- (c) the court considers it just and reasonable in all the circumstances to give leave.

Recommendation 32

SALRI recommends that the proposed *Forfeiture Act* should provide that the judge who tries the criminal charges arising from the killing and who sentences the offender should not be involved in determining the potential modification of the rule as a separate civil application.

Recommendation 33

SALRI recommends that the proposed *Forfeiture Act* should codify the effect of the forfeiture rule on the killer and on the succession rights of third parties.

Recommendation 34

SALRI recommends that, as a result of the proposed *Forfeiture Act*, consequential and consistent amendments should be made to the *Wills Act 1936* (SA), the *Trustee Act 1936* (SA), the *Real Property Act 1886* (SA) and to Part 3 of the *Administration and Probate Act 1919* (SA).

Recommendation 35

SALRI recommends that the proposed *Forfeiture Act* should provide that the killer of the deceased person shall be disqualified from acting as a personal representative of that deceased person's estate.

Recommendation 36

SALRI recommends that the proposed *Forfeiture Act* should provide that a court should be given a discretion to disqualify a person who applies for a grant of representation if there are reasonable grounds to suspect the person has unlawfully killed the deceased and where the court considers it just and reasonable in all the circumstances.

Recommendation 37

SALRI recommends that the proposed *Forfeiture Act* should provide that disqualification from acting as a personal representative would not be able to be modified by a forfeiture rule modification order.

Recommendation 38

SALRI recommends that the proposed *Forfeiture Act* should provide that an executor, administrator or trustee should be able to apply the forfeiture rule and distribute property to benefit someone other than the killer without obtaining an order, advice or directions from the court. However, the benefit could not be distributed until either after the killer had been found guilty of an unlawful killing in an Australian court, or where there is no finding of guilt in criminal proceedings, after it had been established in civil proceedings in an Australian court that the killer had unlawfully killed the victim.

Recommendation 39

SALRI recommends that the proposed *Forfeiture Act* should provide that where an executor, administrator or trustee requires guidance from the court, that they are able to make an application for such guidance.

Recommendation 40

SALRI recommends that the proposed *Forfeiture Act* should provide that where the deceased victim's will contains a bequest to a person who has been precluded by the forfeiture rule from acquiring it or who disclaims it, then, unless a contrary intention appears by the will, or a forfeiture modification order has been made in favour of the person, the person is deemed to have predeceased the deceased victim.

Recommendation 41

SALRI recommends that the proposed *Forfeiture Act* should provide that where the deceased victim dies intestate and a share of their estate is to pass to a person who is precluded by the forfeiture rule from acquiring it or who disclaims it, unless a forfeiture modification order has been made in favour of the person, that person is deemed to have predeceased the deceased victim.

Recommendation 42

SALRI recommends that the rectification power in s 25AA(1) of the *Wills Act 1936* (SA) should not be broadened to give a court the power to ascertain the hypothetical intention of the will-maker in unforeseen circumstances.

Recommendation 43

SALRI recommends that the proposed *Forfeiture Act* should apply to all property interests including financial provisions available to the killer under other South Australian Acts, such as the *Inheritance (Family Provision) Act 1972* (SA).

Recommendation 44

SALRI recommends that where the operation of the forfeiture rule is modified by a forfeiture rule modification order under the proposed *Forfeiture Act*, the killer would be able to make a claim under the *Inheritance (Family Provision) Act 1972* (SA).

Recommendation 45

SALRI recommends that the Family Court should play no additional role in cases where the forfeiture rule applies, and where property division proceedings in the Family Court were on foot at the time of the killing.

Recommendation 46

SALRI recommends that the proposed *Forfeiture Act* should provide that until criminal proceedings are finalised, a court should not be empowered to appropriate any part of the deceased's estate for the use of the unlawful killer.

Recommendation 47

SALRI recommends that the proposed *Forfeiture Act* should provide that a court should have the power to grant the killer access to the killer's pre-existing share of property jointly owned by the killer with the deceased, but no more.

Recommendation 48

SALRI recommends that the proposed *Forfeiture Act* should apply to all property interests including property held as joint tenants between the victim and the killer and third parties.

Recommendation 49

SALRI recommends that the proposed *Forfeiture Act* should provide that, where the forfeiture rule applies and a joint proprietor has been unlawfully killed by another joint proprietor, the property shall devolve at the death of the victim as if the property were owned by each of them as tenants in common in equal shares.

Recommendation 50

SALRI recommends that the proposed *Forfeiture Act* should provide that, where there are more than two proprietors, the property shall devolve at the death of the victim as if the unlawful killer holds their interest as a tenant in common with the other proprietors. The joint tenancy will continue to exist between the innocent joint proprietors. The surviving innocent joint proprietors will take the victim's interest by survivorship.

Recommendation 51

SALRI recommends that the proposed *Forfeiture Act* should provide that, if the effect of the forfeiture rule is modified by the court, the survivorship rules will apply in the usual manner to the killer and third parties.

Recommendation 52

SALRI recommends that the proposed *Forfeiture Act* should apply to all property interests including assets held in trusts.

Recommendation 53

SALRI recommends that the proposed *Forfeiture Act* should provide that, in the case of a trust where the beneficial interests are fixed, a court should have the power to give directions to the trustee of the trust necessary to ensure that the beneficial interest held by the deceased is not available to the unlawful killer.

Recommendation 54

SALRI recommends that the proposed *Forfeiture Act* should provide that where the deceased was, at the date of death:

- (a) an identified object under a trust; or
- (b) a person who takes capital of the trust property in default,

a court should have the power to make orders prohibiting the unlawful killer from acting in any role under the trust deed which gives him or her any control over the distribution of income or capital of that trust.

Recommendation 55

SALRI recommends that the proposed *Forfeiture Act* should provide that, if the effect of the forfeiture rule is modified by a court, the unlawful killer should be entitled to take on any role under the trust deed and receive distributions of some or all of the trust fund, in the manner they would have, had the forfeiture rule not applied.

Recommendation 56

SALRI recommends that the proposed *Forfeiture Act* should apply, as far as State law allows, to all property interests including the superannuation death benefits of the deceased person.

Recommendation 57

SALRI recommends that the proposed *Forfeiture Act* should provide, to the extent that the deceased has superannuation entitlements that are governed by State law, such entitlements should be subject to the forfeiture rule and, in the absence of a binding direction of the deceased that they should go to someone other than the unlawful killer, they should pass to the deceased's legal personal representative.

Recommendation 58

SALRI recommends that the proposed *Forfeiture Act* should provide that, if the effect of the forfeiture rule is modified by a court, the trustee of the deceased's superannuation fund should pay out the superannuation death benefit of the deceased to the beneficiaries, including the killer, in the manner they would have, had the forfeiture rule not applied.

Recommendation 59

SALRI recommends that the proposed *Forfeiture Act* should apply, as far as State law allows, to all property interests, including proceeds from a life insurance policy.

Recommendation 60

SALRI recommends that the proposed *Forfeiture Act* should provide that, as far as State law allows, if the effect of the forfeiture rule is modified by a court, the unlawful killer should be entitled to receive the life insurance proceeds of the deceased in the manner they would have, had the forfeiture rule not applied.

Recommendation 61

SALRI recommends that the proposed *Forfeiture Act* should apply, as far as State law allows, to all property interests including social security and any other public benefits.

Recommendation 62

SALRI recommends that the proposed *Forfeiture Act* should provide that, as far as State law allows, if the effect of the forfeiture rule is modified by a court, the unlawful killer should be entitled to receive social security benefits and any other public benefit, in the manner they would have, had the forfeiture rule not applied.

Recommendation 63

SALRI recommends that the forfeiture rule should not be extended to financial benefits derived indirectly by the killer.

Recommendation 64

SALRI recommends that if the forfeiture rule was extended to financial benefits derived indirectly by the killer, the tracing provision described in the circumstance of an overturned conviction should be adopted as the appropriate mechanism to determine which assets the forfeiture rule applies to.

Recommendation 65

SALRI recommends that the forfeiture rule should not be extended to cases involving elder abuse.

Recommendation 66

SALRI recommends that, subject to funding, research ethics approval, the necessary consultation (especially with Aboriginal communities) and the input of Aboriginal communities, it undertake a future law reform project to examine the various areas where there is tension between current succession laws in South Australia and Aboriginal kinship and customary law and practice (this project to include funeral instructions in a will, the disposal of a deceased's remains and the resolution of disputes that may arise, and the operation and effect of the forfeiture rule) and to make appropriate recommendations.

Recommendation 67

SALRI recommends that it should not be possible to 'contract out' or make a 'consent order' as to the application or not of the forfeiture rule and any proposed agreement between the relevant parties to modify the application of the rule must be subject to the approval of the Court.

Part 1 - Background

1.1 The South Australian Law Reform Institute

1.1.1 The South Australian Law Reform Institute (SALRI) is an independent non-partisan law reform body based at the Adelaide University Law School that conducts inquiries — also known as references — into areas of law. The areas of law are determined by the SALRI Advisory Board and may also be at the request of the South Australian Attorney-General or other parties. SALRI examines how the law works in South Australia and elsewhere (both in Australia and overseas), conducts multidisciplinary research and consults widely with the community, interested parties and experts. Based on the research and consultation that it conducts during a reference, SALRI then makes reasoned recommendations to the State Government so that the Government and Parliament can make informed decisions about any changes to relevant law and/or practice. SALRI's recommendations may be acted upon and accepted by the Government and Parliament. However, any decision on accepting a recommendation from SALRI is entirely an issue for the Government and/or Parliament.

1.1.2 When undertaking its work, SALRI has a number of objectives. These include identifying law reform options that would modernise the law, fixing any problems in the law, consolidating areas of overlapping law, removing unnecessary laws, or, where desirable, bringing South Australian law into line with other States and Territories.⁵⁹

1.1.3 A central premise of law reform is to promote the clarity, comprehension and accessibility of the law. SALRI adopts the view of Kirby J in this context: 'The right of citizens ... to have the most modern, well-informed, efficient system of law that the state can reasonably provide.'⁶⁰

1.1.4 SALRI was established in December 2010 under an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia.⁶¹ It is based at the University of Adelaide Law School. SALRI is assisted by an expert Advisory Board. SALRI is based on the Alberta law reform model that is also used in Tasmania⁶² and is linked to the Law

⁵⁹ The importance and value of a national uniform, or at least consistent, approach is especially evident in a complex issue such as succession that has interstate dimensions. The NSW Law Society in its submission to SALRI supported the harmonisation of the law relating to the forfeiture rule across States and Territories. However, reform of the forfeiture rule was not addressed by the National Committee for Uniform Succession Laws. See Tasmania Law Reform Institute, *The Forfeiture Rule* (Issues Paper No 5, December 2003) 2. Additionally, in its previous consultations on succession law issues, SALRI has found only little support for uniform succession laws. The majority view in previous consultation drew attention to the existing disparities between succession laws throughout Australia and highlighted the advantage of flexibility and that South Australia's succession laws should reflect and meet local circumstances that may well not exist elsewhere. See also SALRI, *'Distinguishing between the Deserving and the Undeserving': Family Provision Laws in South Australia* (Report No 9, December 2017) [2.1.27], [3.4.1].

⁶⁰ Michael Kirby, 'Changing Fashions and Enduring Values in Law Reform' (Speech, Conference on Law Reform on Hong Kong: Does it Need Reform?, University of Hong Kong, 17 September 2011) <<http://www.alrc.gov.au/news-media/2011/changing-fashions-and-enduring-values-law-reform>>.

⁶¹ SALRI can be seen as the successor to the Law Reform Committee of South Australia which operated between 1968 and 1987. During its operation, the Law Reform Committee produced a remarkable output of 106 reports. See Adelaide Law School, *South Australian Law Reform Institute* (Web Page) <<http://law.adelaide.edu.au/research/south-australian-law-reform-institute>>.

⁶² See Kate Warner, 'Institutional Architecture' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 55, 62–64, 68. There are close links and joint research between SALRI and the Tasmanian Law Reform Institute based at the University of Tasmania Law School.

Reform course at the University of Adelaide. The work of the Law Reform class plays a valuable role to inform and support SALRI's work (including this reference).

1.1.5 As part of its succession reference, SALRI identified various topics for review, and has now completed Reports on each of these issues. This work is now concluded and includes:

- Review of Sureties' Guarantees for Letters of Administration.⁶³
- Wills Register: State Schemes for Storing and Locating Wills.⁶⁴
- Small Estates: Review of the Procedures for Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes in South Australia.⁶⁵
- The Law of Intestacy.⁶⁶
- Management of the Affairs of a Missing Person.⁶⁷
- 'Distinguishing between the Deserving and the Undeserving': Family Provision Laws in South Australia.⁶⁸
- Who May Inspect a Will?⁶⁹

1.1.6 Copies of the Papers and Reports mentioned above can be found at <https://law.adelaide.edu.au/research/south-australian-law-reform-institute>.

1.2 The Common Law Forfeiture Rule reference

1.2.1 In 2011, the then Attorney-General, the Hon John Rau MP, asked SALRI to review the role and application of the common law forfeiture rule in relation to unlawful homicide and examine any need for legislative intervention in South Australia. The Attorney-General drew the attention of SALRI to a suggestion that there was a need for a new law to permit the forfeiture rule to be mitigated.

1.2.2 The suggestion was made to the then Attorney-General by a Mrs Narayan who had been convicted of the manslaughter of her husband after the trustees of her husband's superannuation fund invoked the common law forfeiture rule to refuse to make payments to her from the fund.⁷⁰ She asked

⁶³ SALRI, *Dead Cert: Sureties' Guarantees for Letters of Administration* (Issues Paper No 2) was released in December 2012 and Final Report No 2, entitled, *Sureties' Guarantees for Letters of Administration*, was released in August 2013. See also *Administration and Probate (Removal of Requirement for Surety) Amendment Act 2014* (SA).

⁶⁴ SALRI, *Losing It: State Schemes for Storing and Locating Wills* (Issues Paper No 6, July 2014); SALRI, *Losing It: State Schemes for Storing and Locating Wills* (Final Report No 5, October 2016).

⁶⁵ SALRI, *Small Fry: Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes* (Issues Paper No 5, January 2014). A follow up Consultation Paper was circulated in December 2015.

⁶⁶ SALRI, *Cutting the Cake: South Australian Rules of Intestacy* (Issues Paper No 7, December 2015); SALRI, *South Australian Rules of Intestacy* (Final Report No 7, July 2017).

⁶⁷ SALRI, *Management of the Affairs of a Missing Person* (Report No 8, July 2017).

⁶⁸ SALRI, *'Distinguishing between the Deserving and the Undeserving': Family Provision Laws in South Australia* (Report No 9, December 2017).

⁶⁹ SALRI, *Who May Inspect a Will?* (Report No 10, November 2017).

⁷⁰ *R v Narayan* [2011] SASCFC 61. The defendant killed her husband by pouring petrol on him and setting him alight. On her trial for murder she was found guilty of manslaughter due to provocation following psychological and physical abuse from her husband and, on the occasion in question, verbal abuse upon confronting her husband about an affair he was having. During sentencing submissions, it was accepted by Sulan J that special reasons existed such that the non-parole period could be set at less than 4/5 of the head sentence and also because of the degree to which the defendant had cooperated in the investigation or prosecution of the offence and the circumstances surrounding that cooperation. She was sentenced to six years imprisonment with a non-parole period of three years, wholly suspended upon the defendant entering into a good behaviour bond. The sentence

the then Attorney-General to consider introducing laws like those in New South Wales⁷¹ and the Australian Capital Territory⁷² which allow the forfeiture rule to be mitigated in cases of manslaughter, including cases, like hers, where, for example, the unlawful killing occurred in circumstances of provocation after many years of physical and emotional abuse. The issue and implications of family violence have gained particular attention since 2011⁷³ and deserve careful consideration. This Report is not limited to family violence and aims to explore the application of the scope and operation of the common law forfeiture rule in as many contexts as possible

1.2.3 SALRI has not been able until now to undertake this major reference owing to other commitments⁷⁴ and the need to first complete its extensive reference into various aspects of succession law, as well as provocation and other defences to murder and related issues (notably the domestic violence implications of the present law in this area).⁷⁵ These references provide the necessary background and context to this review of the common law forfeiture rule.

1.2.4 The present Attorney-General, the Hon Vickie Chapman MP, supported SALRI undertaking this reference.⁷⁶

1.2.5 The ACT and NSW models allow the forfeiture rule to be varied by a court in cases of manslaughter but not murder. This flexibility would assist cases such as Mrs Narayan where the unlawful killing occurred in a context of often longstanding physical and/or emotional abuse.⁷⁷ The issue and implications of family violence have gained particular attention and concern since 2011.⁷⁸ The potentially drastic and unfair application of the forfeiture rule to victims of family violence who may unlawfully kill an abusive spouse (especially if amounting to manslaughter) has been noted.⁷⁹

1.2.6 This Report is not limited to family violence and aims to explore the role and application of the common law forfeiture rule in various contexts.

was upheld on appeal, the Court of Criminal Appeal observing that, whilst the sentence may have been merciful, it was not unduly lenient. If convicted of murder, she would have been sentenced to imprisonment for life with a possible non-parole period of a little less than 20 years. See further below Appendix B.

⁷¹ See the NSW Act.

⁷² See the ACT Act.

⁷³ See, for example, Council of Australian Governments, *The National Plan to Reduce Violence against Women and their Children 2010–2022* (COAG Document, 2010); Parliament of South Australia, *Report of the Social Development Committee into Domestic and Family Violence* (Report No 39, April 2016); Government of South Australia, (Discussion Paper, July 2016); *Royal Commission into Family Violence* (Summary and Recommendations, March 2016).

⁷⁴ The death of Helen Wighton, the founding Deputy Director of SALRI, in 2014 also delayed this project. SALRI acknowledges the valuable contribution to the current Report by the late Ms Wighton. See also below [1.2.12].

⁷⁵ David Plater, Lucy Line and Kate Fitz-Gibbon, South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 1* (Report, April 2017); David Plater, David Bleby, Megan Lawson, Lucy Line, Amy Teakle, Katherine O'Connell and Kate Fitz-Gibbon, South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 2* (Report No 11, April 2018).

⁷⁶ Indeed, the Attorney-General and the Shadow Attorney-General, the Hon Kyam Maher MLC, helpfully attended SALRI's roundtable on 5 April 2019.

⁷⁷ *R v Narayan* [2011] SASFC 61. See also below Appendix B.

⁷⁸ See, for example, Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, 28 February 2015) 49.

⁷⁹ Barbara Hamilton and Elizabeth Sheehy, 'Thrice Punished: Battered Women, Criminal Law and Disinheritance' (2004) 8 *Southern Cross University Law Review* 96.

1.2.7 ‘It is a basic principle of social morality that crime should not pay.’⁸⁰ The application of the forfeiture rule ‘is consistent with the long-standing legal maxim that no one can derive an advantage from his or her criminal wrongdoing.’⁸¹ The rule effectively precludes the ‘convenient plot device’ in popular crime fiction — that of the murderer who kills out of greed and to be take benefit from their victim.⁸² The rule developed as a matter of public policy, namely ‘that a person who unlawfully kills another cannot acquire a benefit as a consequence of the killing.’⁸³ It is often overlooked that the purpose of the forfeiture rule is not to punish the offender.⁸⁴ Rather, as articulated in *Helton v Allen*, the first High Court decision to recognise the application of the rule in Australia, the underlying rationale of the rule

is placed upon a principle of public policy, and it was said that no system of jurisprudence could with reason include amongst the rights which it enforces rights directly resulting to a person asserting them from the crime of that person.⁸⁵

1.2.8 Cummins J defined the forfeiture rule in the following stark terms:

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.⁸⁶

1.2.9 The forfeiture rule is said to be ‘absolute and inflexible’ in relation to both murder and manslaughter,⁸⁷ but the scope and operation of the rule remain uncertain and obscure.⁸⁸ The famed words of Winston Churchill have recently been used to characterise the current extent and application of the forfeiture rule as ‘a riddle wrapped in a mystery inside an enigma’.⁸⁹ Although the underlying policy or rationale of the rule is sound, SALRI is of the view that the rule requires reform for two reasons: clarity and fairness.⁹⁰ The practical operation of the rule is also unclear and convoluted.

⁸⁰ Leslie Blohm QC, ‘(Not) Getting Away with Murder or Some Reflections on the Principle of Forfeiture as Applied to the Administration of Estates’, *St John’s Chambers* (Online Article, October 2018) 1 <<https://www.stjohnschambers.co.uk/wp-content/uploads/2018/11/Some-reflections-on-the-principle-of-forfeiture-as-applied-to-the-administration-of-estates-1.pdf>>.

⁸¹ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 6.

⁸² Ian Williams, ‘How does the Common Law Forfeiture Rule Work?’ in Birke Hacker and Charles Mitchell (eds), *Current Issues in Succession Law* (Bloomsbury, 2016) 51, 51.

⁸³ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 2.

⁸⁴ SALRI, ‘*Cutting the Cake: South Australian Rules of Intestacy* (Issues Paper No 7, December 2015) 109.

⁸⁵ (1940) 63 CLR 691, 709 (Dixon, Evatt and McTiernan JJ).

⁸⁶ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) v.

⁸⁷ *Troja v Troja* (1994) 33 NSWLR 268, 299. See also, for example, *Pike v Pike* [2015] QSC 134, [22].

⁸⁸ ‘The modern rule lacks the clarity of focus... it focusses attention on a killer’s loss of benefits with certainty as to who, incidentally, acquires forfeited benefits. There is a problem inherent in the operation of the modern rule — determination of how far the rule operates derivatively and takes the benefit or property subject of a forfeiture’: *Re Settree Estates; Robinson v Settree* [2018] NSWSC 1413, [26]. See also the lengthy and inconclusive discussion in *Edwards v State Trustees Limited* (2016) 257 A Crim R 529 of the scope of the forfeiture rule.

⁸⁹ Darryl Brown and Ruth Pollard, ‘Where from and where to with the Forfeiture Rule’ (2018) 148 *Precedent* 14.

⁹⁰ See also Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) ix.

1.2.10 The forfeiture rule has proved contentious and various jurisdictions have either changed the rule or are considered changing the rule. Although this reference is the first public review of the common law forfeiture rule in South Australia, SALRI was able to draw upon the results of earlier reviews by law reform bodies, both in Australia and in other jurisdictions. These bodies include:

1. The Law Commission of New Zealand.⁹¹
2. The Scottish Law Commission.⁹²
3. The Law Commission for England and Wales.⁹³
4. The Tasmania Law Reform Institute.⁹⁴
5. The former Victorian Law Reform Advisory Council.⁹⁵
6. The Victorian Law Reform Commission.⁹⁶
7. The NSW Law Reform Commission.⁹⁷
8. The Law Reform Commission of Ireland.⁹⁸

1.2.11 The research and work of these law reform bodies is a valuable resource. SALRI draws on these sources. As the VLRC has noted: '[t]he 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.'⁹⁹

1.2.12 SALRI wishes to acknowledge the valuable contribution to the current Report by the late Helen Wighton, the founding Deputy Director of SALRI. Ms Wighton 'was a tireless campaigner and worker for law reform in this and many other areas of the law.'¹⁰⁰ Ms Wighton conducted extensive research and analysis for this Report and SALRI is grateful for her input and commitment.

1.2.13 SALRI also acknowledges the contributions of Professor Gino Dal Pont of the University of Tasmania, Dr Xianlu Zeng of the University of South Australia, the Hon David Bleby QC, Emily Sims and the students of the 2012, 2017, 2018 and 2019 Law Reform classes at the Adelaide University Law School. SALRI also acknowledges the valuable input to this Report of Terry Evans and its expert Advisory Board.

⁹¹ New Zealand Law Commission, *Succession Law: Homicidal Heirs* (Report No 38, 15 July 1997).

⁹² Scottish Law Commission, *Report on Succession* (Report No 124, 13 November 1989); Scottish Law Commission, *Report on Succession* (Report No 215, 15 April 2009).

⁹³ Law Commission of England and Wales, *The Forfeiture Rule and the Law of Succession* (Report No 295, 4 July 2005).

⁹⁴ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004).

⁹⁵ Richard Boaden, Law Reform Advisory Council *The 'Forfeiture Rule'* (Discussion Paper, 1995).

⁹⁶ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014); Victorian Law Reform Commission, *The Forfeiture Rule* (Consultation Paper, March 2014).

⁹⁷ NSW Law Reform Commission, *Uniform Succession Laws: Intestacy* (Report No 116, April 2007).

⁹⁸ Law Reform Commission of Ireland, *Report on Prevention of Benefit from Homicide* (Report No 114, July 2015).

⁹⁹ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 4 [1.20].

¹⁰⁰ South Australia, *Parliamentary Debates*, House of Assembly, 7 May 2015, 1117–1118 (Hon John Rau, Attorney-General).

1.2.14 SALRI finally wishes to express its appreciation to the many succession lawyers and members of the community who have generously contributed to this reference and shared their personal experiences of the operation of the current law.

1.3 Consultation approach

1.3.1 SALRI is committed to inclusive and accessible consultation with the South Australian community and all interested parties, including but not confined to the legal profession and experts. Such genuine and inclusive consultation is integral to modern law reform. As Neil Rees has observed:

Effective community consultation is one of the most important, difficult and time consuming activities of law reform agencies ... community participation has two major purposes: to gain responses and feedback and to promote a sense of public 'ownership' over the process of law reform ... consultation often brings an issue to the attention of the public and creates an expectation that the government will do something about the matter ...¹⁰¹

1.3.2 This reference has involved extensive research and consultation. SALRI conducted its main consultation on its review of the forfeiture rule between February 2019 and May 2019. This was facilitated through the release of SALRI's Factsheet and Consultation Questions.¹⁰²

1.3.3 On 5 April 2019, two separate Roundtables were conducted at the University of Adelaide to discuss the various issues and consultation questions identified in SALRI's factsheet. These Roundtables were facilitated by the Hon Tom Gray QC. SALRI is grateful for Mr Gray's insightful input. The first Roundtable had a focus on agencies in the domestic and family violence sector. There were 11 attendees (apart from SALRI), including representatives from the Legal Services Commission, the Office for Women, the Women's Legal Service SA, Uniting Communities, the Women Lawyers' Association, local law firms, the Attorney-General's Department and the Law Society of South Australia's Succession Law and Women Lawyers Committees. The second Roundtable had a legal focus. There were 12 attendees (apart from SALRI). The attendees included the Attorney-General (the Hon Vickie Chapman MP), the Shadow Attorney-General (the Hon Kyam Maher MLC), the Hon John Sulan QC, Mr Christopher Charles, local succession lawyers and representatives of the South Australian Bar Association and the Society of Trust and Estate Practitioners. SALRI is grateful for the constructive and considered input of all who took part.

1.3.4 On 15 April 2019, SALRI held a Roundtable for legal experts and community members in Mount Gambier in which 10 legal practitioners attended. On 17 April 2019 a further Roundtable was conducted at the University of Adelaide for legal experts and other interested parties. There were six attendees including representatives from the University of Adelaide, OARS Community

¹⁰¹ Neil Rees, 'The Birth and Rebirth of Law Reform Agencies' (Conference Paper, Australasian Law Reform Agencies Conference, 10–12 September 2008), <http://www.lawreform.vic.gov.au/sites/default/files/ALRAC%2BPaper%2B_NeilRees.pdf>. See also Roslyn Atkinson, 'Law Reform and Community Participation' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 160–174; Michael Kirby, 'Changing Fashions and Enduring Values in Law Reform' (Speech, Conference on Law Reform on Hong Kong: Does it Need Reform?, University of Hong Kong, 17 September 2011) <<http://www.alrc.gov.au/news-media/2011/changing-fashions-and-enduring-values-law-reform>>.

¹⁰² Please see SALRI webpage: <<https://law.adelaide.edu.au/research/south-australian-law-reform-institute>> for a copy of the Fact Sheet and Consultation Questions.

Transitions, Minter Ellison, Adelaide Lawyers and the Aboriginal Legal Rights Movement. All of the Roundtables were conducted under the Chatham House rule.

1.3.5 SALRI has also spoken individually to various interested judges, legal practitioners and experts including the Hon Tom Gray QC (former judge of the South Australian Supreme Court), the Hon Justice David Berman of the Family Court, the Hon Geoffrey Muecke (former Chief judge of the South Australian District Court), Professor Gino Dal Pont and Ken Mackie of the University of Tasmania, Kellie Toole from the University of Adelaide, Associate Professor Ben Livings and Dr Xianlu Zeng of the University of South Australia, the Public Trustee, the South Australian Commissioner for Victims' Rights, Michael O'Connell (former South Australian Commissioner for Victims' Rights), the Victims' Support Service, Bill Boucaut QC of the local Bar and Glenn Carrasco of the English Bar.

1.3.6 SALRI received a total of 36 submissions, from industry bodies, legal practitioners, academics, interested agencies and the community. These submissions took the form of formal written submissions or comments provided by various means including face-to-face meetings.

1.3.7 Dr Sylvia Villios and Dr David Plater conducted several media interviews with radio stations in Adelaide and Mount Gambier. SALRI also presented a CPD session at the Mount Gambier Roundtable for local legal practitioners.

1.3.8 SALRI conducted a number of further meetings in the second half of 2019 with various parties and experts into a number of often difficult or technical issues that arose. SALRI acknowledges the particular input of Kaela Dore, Mark Jordan, Madalena Vellotti and Julie Van Der Velde.

1.3.9 In the preparation of this Report, SALRI had careful regard to all the various views expressed to it. SALRI is grateful for the time and valuable contributions of all attendees and interested parties who responded and contributed to this Report. SALRI also had regard to previous submissions made to it during the course of its wider succession reference.

1.3.10 SALRI notes that the focus of past law reform references and academic commentary has tended to be on the scope of the forfeiture rule and what categories of unlawful homicide, if any, should be excluded from the operation of the rule and the role and operation of any judicial discretion to modify the operation of the rule. The practical implications and consequences of the potential operation of the forfeiture rule arise in a wide variety of succession situations such as when the victim dies with a will or intestate, holds property as a joint tenant, holds trust assets, holds a life insurance, is a member of a superannuation fund or is in receipt of other benefits. The practical implications and consequences that arise from the potential operation of the rule are significant but have been often overlooked.¹⁰³ One particular criticism is that the forfeiture rule may operate in such a way that the sins of the unlawful killer are visited upon their blameless children.¹⁰⁴ As part of this reference, SALRI has examined the often overlooked practical implications and consequences that arise from the potential operation of the rule.

¹⁰³ Though see the Law Commission of England and Wales, *The Forfeiture Rule and the Law of Succession* (Consultation Paper No 172, 30 September 2003).

¹⁰⁴ See, for example, *Re DWS (dec'd)* [2001] Ch 568. See also Roger Kerridge, 'Visiting the Sins of the Fathers on their Children' (2001) 117 (July) *Law Quarterly Review* 371; Law Commission of England and Wales, *The Forfeiture Rule and the Law of Succession* (Consultation Paper No 172, 30 September 2003).

1.3.11 The following sections of this Report address a range of specific law reform issues on which the consultation discussion questions were primarily focused. The issues covered were:

- a. Whether reform to the common law forfeiture rule is necessary in South Australia?
- b. Which model of legislative reform should be introduced in South Australia?
- c. What should be the scope of the forfeiture rule?
- d. How should any modification provisions operate?
- e. What the effect of the rule should be on the killer and third parties?

1.4 Scope and operation of the common law forfeiture rule¹⁰⁵

1.4.1 The notion that a killer should not benefit or profit from their crime appeared in Jewish and Roman law and can be traced to Biblical times. ‘The problem is timeless and universal ... Nowadays the slayer rule is regarded as universal and applies in almost every known system of law.’¹⁰⁶

1.4.2 The common law forfeiture rule that a killer cannot profit from their crime draws on the doctrines of attainder, forfeiture, corruption of blood and escheat which prevailed in England until 1870.¹⁰⁷ These ‘stern doctrines’¹⁰⁸ solved the problem created by one person unlawfully killing another benefiting under his or her will or otherwise, because given a conviction for murder or some other felony the property of the criminal was taken by the Crown, therefore destroying the line of descent.¹⁰⁹

1.4.3 The modern forfeiture rule is articulated in the common law¹¹⁰ and, despite its drastic effect, has no statutory basis¹¹¹ (a fact which caused some surprise to interested parties in SALRI’s

¹⁰⁵ As part of this reference, Olivia Jay examined cases of murder and manslaughter in South Australia in the period 2007–2017 and the implications of those cases for the role and application of the forfeiture rule. This study was based on the publicly available sentencing remarks in South Australia for murder and manslaughter for this period kindly previously made available by the South Australian DPP. There were about 119 such cases (83 of murder and 36 of manslaughter) identified during this period. This study cannot be regarded as complete as it omitted cases where the sentencing remarks were suppressed and in several instances it is unclear on what basis the offender was convicted of manslaughter. See also David Plater, David Bleby, Megan Lawson, Lucy Line, Amy Teakle, Katherine O’Connell and Kate Fitz-Gibbon, South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 2* (Report No 11, April 2018) xvi n 14, 84 n 598; Megan Lawson, South Australian Law Reform Institute, *Homicide Sentencing* (Background Research Paper, April 2018) <https://law.adelaide.edu.au/system/files/media/documents/2019-02/homicide_sentencing_background_research_paper_20180620.pdf> See also below Appendix B. There were 42 cases where the forfeiture rule may have arisen. Ms Jay also examined the cases of murder publicly available between 2007–2019 where the killer had been found not guilty by reason of mental impairment under Part 8A of the *CLCA* for the interaction with the forfeiture rule. SALRI’s analysis found that there were 11 cases which occurred in the familial context, which may have theoretically attracted the operation of the rule. Under the present law, the forfeiture rule could not have applied to these 11 cases due to the mental impairment of the killer in these cases, despite the fact that the killer caused the deceased’s death. See also below Appendix B and Appendix C.

¹⁰⁶ Nili Cohen, ‘The Slayer Rule’ (2012) 92(3) *Boston University Law Review* 793, 794. See also Arie Freiberg and Richard Fox, ‘Fighting Crime with Forfeiture: Lessons from History’ (2000) 6(1–2) *Australian Journal of Legal History* 1.

¹⁰⁷ See further below Part 2.

¹⁰⁸ Norman Tarnow, ‘Unworthy Heirs: The Application of the Public Policy Rule in the Administration of Estates’ (1980) 58(3) *Canadian Bar Review* 582.

¹⁰⁹ *Ibid.*

¹¹⁰ *Cleaver v Mutual Reserve Fund Life Assurance* [1892] 1 QB 147.

¹¹¹ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 2.

consultation). The forfeiture rule operates independently and outside of the elaborate legislative regime found in the *Criminal Assets Confiscation Act 2005* (SA) for the forfeiture and confiscation to the State of the proceeds of crime and other criminal assets.¹¹² The common law forfeiture rule embodies a

¹¹² All Australian jurisdictions have similar Acts as the *Criminal Assets Confiscation Act 2005* (SA) to provide for involved statutory schemes for the forfeiture and confiscation to the State of the proceeds of crime and other criminal assets. Though the focus and operation of these statutory schemes and the common law forfeiture rule are somewhat different (one operates to confiscate the proceeds of crime of an offender to the State and the other operates to deny an unlawful killer from benefitting under the civil law and no assets are confiscated as a result to the State), both share a similar premise in that ‘crime should not pay’ and to deny an offender from profiting from their crimes. The operation of the forfeiture rule alongside the statutory schemes in Australia has been largely overlooked by both law reform agencies and commentators. The VLRC Report, for example, almost totally omits any reference to Victoria’s statutory scheme for the confiscation of criminal assets. SALRI notes that the proposed *Forfeiture Act* would necessitate the making of consequential amendments to the *Criminal Assets Confiscation Act 2005* (SA) to ensure that any relief from forfeiture ordered by a court under the new law is also excluded from forfeiture to the State that may otherwise arise under the 2005 South Australian Act. In addition, SALRI notes that:

1. Where SALRI proposes that certain additional categories of property be brought within the forfeiture rule (such as jointly owned property, superannuation etc), the operation of the 2005 Act is potentially affected by taking such property out of the sphere of the operation of the statutory scheme for the forfeiture and confiscation to the State of the proceeds of crime and other criminal assets.
2. The proposed *Forfeiture Act*, in allowing relief from the forfeiture rule for the offender, may be perceived to be somewhat at odds with the existing policy in the 2005 Act that ‘crime should not pay’ and to deny an offender from profiting from their crimes.

However, SALRI notes that the focus and operation of the statutory schemes and the common law forfeiture rule are somewhat different and the 2005 Act should not preclude or prevent suitable reform of the common law rule through a new *Forfeiture Act* as recommended in this Report. The forfeiture rule was designed to operate independently of any statutory scheme for the confiscation of the proceeds of crime to the State. SALRI is supported in its conclusion by the views of Duggan J in *Rivers v Rivers* (2002) 84 SASR 426. In *Rivers*, it was argued that the forfeiture rule no longer applied in South Australia because it had been subsumed under the provisions of the [then] *Criminal Assets Confiscation Act 1996* (SA). ‘According to the argument, the *Confiscation Act* operates to the exclusion of the general law forfeiture rule. Mr Wells contended that, whereas the forfeiture rule is not mentioned expressly in the *Confiscation Act*, the effect of the Act is to provide a statutory answer to circumstances which, formerly, would have given rise to the operation of the forfeiture rule. It was argued that the Act evinces a legislative intention to replace the forfeiture rule with the statutory scheme by addressing the public policy considerations underlying the forfeiture rule and creating a scheme which is inconsistent with any general rule dealing with aspects of the same public policy’: at [14]. Duggan J did not accept this argument. His Honour noted that, in those jurisdictions such as the UK, NSW and ACT where the forfeiture rule has been recently modified by statute, ‘it would appear that in these jurisdictions it has been accepted without question that the forfeiture rule remained despite the passing of far reaching legislation empowering the courts to make confiscation orders in relation to the proceeds of crime’: at [31]. Duggan J reasoned:

‘In my view, the provisions of the *Confiscation Act* are far removed from the operation of the general law forfeiture rule. The policy of the *Confiscation Act* is to enable the government to gain access to property used in some way to commit crime or property obtained from crime; to obtain orders for confiscation of such property and to use the proceeds of offences for purposes associated with the consequences of crime, such as the compensation of victims. It might be said that the principle that an offender should not benefit from his or her crime is part of the policy underlying the Act. However, the nature and purpose of the legislation is wider than this element of its policy. Any similarities in policy which might exist between the Act and the forfeiture rule do not advance the argument that the Act was intended to replace the forfeiture rule’: at [28]–[29].

Duggan J concluded:

‘In summary, therefore, the *Confiscation Act* provides a comprehensive scheme for the confiscation of proceeds of crime and property used in the commission of crime. The forfeiture rule prevents a person from exercising a right to property which could have been exercised if it had not been for the fact that the death of the owner of the property had been the result of the unlawful act of the claimant. In my view, the different purposes served by the scheme of the Act on the one hand and the forfeiture rule on the other leave no room for the argument that the forfeiture rule has been subsumed under the Act. Regard must also be had to the fact that the forfeiture rule is a well-established general law rule. A statute is to be construed in conformity with the common law unless the contrary intention is manifested’: at [32].

broad principle of public policy that no person should be permitted to profit or benefit from their crime.¹¹³

1.4.4 The principle provides that when a person has unlawfully killed another, they are prohibited from inheriting from their victim or acquiring another financial benefit from the death. As such, any interest in their estate is forfeited.¹¹⁴ This is an expression of the fundamental principle that crime should not pay, and it conveys the community's strong disapproval of homicide.

1.4.5 The rule is largely employed to prevent a person benefiting from having unlawfully killed another, and this is the main focus of this Report. The rule has sometimes also been held to apply to lesser crimes, including non-fatal offences.¹¹⁵ SALRI does not support such a drastic extension of the rule, and little support is expressed in either research or consultation for such an extension.¹¹⁶

1.4.6 The modern statement of the forfeiture rule was first enunciated following the famous (or infamous) case of Florence Maybrick convicted of the murder by poison of her husband and the resulting 1891 English decision in *Cleaver v The Mutual Reserve Fund Life Assurance*.¹¹⁷ Fry LJ stated:

It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from a crime of that person.¹¹⁸

1.4.7 The rule is based upon the idea that a person shall not slay their benefactor and thereby take their bounty.¹¹⁹ In the famous *Crippen* case, Evans P observed:

It is clear law 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. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence.¹²⁰

¹¹³ *Gonzales v Claridades* (2003) 58 NSWLR 211, 220 [42]; *State Trustees Ltd v Edwards* [2014] VSC 392, [87].

¹¹⁴ This includes disqualification from taking anything under the victim's will, from the victim's intestate estate, from an insurance policy on the life of the victim, or otherwise obtaining an advantage from the crime. See, for example, *State Trustees Ltd v Edwards* [2014] VSC 392.

¹¹⁵ See, for example, the summary by Brooking J for the Victorian Full Court in *Church of The New Faith v Commissioner for Pay Roll Tax* [1983] 1 VR 97: 'Since death affects the destination of property, it is not surprising that the cases in which the principle has been considered are almost without exception cases of felonious homicide. Expressions like "his own felonious act" (*Re Sangal* [1921] VLR 355, 359) must be read with reference to the facts of the case. The principle has often been stated in terms which would not confine it to felonious slayings or even to felonies; for example, the formulations of Fry LJ in *Cleaver v Mutual Reserve Fund Life Assurance* [1892] 1 QB 147, 156, of Sir Samuel Evans P in *Re Crippen* [1911] P 108, 112 and of Lord Atkin and Lord Macmillan in *Beresford v Royal Insurance Co Ltd* [1938] AC 586, 599, 603, and 605 all speak of "crime". Fry LJ indeed refers both to "crime" and to "felony or misdemeanour", and, subject to what I shall say in a moment about offences which do not as a matter of public policy call for the application of the principle. I would view his Lordship's reference to misdemeanours as meaning all crimes below felony: cf *Pickup v Dental Board of the United Kingdom* [1928] 2 KB 459.'

¹¹⁶ However, the NSW Law Society submitted that the forfeiture rule should extend to offences other than unlawful homicide in the topical context of 'elder abuse'. This suggestion is beyond the scope of this reference but is worthy of future consideration. See also below [9.2.1]–[9.2.17].

¹¹⁷ [1892] 1 QB 147. See further Part 2.

¹¹⁸ *Cleaver v Mutual Reserve Fund Life Assurance* [1892] 1 QB 147, 156.

¹¹⁹ *Re Hall* [1914] P 1, 7.

¹²⁰ *Re Crippen* [1911] P 108.

1.4.8 The forfeiture rule was applied by the Australian High Court in *Helton v Allen*,¹²¹ referring to ‘the principle that by committing a crime no person could obtain a lawful benefit to himself.’ This was a strict and inflexible application of the rule, which dictated that, regardless of culpability, the law would not enable an unlawful killer to benefit from that deed.

1.4.9 The forfeiture rule has application to murder,¹²² manslaughter,¹²³ manslaughter by unlawful and dangerous act,¹²⁴ manslaughter on the basis of provocation¹²⁵ or diminished responsibility¹²⁶ (even in the context of a victim of family violence),¹²⁷ defensive homicide or manslaughter on the basis of excessive self-defence,¹²⁸ manslaughter by gross negligence¹²⁹ (including the use of a motor vehicle),¹³⁰ assisted suicide¹³¹ and the subject of a failed suicide pact.¹³² It remains unclear whether the rule applies in Australia to the offence(s) of causing death by culpable or dangerous

¹²¹ (1940) 60 CLR 691 (Dixon, Evatt and McTiernan JJ).

¹²² *Re Crippen* [1911] P 108; *Gonzales v Claridades* (2003) 58 NSWLR 211, 220 [46]; *Pike v Pike* [2015] QSC 134; *Re Rattle* [2018] VSC 249.

¹²³ See, for example, *Lundy v Lundy* (1895) 24 SCR 650; *Re Hall* [1914] P 1; *Re Stone* [1989] 1 Qd R 351; *Pike v Pike* [2015] QSC 134.

¹²⁴ *Gray v Barr* [1971] 2 QB 554; *Henderson v Wilcox* [2016] 4 WLR 14; *Pike v Pike* [2015] QSC 134.

¹²⁵ *Mack v Lockwood* [2009] EWHC 1524 (Ch).

¹²⁶ *Re Giles (dec’d)* [1972] Ch 544; *Jones v Roberts* [1995] 2 FLR 422; *Chadwick v Collison* [2014] EWHC 3055 (Ch).

¹²⁷ *Troja v Troja* (1994) 33 NSWLR 269; *Re K (dec’d)* [1985] 3 WLR 234. See also *Bain v Morabito* (Supreme Court of New South Wales, Powell J, 14 August 1992).

¹²⁸ *State Trustees Ltd v Edwards* [2014] VSC 392.

¹²⁹ *Ontario Municipal Employees Retirement Board v Young* (1985) 49 OR (2d) 78; *Land v Land* [2007] 1 WLR 1009; *Nay v Iskov* [2012] NSWSC 598. *Re Tucker* (1920) 21 SR (NSW) 175, 178 suggests that the forfeiture rule also applies to omissions resulting in death, for example by failing to provide the necessities of life. There is a view that the forfeiture rule does not apply to ‘motor manslaughter’ (this view is based on an English line of authority, see below) and/or manslaughter by inadvertence or ‘gross negligence’. In *Re Estate of Soukup* (1997) 97 A Crim R 103, for example, Gillard J said: ‘It is unnecessary for me to decide whether an inadvertent or involuntary act which results in the finding of manslaughter should preclude the operation of the rule. For what it is worth, I think the English approach is appropriate in the circumstances. In other words, the rule does not apply if the person seeking the right was not guilty of deliberate intentional and unlawful violence or threats of violence resulting in death’: at 113. See further below [6.1.40]–[6.1.77], [6.2.27]–[6.2.37], [6.3.1]–[6.3.18].

¹³⁰ *Nay v Iskov* [2012] NSWSC 598. *Nay* was a disturbing case in a context of family violence. The husband pleaded guilty to manslaughter by gross negligence of his wife: at [6]. ‘The marriage was a difficult one. In May 2007, the deceased told the defendant she wanted a divorce. On 6 August 2007, after delivering two of the children to childcare and school, respectively, the deceased met the defendant, who entered her car. Prior to doing so, he assaulted and occasioned actual bodily harm to her. He then detained her, drove her for some three and a half hours around and in the vicinity of Lismore and, ultimately, by gross criminal negligence, drove the car into a tree ... as a result of which collision the deceased was killed’: at [5]. The situation of causing death by culpable or dangerous driving is problematic. See further below [6.1.40]–[6.1.77], [6.2.27]–[6.2.37], [6.3.19]–[6.3.24].

¹³¹ *Dunbar v Plant* [1998] Ch 412, *Public Trustee of Queensland v Public Trustee of Queensland* [2014] QSC 47.

¹³² *Whitelaw v Wilson* [1934] OR 415; *Dunbar v Plant* [1998] Ch 412.

driving¹³³ (noting in South Australia this is a single combined offence)¹³⁴ but the strict operation of the rule is clear. As stated in *Pike* by Atkinson J:

The forfeiture rule has been held to extend even to cases of assisted suicide and clearly, in my view, in this State covers all cases of murder and manslaughter, at the very least. This includes cases where the elements of murder are not present; that is, where an intention to kill or do grievous bodily harm is absent.¹³⁵

1.4.10 The rule arises regardless of the degree of moral culpability or the punishment imposed by the criminal court.¹³⁶ It also arises regardless of any hardship to the killer.¹³⁷

1.4.11 The forfeiture rule has drastic practical effect to deny the killer any benefit arising as a result of the crime. It has been held to preclude a killer from acquiring a benefit via a will¹³⁸ or distribution on intestacy,¹³⁹ other benefits such as insurance policies¹⁴⁰ or a statutory pension.¹⁴¹ The killer is also barred from making a claim under family provision laws.¹⁴² Where the killer and deceased held property as joint tenants, the rule will prevent the killer from acquiring the deceased's interest, either by severing the joint tenancy,¹⁴³ or through a constructive trust.¹⁴⁴ 'One point to remember is that the rule prevents the enforcement of rights, not their creation.'¹⁴⁵

¹³³ *Straede v Eastwood* [2003] NSWSC 280. In England, motor manslaughter cases are exempt from the operation of the forfeiture rule. See *Tinline v White Cross Insurance Association Limited* [1921] 3 KB 327; *James v British General Insurance Company Limited* [1927] 2 KB 311. Death by dangerous driving also seemingly falls outside the rule in England. However, the rationale of this exception has been doubted in an Australian context, rightly noting the gravity with which offences involving dangerous driving or gross negligence involving motor vehicles causing death are now regarded in Australia. 'Those [UK] cases may need to be reconsidered given the change in public policy over the last few decades to the circumstances in which people are killed by the drivers of motor vehicles': *Edwards v State Trustees Limited* (2016) 257 A Crim R 529, 571 [155] (Santamaria JA). This theme was also widely raised in SALRI's consultation. An experienced Mount Gambier lawyer told SALRI that death by culpable or dangerous driving may well amount to offending of the highest blameworthiness and should fall within the potential operation of the forfeiture rule. Mr Boucalt QC made a similar powerful point to SALRI, noting also that manslaughter by gross negligence is seldom charged in relation to even the most egregious and blameworthy driving causing death and death by culpable or dangerous driving is instead relied upon. See also below [6.1.40]–[6.1.77], [6.2.27]–[6.2.37], [6.3.19]–[6.3.24].

¹³⁴ *CLCA* s 19A. See further below n 754.

¹³⁵ *Pike v Pike* [2015] QSC 134, [22].

¹³⁶ *Re Giles (dec'd)* [1972] Ch 544; *Troja v Troja* (1994) 33 NSWLR 269, 283, 299; *Re Estate of Soukup* (1997) 97 A Crim R 103.

¹³⁷ *State Trustees Ltd v Edwards* [2014] VSC 392, [94].

¹³⁸ *Re Dellow's Will Trusts* [1964] 1 All ER 771.

¹³⁹ See, for example, *Re Cash* (1911) 30 NZLR 577; *Re Tucker* (1920) 21 SR (NSW) 175; *Re Sangal* [1921] VR 355; *Re Signorth* [1935] Ch 89; *Re Dellow's Will Trusts* [1964] 1 All ER 771; *Re Estate of Soukup* (1997) 97 A Crim R 103; *Rivers v Rivers* (2002) 84 SASR 426, [42]–[43].

¹⁴⁰ *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147; *Gray v Barr* [1971] 2 QB 554.

¹⁴¹ *R v Chief National Insurance Commissioner, Ex Parte Connor* [1981] QB 758; *Glover v Staffordshire Police Authority* [2007] ICR 661.

¹⁴² *Re Royse (dec'd)* [1985] Ch 22; *Troja v Troja* (1994) 35 NSWLR 182.

¹⁴³ *Re Barroncliff* [1927] SASR 147.

¹⁴⁴ *Re Thorp and Real Property Act* (1961) 80 WN (NSW) 61.

¹⁴⁵ Leslie Blohm QC, '(Not) Getting Away with Murder or Some Reflections on the Principle of Forfeiture as Applied to the Administration of Estates', *St John's Chambers* (Online Article, October 2018), 2 <<https://www.stjohnschambers.co.uk/wp-content/uploads/2018/11/Some-reflections-on-the-principle-of-forfeiture-as-applied-to-the-administration-of-estates-1.pdf>>. In *Cleaver*, for example, the rule prevented the

1.4.12 The underlying rationale of the forfeiture rule is sound, but its scope and operation are unclear and contentious. The uncertain scope of the forfeiture rule is a product of its origin as judicial law derived from the decision in *Cleaver*.¹⁴⁶ The rule was developed after the enactment of the *Forfeiture Act 1870* (UK) which abolished the historical feudal doctrines that required persons convicted of a felony to forfeit their assets to the Crown.¹⁴⁷ Kirby P described the development of the rule as occurring ‘without a great deal of consideration, either of its scope, or of its exceptions, or of its fundamental underlying rationale. The result has been controversy as to the scope, uncertainty about the exceptions and confusion as to the rationale’.¹⁴⁸ There is further uncertainty as to precise basis of the rule.¹⁴⁹

1.4.13 Distilling the details of when and how the rule applies can be difficult and has challenged courts in many jurisdictions since the outset of the rule. As early as 1921, Harvey J in *Re Tucker*,¹⁵⁰ after considering the English authorities and concurrent developments in United States law, observed:

What exactly the principle is, it is not easy to find out, because the Judges have expressed themselves differently. They all agree that it is based somehow on some principle of public policy, but exactly what is meant by public policy, they are not agreed upon ... 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.¹⁵¹

1.4.14 Harvey J’s criticisms remain apposite. In the case of murder, the application of the forfeiture rule is ‘clear and uncontroversial’.¹⁵² However, even post *Troja*,¹⁵³ the reach of the rule to other forms of unlawful killing, such as manslaughter in certain situations (such as by gross negligence),¹⁵⁴ causing death by culpable or dangerous driving¹⁵⁵ and crimes involving inadvertent and involuntary acts, is unsettled. The implications or consequences of the application of the forfeiture rule are also unclear. The underlying basis of the rule also remain unclear.

wrong doer or their representative enforcing the rights to a life insurance policy on the deceased in favour of Mrs Maybrick who had been convicted of the murder of her husband. Lord Esher MR appears to have taken a cautious view of the insurer’s motivations: ‘... when people vouch [the forfeiture] rule to excuse themselves from the performance of a contract, in respect of which they have received the full consideration, and when all that remains to be done under the contract is for them to pay money, the application of the rule ought to be narrowly watched, and ought not to be carried a step further than the protection of the public requires.’ See also: at 2

¹⁴⁶ See further below Part 2.

¹⁴⁷ Dianne Caldwell, ‘Criminal Law and Estates: The Forfeiture Rule’ (2005) 24(3) *Estates, Trusts and Pensions Journal* 269, 269; Nicola Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31(1) *Common Law World Review* 1, 4; Chris Triggs, ‘Against Policy: Homicide and Succession to Property’ (2005) 68(1) *Saskatchewan Law Review* 117, 199. See further below Part 2.

¹⁴⁸ *Troja v Troja* (1994) 33 NSWLR 269, 278.

¹⁴⁹ *Permanent Trustee Co Ltd v Gillett* (2004) 145 A Crim R 220, 225 [18]; *Estate of Raul Novosadek* [2016] NSWSC 554, [19]–[20].

¹⁵⁰ (1920) 21 SR (NSW) 175.

¹⁵¹ *Ibid* 180–181.

¹⁵² *Re Rattle* [2018] VSC 249, [42].

¹⁵³ *State Trustees Ltd v Edwards* [2014] VSC 392; *Edwards v State Trustees Limited* (2016) 257 A Crim R 529.

¹⁵⁴ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 20 [3.17].

¹⁵⁵ *Straede v Eastwood* [2003] NSWSC 280. See also below n 1232.

1.4.15 If an unlawful killing falls within the scope of the forfeiture rule, the prevailing (though not universal)¹⁵⁶ view following *Troja v Troja* is that the rule will apply regardless of the circumstances in which the unlawful homicide has occurred and will apply to any act of murder or manslaughter.¹⁵⁷ The rule applies regardless of the killer's intention or motivation.¹⁵⁸ The operation of the rule does not depend on the punishment in the criminal court or the degree of moral culpability, even if low, of the unlawful killer.¹⁵⁹ The prevailing view is that there is no judicial ability or discretion to modify the strict effect of the rule.¹⁶⁰

1.4.16 The rule may well operate unfairly because of this inflexible application, and it has been labelled as 'too rigid' by commentators on the topic.¹⁶¹ In particular, the application of the forfeiture rule to unlawful killings which involve a lesser degree of culpability has illustrated that the rule's strict application is capable of leading to unjust outcomes.¹⁶² For example, the callous premeditated murder of a close relative carried out with the intention of obtaining a financial benefit is treated the same as a suicide pact in which one of the parties survived or where a victim of many years of sustained violence and abuse responds and kills a violent spouse and is convicted of manslaughter. The prevailing view following *Troja* is that all these situations will attract the strict application of the forfeiture rule and produce the same consequences in terms of an offender's succession rights.¹⁶³

¹⁵⁶ See, for example, *Edwards v State Trustees Limited* (2016) 257 A Crim R 529.

¹⁵⁷ *Batey v Potts* (2004) 61 NSWLR 274; *Permanent Trustee Co Ltd v Gillett* (2004) 145 A Crim R 220, 224; *Pike v Pike* [2015] QSC 134, [22]; Tasmanian Law Reform Institute, *The Forfeiture Rule* (Issues Paper No 5, December 2003) 3, 9–10. This was also the overwhelming view expressed to SALRI in consultation. Cf *State Trustees Ltd v Edwards* [2014] VSC 392; *Edwards v State Trustees Limited* (2016) 257 A Crim R 529.

¹⁵⁸ *Josifovski v Veleviski* [2013] NSWSC 1103, [28].

¹⁵⁹ *Troja v Troja* (1994) 33 NSWLR 269, 283, 299; *Re Estate of Soukup* (1997) 97 A Crim R 103, 111, 115, 118; *State Trustees Ltd v Edwards* [2014] VSC 392, [94].

¹⁶⁰ *Re Estate of Soukup* (1997) 97 A Crim R 103; *Batey v Potts* (2004) 61 NSWLR 274; *Permanent Trustee Co Ltd v Gillett* (2004) 145 A Crim R 220, 224; *Pike v Pike* [2015] QSC 134, [22]; Tasmanian Law Reform Institute, *The Forfeiture Rule* (Issues Paper No 5, December 2003) 3, 9–10. This view accords with the English approach; see *Re Giles (dec'd)* [1972] Ch 544; *Dunbar v Plant* [1998] Ch 412; *Dalton v Latham* [2003] EWHC 796 (Ch); *Land v Land* [2007] 1 WLR 1009; *Chadwick v Collison* [2014] EWHC 3055 (Ch); Graham Virgo, *The Principles of the Law of Restitution* (3rd ed) (Oxford University Press, 2015) 547–548. This was also the overwhelming view expressed to SALRI in consultation.

¹⁶¹ J Chadwick, 'A Testator's Bounty to His Slayer' (1914) 30(2) *Law Quarterly Review* 211, 211. See also, for example, Nicola Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31(1) *Common Law World Review* 1.

¹⁶² Caroline Overington, 'No Room for Compassion in a House of Senseless Domestic Violence', *The Australian* (online, 9 April 2016) <<https://www.theaustralian.com.au/nation/inquirer/no-room-for-compassion-in-a-house-of-senseless-domestic-violence/news-story/1daa7d303305c972b9ce5df129086921>>.

¹⁶³ Further the application of the forfeiture rule is two tiered and can also have unfair consequences for third parties, affecting their rights to take a forfeited benefit.

1.4.17 The rule may produce particularly unfair implications in the context of domestic or family violence,¹⁶⁴ where the typically (though not inevitably) female¹⁶⁵ victim of family violence kills an abusive spouse and is convicted of manslaughter. As Hamilton and Sheehy contend:

The legal system deals harshly with an abused woman who kills her male partner. It metes out severe ‘punishment’ bearing scant relation to the ‘crime’ of choosing a violent man as a partner: this results in the woman being ‘thrice punished’. Her first punishment is enduring hell in the relationship itself, without access to effective legal intervention or protection. Her second is in facing criminal charges at a time when she is likely to be suffering the effects of post-traumatic stress occasioned by violence in the relationship, in a context in which battered women face serious barriers to obtaining a fair trial on the merits ... Her third punishment occurs even if she manages to obtain a conviction for manslaughter rather than for murder: any inheritance through the deceased by will, intestacy, superannuation, pension right, joint tenancy, or family provision right can be forfeited according to the public policy rule that a killer cannot benefit from her/his own wrongs. An acquittal on a charge of murder or manslaughter does not forestall the operation of the public policy rule.¹⁶⁶

1.4.18 The rigid application of the forfeiture rule in circumstances such as a victim of family violence convicted of manslaughter in relation to the death of a violent and abusive spouse has been

¹⁶⁴ Barbara Hamilton and Elizabeth Sheehy, ‘Thrice Punished: Battered Women, Criminal Law and Disinheritance’ (2004) 8 *Southern Cross University Law Review* 96. SALRI notes that various terms are used such as ‘domestic violence’ (see Government of South Australia, *Domestic Violence* (Discussion Paper, July 2016) 12) or ‘family violence’. Under the *Intervention Orders (Prevention of Abuse) Act 2009* (SA), the term ‘domestic abuse’ is used. SALRI uses the term ‘family violence’ in this Report. ‘Family violence is a broader term that refers to violence between family members, as well as violence between intimate partners. It involves the same sorts of behaviours as described for domestic violence. As with domestic violence, the National Plan recognises that although only some aspects of family violence are criminal offences, any behaviour that causes the victim to live in fear is unacceptable. The term, “family violence” is the most widely used term to identify the experiences of Indigenous people, because it includes the broad range of marital and kinship relationships in which violence may occur’: at Council of Australian Governments, *The National Plan to Reduce Violence against Women and their Children 2010–2022* (COAG Document, 2010).

¹⁶⁵ Parliament of South Australia, Legislative Council, *Report of the Social Development Committee into Domestic and Family Violence* (Report No 39, April 2016), 33 [4.2]; Government of South Australia, *Domestic Violence Domestic Violence* (Discussion Paper, July 2016) 19, 26–27. Intimate partner violence is also a very real problem within LGBTIQ communities as in heterosexual relationships. See Monica Campo and Sarah Tayton, Australian Institute of Family Studies, *Intimate Partner Violence in Lesbian, Gay, Bisexual, Trans, Intersex and Queer Communities: Key Issues* (Practitioner Resource, December 2015) <<https://aifs.gov.au/cfca/publications/intimate-partner-violence-lgbtiq-communities>>. LGBTIQ intimate partner violence is often unacknowledged in legal, governmental, policy and service responses to family violence. See Matthew Ball and Sharon Hayes, ‘Same-Sex Intimate Partner Violence: Exploring the Parameters’ in Burkhard Scherer (ed), *Queering Paradigms* (Peter Lang Publishing, 2009), 161–177. It has been previously noted to SALRI in consultation that the implications of family violence for LGBTIQ communities are significant but are all too often overlooked. This accords with the findings of the Victorian Royal Commission: ‘The family violence experiences of lesbian, gay, bisexual, transgender and intersex people and the barriers they face in obtaining services are distinct from those of other victims of family violence. They also differ within these various communities. LGBTI people may also experience distinct forms of family violence, including threats to “out” them. Although there has been little research into family violence in LGBTI relationships, the existing research suggests that intimate partner violence may be as prevalent in LGBTI communities as it is in the general population. The level of violence against transgender and intersex people, including from parents and other family members, appears to be particularly high. There are a variety of barriers to LGBTI people reporting and seeking help, including homophobia, transphobia and a fear of discrimination. The level of awareness of LGBTI experiences and needs is limited among police, in the courts, among service providers and in the community generally. As a result, LGBTI people can feel invisible in the family violence system’: *Royal Commission into Family Violence* (Summary and Recommendations, March 2016) 35.

¹⁶⁶ See also Barbara Hamilton and Elizabeth Sheehy, ‘Thrice Punished: Battered Women, Criminal Law and Disinheritance’ (2004) 8 *Southern Cross University Law Review* 96, 96–97.

described as ‘unnecessarily harsh, inconsistent and ... irrational’¹⁶⁷ and ‘injudicious and incongruous’¹⁶⁸ with its public policy foundations. The automatic and inflexible application of the rule is at odds with changes in community attitudes,¹⁶⁹ which is ‘reflected in the greater range of criminal offences and sentence options today compared to when the rule was first articulated.’¹⁷⁰

1.4.19 Where it does apply, the effect that the forfeiture rule has on the subsequent distribution of forfeited benefits is also uncertain. In South Australia, there is no law which codifies the effect of the forfeiture rule on the killer and others or the destination of the victim’s property under the rule. There is a body of case law which provides some guidance as to the effect of the forfeiture rule and while the law is clear that the killer cannot benefit from the killing, the law is unclear as to the effect of the forfeiture rule on third parties and on who then becomes the beneficial owner of the deceased victim’s property.

1.5 Broad Policy Considerations

1.5.1 In considering whether legislative intervention is justified in relation to the forfeiture rule, it is important to examine the policy objectives that underlie the rule and may support its modification.

1.5.2 It is also important to ensure that any legislative proposal is considered for consistency with the policy objectives of other laws, such as those:

- a. that seek to prevent or deny profit from crime;¹⁷¹
- b. that divide family property upon dissolution of marriage;¹⁷²
- c. that permit family provision to be made to a person;¹⁷³
- d. that govern the legal and equitable title to jointly owned property;
- e. that set the elements of murder and manslaughter and the defences to these crimes; and
- f. that establish sentencing principles.¹⁷⁴

¹⁶⁷ Nicola Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31(1) *Common Law World Review* 1, 20.

¹⁶⁸ Anthony Dillon, ‘When Beneficiary Slays Benefactor: The Forfeiture “Rule” Should Operates as a Principle of the General Law’ (1998) 6(3) *Australian Property Law Journal* 1, 1; Nicola Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31(1) *Common Law World Review* 1, 6.

¹⁶⁹ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 9.

¹⁷⁰ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) ix; Professor Prue Vines, Submission No 1 to Victorian Law Reform Commission, *The Forfeiture Rule* (5 May 2014), 2 highlighted these changes in social attitudes in her submission.

¹⁷¹ See also *Criminal Assets Confiscation Act 2005* (SA).

¹⁷² *Family Law Act 1975* (Cth).

¹⁷³ *Inheritance (Family Provision) Act 1972* (SA).

¹⁷⁴ *Sentencing Act 2017* (SA) ss 3, 4, 9, 10, 11.

Part 2– History of the Common Law Forfeiture Rule

2.1 Introduction

2.1.1 The common law forfeiture rule provides that an individual found criminally responsible for the death of another cannot benefit or profit from their offence through, for example, a life insurance policy or will. The modern origins of this rule are to be found in the 1892 English case of *Cleaver v Mutual Reserve Fund Life Association*, arising from the famous case of Florence Maybrick convicted of the murder of her husband, where the rule was adopted on the grounds of public policy.¹⁷⁵ In 1913, in *Re Hall*,¹⁷⁶ the forfeiture rule was extended to manslaughter. *Cleaver* and *Hall* were later endorsed by the High Court of Australia in *Helton v Allen*¹⁷⁷ and still form the basis of the present law in South Australia (and elsewhere in Australia) as to the scope of the forfeiture rule.

2.1.2 Most modern studies of the forfeiture rule commence their examination of the forfeiture rule from *Cleaver* and pay only scant regard to the history of the rule. This is a significant omission. *Cleaver* was not decided in isolation and must be viewed against the historical context.¹⁷⁸ As Freiberg and Fox point out, ‘modern laws of forfeiture ... can only be properly understood in the light of their history’.¹⁷⁹ The modern rule is arguably based on tenuous foundations. Most modern studies also omit or pay inadequate regard to the extraordinary facts of both *Cleaver* and *Hall*.

2.1.3 There are two related concepts that must be considered to understand the basis and timing of the judgment in *Cleaver*.

2.1.4 First, it is necessary to look to the history of forfeiture for felony and treason, which existed from the Anglo-Saxon period and was part of common law until abolished by statute in 1870.¹⁸⁰ The public policy rule espoused in *Cleaver* was not directly related to these doctrines, though their existence explains why it was not until 1892, after the *Forfeiture Act 1870*, that the public policy rule stated in *Cleaver* became part of the common law. In addition, contemporary social attitudes to forfeiture for felony and treason mirror criticisms of the present common law forfeiture rule. Commentators critical of the common law forfeiture rule often argue that it is unnecessarily harsh to those who kill as a result of an abusive relationship, and those who would otherwise inherit from killers, such as the grandchildren of the victim.¹⁸¹ These concerns have a long history, and the law of forfeiture for felony and treason was routinely changed and mitigated, partly in response to similar criticisms.

2.1.5 Secondly, it is necessary to examine the origins of the notion that, as a part of public policy, a person should not profit from their crime, or that an heir should not inherit if they caused or contributed to the death of another. This history is somewhat elusive but seems to have grown out of decisions at equity linked to fraud and undue influence, perhaps with some influence from the civil

¹⁷⁵ *Cleaver v Mutual Reserve Fund Life Association* (1892) 1 QB 147.

¹⁷⁶ *Re Hall* [1914] P 1.

¹⁷⁷ (1940) 63 CLR 691.

¹⁷⁸ It is also necessary to have regard to the extraordinary circumstances in *Cleaver*. See below [2.3.10]–[2.3.13]

¹⁷⁹ Arie Freiberg and Richard Fox, ‘Fighting Crime with Forfeiture: Lessons from History’ (2000) 6(1–2) *Australian Journal of Legal History* 1, 4.

¹⁸⁰ *Forfeiture Act 1870*, 33 & 34 Vict, c 23, s 1.

¹⁸¹ See for example Barbara Hamilton and Elizabeth Sheehy, ‘Thrice Punished: Battered Women, Criminal Law and Disinheritance’ (2004) 8 *Southern Cross University Law Review* 96.

law.¹⁸² The notion of public policy can be found in some 19th century English and American cases that pre-date *Cleaver*.¹⁸³ These cases are more likely to have directly influenced the ruling in *Cleaver*, but within them there appears some disunity regarding the origins of the public policy rule itself, which suggests a lack of stable foundation for the modern rule. The history of both forfeiture for felony and treason and the public policy that an individual should not benefit from their crime are considered.

2.2 Origins of Forfeiture for Treason and Felony

2.2.1 There is no direct link between the feudal doctrines of forfeiture and the common law forfeiture rule. *Cleaver* makes no mention of the feudal doctrines or the *Forfeiture Act 1870* that abolished them. However, the existence of felony forfeiture until 1870 was the reason the court in *Cleaver* faced a novel issue of law.

2.2.2 Forfeiture has been a part of the majority of legal systems.¹⁸⁴ For much of English history, it was impossible for a person who unlawfully killed to inherit in any manner from the deceased because, upon commission of the offence and a judgement of attainder, all of their personal property was forfeited and their land escheated to the Crown, either permanently in the case of treason, or for a year and a day and then to the Lord in cases of felony.¹⁸⁵ All heirs were disinherited because the offender's blood was said to be 'corrupted'. Forfeiture for treason and felony were based on feudal doctrines. The purposes of these doctrines were 'to deter revolution and maintain order',¹⁸⁶ and provide 'revenue for the Crown'.¹⁸⁷ They were 'seen as a "natural" consequence of [a criminal's] violation of his obligations to society'.¹⁸⁸

2.2.3 References to forfeiture exist in the Bible and customary law.¹⁸⁹ It was part of Roman law¹⁹⁰ (including the Justinian Code). Freiberg and Fox locate early origins of forfeiture in pre-conquest English conflict resolution and arbitration, offences against the King, and laws relating to breaches of the peace.¹⁹¹ Kesselring notes that forfeiture for treason and felony probably came into existence during the Anglo-Saxon period, when the legal system was based upon feuds and compensation.¹⁹² A criminal was to compensate the King by forfeiting his property to the Crown. Forfeiture of chattels happened

¹⁸² TK Earnshaw and PJ Pace, 'Let The Hand Receiving It Be Ever So Chaste...' (1974) 37(5) *Modern Law Review* 481, 481; *Villers v Beaumont* (1682) 1 Vern 100; 23 ER 342; *Bridgeman v Green* [1757] Wilm 58; 97 ER 22.

¹⁸³ See, for example, *Amicable Society for a Perpetual Assurance Office v Bolland* (1830) 2 Dow & Clark 1; 6 ER 630 ('*Fauntleroy's Case*'); *Riggs v Palmer* 115 NY 506 (1889).

¹⁸⁴ Arie Freiberg and Richard Fox, 'Fighting Crime with Forfeiture: Lessons from History' (2000) 6(1-2) *Australian Journal of Legal History* 1.

¹⁸⁵ Krista Kesselring, 'Felony Forfeiture in England, c.1170-1870' (2009) 30(3) *Journal of Legal History* 201.

¹⁸⁶ Norman Tarnow, 'Unworthy Heirs: The Application of the Public Policy Rule in the Administration of Estates' (1980) 58(3) *Canadian Bar Review* 582, 584.

¹⁸⁷ *R v Cutbbertson* [1981] AC 470, 472.

¹⁸⁸ *Ibid.*

¹⁸⁹ Arie Freiberg and Richard Fox, 'Fighting Crime with Forfeiture: Lessons from History' (2000) 6(1-2) *Australian Journal of Legal History* 1.

¹⁹⁰ *Re Tucker* (1920) 21 SR (NSW) 175, 177-178.

¹⁹¹ Arie Freiberg and Richard Fox, 'Fighting Crime with Forfeiture: Lessons from History' (2000) 6(1-2) *Australian Journal of Legal History* 1.

¹⁹² Krista Kesselring, 'Felony Forfeiture in England, c.1170-1870' (2009) 30(3) *Journal of Legal History* 201.

immediately upon the commission of the offence, whereas forfeiture of lands occurred upon conviction.¹⁹³ This continued ‘in altered guise throughout the Norman and Angevin reforms’.¹⁹⁴

2.2.4 After the 1066 Norman conquest, the distinction between criminal and civil law emerged, as did the concept of felony, which included notions of breach of fealty, forfeiture, and the ‘moral taint’ of corruption of blood.¹⁹⁵ It seems that forfeiture, more than capital punishment, was the ‘true criterion of felony’.¹⁹⁶ Forfeiture was a regular punishment by the 12th century. The ‘standard formula’ was enshrined in *Magna Carta* and the *Prerogativa Regis*, and iterated in Glanvill: ‘from traitors, all lands and chattels to the King, and from felons, all chattels to the King and all lands to the lord after the King’s year and a day’.¹⁹⁷ This iteration was based on three interrelated feudal doctrines: attainder, escheat, and corruption of blood.

Attainder

2.2.5 If a person was convicted of a capital offence and sentenced to death, they may also be attainted at common law. Attainder operated *in personam*.¹⁹⁸ Upon a death sentence following conviction for felony or treason, or pronouncement of outlawry, a court might pass sentence of attainder. An individual was then deemed *civilitier mortus*, and all civil rights and capacities, for example rights of property holding, inheritance or disposal, were taken away.¹⁹⁹ Forfeiture, escheat of lands and corruption of blood followed.²⁰⁰

2.2.6 Attainder was also possible by statute. The first Acts of Attainder appeared in the 14th century and were used until the 18th century.²⁰¹ Bills of attainder were generally used to ‘to destroy the King’s opponents, to exact revenge,’ or ‘to enrich the Crown’ with an air of legality.²⁰² Freiberg and Fox describe attainder as ‘the most solemn penalty known to the common law’.²⁰³

¹⁹³ Alison Reppy, ‘The Slayer’s Bounty: History of Problem in Anglo-American Law’ (1942) 19(2) *New York University Law Quarterly Review* 229.

¹⁹⁴ Krista Kesselring, ‘Felony Forfeiture in England, c.1170–1870’ (2009) 30(3) *Journal of Legal History* 201, 203.

¹⁹⁵ Arie Freiberg and Richard Fox, ‘Fighting Crime with Forfeiture: Lessons from History’ (2000) 6(1–2) *Australian Journal of Legal History* 1, 10.

¹⁹⁶ William Blackstone, *Commentaries on the Laws of England: Book IV of Public Wrongs* (Oxford University Press, 2016) vol 4, 64; See also Henry John Stephen, *New Commentaries on the Laws of England* (Butterworths, 4th ed, 1858) vol 1, 179.

¹⁹⁷ GDG Hall (ed), *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (Oxford University Press, 1965), 90–91 as cited in Krista Kesselring, ‘Felony Forfeiture in England, c.1170–1870’ (2009) 30(3) *Journal of Legal History* 201, 204.

¹⁹⁸ Arie Freiberg and Richard Fox, ‘Fighting Crime with Forfeiture: Lessons from History’ (2000) 6(1–2) *Australian Journal of Legal History* 1.

¹⁹⁹ Alison Reppy, ‘The Slayer’s Bounty--History of Problem in Anglo-American Law’ (1942) 19(2) *New York University Law Quarterly Review* 229; Arie Freiberg and Richard Fox, ‘Fighting Crime with Forfeiture: Lessons from History’ (2000) 6(1–2) *Australian Journal of Legal History* 1.

²⁰⁰ Arie Freiberg and Richard Fox, ‘Fighting Crime with Forfeiture: Lessons from History’ (2000) 6(1–2) *Australian Journal of Legal History* 1.

²⁰¹ Krista Kesselring, ‘Felony Forfeiture in England, c.1170–1870’ (2009) 30(3) *Journal of Legal History* 201.

²⁰² Arie Freiberg and Richard Fox, ‘Fighting Crime with Forfeiture: Lessons from History’ (2000) 6(1–2) *Australian Journal of Legal History* 1, 22.

²⁰³ *Ibid* 20.

Escheat and Corruption of Blood

2.2.7 As a consequence of Attainder, a felon's land escheated to the lord due to corruption of blood.²⁰⁴ Early legal writers regarded escheat and felony forfeiture as very closely linked under feudal laws.²⁰⁵ A feud described a tenant's right to enjoyment of lands owned by a lord. The lord received from the tenant duties and services and reserved the right to have the land returned, or later escheat, when his grant to the tenant expired.²⁰⁶ The tenant, in exchange for his services, was entitled to the lord's protection. If the tenant died and had no heirs, the land escheated to the lord automatically in line with civil law. The lord then had ownership of the land.²⁰⁷

2.2.8 Crime was viewed contractually during this period. If an agreement was breached, the punishment was that land passed to the lord and not the heir.²⁰⁸ A felon's land escheated to the lord because, it was said, his blood had become corrupted and he thus died without heirs.²⁰⁹ Any heirs were disinherited and the offender whose blood was corrupted could no longer inherit from their ancestors.²¹⁰ Thus if the offence was murder of a person whom the offender would otherwise inherit from, corruption of blood ensured this could not occur. Corruption of blood also ensured a widow was barred from receiving her dower if her husband had committed felony or treason. Dower was technically a claim against the heir; a widow could not make a claim against a felonious husband's heir because they were deemed to not exist.²¹¹ If the tenant was convicted of felony or outlawed the tenement reverted to the King for a year and a day, then to the lord. This was different to the rules relating to treason, where forfeiture to the King was considered a royal prerogative.²¹²

Purpose and Criticisms

2.2.9 In the period after the Norman conquest of 1066, forfeiture was identified and used by the Crown and feudal lords as a source of revenue.²¹³ Arguably, during this period, sustaining revenue for the Crown was a more important aspect of criminal procedure than ensuring justice.²¹⁴ After the

²⁰⁴ This was not the case for treason, where land went to the Crown.

²⁰⁵ Krista Kesselring, 'Felony Forfeiture in England, c.1170–1870' (2009) 30(3) *Journal of Legal History* 201.

²⁰⁶ *Burgess v Wheate* (1759) 1 Eden 177, 191; 28 ER 652, 657–8.

²⁰⁷ Arie Freiberg and Richard Fox, 'Fighting Crime with Forfeiture: Lessons from History' (2000) 6(1–2) *Australian Journal of Legal History* 1.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*; Krista Kesselring, 'Felony Forfeiture in England, c.1170–1870' (2009) 30(3) *Journal of Legal History* 201.

²¹⁰ Arie Freiberg and Richard Fox, 'Fighting Crime with Forfeiture: Lessons from History' (2000) 6(1–2) *Australian Journal of Legal History* 1.

²¹¹ 'In the case of treason, a wife's jointure was not forfeitable for her husband's crime because it was settled on her prior to the act of treason. However, her dower was forfeited.' GDG Hall (ed), *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (Oxford University Press, 1965), 90–91 as cited in Krista Kesselring, 'Felony Forfeiture in England, c.1170–1870' (2009) 30(3) *Journal of Legal History* 201, 204.

²¹² Arie Freiberg and Richard Fox, 'Fighting Crime with Forfeiture: Lessons from History' (2000) 6(1–2) *Australian Journal of Legal History* 1. Another category of forfeiture is that of the deodand. See Krista Kesselring, 'Felony Forfeiture in England, c.1170–1870' (2009) 30(3) *Journal of Legal History* 201.

²¹³ Arie Freiberg and Richard Fox, 'Fighting Crime with Forfeiture: Lessons from History' (2000) 6(1–2) *Australian Journal of Legal History* 1; Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (Cambridge University Press, 2nd ed, 1898) vol 2.

²¹⁴ Arie Freiberg and Richard Fox, 'Fighting Crime with Forfeiture: Lessons from History' (2000) 6(1–2) *Australian Journal of Legal History* 1.

14th century, however, forfeiture did not provide a significant amount of income to monarchs.²¹⁵ Henry VII and Henry VIII used forfeiture to raise revenue, but the *Statute of Uses 1536* effectively ended this practice.²¹⁶ From then on, forfeiture was seen as a source of patronage grants, as opposed to direct revenue.²¹⁷ After the ‘Glorious Revolution’ of 1688, the Crown entirely stopped using felony forfeiture as a source of patronage.²¹⁸

2.2.10 From the 16th century, the purpose of forfeiture was said to be its deterrent effect. Legal writers argued that individuals unconcerned about themselves might refrain from criminality to protect ‘those persons who in nature and affection are nearest and dearest to them and most to be beloved’.²¹⁹ This argument became increasingly untenable as reforms to protect wives and heirs were brought in over the early modern and modern period. By the 19th century, treatises such as *Chitty on Prerogatives of the Crown* were arguing that ‘forfeiture was not intended to deprive the offender of the fruits of his crime but was ... a “natural” consequence of his violation of his obligations to society’.²²⁰

2.2.11 Criticism of forfeiture existed during the Medieval period and became prevalent in the 16th century.²²¹ Kesselring notes the existence of ‘a few expressions of discontent that widows and heirs of offenders suffered’ due to forfeiture in the 14th century parliamentary rolls.²²² In 1548, Henry Brinkelow wrote about the ‘most wicked laws’ of forfeiture:

from the law of nature, also, that when a traitor, a murderer, a felon, or an heretic is condemned and put to death, his wife and children, his servants and all ... whom he is debtor unto should be robbed for his offence ... [H]e forfeits unto the king not only all his own goods and lands, but also that which is none of his.²²³

2.2.12 The unnecessarily negative impact forfeiture had upon families was noted in 1657 by William Tomlinson, who wrote: ‘It is not enough that the wife hath lost her husband and the children their father, but to increase their misery, their livelihood must go with his life.’²²⁴ John March, earlier the same decade, wrote: ‘There cannot be ... a more rigid and tyrannical law in the world that the children should thus extremely suffer for the crime and wickedness of the father, the innocent for the nocent.’²²⁵

²¹⁵ Ibid.

²¹⁶ 27 Hen 8, c 10. See Krista Kesselring, ‘Felony Forfeiture in England, c.1170–1870’ (2009) 30(3) *Journal of Legal History* 201.

²¹⁷ Ibid.

²¹⁸ Though Kesselring argues forfeiture continued into the hands of lords instead. See Krista Kesselring, ‘Felony Forfeiture in England, c.1170–1870’ (2009) 30(3) *Journal of Legal History* 201.

²¹⁹ Ibid 213.

²²⁰ Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject* (J Butterworth and Son, 1820) 213–226.

²²¹ Krista Kesselring, ‘Felony Forfeiture in England, c.1170–1870’ (2009) 30(3) *Journal of Legal History* 201.

²²² Ibid 208.

²²³ Henry Brinkelow, *The Complaynt of Roderyck Mors* (London, 1548), cited in Krista Kesselring, ‘Felony Forfeiture in England, c.1170–1870’ (2009) 30(3) *Journal of Legal History* 201, 209.

²²⁴ William Tomlinson, *Seven Particulars* (London, 1657), cited in Krista Kesselring, ‘Felony Forfeiture in England, c.1170–1870’ (2009) 30(3) *Journal of Legal History* 201, 217.

²²⁵ John March, *Amicus Reipublicae, The Commonwealth’s Friend, an Exact and Speedie Course to Justice and Right* (London, 1651) 109–112 cited in Krista Kesselring, ‘Felony Forfeiture in England, c.1170–1870’ (2009) 30(3) *Journal of Legal History* 201, 217. Kesselring believes these kinds of discontents may not have been novel to this century, but may have existed before but not recorded for the present-day historian to discover: at 209.

2.2.13 Critics in the 17th century continued to hold forfeiture as ‘a form of double jeopardy’ that punished the offender and their family.²²⁶ There were further criticisms that only the Crown, and not innocent victims, benefited from forfeiture, that creditors lacked avenues to sue for the debts owed to them once their debtor’s property was forfeited, that families never saw the property of wrongly convicted felons again, and that the rate of crime had no bearing on the existence, or lack thereof, of forfeiture.²²⁷

2.2.14 From the 18th century, existing criticisms of forfeiture’s unnecessarily harsh effect upon wives, offspring and creditors drew new strength from changing ideas about natural property rights.²²⁸ Forfeiture of land for treason was nearly abolished in 1709 because ‘post-revolutionary fondness for private property and its protection was so strong’.²²⁹ Writers during this period argued that escheat and felony forfeiture, once regarded as almost synonymous, had different origins. Henry Spellman, amongst others, argued that ‘forfeiture had Anglo-Saxon (and hence legitimate) roots, whereas escheat by corruption of blood had Norman (and hence questionable) origins’.²³⁰

2.2.15 Blackstone was particularly critical of corruption of blood,²³¹ as was Sir Samuel Romilly, who brought a Bill for the abolition of the doctrine to the House of Commons in 1814.²³² Romilly argued that the principle was outdated, and took issue with the fact that ‘if a man had a son and a grandson, and his son should be capitally convicted, if he should die intestate, his grandson would be deprived of the benefit of any real estate of which he might have been possessed ... whereby a punishment would be inflicted where punishment was not intended’.²³³ This reflected the view of many commentators that forfeiture to the Crown was anachronistic. The same arguments about the lack of compensation for victims and redress for creditors were bolstered by arguments that most crimes were now misdemeanours, and forfeiture only applied to felony and treason,²³⁴ and pragmatically that the Crown could effectively raise more revenue through taxation than resorting to forfeiture.²³⁵

2.2.16 The criticisms of forfeiture for felony and treason were reflected, to an extent, in changing legislation, jury mitigation of forfeiture, and avoidance of the doctrine altogether through intricate landholding methods.

²²⁶ Arie Freiberg and Richard Fox, ‘Fighting Crime with Forfeiture: Lessons from History’ (2000) 6(1–2) *Australian Journal of Legal History* 1, 41.

²²⁷ Ibid.

²²⁸ Krista Kesselring, ‘Felony Forfeiture in England, c.1170–1870’ (2009) 30(3) *Journal of Legal History* 201, 222.

²²⁹ Ibid 223.

²³⁰ JGA Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge University Press, 1957) 91–123 cited in Krista Kesselring, ‘Felony Forfeiture in England, c.1170–1870’ (2009) 30(3) *Journal of Legal History* 201, 205.

²³¹ William Blackstone, *Commentaries on the Laws of England: Book IV Of Public Wrongs* (Oxford University Press, 2016) vol 4.

²³² United Kingdom, *Parliamentary Debates*, House of Commons, 23 March 1814, vol 27, cols 342–6 (Sir S Romily and Mr Yorke).

²³³ Ibid.

²³⁴ James Fitzjames Stephen, *A General View of the Criminal Law of England*, (Macmillan and Co, 1st ed, 1863).

²³⁵ *R v Cutbbertson* [1981] AC 470.

Legislative Reform

2.2.17 Key changes to forfeiture occurred in the 16th century.²³⁶ During this period, statutes began to apply the label of felony to crimes in different and more flexible ways, creating graded punishments for offences committed multiple times.²³⁷ Some statutes separated forfeiture from felony, giving lawmakers greater flexibility in defining and punishing crime.²³⁸ During the great rewriting of criminal law during Edward VI's reign, Parliaments, when creating new felonies, expressly stipulated that corruption of blood would not apply in order to protect the heirs of felons.²³⁹ Moveable goods still forfeited to the Crown, but land only forfeited during the offender's lifetime. Both Edward VI's 1549 Act against riotous assemblies²⁴⁰ and Henry VIII's Act²⁴¹ that made murder by poison an act of treason stated that the land of offenders must be forfeited to the lord and not to the King, in line with cases of felony. Furthermore, when sodomy was made a felony punishable by death during Edward's reign, the Act stated that no forfeiture of lands should occur.²⁴²

2.2.18 'Unprecedented' protections for widows and heirs were brought in by Parliament under Edward VI.²⁴³ A 1388 Act had 'excluded from forfeiture as a result of statutory attainder the heritage of women or jointure with their husband.'²⁴⁴ A 16th century Act then stipulated that a felon's wife would not lose her right to dower.²⁴⁵ There were also isolated incidents of mercy, for example, Lord Dacre's widow, lacking jointure, was to be left 'dowerless and penniless' by forfeiture laws following her husband's prosecution and execution for murder in 1541. The King 'stepped in with a special Act of grace'.²⁴⁶

2.2.19 Other attempts to adapt to criticisms were less effective. Parliaments from 1610 to 1626 debated how to protect creditors of felons from the impact of felony forfeiture. No Bills passed, and as Kesselring explains, these 'problems arose in part because the King was not the only one who received such forfeitures, but ... the main problem proved to be the abrupt dissolution of the parliamentary sessions.'²⁴⁷

Avoidance Through Complex Landholding Techniques

2.2.20 There existed an important distinction between felony forfeiture for land and goods. Forfeiture of personal property was fairly straightforward. This was not the case for the forfeiture of real property, and individuals developed means of avoiding forfeiture of land, which otherwise took

²³⁶ Krista Kesselring, 'Felony Forfeiture in England, c.1170–1870' (2009) 30(3) *Journal of Legal History* 201.

²³⁷ Ibid.

²³⁸ Ibid 211.

²³⁹ Ibid. However these provisions only applied to newly created felonies, not the traditional felonies already in existence. This was different, and less useful, than the provision concerning a widow's dower.

²⁴⁰ *Riotous Assemblies Act 1549* 3 & 4 Edw VI c. 5.

²⁴¹ *Poisoning Act 1530*, 22 Hen VIII, c 9.

²⁴² *Sodomy Act 1548*, 2 & 3 Edw VI, c 29.

²⁴³ Krista Kesselring, 'Felony Forfeiture in England, c.1170–1870' (2009) 30(3) *Journal of Legal History* 201, 209.

²⁴⁴ *Labourers, Beggars Act 1388*, 12 Ric 2, c 5.

²⁴⁵ *Repeal of Statutes as to Treasons, Felonies, etc Act 1547*, 1 Edw VI, c 12.

²⁴⁶ Krista Kesselring, 'Felony Forfeiture in England, c.1170–1870' (2009) 30(3) *Journal of Legal History* 201, 212.

²⁴⁷ Ibid 215–216.

effect upon the commission of the offence.²⁴⁸ For treason, all property, real and moveable, forfeited to the Crown. With felony, personal property forfeited and land escheated to the lord after the Crown's possession for a year and a day.²⁴⁹ Forfeiture of real property drew greater criticism and resistance, perhaps because a number of people (the lord, wives, offspring, trustees and beneficiaries) were likely to have an interest in it.²⁵⁰ Reproach intensified as landholding became more complex over the early modern and modern period. Land held in fee tail, for example, 'was particularly problematic since forfeiture would affect the rights of innocent third parties who had a legitimate expectation under the law of inheritance.'²⁵¹ Critics believed lands held in fee tail should go to the heir.²⁵² From 1285 'the courts generally held that land in fee tail was immune from forfeiture, although exceptions certainly existed with respect to treason cases.'²⁵³

2.2.21 Bean has suggested that the rise of the use may have partly occurred to avoid forfeiture once it was clear fee tails were not safe from it.²⁵⁴ The situation in which a trustee was attainted and land held in trust was forfeited was regarded as unjust for beneficiaries, and a number of statutes gradually ameliorated the situation.²⁵⁵ After the *Statute of Uses 1535*, if the offender was the beneficiary he forfeited his interest, but if he was trustee he did not.²⁵⁶ In the 1700s, trusts and strict settlement were used to protect estates from forfeiture. By this period 'the escheat of any land save copyhold estates seems to have become quite rare'.²⁵⁷

Pious Perjury

2.2.22 Pious perjury is a term used to describe a jury's devaluing of goods to mitigate the effects of the 18th and 19th century criminal law.²⁵⁸ It usually describes avoidance of the death penalty but operated in relation to forfeiture too. In cases of outlawry, a defendant who fled the jurisdiction was considered guilty of their offence.²⁵⁹ Blackstone stated that juries, asked to find whether the defendant had fled, were hesitant to return a verdict of flight because forfeiture seemed a disproportionately harsh outcome.²⁶⁰

²⁴⁸ Arie Freiberg and Richard Fox, 'Fighting Crime with Forfeiture: Lessons from History' (2000) 6(1–2) *Australian Journal of Legal History* 1.

²⁴⁹ Krista Kesselring, 'Felony Forfeiture in England, c.1170–1870' (2009) 30(3) *Journal of Legal History* 201.

²⁵⁰ Arie Freiberg and Richard Fox, 'Fighting Crime with Forfeiture: Lessons from History' (2000) 6(1–2) *Australian Journal of Legal History* 1.

²⁵¹ Ibid 13. Unlike land held in fee simple, a tenant in fee tail held a life interest only.

²⁵² JR Lander, 'Attainder and Forfeiture, 1453 to 1509' (1961) 4(2) *Historical Journal* 119.

²⁵³ *The Statute of Westminster the Second (De Donis Conditionalibus) 1285*, 13 Edw 1, c 1; Krista Kesselring, 'Felony Forfeiture in England, c.1170–1870' (2009) 30(3) *Journal of Legal History* 201, 206.

²⁵⁴ JMW Bean, *The Decline of English Feudalism* (Manchester University Press, 1968).

²⁵⁵ Arie Freiberg and Richard Fox, 'Fighting Crime with Forfeiture: Lessons from History' (2000) 6(1–2) *Australian Journal of Legal History* 1.

²⁵⁶ 27 Hen 8, c 10. See Arie Freiberg and Richard Fox, 'Fighting Crime with Forfeiture: Lessons from History' (2000) 6(1–2) *Australian Journal of Legal History* 1.

²⁵⁷ Krista Kesselring, 'Felony Forfeiture in England, c.1170–1870' (2009) 30(3) *Journal of Legal History* 201, 223.

²⁵⁸ Clive Emsley, Tim Hitchcock and Robert Shoemaker, 'Crime and Justice – Trial Verdicts', *Old Bailey Proceedings Online* (Web Page, 16 August 2019) <<https://www.oldbaileyonline.org/static/Verdicts.jsp>>.

²⁵⁹ Criminal outlawry was abolished by s 12 of the *Administration of Justice (Miscellaneous Provisions) Act 1938*, but it was obsolete before then.

²⁶⁰ William Blackstone, *Commentaries on the Laws of England: Book IV of Public Wrongs* (Oxford University Press, 2016) vol 4, 380. This rule was abolished by *Lands of Tilson, Receiver-General Act 1826*, 7 & 8 Geo 4, c 28.

2.2.23 By the late 1700s, ‘except where offenders had killed themselves in order to escape justice, juries had virtually stopped punishing suicide by forfeiture, presuming that ordinary suicides were insane when they ended their lives’.²⁶¹ Pious perjury on the part of jurors ‘motivated by reverence for the rights of inheritance in an agrarian economy and sympathy for the suicide’s immediate kin’ became standard.²⁶²

Forfeiture Act 1870

2.2.24 The rise of transportation and imprisonment in the decades after the Bloody Code period complicated matters of felony forfeiture.²⁶³ There was an increasing view during the 1800s that the doctrine of criminal forfeiture was outdated, anachronistic and not a deterrent, reflecting the increasing prevalence of ‘wages, bonds, insurance, annuities, and other such intangible assets’ in ‘large and important segments’ of society.²⁶⁴ In 1834, in a House of Commons debate concerning the Felon’s Property Bill, Mr Aglionby stated that: ‘Forfeitures were relics of the feudal times ... and should not be tolerated at the present day. He trusted to see them no longer disgracing our Criminal Code.’²⁶⁵

2.2.25 There were regular efforts to restrict the feudal doctrines of attainder, escheat and corruption of blood throughout the 19th century.²⁶⁶ This, alongside the changing financial landscape, may explain the emergence of case law concerning the public policy that an offender should not benefit from his crime. In 1814 a statute provided ‘that no attainder for felony except in relation to the commission or abetting of high treason, petit treason, or murder should cause the disinheritance of any heir or prejudice the right or title of any person except that of the offender during the offender’s natural life only.’²⁶⁷ The *Inheritance Act 1833* entirely abolished Corruption of Blood.²⁶⁸

2.2.26 Efforts at reform and attempts to abolish criminal forfeiture escalated from 1864. After some unsuccessful attempts, the Felony Bill was introduced into the House of Commons in 1870.²⁶⁹ The parliamentary debate rehearsed many of the familiar arguments in support of abolition of the felony forfeiture rule. It was additionally stated that the amounts forfeited to the Crown were minimal, and that forfeiture laws were tied to the amount of property the offender owned as opposed to the gravity of the offence they committed, and were applied unequally, often only in ‘exceptional and occasional circumstances.’²⁷⁰ The UK *Forfeiture Act 1870* abolished the doctrines of attainder, forfeiture,

²⁶¹ Arie Freiberg and Richard Fox, ‘Fighting Crime with Forfeiture: Lessons from History’ (2000) 6(1–2) *Australian Journal of Legal History* 1, 27.

²⁶² Ibid 26.

²⁶³ Krista Kesselring, ‘Felony Forfeiture in England, c.1170–1870’ (2009) 30(3) *Journal of Legal History* 201.

²⁶⁴ Ibid 223.

²⁶⁵ United Kingdom, *Parliamentary Debates*, House of Commons, 26 March 1834, vol 22, col 718 (Mr Aglionby).

²⁶⁶ Alison Reppy, ‘The Slayer’s Bounty: History of Problem in Anglo-American Law’ (1942) 19(2) *New York University Law Quarterly Review* 229.

²⁶⁷ *Corruption of Blood Act 1814*, 54 Geo. 3, c 145; Arie Freiberg and Richard Fox, ‘Fighting Crime with Forfeiture: Lessons from History’ (2000) 6(1–2) *Australian Journal of Legal History* 1, 21.

²⁶⁸ *Inheritance Act 1833*, 3 & 4 Wm. 4, c 106. It is also noteworthy that many of the colonies in the 17th century implemented amended, less harsh, versions of forfeiture, or did not implement it at all. See Krista Kesselring, ‘Felony Forfeiture in England, c.1170–1870’ (2009) 30(3) *Journal of Legal History* 201, 216.

²⁶⁹ Arie Freiberg and Richard Fox, ‘Fighting Crime with Forfeiture: Lessons from History’ (2000) 6(1–2) *Australian Journal of Legal History* 1.

²⁷⁰ Ibid 43–46; See also United Kingdom, *Parliamentary Debates*, House of Commons, 26 March 1834, vol 22, col 714–19.

corruption of blood and escheat.²⁷¹ The *Treason and Felony Forfeiture Act* followed in 1874 in South Australia. Hemming believes that ‘by 1891, a year before *Cleaver* was decided, forfeiture in Australia was a “tabula rasa” awaiting the common law adoption of a principle of public policy’.²⁷²

2.2.27 The connection between the common law forfeiture rule as stipulated in *Cleaver* and forfeiture based on feudal doctrines is not straightforward. The common law forfeiture rule does not directly originate from the feudal doctrines. While common law forfeiture focuses on preventing an offender from inheriting property as a result of the commission of a crime, forfeiture for felony and treason focused on ensuring an offender had all existing and future property removed from them.

2.2.28 However, though abolished, the feudal doctrines were still significant and influenced *Cleaver*. Both the forfeiture rule from *Cleaver* and the feudal doctrines were arguably built upon the premise that a criminal should not profit from their crime. *Cleaver* effectively filled a gap in the law left by the *Forfeiture Act 1870*. As Reppy notes, the public policy rule ‘was destined to exert an important influence in the solution of the problem of the slayer and his bounty after the enactment of the *Forfeiture Act* of 1870.’²⁷³ By the time of *Cleaver*, as Maki and Kaplan state:

The solution to the murdering heir problem was ... not as simple as it had been in the past; forfeiture was no longer a viable solution, and judges had to look elsewhere for support if they wanted to deny the slayer his bounty.²⁷⁴

2.3 Origins of Public Policy that a Criminal Should Not Benefit from His Crime

2.3.1 During feudal times the doctrine of attainder ensured that an offender could no longer inherit property.²⁷⁵ In cases where a felon was an heir or claimed under an intestacy of a person, the escheat of lands passed through them and went to the Crown if they caused or contributed to the testator’s death.²⁷⁶ Blackstone stated in relation to attainder:

[I]t appears that a person attainted is neither allowed to retain his former estate, nor to inherit a future one, nor to transmit any inheritance to his issue, either immediately from himself, or immediately through himself from any remote ancestor; for his inheritable blood, which is necessary either to hold, to take, or to transmit any feudal property, is blotted out, corrupted, and extinguished forever...²⁷⁷

2.3.2 The dearth of case law on the subject of ‘the slayer and his bounty’ before 1870 is a by-product of the effect of the feudal doctrines, and any reported cases involve issues that fell outside

²⁷¹ Andrew Hemming, ‘Killing the Goose and Keeping the Golden Nest Egg’ (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342.

²⁷² *Ibid* 346.

²⁷³ Alison Reppy, ‘The Slayer’s Bounty--History of Problem in Anglo-American Law’ (1942) 19(2) *New York University Law Quarterly Review* 229, 235.

²⁷⁴ Linda J Maki and Alan M Kaplan, ‘Elmer’s Case Revisited: The Problem of the Murdering Heir’ (1980) 41(4) *Ohio State Law Journal* 905, 907.

²⁷⁵ *Ibid*; Arie Freiberg and Richard Fox, ‘Fighting Crime with Forfeiture: Lessons from History’ (2000) 6(1–2) *Australian Journal of Legal History* 1.

²⁷⁶ *Re Tucker* (1920) 21 SR (NSW) 175.

²⁷⁷ William Blackstone, *Commentaries on the Laws of England: Book II Of the Rights of Things* (Oxford University Press, 2016) vol 2, 173.

their scope.²⁷⁸ For example, a 1572 case, *Brook v Ward*, involved an heir who had murdered his testator, but the issue revolved around whether a will could be revoked by parole alone.²⁷⁹

2.3.3 The rise of the credit economy and insurance from the 18th century onwards resulted in a changing landscape that the doctrines concerning forfeiture for felony and treason did not necessarily cover, especially after legislative reform to protect heirs and widows. Judges, in the face of diminishing power of forfeiture through feudal doctrines, had to look elsewhere to ground decisions that prevented a criminal from profiting from his crime. It is notable that later cases explicitly attempted to distance themselves from the *Felony Forfeiture Act* and the feudal doctrines it abolished. In *Re Hall*, according to Halsbury, ‘it was assumed that the Forfeiture Act, 1870 ... had nothing to do with the matter.’²⁸⁰ Yet, Halsbury continued:

There appears, however, to be no reported case before that Act in which the Crown, owing to the disability in question, lost property acquired by the felon at the time of conviction, and otherwise forfeitable to the Crown.²⁸¹

2.3.4 The *Forfeiture Act 1870* appears to have had long lasting implications for the question of whether the Crown could make claims of entitlement to the estate of killers. It was considered in *Re Callaway*, a 1956 case involving a daughter who murdered her mother.²⁸² While a murderer was not allowed by law to succeed to the victim's estate, no forfeiture defeating the heirs was allowed.²⁸³ As Mackie reasons:

To allow a claim by the Crown in these circumstances would have been an indirect reversal of the policy behind [the *Forfeiture Act 1870*] ... It is no doubt for these reasons that the Crown has not claimed in any subsequent cases.²⁸⁴

2.3.5 The court in *Cleaver*, unable to apply the feudal doctrines of forfeiture, and without reference to the *Forfeiture Act 1870*, relied on the somewhat nebulous notion of public policy to prevent the killer from benefitting.²⁸⁵ But there exists a lack of clarity as to the origins of this public policy. Some later cases and academic articles cite its origins in the civil law.²⁸⁶ Reppy, in a 1942 article, speculates that chancellors, trained in Rome and thus aware of the civil law, may have brought the concept that a man cannot profit from his own crime into equity and acquainted administrators of the King's justice with the idea, who, in turn, may have introduced it to the common law.²⁸⁷

²⁷⁸ Linda J Maki and Alan M Kaplan, ‘Elmer's Case Revisited: The Problem of the Murdering Heir’ (1980) 41(4) *Ohio State Law Journal* 905.

²⁷⁹ *Brook v Ward* (1572) 3 Dy 310; 73 ER 702.

²⁸⁰ Earl of Halsbury, *Halsbury's Laws of England Being A Complete Statement of the Whole Law Of England* (Butterworth and Co, 2nd ed, 1940) vol 24, 46.

²⁸¹ *Ibid*.

²⁸² *Re Callaway* (1956) Ch 559.

²⁸³ *Ibid*. As the author of one case note stated, ‘To allow the daughter to take the estate under the will and then to transfer it to the Crown is simply to apply a rule of forfeiture’: FJ Odgers, ‘Wills And Intestacy: Murder Of Deceased — Effect Of Exclusion Of Murderer From Benefit’ (1956) 14(2) *Cambridge Law Journal* 167, 168.

²⁸⁴ Ken Mackie, ‘The Forfeiture Rule: The Destination of Property Interests on Homicide’ (1997) 2(2) *Newcastle Law Review* 30, 42.

²⁸⁵ The extraordinary circumstances of the crime are also significant.

²⁸⁶ Alison Reppy, ‘The Slayer's Bounty: History of Problem in Anglo-American Law’ (1942) 19(2) *New York University Law Quarterly Review* 229.

²⁸⁷ *Ibid*.

2.3.6 In the 1914 US case of *Re Wolf*, it was noted that ‘under ancient Roman law inheritance was forfeited when a deceased lost his life through the fault or negligence of an heir.’²⁸⁸ *Swinburne on Wills and Testaments* stated that under civil law, applied in the Ecclesiastical Courts of England, ‘if the Legatary become Enemy to the Testator, he loseth his Legacy’.²⁸⁹ Yet the 1920 case of *Re Tucker* in New South Wales found ‘no trace whatever of any similar doctrine of “unworthiness” in systems of law which are based on the common law’ and ‘no suggestion of any common law disability to take a legacy’.²⁹⁰ However, Blackstone did state that persons convicted of treason were unable to inherit a legacy.²⁹¹ There were also ‘various disabilities by Statute Law, such as persons who deny the doctrine of the Trinity or the sanctity of the Bible,’ and occasional statutory provisions ‘which place[d] certain people in the category of individuals who cannot take a legacy.’²⁹²

2.3.7 One scholar notes that since ‘the inception of modern equity during Lord Nottingham’s Chancellorship, the beginnings of a rule of public policy that a man shall not profit by his crime or fraud are perceptible.’²⁹³ The 1682 case of *Villers v Beaumont*, which dealt with contractual fraud at equity, and *Bridgeman v Green* in 1755, which dealt with the newly emerging concept of undue influence, are cited to support this.²⁹⁴ The latter judgment included the following statement: ‘Let the hand receiving it be ever so chaste, yet if it comes through a corrupt polluted channel, the obligation of restitution will follow it’.²⁹⁵ More cases at equity followed in the 19th century.

2.3.8 Even before the *Forfeiture Act 1870*, a series of cases involving life insurance policies in England and America came before the courts. *Cleaver* cited an obiter observation from *Amicable Society for a Perpetual Assurance Office v Bolland*, also known as *Fauntleroy’s Case* in 1830.²⁹⁶ The facts of *Fauntleroy’s Case* fell outside the scope of felony forfeiture and followed the 1814 Act that effectively ‘amounted to the abolition of corruption of blood and forfeiture of land in ordinary felonies’.²⁹⁷ In this case, the would-be beneficiaries under a life insurance policy taken out by Henry Fauntleroy, who was executed upon conviction of a felony, were denied the right to benefit under the policy on the grounds that ‘by the general policy of the law the insurance became void, as to those claiming under and in right of HF, in consequence of the deaths being occasioned by his own criminal act’.²⁹⁸ One argument the appellants made was that, following Fauntleroy’s attainder, he ceased to have any interest in the insurance company. The Lord Chancellor did not accept this line of reasoning, instead deciding the case on the basis that a policy expressly insuring against death caused by felonious acts should be held void because it would encourage crime and be ‘contrary to public policy’, and thus ‘[i]f such a policy could not be

²⁸⁸ *Re Wolf*, 88 Misc 433 (NY Surr Ct, 1914).

²⁸⁹ Henry Swinburne, *A Treatise of Testaments and Last Wills* (W Clarke & Sons, 7th ed, 1793) vol 1, pt 7, sec 22, 556.

²⁹⁰ *Re Tucker* (1920) 21 SR (NSW) 175, 178.

²⁹¹ William Blackstone, *Commentaries on the Laws of England: Book II Of the Rights of Things* (Oxford University Press, 2016) vol 2.

²⁹² *Re Tucker* (1920) 21 SR (NSW) 175, 179.

²⁹³ TK Earnshaw and PJ Pace, ‘Let the Hand Receiving It Be Ever So Chaste...’ (1974) 37(5) *The Modern Law Review* 481, 481; *Villers v Beaumont* (1682) 1 Vern 100; 23 ER 342; *Bridgeman v Green* [1757] Wilm 58; 97 ER 22.

²⁹⁴ *Ibid*.

²⁹⁵ *Bridgeman v Green* [1757] Wilm 58, 65; 97 ER 22, 25.

²⁹⁶ *Amicable Society for a Perpetual Assurance Office v Bolland* (1830) 2 Dow & Clark 1; 6 ER 630 (*‘Fauntleroy’s Case’*).

²⁹⁷ Alison Reppy, ‘The Slayer’s Bounty: History of Problem in Anglo-American Law’ (1942) 19(2) *New York University Law Quarterly Review* 229, 235.

²⁹⁸ *Amicable Society for a Perpetual Assurance Office v Bolland* (1830) 2 Dow & Clark 1, 1; 6 ER 630, 630 (*‘Fauntleroy’s Case’*).

sustained where a risk of that kind was mentioned in direct terms and language, how can you give effect to a policy if it in reality involves that condition?’²⁹⁹

2.3.9 *Cleaver* was the first case through which the courts explicitly developed and applied what became known as the forfeiture rule.³⁰⁰ Most studies of the forfeiture rule simply state the leading passage of Fry LJ but the facts of *Cleaver* are extraordinary and should not be overlooked.

2.3.10 On 7 August 1889, Florence Maybrick was convicted of the wilful murder of her husband, James Maybrick, by administering him with arsenic.³⁰¹ The case had attracted intense interest and publicity.³⁰² As one modern report of the background notes:

The story began in 1880, when Florence Chandler, a flirtatious 17-year-old from Alabama, met a Liverpool merchant on board a steamer making its way across the Atlantic. James Maybrick, 23 years her senior, was immediately smitten, and the following year they were married. The Maybricks lived in Virginia for a while, and the marriage seemed happy. Later, they settled with their two children in Battlecrease House, a ponderous villa in the suburbs of Liverpool, and their contentment began to fade. James was unfaithful, keeping a long-term mistress in London. His business fortunes were precarious. Florence was bored and lonely, and, in distracting herself with expensive finery and occasional gambling, ran up substantial debts that had to be hidden from her husband. She confided in her mother: ‘whenever the doorbell rings I feel ready to faint for fear it is someone coming to have an account paid’. Like James, she found consolation outside the home, embarking on a risky affair with Alfred Brierley, a flashy young family friend. Violent rows disrupted the Maybricks’ comfortable domestic routines. Sharp-eyed and sharp-tongued, the family’s servants missed nothing of these unseemly goings-on. James’s health seemed as shaky as his marriage. He had always been a hypochondriac, and as he aged he was increasingly inclined to take a bewildering array of patent medicines. Many of his preferred tonics contained strychnine, belladonna, phosphoric acid or arsenic. Regular doses of these toxic potions could hardly have improved his condition, and to the modern mind such a regime looks crazy. Yet in the late 19th century it was not unusual. Small amounts of poisonous substances were thought to be invigorating. They were available in a variety of popular remedies, and commonly prescribed by reputable doctors. James habitually took arsenic in the form of ‘Fowler’s Solution’, and strychnine as ‘nux vomica’.³⁰³

2.3.11 Maybrick had taken increasing doses of arsenic and ultimately died in suspicious circumstances. There was evidence to implicate Mrs Maybrick in her husband’s suspicious death though the strength of this evidence is debatable. Mrs Maybrick was charged with her husband’s

²⁹⁹ *Amicable Society for a Perpetual Assurance Office v Bolland* (1830) 2 Dow & Clark 1, 19; 6 ER 630, 637 (‘*Fauntleroy’s Case*’).

³⁰⁰ *Cleaver v Mutual Reserve Life Fund Association* [1892] 1 QB 147.

³⁰¹ ‘The Maybrick Murder: Petitions for Commutation of Sentence’, *Manchester Guardian* (Manchester, 9 August 1889) 5.

³⁰² Alexander MacDougall, *The Facts of the Case, and of the Proceedings in Connection with the Charge, Trial, Conviction, and Present Imprisonment of Florence Elizabeth Maybrick* (Baillière, Tindall and Cox, 1891); Helen Densmore, *The Maybrick Case: English Criminal Law* (Sonnenschein, 1892); HB Irving (ed), *Trial of Mrs Maybrick* (William Hodge, 1912). The case continues to attract interest. See, for example, Bernard Ryan, *The Poisoned Life of Mrs Maybrick* (Excel Press, 1977); George Robb, ‘The English Dreyfus Case: Florence Maybrick and the Sexual Double-Standard’ in George Robb and Nancy Erber (eds), *Disorder in Court* (Palgrave MacMillan, 1999) 57; Kate Colquhoun, *Did She Kill Him?: A Victorian Tale of Deception, Adultery and Arsenic* (Harry Abrams, 2014); Richard Hutto, *A Poisoned Life: Florence Maybrick, The First American Woman to be Sentenced to Death in England* (Blackstone Publishing, 2018). Hutto even notes that Florence’s husband is suspected (amongst many others over the years) of being Jack the Ripper.

³⁰³ Dinah Birch, ‘Did She Kill Him? Review: A Victorian Scandal of Sex and Poisoning’, *The Guardian* (online, 26 February 2014) <<https://www.theguardian.com/books/2014/feb/25/did-she-kill-him-kate-colquhoun-review>>.

murder. It took the jury 35 minutes to find her guilty of Maybrick's murder.³⁰⁴ It is significant that in 19th century society, Mrs Maybrick had committed a crime truly beyond the pale. Not only had she murdered her husband (already a heinous crime), but in a 19th century context her guilt was even further aggravated through her 'immorality' (her affair with Brierley) and the use of poison as the instrument of murder.³⁰⁵

2.3.12 However, despite the nature and gravity of her alleged crime, there were many concerns over the conduct and outcome of the trial and doubts as to Mrs Maybrick's guilt.³⁰⁶ Medical evidence showed that there was real doubt as to whether Maybrick's death was due to a lethal amount of arsenic,³⁰⁷ and he was also known to often take arsenic medicinally for himself.³⁰⁸ The trial judge, Stephen J, made numerous errors in the course of the trial and was suffering from a mental illness which soon after forced his retirement.³⁰⁹ These errors were compounded by his hostile directions to the jury by stating that her ability to have an affair was proof enough that Mrs Maybrick was cruel enough to murder her husband.³¹⁰ 'Many believed that Florence had been convicted of adultery, rather than murder.'³¹¹ Reports at the time highlighted that 'many persons [felt] that there is really a doubt in the case' sufficient enough 'to justify the exercise of the Royal prerogative of mercy'.³¹² Newspapers of the period believed she was 'guilty of unfaithfulness' but found it 'hard to believe that she has been guilty of murder'³¹³ Petitions were made on the basis that the evidence of the medical experts in the trial was so conflicting that a guilty verdict is unfair.³¹⁴

2.3.13 On 22 August 1889, the Home Secretary, in the face of public and press pressure,³¹⁵ commuted Mrs Maybrick's sentence to penal servitude for life, stating that 'although the evidence leads clearly to the conclusion that the prisoner administered and attempted to administer arsenic to her

³⁰⁴ Edgar Marcus Lustgarten, *Verdict in Dispute* (Allan Wingate, 1949) 41.

³⁰⁵ See further David Plater, Joanna Duncan and Sue Milne, "'Innocent Victim of Circumstance" or a "Very Devil Incarnate"': The Trial and Execution of Elizabeth Woolcock in South Australia in 1873' (2013) 15(2) *Flinders Law Journal* 315, 364–378; David Plater and Sue Milne, "'All that's Good and Virtuous or Depraved and Abandoned in the Extreme?'" Capital Punishment and Mercy for Female Offenders in Colonial Australia, 1824 to 1865' (2014) 33(1) *University of Tasmania Law Review* 83, 100–117.

³⁰⁶ Florence Maybrick's lawyer at trial, Sir Charles Russell, later the Lord Chief Justice of England, was convinced of her innocence and wrote to successive Home Secretaries volunteering his 'strong and emphatic' opinion that Mrs Maybrick should never have been convicted: Charles Bell, 'The Maybrick Case' (1911) 29(2) *Medico-Legal Journal* 72, 73.

³⁰⁷ 'The Maybrick Case', *The Times* (London, 9 August 1889) 3; JH Levy (ed), *The Necessity for Criminal Appeal: As Illustrated by the Maybrick Case and the Jurisprudence of Various Countries*, (PS King and Son, 1899) 441.

³⁰⁸ 'The Aigburth Poisoning Case,' *The Times* (London, 13 June 1889) 10.

³⁰⁹ Edgar Marcus Lustgarten, *Verdict in Dispute* (Allan Wingate, 1949) 39–40; Dinah Birch, 'Did She Kill Him? Review: A Victorian Scandal of Sex and Poisoning', *The Guardian* (online, 26 February 2014) <<https://www.theguardian.com/books/2014/feb/25/did-she-kill-him-kate-colquhoun-review>>.

³¹⁰ See the transcript of the trial: HB Irving (ed), *Trial of Mrs Maybrick* (William Hodge, 1912) 351–2.

³¹¹ Dinah Birch, 'Did She Kill Him? Review: A Victorian Scandal of Sex and Poisoning', *The Guardian* (online, 26 February 2014) <<https://www.theguardian.com/books/2014/feb/25/did-she-kill-him-kate-colquhoun-review>>.

³¹² 'The Maybrick Case', *The Times* (London 9 August 1889) 3.

³¹³ 'The Maybrick Case', *Evening Journal* (Adelaide, 9 August 1889) 3.

³¹⁴ 'The Maybrick Case', *The Times* (London, 9 August 1889) 3.

³¹⁵ See also Martin Weiner, 'Convicted Murderers and the Victorian Press: Condemnation Versus Sympathy' (2007) 1(2) *Crimes and Misdemeanours* 110.

husband with intent to murder, yet it does not wholly exclude a reasonable doubt whether his death was in fact caused by the administration of arsenic’.³¹⁶

2.3.14 The Home Secretary’s reasoning is dubious.³¹⁷ Either Mrs Maybrick had murdered her husband through poison or she had not. She had not been tried for the attempted murder of Maybrick. But as there was no Court of Criminal Appeal at the time, her conviction could not be appealed.³¹⁸ It is unclear whether Mrs Maybrick actually murdered her husband, and this uncertainty is even apparent in *Cleaver*. In the original decision, Denman J stated that ‘it is to be assumed she murdered her husband’.³¹⁹ On appeal, Fry LJ referred to the murder of James Maybrick by Florence as ‘if proved’.³²⁰ It is therefore interesting that, *Cleaver* as the basis for the modern forfeiture rule, is based on a murder case which may not have been established, especially beyond reasonable doubt.

2.3.15 However, though her sentence was commuted to life imprisonment, Mrs Maybrick assigned her rights under her husband’s life insurance policy to another, who attempted to collect. After James Maybrick’s death, Thomas and Michael Maybrick were appointed his executors. Cleaver was appointed the administrator of Florence Maybrick’s estate under s 9 of the *Forfeiture Act 1870*. Cleaver and the executors then claimed payment of the life insurance policy. The insurance company, Mutual Research Fund Life Association, argued that that they should not have to fulfil their part of the contract because as Mrs Maybrick had murdered her husband, it would be contrary to public policy to pay out his life insurance policy.

2.3.16 The issue raised by the insurance company was that public policy prevented them from paying out his life insurance policy.³²¹ The Court of Queen’s Bench held that Mrs Maybrick was precluded by public policy from receiving any benefit arising from her husband’s untimely death.³²² The court held that the law did not allow the enforcement of ‘rights directly resulting to the person enforcing them from the crime of that person’.³²³ Lord Esher held it is contrary to public policy for a person who commits murder to benefit from their criminal act.³²⁴ It would be noted that Lord Esher did not talk of other forms of unlawful homicide. However, in making his judgment, Lord Esher had to consider the legal effect of the insurance policy when read in light of s 11 of the *Married Women’s Property Act 1882*.³²⁵ This section creates a trust in the wife’s favour, and ‘when no object of the trust remains unperformed,’ the insurance money forms part of the husband’s estate.³²⁶ Lord Esher applied the principle of public policy to the construction of this section and held that Mrs Maybrick’s crime in murdering her husband rendered the trust unable to be performed, and therefore the insurance money

³¹⁶ JH Levy (ed), *The Necessity for Criminal Appeal: As Illustrated by the Maybrick Case and the Jurisprudence of Various Countries* (PS King and Son, 1899) 441.

³¹⁷ See also Charles Bell, ‘The Maybrick Case’ (1911) 29(2) *Medico-Legal Journal* 72.

³¹⁸ Edgar Marcus Lustgarten, *Verdict in Dispute* (Allan Wingate, 1949) 42.

³¹⁹ ‘The Maybrick Insurance Case,’ *The Times* (London, 21 July 1891) 13–14.

³²⁰ *Cleaver v Mutual Reserve Life Fund Association* [1892] 1 QB 147, 155–56.

³²¹ ‘The Maybrick Insurance Case,’ *The Times* (London, 21 July 1891) 13–14.

³²² *Cleaver v Mutual Reserve Life Fund Association* [1892] 1 QB 147.

³²³ *Ibid* 156–57

³²⁴ *Ibid* 152.

³²⁵ *Ibid* 153; *Married Women’s Property Act 1882* 45 & 46 Vict. c 75, s 11.

³²⁶ *Cleaver v Mutual Reserve Life Fund Association* [1892] 1 QB 147, 154.

formed part of James Maybrick's estate.³²⁷ In making this construction, Lord Esher specified that 'the rule of public policy is not to be carried further than is necessary'.³²⁸ This has been argued as limiting the rule's scope.³²⁹ Lord Esher also states the rule operates 'in such a case'.³³⁰

2.3.17 Fry LJ, in an oft quoted but troublesome passage as to the scope of forfeiture rule, stated:

It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanor. It may be that there is no authority directly asserting the existence of the principle; but the decision of the House of Lords in *Fauntleroy's Case* appears to proceed on this principle, and to be a particular illustration of it. This principle of public policy, like all such principles, must be applied to all cases to which it can be applied without reference to the particular character of the right asserted or the form of its assertion.³³¹

2.3.18 However, the persuasive effect of this often quoted passage is questionable.³³² It is at odds with the more limited formulation of the rule in *Cleaver* of Lord Esher MR and Fry LJ's formulation has been criticised for its width.³³³ Dillon raises that if Lord Esher's judgment had been cited more than Fry LJ's, the modern forfeiture rule might have developed more fairly.³³⁴

2.3.19 There was no mention of public policy in the earlier 1858 English case of *The Prince of Wales & Association Company v Palmer*.³³⁵ The decision, which had similar facts to *Cleaver*, 'was grounded on fraud'.³³⁶ Walter Palmer had died in 'suspicious circumstances' following the setting up of a life insurance policy for £13,000.³³⁷ It was alleged that his brother, William Palmer, who had claimed the amount under the policy, had murdered him. William was found guilty of the murder of another man but never his brother. It was decided that the policy was to be 'delivered up and cancelled' on the basis

³²⁷ Ibid 154–55.

³²⁸ Ibid 155.

³²⁹ Anthony Dillon 'When Beneficiary Slays Beneficiary: The Forfeiture "Rule" Should Operate as a Principle of General Law' (1998) 6(3) *Australian Property Law Journal* 254, 17.

³³⁰ *Cleaver v Mutual Reserve Life Fund Association* [1892] 1 QB 147, 155.

³³¹ Ibid 156.

³³² Even Fry LJ admitted there was no authority for his use of the principle of public policy (Ibid, 156) and instead developed the rule using *Fauntleroy's Case* (see *Amicable Society for a Perpetual Assurance Office v Bolland* (1830) 2 Dow & Clark 1; 6 ER 630 (*'Fauntleroy's Case'*)). Fry LJ's usage of *Fauntleroy* as authority was criticised by contemporary observers, as counsel in *Cleaver* argued that *Fauntleroy's Case* was only authority for the rule where the insured causes his own death and not where death is caused by a third party. See *Cleaver v Mutual Reserve Life Fund Association* [1892] 1 QB 147, 149–50. *The Observer* also criticised using *Fauntleroy's Case* as it was not 'exactly in point' to *Cleaver*, because the person who effected the policy and committed the felonious act in *Fauntleroy's Case* was the same person. See 'Notes from the Law Courts', *The Observer* (London, 26 July 1891) 3.

³³³ Anthony Dillon 'When Beneficiary Slays Beneficiary: The Forfeiture "Rule" Should Operate as a Principle of General Law' (1998) 6(3) *Australian Property Law Journal* 254; MFC Scott, 'The Effect of Homicide on Property Rights' (1963) 1(6) *Tasmanian University Law Review* 817; Norman M. Tarnow, 'Unworthy Heirs: The Application of the Public Policy Rule in the Administration of Estates,' (1980) 58(3) *Canadian Bar Review* 582, 584; TG Youdan, 'Acquisition of Property by Killing' (1973) 89(2) *Law Quarterly Review* 235, 239.

³³⁴ Anthony Dillon 'When Beneficiary Slays Beneficiary: The Forfeiture "Rule" Should Operate as a Principle of General Law' (1998) 6(3) *Australian Property Law Journal* 254.

³³⁵ (1858) 25 Beav 605; 53 ER 768.

³³⁶ Earl of Halsbury, *Halsbury's Laws of England Being A Complete Statement of The Whole Law of England* (Butterworth and Co, 2nd ed, 1940) vol 24, 46; *The Prince of Wales & Association Company v Palmer* (1858) 25 Beav 605; 53 ER 768.

³³⁷ *The Prince of Wales & Association Company v Palmer* (1858) 25 Beav 605; 53 ER 768.

that it had been obtained by ‘fraudulent means or for fraudulent purposes’.³³⁸ The premium Walter originally paid was used to pay the defendant’s costs.

2.3.20 In the 1886 US case *New York Mutual Life Insurance Company v Armstrong*,³³⁹ it was held that it ‘would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of the party whose life he had feloniously taken.’³⁴⁰ *Riggs v Palmer*³⁴¹ followed in 1889, three years before *Cleaver* in England. It was decided in *Riggs v Palmer* that for a person to ‘give effect and operation to a will by murder, and ... take the property’ was ‘a reproach to the jurisprudence of our state, and an offense against public policy.’³⁴² The case apparently relied ‘on an ancient legal principle that a person cannot benefit from his or her wrongdoing’.³⁴³ The court stated that

all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.³⁴⁴

2.3.21 *Riggs v Palmer* was thus decided on the basis of a ‘general principle of law’. But, as Maki and Kaplan point out, ‘neither the court in *Riggs v Palmer* nor scholars who believe in general principles of law have identified the specific source of these principles.’³⁴⁵ The closest Earl J got to such a discussion came in His Honour’s discussion of the origins of the public policy rule:

Under the civil law evolved from the general principles of natural law and justice by many generations of juriconsults, philosophers and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered ... so far as I can find, in no country where the common law prevails has it been deemed important to enact a law to provide for such a case. Our revisers and law-makers were familiar with the civil law, and they did not deem it important to incorporate into our statutes its provisions upon this subject. This is not a *casus omissus*. It was evidently supposed that the maxims of the common law were sufficient to regulate such a case and that a specific enactment for that purpose was not needed.³⁴⁶

2.3.22 The court in *Riggs v Palmer* distinguished its decision from an 1888 US decision, *Owens v Owens*,³⁴⁷ which held a wife convicted as an accessory to her husband’s murder was still entitled to her dower. The court in *Owens* was evidently concerned by the outcome of the case, which appears to have been a result of the court’s inability to apply the feudal doctrines outlawed by the *Forfeiture Act*, and a lack of case law or statute that supported forfeiture. The judgment stated that ‘while the law gives the

³³⁸ *The Prince of Wales & Association Company v Palmer* (1858) 25 Beav 605, 608; 53 ER 768, 769.

³³⁹ *Mutual Life Insurance Company Of New York v Armstrong* 117 US 591, 600 (1886).

³⁴⁰ *Ibid*.

³⁴¹ *Riggs v Palmer* 115 NY 506 (1889).

³⁴² *Ibid* 509.

³⁴³ Linda Maki and Alan Kaplan, ‘Elmer’s Case Revisited: The Problem of the Murdering Heir’ (1980) 41(4) *Ohio State Law Journal* 905, 905.

³⁴⁴ *Riggs v Palmer* 115 NY 506, 509 (1889).

³⁴⁵ Linda Maki and Alan Kaplan, ‘Elmer’s Case Revisited: The Problem of the Murdering Heir’ (1980) 41(4) *Ohio State Law Journal* 905, 926.

³⁴⁶ *Riggs v Palmer* 115 NY 506, 513 (1889) (citations omitted).

³⁴⁷ *Owens v Owens* 100 NC 240 (1888).

dower ... there is no provision for its forfeiture for crime, however heinous it may be'.³⁴⁸ The court believed 'it belongs to the law-making power alone to prescribe additional grounds of forfeiture of the right which the law itself gives to a surviving wife'.³⁴⁹ However, in *Riggs v Palmer*, the court was 'unwilling to assent to the doctrine of that case'.³⁵⁰ It was argued that 'a widow should not, for the purpose of acquiring ... property rights, be permitted to allege a widowhood which she has wickedly and intentionally created'.³⁵¹

2.3.23 The doubts as to the precise origin of the forfeiture rule were overlooked. In the 1913 case of *Re Hall*,³⁵² the rule was held to apply equally to manslaughter as well as murder. In this case, Hamilton LJ applied Fry LJ's comments. Hamilton LJ highlighted the policy of the law and, in another oft quoted but troublesome passage, held:

The fact is that the principle can only be expressed in that wide form. The principle is that a man shall not slay his benefactor and thereby take his bounty. And I cannot understand why a distinction should be drawn between the rule of public policy when the criminality consists in murder and the case where the criminality consists in manslaughter ... The distinction seems to me to be either one of an undue reliance on legal classification, or else to encourage what, I am sure, would be very noxious — a sentimental speculation as to the motives and degree of moral guilt of a person who has been justly convicted and sent to prison.³⁵³

2.3.24 However, the facts in *Hall* (as in *Cleaver*) deserve closer scrutiny than is usually accorded. In 1913, Jean Baxter was charged with the murder of her lover Julian Hall, but she was surprisingly convicted of manslaughter. Baxter was Hall's lover, however Hall had another lover, Ada Knight.³⁵⁴ After being asked to choose between Baxter and Knight, Hall chose Baxter and then became abusive, striking Knight and striking Baxter in the face with an unloaded revolver.³⁵⁵ However, Baxter was adamant that Hall was going to marry her and told her neighbour that if Hall did not marry her or get her previous lover, a Mr Unwin back for her, she would kill Hall.³⁵⁶ She later went into Hall's bedroom and shot him four or five times with a revolver whilst he lay in bed.³⁵⁷ Immediately after shooting him, Baxter told her neighbour that 'I have shot him,' and that Hall 'dared [her] to do it'.³⁵⁸ Before he had

³⁴⁸ *Owens v Owens* 100 NC 240, 241 (1888).

³⁴⁹ Ibid 795. It is perhaps notable that in North Carolina, following the decision in *Owens*, '[the] legislature amended the dower statute to prevent a wife from receiving dower when she had feloniously slain her husband': Linda Maki and Alan Kaplan, 'Elmer's Case Revisited: The Problem of the Murdering Heir' (1980) 41(4) *Ohio State Law Journal* 905, 930.

³⁵⁰ *Riggs v Palmer* 115 NY 506, 514 (1899).

³⁵¹ Ibid.

³⁵² [1914] P 1.

³⁵³ Ibid 7.

³⁵⁴ 'Young Aviator's Death: Murder Charge Against a Woman', *Manchester Guardian* (Manchester, 30 April 1913) 8.

³⁵⁵ Ibid.

³⁵⁶ Ibid.

³⁵⁷ Ibid. See also *Gray v Barr* [1971] 2 QB 554, 571–72.

³⁵⁸ 'Young Aviator's Death: Murder Charge Against a Woman', *Manchester Guardian* (Manchester, 30 April 1913) 8.

died, Hall had named Baxter as a beneficiary under his will.³⁵⁹ After Hall's death, the executor of his estate commenced an action to prevent Baxter benefiting under Hall's will.³⁶⁰

2.3.25 It is important to consider the facts of *Hall* to understand why the rule was extended to manslaughter in that case.³⁶¹ For whilst Baxter was convicted of manslaughter, her actions on any objective analysis were far closer to murder.³⁶² According to *The Times*, this may be because 'juries took a lenient view when the person indicted was a woman, and returned a verdict of manslaughter on facts which might have justified a more serious verdict'.³⁶³ The verdict has been described as 'somewhat remarkable'.³⁶⁴ One writer notes that Baxter's 'actions must surely [have] come at the extreme edge of that crime [manslaughter] and to have been very close to murder'.³⁶⁵ Salmon LJ remarked that it was surprising Baxter was acquitted of murder and convicted only of manslaughter and it was unsurprising she was not allowed to profit from the crime:

Hall's case may seem to be an authority for the proposition that anyone who has committed manslaughter, in any circumstances, is necessarily under the same disability as if he had committed murder. The facts however are not stated in the report and they are of vital importance in order to understand the decision. They have now been ascertained from the record. A man named Julian Hall kept a woman named Jeannie Baxter and had made a will in her favour. They had had many quarrels. He had promised to marry her but had not done so. On April 13, 1913, she took his revolver and, whilst he was in bed, shot him dead with four or five shots. She was acquitted of murder but convicted of manslaughter. It is small wonder that the court held that, on grounds of public policy, she could not take under Hall's will. The only surprising thing about the case is that she was acquitted of murder, apparently for no reason — except, perhaps, that she was defended by Mr Marshall Hall.³⁶⁶

2.3.26 SALRI raises that *Hall*, like *Cleaver*, may be explicable by its particular and unusual facts. Given the merciful verdict extended to Baxter, it can be suggested that *Hall* is not sound authority for the proposition that the forfeiture rule extends to all forms of manslaughter. The rule was arguably extended in *Hall* because the court believed Baxter should have been convicted of Hall's murder. This suggestion is supported by Cozens-Hardy MR, who states that 'in a case like this' he saw 'no reason to draw a distinction between murder and manslaughter'.³⁶⁷

³⁵⁹ Ibid; 'Aviator's Death in a Flat: "Dared Me to Do It" The Murder Charge Against a Woman', *The Manchester Guardian* (Manchester, 19 April 1913) 10.

³⁶⁰ *Re Hall* [1914] P 1, 2.

³⁶¹ *Gray v Barr* [1971] 2 QB 554, 581 (Salmon LJ).

³⁶² *Gray v Barr* [1971] 2 QB 554, 571–72; Chris Triggs, 'Against Policy: Homicide and Succession to Property,' (2005) 68(1) *Saskatchewan Law Review* 117, 121.

³⁶³ 'Probate, Divorce, and Admiralty Division (Before the Right Hon Sir Samuel Evans, President),' *The Times* (London, 1 August 1913) 4.

³⁶⁴ Chris Triggs, 'Against Policy: Homicide and Succession to Property' (2005) 68(1) *Saskatchewan Law Review* 117, 121.

³⁶⁵ Touchstone, 'Recent Developments of the Forfeiture Rule' (1991) 135 *Solicitor's Journal* 109.

³⁶⁶ *Gray v Barr* [1971] 2 QB 554, 581. Marshall Hall was a famed English barrister known for his skills as an orator to a jury. He successfully defended many people accused of notorious murders and became known as 'The Great Defender'. See further Edward Marjoribanks, *The Great Defender: The Life and Trials of Edward Marshall Hall KC, England's Greatest Barrister* (Monday Books, 2014); Sally Smith, *Marshall Hall: A Law Unto Himself* (Wildy, Simmonds and Hill Publishing, 2015).

³⁶⁷ *Re Hall* [1914] P 1, 6.

2.3.27 The widened scope of the rule was recognised and questioned by contemporary commentators. For example, JP Valetta, Ms Baxter's counsel, argued that a principle applying 'to anyone responsible for the death of another ... was far too broad' as 'manslaughter was sometimes almost innocent and, and sometimes not far removed from murder'.³⁶⁸ Mr Valetta also criticised applying the principle beyond contract cases.³⁶⁹ Mr Valetta argued that the wide application of the principle 'cannot be supported' because it 'embraces every case where the death of a testator has been occasioned by a beneficiary'.³⁷⁰ Valetta also provided the topical example of unwittingly causing death by car accident to demonstrate that 'there are various degrees of manslaughter'.³⁷¹ Another contemporary, J Chadwick in his 1914 article, was also critical of the rule in *Hall*, stating that it 'is laid down in too rigid form' because it applies to all criminal acts which cause a testator's death and because 'the motives and degree of moral guilty of the crime are immaterial'.³⁷²

2.3.28 The forfeiture rule from *Cleaver* and *Hall* was adopted in Australia by the High Court in *Helton v Allen*.³⁷³ The majority of the High Court, the joint judgment of Dixon, Evatt and McTiernan JJ, observed:

Helton relies upon his acquittal of the charge of murder in the Criminal Court as an answer to the application of the rule excluding a homicide from any benefit under the will or intestacy of the person who died at his hands. The rule is one of recent development. Its earliest appearance in any form may be said to be *Fauntleroy's Case*, or the *Amicable Society v Bolland*. In *Prince of Wales & Association Co v Palmer* it appeared that Palmer, the poisoner, had effected insurances upon his victims with the intention of defrauding, and the rule disqualifying a homicide from claiming under the will or intestacy of his victim, or by reason of his death, was scarcely in point. Its first clear formulation was left to *Cleaver's Case*, which arose out of the conviction of Mrs Maybrick. It is placed upon a principle of public policy, and it was said that no system of jurisprudence could with reason include amongst the rights which it enforces rights directly resulting to a person asserting them from the crime of that person (per Fry LJ). In *In the Estate of Hall*, the doctrine was finally established and held to include not only murder but manslaughter. There *Hamilton LJ* said that the principle could only be expressed in the wide form: 'It is that a man shall not slay his benefactor and thereby take his bounty; and I cannot understand why a distinction should be drawn between the rule of public policy where the criminality consists in murder and the rule where the criminality consists in manslaughter'.³⁷⁴

2.3.29 *Helton* has been generally perceived to endorse both *Cleaver* and *Hall*, but its precise status remains unresolved.³⁷⁵ In *Rivers v Rivers*,³⁷⁶ the Full Court held that the remarks in the joint judgment in

³⁶⁸ 'Probate, Divorce and Admiralty Division (Before the Right Hon Sir Samuel Evans, President)', *The Times* (London, 1 August 1913) 4.

³⁶⁹ *Ibid.*

³⁷⁰ *Re Hall* [1914] P 1, 1, 3.

³⁷¹ *Ibid* 2–3.

³⁷² J Chadwick, 'A Testator's Bounty to his Slayer' (1914) 30(2) *Law Quarterly Review* 211, 211–212.

³⁷³ (1940) 63 CLR 691.

³⁷⁴ *Ibid* 709.

³⁷⁵ There is a view that the passage is obiter and is not binding on Australian courts. See, for example, *Troja v Troja* (1994) 33 NSWLR 269, 280 (Kirby P); *State Trustees Ltd v Edwards* [2014] VSC 392, [30] (McMillan J). However, this view was rejected in South Australia in *Rivers v Rivers* (2002) 84 SASR 426 which held that the comments on the forfeiture rule constitute part of the *ratio decidendi* of the case and should be followed in South Australia.

³⁷⁶ (2002) 84 SASR 426.

Helton concerning the forfeiture rule were part of the *ratio decidendi* of the case and should be followed. In South Australia and elsewhere, courts have often (but by no means universally)³⁷⁷ specifically followed the High Court in *Helton v Allen*³⁷⁸ to hold that the forfeiture rule applies to all cases of unlawful killing, regardless of whether the killer intended to benefit from the killing or not.³⁷⁹

2.3.30 Professor Vines told SALRI that the present law represents a triumph of ‘form over substance’ and *Cleaver*, *Crippen* and *Hall* are explicable by their particular facts and were not intended to be of general application.

2.4 SALRI’s Observations and Conclusions

2.4.1 The famous passage of Fry LJ in *Cleaver* has been quoted innumerable times (notably by the High Court in *Helton v Allen*) as the source of the modern forfeiture rule. The passage of Hamilton LJ in *Hall* has also been quoted numerous times (again notably by the High Court in *Helton v Allen*) as authority for the proposition that the rule also applies in all cases of manslaughter. However, *Cleaver* and *Hall* cannot be looked at in isolation. SALRI’s historical analysis suggests that the persuasive value of both *Cleaver* and *Hall* as the source of the modern forfeiture rule (especially in its purported application as a rigid rule to both murder and manslaughter) is dubious. It is important to appreciate the historical context to *Cleaver* and *Hall*, the precise reasoning of all the judges (not just Fry LJ and Hamilton LJ) and the extraordinary, if not sensational,³⁸⁰ facts of both cases.

2.4.2 *Cleaver* was decided in the UK in 1893, three years after *Riggs v Palmer* in the United States. As *Riggs v Palmer* was decided in a different jurisdiction, it cannot be said to have had any formal, direct influence upon the decision in the famed case of Mrs Maybrick. *Cleaver* was the first time an English court was asked to consider the problem of ‘the slayer’s bounty’, but, as Reppy states, ‘the courts of England were called upon, in the absence of express legislation, to devise a new solution for an old problem of the human race, but one which could not or did not arise in England prior to 1870’.³⁸¹ After the *Forfeiture Act 1870*, a gap was left in English law of how to respond to ‘the slayer’s bounty’ that *Cleaver* proceeded to fill by effective recourse to the feudal doctrines of forfeiture, only abolished a few years in 1870.³⁸² The exact origins of this reasoning appear to come from equity, perhaps with some civil law influence, but the origins of the forfeiture rule (especially as stated by Fry LJ) are unclear, raising the distinct possibility that the persuasive value of *Cleaver* on close scrutiny is tenuous.

³⁷⁷ See, for example, Ken Mackie, ‘The Forfeiture Rule: The Destination of Property Interests on Homicide’ (1997) 2(2) *Newcastle Law Review* 30; Ken Mackie, ‘The Troja Case: Criminal Law, Succession and Law Reform’ (1998) 5(1–2) *Canberra Law Review* 177.

³⁷⁸ (1940) 63 CLR 691.

³⁷⁹ See, for example, *Re Luxton* (2006) 96 SASR 218, [19] (Gray J, citing *Troja v Troja* (1994) NSWLR 269).

³⁸⁰ Mrs Maybrick’s case has been described as one of the most sensational and controversial criminal case of the 19th century.

³⁸¹ Alison Reppy, ‘The Slayer’s Bounty: History of Problem in Anglo-American Law’ (1942) 19(2) *New York University Law Quarterly Review* 229, 241.

³⁸² Chris Triggs, ‘Against Policy: Homicide and Succession to Property’ (2005) 68(1) *Saskatchewan Law Review* 117, 119; *Troja v Troja* (1994) 33 NSWLR 269, 277–78 (Kirby P); *Dunbar v Plant* [1998] Ch 412, 430.

2.4.3 It is also significant that Fry LJ's statement of the rule is more expansive in scope than the more qualified proposition of Lord Esher MR.³⁸³ It will be recalled that the Master of Rolls was clear that 'the rule of public policy is not to be carried further than is necessary to ensure its object.'³⁸⁴

2.4.4 SALRI would suggest that *Cleaver* is explicable by its particular facts and was correctly decided on those facts but its persuasive value for the modern forfeiture rule, especially in the form stated by Fry LJ, is questionable. The rationale of the forfeiture rule is sound, but the foundation of the forfeiture rule in its application to murder and manslaughter, and its modern persuasive effect, is tenuous. First, it is unclear whether the court in *Cleaver* intended to be authority for the application of the principle beyond contract law.³⁸⁵ Secondly, the statement of the forfeiture rule in *Cleaver* cannot be seen in isolation from the context of the recently abolished much criticised feudal doctrines. The extraordinary facts of *Cleaver* and the hostility to an offender such as Mrs Maybrick cannot be ignored.

2.4.5 SALRI suggests that *Hall* on close analysis should not be regarded as a sound authority for the proposition for which it is so often cited, namely that the forfeiture rule applies to murder and manslaughter. The extraordinary facts of the case are significant. Baxter seemingly benefitted from a merciful jury and the court regarded her as fortunate to have escaped conviction for Hall's murder. *Hall* is explicable by its particular facts and on these facts one can understand why the court held her ineligible to benefit from her crime. However, this is not necessarily tantamount, as Hamilton LJ stated, to holding that the forfeiture rule will necessarily apply in all cases of manslaughter. The other two members of the court in *Hall* appear to have been swayed by the nature of the particular case before them. Cozens-Hardy MR accepted that the forfeiture rule could extend to a case of manslaughter 'like this' and it would be 'shocking' if Jean Baxter who had plainly caused Hall's death could benefit from her crime.³⁸⁶ Swinfen Eady LJ accepted that the forfeiture rule was not confined to murder and it would be against public policy for Baxter to 'in any way benefit from the crime which she has committed.'³⁸⁷ Even if the court in *Hall* intended the rule to apply to all cases of manslaughter, such a formulation was criticised, even at the time for its unwarranted extension of the rule and rigid application.³⁸⁸

2.4.6 The unwanted and unjust consequences upon innocent parties of the feudal forfeiture doctrines have a long history; a history that pre-dates by *Cleaver* by decades if not centuries. It is significant, in light of this history, to find similar modern expressions of concern as to the harsh and unjust consequences of the forfeiture rule. Peart suggests that the proposition that a killer should not profit from the death of his or her victim started out as a general principle, but rapidly turned into a rigid and unsound rule.³⁸⁹ This version of the rule has been described as 'ruinously strict'.³⁹⁰ SALRI

³⁸³ The brief judgment of Lopes LJ is simply that public policy precluded Mrs Maybrick from recovering any benefit arising from her 'crime': *Cleaver v Mutual Reserve Fund Life Assurance* [1892] 1 QB 147, 160. See further Anthony Dillon, 'When Beneficiary Slays Benefactor: The Forfeiture "Rule" Should Operate as a Principle of General Law' (1998) 6(3) *Australian Property Law Journal* 254.

³⁸⁴ *Cleaver v Mutual Reserve Fund Life Assurance* [1892] 1 QB 147, 155.

³⁸⁵ See also MFC Scott, 'The Effect of Homicide on Property Rights' (1963) 1(6) *Tasmanian University Law Review* 817, 819.

³⁸⁶ *Re Hall* [1914] P 1, 8.

³⁸⁷ *Ibid* 6.

³⁸⁸ J Chadwick, 'A Testator's Bounty to his Slayer' (1914) 30(2) *Law Quarterly Review* 211, 211–12.

³⁸⁹ Nicola Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31(1) *Common Law World Review* 1.

³⁹⁰ Anthony Dillon 'When Beneficiary Slays Beneficiary: The Forfeiture "Rule" Should Operate as a Principle of General Law' (1998) 6(3) *Australian Property Law Journal* 254, 259.

acknowledges that the historical analysis suggests that both *Cleaver* and *Hall* are tenuous authorities as a source of the modern forfeiture rule. Indeed, as Baxter's counsel prophetically contended in *Hall*, the common law had somehow restated the much-criticised feudal doctrines only abolished in 1870.³⁹¹

³⁹¹ *Re Hall* [1914] P 1, 2–3.

Part 3 - Reform of the Common Law Forfeiture Rule

3.1 The Adoption of the Common Law Forfeiture Rule in Australia

3.1.1 The rule from *Cleaver* was adopted in Australia by the High Court in *Helton v Allen*.³⁹² In South Australia and elsewhere, courts have often (but by no means universally)³⁹³ followed the High Court and held that the forfeiture rule applies to all cases of unlawful killing, regardless of whether the killer intended to benefit from the killing or not.³⁹⁴ The rule has been extended to apply both in cases of murder and manslaughter.³⁹⁵ Subsequently, in *Re Giles dec'd*,³⁹⁶ the rule was applied to a woman, convicted of her husband's manslaughter on the grounds of diminished responsibility. The court held that the rule applied to any person convicted of culpable homicide, not only to those killings carrying a sufficient degree of moral culpability.³⁹⁷

3.1.2 The view that the High Court's joint judgment represents the unequivocal endorsement of the scope of the absolute forfeiture rule is supported by Rolfe J, who has observed that '[t]heir Honours did not indicate any proviso to this rule'.³⁹⁸ This view has also been endorsed by Mahoney JA, who stated that '[t]he legal principle has been affirmed and the application of it to circumstances of the present kind [a wife killed her husband and was convicted of manslaughter] has been approved by the High Court'.³⁹⁹

3.2 The Discretionary Approach

3.2.1 In the 1980s, some courts began to make exceptions to the forfeiture rule in view of the nature of the crime and an offender's moral culpability.⁴⁰⁰ This was a gradual departure from the traditional formulation of the rule in *Helton v Allen*, into an approach which allowed for a limited degree of flexibility. A line of judicial authority sought to modify the strict application of the rule. In *Public Trustee v Evans*⁴⁰¹ and *Re Keitley*,⁴⁰² for example, the rule was not applied to beneficiaries who had been found guilty of manslaughter. In *Public Trustee v Fraser*,⁴⁰³ Kearney J held that 'the fundamental question

³⁹² (1940) 63 CLR 691.

³⁹³ See, for example, Ken Mackie, 'The Forfeiture Rule: The Destination of Property Interests on Homicide' (1997) 2(2) *Newcastle Law Review* 30; Ken Mackie, 'The Troja Case: Criminal Law, Succession and Law Reform' (1998) 5(1–2) *Canberra Law Review* 177.

³⁹⁴ See, for example, *Pike v Pike* [2015] QSC 134, [22]; *Re Luxton* (2006) 96 SASR 218, [19] (Gray J, citing *Troja v Troja* (1994) NSWLR 269).

³⁹⁵ *Re Hall* [1914] P 1.

³⁹⁶ [1972] Ch 544.

³⁹⁷ *Re Giles (dec'd)* [1972] Ch 544, 552.

³⁹⁸ *Permanent Trustee Co Ltd v Freedom from Hunger Campaign* (1991) 25 NSWLR 140, 148.

³⁹⁹ *Troja v Troja* (1994) 33 NSWLR 269, 294.

⁴⁰⁰ These cases applied a flexible approach, driven by the problematic context of family violence and mental health: *Public Trustee v Evans* (1985) 2 NSWLR 188 (Young J); *Public Trustee v Fraser* (1987) 9 NSWLR 433 (Kearney J); *Re Keitley* [1992] 1 VR 583 (Coldrey J).

⁴⁰¹ (1985) 2 NSWLR 188.

⁴⁰² [1992] 1 VR 583.

⁴⁰³ (1987) 9 NSWLR 433.

is to determine whether the taking of a benefit by a person through his crime would be unconscionable as representing an unjust enrichment of that person so as to attract the public policy rule'.⁴⁰⁴

3.2.2 In *Public Trustee v Evans*,⁴⁰⁵ Young J considered the scope of the forfeiture rule in finding that it did not apply to a woman who was effectively acquitted of manslaughter after the criminal trial judge had concluded any punishment would be merely 'nominal'. Mrs Young had fatally shot her abusive husband after he assaulted both her and their child and threatened to kill her and their children with a loaded gun. Young J interpreted the rule as one of public policy developed by judges that should be limited by the court to reflect contemporary community attitudes.⁴⁰⁶ Young J took into account the family violence context, concluding that the killing involved 'a very minor degree of criminality'.⁴⁰⁷ Young J found that it would be 'socially unreal' if he were not to recognise that 'unfortunate situations may occur in family groups whereby a death regrettably occurs because of a situation of domestic violence',⁴⁰⁸ and to limit the rule appropriately.

3.2.3 This approach was followed in *Public Trustee v Fraser*.⁴⁰⁹ In this case, a son who was a paranoid schizophrenic killed his mother. The son was convicted of manslaughter on the basis of diminished responsibility. Kearney J considered that the 'fundamental question is to determine whether the taking of the benefit by a person through his crime would be unconscionable ... so as to attract the public policy rule'.⁴¹⁰ His Honour held that this required examination of the nature of the crime and the moral culpability of the offender.⁴¹¹ Kearney J concluded that, although the court had a discretion not to apply the rule, cases in which this discretion is exercised must be very rare. In this case, Kearney J applied the forfeiture rule, noting it was a deliberate crime of violence.⁴¹²

3.2.4 In *Re Keitley*,⁴¹³ the Supreme Court of Victoria adopted the discretionary approach. Coldrey J held that the forfeiture rule did not apply to a woman who pleaded guilty to manslaughter after shooting her husband in circumstances of serious family violence. Coldrey J considered 'the circumstances surrounding the unlawful killing including the behaviour of the offender and the victim in assessing both the seriousness of the conduct and the level of moral culpability of the perpetrator of the fatal act'.⁴¹⁴ Coldrey J found that 'the killing had its genesis in the ongoing domestic violence experienced ... at the hands of the deceased'.⁴¹⁵ Accordingly, he concluded that the wife's 'level of moral culpability was markedly diminished'.⁴¹⁶

⁴⁰⁴ (1987) 9 NSWLR 433, 444.

⁴⁰⁵ (1985) 2 NSWLR 188.

⁴⁰⁶ Ibid 192.

⁴⁰⁷ Ibid 193.

⁴⁰⁸ Ibid 192.

⁴⁰⁹ (1987) 9 NSWLR 433.

⁴¹⁰ Ibid 444.

⁴¹¹ Ibid 444.

⁴¹² Ibid 444.

⁴¹³ [1992] 1 VR 583.

⁴¹⁴ Ibid 587.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

3.3 The Reinstatement of the Absolute Approach

3.3.1 The development of the flexible judicial approach came to an abrupt halt with the decision of the NSW Court of Appeal in *Troja v Troja*,⁴¹⁷ which restated the rigid approach. In this case, the wife, after sustained family abuse, shot and killed her abusive husband.⁴¹⁸ Mrs Troja was charged with his murder but was convicted of manslaughter on the grounds of diminished responsibility. The husband had left his estate to Mrs Troja with a gift over to his mother if his wife did not survive him. Clearly, his wife survived him, so that there could be no gift over to his mother under the terms of the will. The victim's mother brought proceedings to prevent his wife (the killer) inheriting and also to have his estate pass to her (as his mother). There were cross-claims by the wife.

3.3.2 At first instance, the forfeiture rule was held to apply to preclude the wife's claim. On appeal, the majority of the NSW Court of Appeal, Meagher JA and Mahoney JA, agreed that the rule applied and furthermore there was no scope for judicial discretion to modify the rule.

3.3.3 Kirby P, dissenting, would have allowed the appeal and acknowledged the need for a less rigid rule, as the common law 'paid no regard to the virtually infinite variety of circumstances in which a homicide may occur, and the ameliorative circumstances that may sometimes exist.'⁴¹⁹ Kirby P held that the basis of the forfeiture rule was whether there was a 'sense of outrage' such that it would be unconscionable for the offender to derive benefits.⁴²⁰ This outrage 'is grounded not in the person's motives but in the moral culpability of the person's conduct'.⁴²¹ Kirby P considered that the court could 'determine and define the applicable rule',⁴²² and that this involved defining the rule so as to achieve justice in the case.⁴²³

3.3.4 The majority of the NSW Court of Appeal, following *Helton* in applying *Cleaver*, held that the forfeiture rule barred the wife, as the killer, from inheriting the property herself and that she held her interest in the estate on a constructive trust for the victim's mother. The rule was rigid and absolute

⁴¹⁷ (1994) 33 NSWLR 269.

⁴¹⁸ Patricia Easteal, 'Til Death Do Us Part' in Kerry Greenwood (ed), *The Thing She Loves: Why Women Kill* (Allen and Unwin, 1996) 2. The background of family violence suffered by Mrs Troja is described as follows: 'Jeanna Troja experienced extensive psychological abuse at the hands of her husband. She was clearly subjected to "an ongoing barrage of degrading comments and baffling mind-games." She killed to free herself from this mental abuse ... He left her for another woman and "was accustomed to making unfavourable comparisons of the femininity, attractiveness and joie de vivre of the two women." In the course of an argument not long before the killing, she said he invited her to "blow her brains out." Around this time her friend feared that she was becoming suicidal. On the day of the killing, she said the deceased made it clear he wanted a divorce and to have control of the house and business, in which she also had been involved, and that he had engaged solicitors to effect these plans. He called her his "baby bull", said that she was "hopeless", and again invited her to take her own life. The last thing she recalled him saying was: "Stiff shit Jeanna baby, you lose." Immediately after the shooting she confessed what she had done to her friend and called the police. Dr Strum, a psychiatrist who examined her, unequivocally expressed the opinion that she was suffering from a severe reactive depression at the time of the shooting'; Barbara Hamilton and Elizabeth Sheehy, 'Thrice Punished: Battered Women, Criminal Law and Disinheritance' (2004) 8 *Southern Cross University Law Review* 96, 112.

⁴¹⁹ *Troja v Troja* (1994) 33 NSWLR 269, 282.

⁴²⁰ *Ibid* 284.

⁴²¹ *Ibid* 282.

⁴²² *Ibid* 284.

⁴²³ *Ibid* 285.

in relation to both murder and manslaughter. The court refused to make any concession for the killer's diminished responsibility or the background of family violence. Meagher JA commented:

The law as laid down in *Cleaver's* case is that all felonious killings are contrary to public policy and hence, one would assume, unconscionable. Indeed, there is something a trifle comic in the spectacle of Equity judges sorting felonious killings into conscionable and unconscionable piles.⁴²⁴

3.3.5 Despite the wife's mitigating circumstances, the majority took a strict approach. Meagher JA rejected the discretionary approach and held that 'the law as laid down in *Cleaver's* case is that all felonious killings are contrary to public policy and hence, one would assume unconscionable'.⁴²⁵

3.3.6 Mahoney JA also favoured the absolute formulation, according no weight to the competing principles of unconscionability and moral culpability.⁴²⁶ His Honour found that the killing was deliberate and unlawful,⁴²⁷ and led 'directly and immediately to [the appellant's] claim to the estate'.⁴²⁸ As such, his Honour concluded that the rule should apply, despite the context in which the killing occurred and the intention of Mrs Troja.⁴²⁹

3.3.7 In *Troja*, the majority view was that the forfeiture rule is absolute, and a court did not have any discretion to decide whether it applied.⁴³⁰ The courts need only to establish a direct relationship between the killing and the benefit, following which the forfeiture rule will automatically apply.⁴³¹ As such, the decision in *Troja* removed the flexibility found in the decisions of the 1980s.⁴³²

3.3.8 Kirby P in dissent expressed his alarm at the injustice that the strict approach of the majority produced, stating:

in the infinite variety of the circumstances which can lead to homicide, there will be no, or little outrage. In such cases there will be no offence to conscience. To the contrary, it is the inflexible application of the "forfeiture rule"... that will cause the offence to conscience.⁴³³

3.3.9 Australian courts are not bound by the rigid English formulation of the rule.⁴³⁴ However, the decision in *Troja* upholding the absolute formulation is binding in New South Wales, and has been cited with approval as the 'modern formulation' of the common law rule.⁴³⁵ It has also been accepted

⁴²⁴ Ibid 299 (Meagher JA).

⁴²⁵ Ibid.

⁴²⁶ Anthony Dillon, 'When Beneficiary Slays Benefactor: The Forfeiture "Rule" Should Operate as a Principle of General Law' (1998) 6(3) *Australian Property Law Journal* 254, 260.

⁴²⁷ *Troja v Troja* (1994) 33 NSWLR 269, 294.

⁴²⁸ Ibid 297.

⁴²⁹ Ibid 298.

⁴³⁰ Bar the only exception which is a mental impairment defence.

⁴³¹ (1994) 33 NSWLR 269, 294–295.

⁴³² Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 6–15.

⁴³³ *Troja v Troja* (1994) 33 NSWLR 269, 284.

⁴³⁴ Anthony Dillon, 'When Beneficiary Slays Benefactor: The Forfeiture "Rule" Should Operate as a Principle of General Law' (1998) 6(3) *Australian Property Law Journal* 254, 257.

⁴³⁵ *Permanent Trustee Co Ltd v Gillett* (2004) 145 A Crim R 220, 224.

in Queensland⁴³⁶ and Victoria⁴³⁷ (though judicial debate in Victoria persists as to the extent of the forfeiture rule and the precise effect of *Troja*).⁴³⁸

3.4 Current South Australian Position

3.4.1 *Troja v Troja* has also been followed in South Australia.⁴³⁹ The scope of the forfeiture rule in relation to cases of reduced culpability has not been entirely resolved in South Australia. The Full Court of the Supreme Court in *Rivers v Rivers*⁴⁴⁰ determined the case in line with *Helton v Allen*, but as the defendant was acquitted of both murder and manslaughter, the court did not discuss the scope of the rule in any detail in this decision. In *Re Luxton*,⁴⁴¹ Gray J considered the two approaches in *Troja* but held that it was unnecessary to determine the issue, as the killer in *Luxton* had been convicted of murder.⁴⁴² In the absence of any definitive authority, it would appear that the strict and inflexible common law approach applies in South Australia.⁴⁴³ As Gray J noted in *Luxton*: ‘It is therefore sufficient for the purposes of the present proceeding that the Full Court in *Rivers* unequivocally adopted the forfeiture rule as enunciated in *Cleaver’s* case and in *Helton*.’⁴⁴⁴

3.4.2 This view also emerged in consultation as to the scope of the rule in South Australia. The consistent view relayed to SALRI is that the rule is likely to strictly apply in South Australia to both murder and manslaughter and does not afford any judicial discretion to modify its operation.

3.4.3 The common law forfeiture rule applies where there is a causal relationship between a person’s wrongdoing and the deceased’s death, from which, but for this rule, the wrongdoer would benefit, and the wrongdoer had the intent necessary to make the killing unlawful.⁴⁴⁵ The rule applies regardless of whether the killer’s motive was to obtain a financial benefit or not, and regardless of whether or not the person’s responsibility for the killing was in some way diminished.⁴⁴⁶

⁴³⁶ *Pike v Pike* [2015] QSC 134.

⁴³⁷ *Re Estate of Soukup* (1997) 97 A Crim R 103; *Edwards v State Trustees Ltd* (2016) 257 A Crim R 529.

⁴³⁸ *Edwards v State Trustees Limited* (2016) 257 A Crim R 529. See further below [3.5.12]–[3.5.21].

⁴³⁹ See *Re Estate of Luxton* (2006) 96 SASR 218, 223; *Troja v Troja* (1994) 33 NSWLR 269.

⁴⁴⁰ (2002) 84 SASR 426.

⁴⁴¹ (2006) 96 SASR 218.

⁴⁴² *Ibid* 223. Gray J noted that ‘there is much to commend the approach of Kirby P [in *Troja*]. However, a concluded view can await a more appropriate vehicle’: at [20].

⁴⁴³ This was the overwhelming view in SALRI’s consultation. Cf *Edwards v State Trustees Limited* (2016) 257 A Crim R 529.

⁴⁴⁴ *Re Luxton* (2006) 96 SASR 218, [20].

⁴⁴⁵ *Permanent Trustee Co Ltd v Gillett* [2004] NSWSC 278.

⁴⁴⁶ *Troja v Troja* (1994) 33 NSWLR 269.

3.4.4 The principle has been applied in situations of both manslaughter and murder,⁴⁴⁷ with some suggestions that the rule could also apply in omissions resulting in death⁴⁴⁸ or unlawful killings from involuntary or negligent acts.⁴⁴⁹

3.4.5 The courts have held that the public policy behind the forfeiture rule is to apply broadly and not be qualified by considerations such as whether or not the felonious act resulted in a criminal conviction.⁴⁵⁰ A person acquitted in criminal proceedings, or not prosecuted for a criminal offence at all, may still be subject to the forfeiture rule.⁴⁵¹ An acquittal is not decisive of a person's innocence, only of the fact that the evidence supporting the criminal charge was not sufficient to meet the high standard of proof required for a criminal conviction.⁴⁵² The forfeiture rule may still apply if the unlawful killing can be established in civil proceedings on the civil standard of proof.⁴⁵³ However, if the killer is found to have been incapable of forming the intent to kill, the forfeiture rule does not apply.⁴⁵⁴ Where the acquittal arises from a finding of insanity or mental impairment, that finding negates any relevant criminal intent, so that although the mentally impaired person's act may have caused the death, the killing is not unlawful and does not attract the forfeiture rule.⁴⁵⁵

⁴⁴⁷ In *Re Hall* [1914] P 1, 7, Hamilton LJ said 'I cannot understand why a distinction should be drawn between the rule of public policy where the criminality consists in murder and the rule where the criminality consists in manslaughter.' See also *Pike v Pike* [2015] QSC 134, [22].

⁴⁴⁸ Dicta in *Re Tucker* (1920) 21 SR (NSW) 175, 178 suggests that the forfeiture rule also applies to omissions resulting in death, for example by failing to provide the necessities of life.

⁴⁴⁹ *Re Estate of Soukup* (1997) 97 A Crim R 103, 113; *Helton v Allen* (1940) 63 CLR 691.

⁴⁵⁰ *Helton v Allen* (1940) 63 CLR 691. In this case, a man was acquitted of murder by poison. His victim's family applied to a civil court for a finding that he did in fact unlawfully kill his wife and was therefore barred from taking under her will or acting as her executor. The court found, on circumstantial evidence, that he had unlawfully killed her. Although, on appeal, the High Court reversed the civil court's decision that the man had unlawfully killed his wife (on the ground that the judge had misdirected the (civil) jury on the appropriate standard of proof) it held that the court was able to make a finding contrary to the finding of a criminal court, and to do so on circumstantial evidence, and to do so without being bound by any finding of the criminal court.

⁴⁵¹ *Ibid.* This was often called the OJ Simpson situation in SALRP's consultation.

⁴⁵² *Ibid.*; *Rivers v Rivers* (2002) 84 SASR 426; *Permanent Trustee Co Ltd v Gillett* [2004] NSWSC 278.

⁴⁵³ *Helton v Allen* (1940) 63 CLR 691; *Rivers v Rivers* (2002) 84 SASR 426. The general common law principle (known as the rule in *Hollington v Henthorn* [1943] KB 587) that a criminal conviction is inadmissible in civil proceedings as evidence of the facts on which the conviction is founded has been widely criticised. South Australia is one of many jurisdictions which have legislated to abrogate that principle. Section 34A of the *Evidence Act 1929* (SA) provides that evidence of a criminal conviction or finding by a criminal court is admissible in a civil proceeding as evidence of the commission of that offence against the person to whom the conviction or finding relates, or against anyone claiming through that person. However, under s 34A (and under similar provisions in other Australian jurisdictions), evidence of the criminal conviction, while admissible, is not conclusive proof of the conduct of the convicted person if this is in issue in a civil proceeding. See also *Public Trustee of New South Wales v Fitter* [2005] NSWSC 1188, [10]–[11]. See also Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 2, 19. See also below [5.5.24]–[5.5.29].

⁴⁵⁴ The common law is described in *Public Trustee of New South Wales v Fitter* [2005] NSWSC 1188, where the court followed *Re Plaister; Perpetual Trustee Company v Crawshaw* (1934) 34 SR (NSW) 547 to hold that at common law, the forfeiture rule does not apply to a person who is insane and does not have the relevant intent to commit a crime. See also *Kemperle v Public Trustee* (Supreme Court of New South Wales, Powell J, 20 November 1985).

⁴⁵⁵ This is an accepted proposition in most jurisdictions. See, for example, *Re Houghton* [1915] 2 Ch 173, *Re Pitts* [1931] 1 Ch 546; *Re Plaister; Perpetual Trustee Company v Crawshaw* (1934) 34 SR (NSW) 547; *Kemperle v Public Trustee* (Supreme Court of New South Wales, Powell J, 20 November 1985); *Re Estate of Soukup* (1997) 97 A Crim R 103. In *Plaister*, the killer died before he could be charged with the homicide and was later found by a civil court to have been insane at the time of the killing.

3.4.6 In South Australia and elsewhere in Australia the forfeiture rule operates as if the killer had never existed.⁴⁵⁶ For example, if a man murdered his parents, he could not inherit from his parents' estate, and neither could his children.⁴⁵⁷

3.5 Issues

3.5.1 The arguments for reform of the forfeiture rule centre on the confusion and doubt regarding the precise scope of the rule (even post *Troja*), the rule's potentially unfair application given its wide and apparent inflexible scope (especially in a family violence context) and the uncertainty and complexity about the practical effects and consequences of the rule.

3.5.2 These concerns have prompted various reviews of the rule by law reform bodies,⁴⁵⁸ resulting, in some jurisdictions, in the introduction of new laws seeking to clarify the application of the rule⁴⁵⁹ or to allow its effect to be modified in some circumstances.⁴⁶⁰

Confusion Regarding the Scope of the Rule

3.5.3 There remains doubt as to the precise basis of the rule and whether it is a creature of equity, common law or public policy (or some combination).⁴⁶¹ Professor Dal Pont at the University of Tasmania told SALRI that the rationale of the forfeiture rule is sound but the rule is 'a strange hybrid' and its genesis has never been fully resolved.

3.5.4 As a result of being a creature of the common law, solely devised to fill the gaps left by the abolition of feudal doctrines, the current application of the rule lacks certainty.⁴⁶² Furthermore, despite having a sound rationale, the concept of public policy is transient and subjective.⁴⁶³ In *Troja v Troja*, Kirby P, in a robust dissent, identified that:

The difficulty was that the new rule [the common law rule of forfeiture] was devised by judges to solve the necessities of particular cases. It developed without a great deal of consideration, either

⁴⁵⁶ See, for example, *Re Tucker* (1920) 21 SR (NSW); *Re Sangal* [1921] VLR 355; *Public Trustee v Fraser* (1987) 9 NSWLR 433 (Kearney J remarked that the killer was to be treated as being 'no longer a member of the class constituted by the next of kin entitled to take on intestacy': at 444); *Re Estate of Soukup* (1997) 97 A Crim R 103. Similar developments have occurred in the UK: see, for example, *Re Sigworth* [1935] Ch 89.

⁴⁵⁷ *Re DWS (dec'd)* [2001] Ch 568.

⁴⁵⁸ A list of law reform reports is in the Bibliography to this paper.

⁴⁵⁹ See, for example, *Succession (Homicide) Act 2007* (NZ).

⁴⁶⁰ See for example, *Forfeiture Act 1991* (ACT); *Forfeiture Act 1995* (NSW); *Forfeiture Act 1982* (UK); *Estates of Deceased Persons (Forfeiture and Law of Succession) Act 2011* (UK).

⁴⁶¹ *State Trustees Ltd v Edwards* [2014] VSC 392, [89]. See also the discussion in *Troja v Troja* (1994) 33 NSWLR 269. Kirby J favoured the view that the forfeiture rule 'is, in reality, an application of to what would otherwise be the operation of the law of the equitable principles which deny persons from gaining benefits from their own morally culpable conduct': at 286. See also *Public Trustee v Evans* (1985) 2 NSWLR 188. The majority in *Troja* disagreed that the forfeiture rule is a rule of equity and based it on an inflexible rule of public policy. See also *State Trustees Ltd v Edwards* [2014] VSC 392, [87]–[97] (McMillan J); *Edwards v State Trustees Ltd* (2016) 257 A Crim R 529, 542 [48] (Whelan J), 588 [190] (Santamaria J).

⁴⁶² *Troja v Troja* (1994) 33 NSWLR 269, 278 (Kirby P); Dianne Caldwell, 'Criminal Law and Estates: The Forfeiture Rule' (2005) 24(3) *Estates, Trusts and Pensions Journal* 269, 284; Ken Mackie, 'The Troja Case: Criminal Law, Succession and Law Reform' (1998) 5(1–2) *Canberra Law Review* 177, 181.

⁴⁶³ Andrew Hemming, 'Killing the Goose and Keeping the Golden Nest Egg' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342, 363; Ian Williams, 'How Does the Common Law Forfeiture Rule Work?' in Birke Hacker and Charles Mitchell (eds), *Current Issues in Succession Law* (Bloomsbury, 2016) 51, 54.

of its scope, or of its exceptions, or of its fundamental underlying rationale. The result has been controversy as to the scope, uncertainty about the exceptions, and confusion as to the rationale.⁴⁶⁴

3.5.5 The rule undoubtedly applies in cases of murder.⁴⁶⁵ However, whether it applies in all cases of manslaughter, even post *Troja*, remains unclear.⁴⁶⁶ The High Court considered the common law forfeiture rule in *Helton v Allen*,⁴⁶⁷ but the case did not explicitly consider its scope or application. Nevertheless, the joint judgment of Dixon, Evatt and McTiernan JJ referred to the decision in *Re Hall*,⁴⁶⁸ which rejected a distinction between murder and manslaughter based on moral culpability.⁴⁶⁹ Some have argued that this conclusively establishes that the rule applies in cases of manslaughter.⁴⁷⁰ In contrast, others hold it to be ‘general observations placing in context the issues’ and not a description of the scope of the forfeiture rule.⁴⁷¹

3.5.6 Despite the apparent acceptance in *Helton* of the forfeiture rule as absolute,⁴⁷² its scope has proved unclear. Though some cases took a strict approach and held in accordance with *Helton* that the rule inflexibly applied to murder and manslaughter,⁴⁷³ a series of cases in the 1980s adopted a more flexible approach to the rule.⁴⁷⁴ A number of these cases considered whether the forfeiture rule should apply to persons who caused the death of an abusive partner.⁴⁷⁵ Rolfe J in *Permanent Trustee Co Ltd v Freedom from Hunger Campaign*,⁴⁷⁶ even went as far as to hold that the forfeiture rule did not apply unless it was established that the killing was intended to bring about a benefit from the estate of the deceased to the perpetrator. On this rationale, if the homicide was unlawful, and a benefit was secured, but this was merely consequential, and not the purpose of the crime, the forfeiture rule had no application.⁴⁷⁷

⁴⁶⁴ (1994) 33 NSWLR 269, 278 (Kirby P).

⁴⁶⁵ Gino Dal Pont and Ken Mackie, *Law of Succession* (LexisNexis, 1st ed, 2013) 192.

⁴⁶⁶ See, for example, *Gray v Barr* [1971] 2 QB 544; *Edwards v State Trustees Limited* (2016) 257 A Crim R 529. In *Re Estate of Soukup* (1997) 97 A Crim R 103, for example, Gillard J accepted the majority view in *Troja* and held that the forfeiture rule applies to ‘murder and manslaughter cases ... and does not depend upon moral culpability or any other factor’: at 115. However, Gillard J doubted whether the rule applied to manslaughter by gross negligence: at 115. See also below [3.5.12]–[3.5.21].

⁴⁶⁷ (1940) 63 CLR 691.

⁴⁶⁸ [1914] P 1.

⁴⁶⁹ *Re Hall* [1914] P 1, 7.

⁴⁷⁰ See, for example, *Troja v Troja* (1994) 33 NSWLR 269, 294–295 (Mahony JA); *Edwards v State Trustees Limited* (2016) 257 A Crim R 529, 565–569 [143]–[149] (Santamaria JA).

⁴⁷¹ See, for example, *Troja v Troja* (1994) 33 NSWLR 269, 280 (Kirby P); *Edwards v State Trustees Limited* (2016) 257 A Crim R 529, 537 (Whelan JA).

⁴⁷² Andrew Hemming, ‘Killing the Goose and Keeping the Golden Nest Egg’ (2008) 8 *Queensland University of Technology Law and Justice Journal* 342, 347.

⁴⁷³ See *Kemperle v Perpetual Trustees* (Supreme Court of NSW, Powell J, 20 November 1985) and *Bain v Morabito* (Supreme Court of NSW, Powell J, 14 August 1992).

⁴⁷⁴ See, for example, *Public Trustee v Evans* (1985) 2 NSWLR 288; *Public Trustee v Fraser* (1987) 9 NSWLR 433. See also Andrew Hemming, ‘Killing the Goose and keeping the Golden Nest Egg’ (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342, 348; Nicola Peart, ‘New Zealand Report on New Developments in Succession Law’ (2010) 14(2) *Electronic Journal of Comparative Law* 1–23, 8; Prue Vines, ‘The Profits of Crime’ (1992) 17(4) *Alternative Law Journal* 192, 193.

⁴⁷⁵ See, for example, *Re Keitley* [1992] 1 VR 583; *Public Trustee v Evans* (1985) 2 NSWLR 288.

⁴⁷⁶ (1991) 25 NSWLR 140.

⁴⁷⁷ The facts of the case were that following a suicide pact, an elderly married couple were found dead in bed, following the self-administration of a poison.

3.5.7 This line of authority came to an abrupt halt in *Troja*⁴⁷⁸ where the absolute formulation and the absence of any distinction between murder and manslaughter was reaffirmed.⁴⁷⁹

3.5.8 The line of authority favouring an equitable approach,⁴⁸⁰ has further blurred the application of the rule. Even though subsequent authority reinstated the traditional formulation of the rule, the observations by the High Court in *Helton v Allen*⁴⁸¹ as to the scope of the rule were arguably obiter, and this decision was also handed down when the High Court was accountable to the Privy Council.⁴⁸² Likewise, in the recent South Australian decisions,⁴⁸³ the traditional application of the rule was endorsed in obiter, as the material issue in both cases did not pertain to the scope of the rule.

3.5.9 There are certain examples of judges refusing to apply the rule based on the circumstances of the unlawful killing.⁴⁸⁴ However, it is unclear whether the rule does not apply to the situation, or whether the rule applied but has had its effect vitiated by the exercise of a judicial discretion.⁴⁸⁵

3.5.10 It is unclear, even after *Troja*, whether deaths caused by negligent, reckless or dangerous acts or omissions attract the operation of the forfeiture rule.⁴⁸⁶ It is unclear if the rule applies to causing death by culpable or dangerous driving. It is also unclear if assisting a murder (at least after the fact) attracts its operation.⁴⁸⁷ Assisted suicide and suicide pacts may or may not attract the operation of the rule.⁴⁸⁸ It is clear that the rule does not arise where a defendant is found not guilty by insanity (or mental impairment),⁴⁸⁹ yet it appears that diminished responsibility (even in the context of family violence) does not affect the strict operation of the rule.⁴⁹⁰ Acquittal in criminal proceedings does not preclude its effects.⁴⁹¹

3.5.11 The VLRC, even post *Troja*, found much confusion in its consultation as to the scope of the rule.⁴⁹² The VLRC identified a lack of clarity regarding the scope of the rule, particularly with regard

⁴⁷⁸ *Troja v Troja* (1994) 33 NSWLR 269.

⁴⁷⁹ See also *Re Estate of Soukup* (1997) 97 A Crim R 103; *State Trustees Ltd v Edwards* [2014] VSC 392, [100].

⁴⁸⁰ See, for example, *Re Keitley* [1992] 1 VR 583; *Public Trustee v Evans* (1985) 2 NSWLR 288, *Public Trustee v Fraser* (1987) 9 NSWLR 433; *Permanent Trustee Co Ltd v Freedom from Hunger Campaign* (1991) 25 NSWLR 140.

⁴⁸¹ (1940) 63 CLR 691.

⁴⁸² *Troja v Troja* (1994) 33 NSWLR 269, 280 (Kirby P). There is a contrary view that *Helton* is binding. See *Edwards v State Trustees Limited* (2016) 257 A Crim R 529, 565–569 [143]–[149] (Santamaria JA).

⁴⁸³ *Rivers v Rivers* (2002) 84 SASR 426; *Re Luxton* (2006) 96 SASR 218.

⁴⁸⁴ See, for example, *Public Trustee v Evans* (1985) 2 NSWLR 188; *Permanent Trustee Co Ltd v Freedom from Hunger Campaign* (1991) 25 NSWLR 140; *Re Keitley* [1992] 1 VR 583.

⁴⁸⁵ *Edwards v State Trustees Limited* (2016) 257 A Crim R 529, 541.

⁴⁸⁶ *Re Estate of Soukup* (1997) 97 A Crim R 103, 115; Victorian Law Reform Commission, *The Forfeiture Rule* (Consultation Paper, March 2014) 21.

⁴⁸⁷ Fiona Pepper and Damien Carrick, ‘A Murderer Can’t Inherit the Estate of Their Victim. What About Someone Who Covers Up the Crime?’ *ABC News* (online, 11 January 2019) <<https://www.abc.net.au/news/2019-06-11/tiffany-wan-annabelle-chen-case-estate-of-victim-forfeiture-law/11177022>>.

⁴⁸⁸ *Re Estate of Soukup* (1997) 97 A Crim R 103, 115. Though see *Dunbar v Plant* [1998] Ch 412.

⁴⁸⁹ *Re Houghton* [1915] 2 Ch 173; *Re Pitts* [1931] 1 Ch 546; *Re Estate of Soukup* (1997) 97 A Crim R 103.

⁴⁹⁰ *Re Giles (dec’d)* [1972] Ch 544; *Jones v Roberts* [1995] 2 FLR 422; *Dalton v Latham* [2003] EWHC 796 (Ch); *Troja v Troja* (1994) 33 NSWLR 269.

⁴⁹¹ See, for example, *Helton v Allen* (1940) 63 CLR 691; *Rivers v Rivers* (2002) 84 SASR 426.

⁴⁹² Participants at the VLRC’s roundtable had difficulty expressing how the forfeiture rule operates in practice. They expressed different opinions as to whether the rule applies to unintentional, involuntary and inadvertent acts and pointed to the difficulty of advising clients with a lack of certainty. See Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 9. McMillan J in *State Trustees Ltd v Edwards* [2014] VSC 392 followed

to ‘unintentional, involuntary and inadvertent acts’.⁴⁹³ Accordingly, ‘parties are encouraged 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’.⁴⁹⁴

3.5.12 The continuing confusion and uncertainty of the scope of the forfeiture rule, even post *Troja*, is illustrated by the Victorian case of *Edwards*.⁴⁹⁵ Jemma Edwards had pleaded guilty to defensive homicide on the basis of excessive self-defence in relation to the death of her abusive husband in the context of a prolonged history of family violence.⁴⁹⁶ She had used a speargun. Mrs Edwards was sentenced to seven years’ imprisonment, with a non-parole period of four years and nine months. All four judges who heard her civil case acknowledged that there were mitigating circumstances (notably the context of family violence), but Mrs Edwards’ deliberate use of violence with lethal intent to cause death or serious harm precluded any relaxation of the modification rule in her case. However, three very different views as to the scope of the forfeiture rule were advanced.

3.5.13 At first instance, McMillan J considered that the High Court’s observations in *Helton* were strictly obiter but held that she was obliged to follow the majority in *Troja* (with which she agreed).⁴⁹⁷ McMillan J held that neither hardship to the killer or low moral are proper considerations in deciding whether the forfeiture rule applies.⁴⁹⁸ McMillan J rejected the notion that there was judicial discretion in the application of the forfeiture rule:

It is therefore entirely logical that a rule, based on a principle of public policy, should not be able to be modified by an individual judge to accord with what that judge thinks is fair in all of the circumstances of a particular case. To allow a judge to modify the rule in this way would be to substitute a judge’s own opinion for a rule shaped by long-standing authority and based on a principle capable of precise formulation. It is neither necessary nor appropriate to answer conclusively in this case what the precise limits of the rule are. But there can be no discretion, in my view, not to apply the rule on the basis of idiosyncratic notions of what public policy (understood here in the widest sense) would require in the instant case.⁴⁹⁹

3.5.14 However, even allowing for the absence of judicial discretion, McMillan J reasoned that, even post *Troja*, the rule did not extend to all forms of manslaughter. McMillan J observed:

Although the statement of the rule in *Troja* would appear to cover all cases of manslaughter, that case concerned a deliberate and forethought act ... the rule might not apply to certain acts causing death that are not deliberate and intentional — consistently with the English statements of principle to that effect — with the qualification that I doubt whether an act or threat of violence is a necessary ingredient for the rule to apply.⁵⁰⁰ I am even more doubtful that the rule would apply

Troja and held that there is no discretion to modify the rule but the rule does not apply to either death by culpable driving or involuntary manslaughter, or at least involuntary manslaughter where there is no deliberate and intentional act (seemingly manslaughter by gross negligence). SALRI also found much uncertainty in the scope of the rule.

⁴⁹³ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 9.

⁴⁹⁴ *Ibid.*

⁴⁹⁵ *State Trustees Ltd v Edwards* [2014] VSC 392.

⁴⁹⁶ It should be noted that the violence was mutual.

⁴⁹⁷ *State Trustees Ltd v Edwards* [2014] VSC 392, [99]–[100].

⁴⁹⁸ *Ibid* [94].

⁴⁹⁹ *Ibid* [92]–[93].

⁵⁰⁰ See *Dunbar v Plant* [1998] Ch 412, 425.

in a case of culpable driving causing death or to other crimes of a similar nature.⁵⁰¹ If there is to be an exception in such cases, it may be because an inadvertent act will not offend the principle of public policy ... In my view, *Troja* and *Re Soukup* are clear authorities for the proposition that the forfeiture rule will apply in all cases of voluntary manslaughter, viz, where the elements of murder are present, but for some reason the culpability of the offender is reduced. The rule laid down in the Australian authorities therefore appears to be that, at the least, a person who kills another person by a deliberate and unlawful act forfeits any benefit arising as a direct result of that act.⁵⁰²

3.5.15 On appeal,⁵⁰³ Whelan JA (with whom Kyro JA agreed) stated that the High Court's comments in *Helton* were not binding. Whelan J considered that all the majority said about the scope of the forfeiture rule 'was no more than general observations placing in context the issues which they had to address. What was said was not, in my view, intended to be a description of the scope of the forfeiture rule in the context of manslaughter.'⁵⁰⁴

3.5.16 Whelan JA considered that the presence of acts or threats of violence is not necessary for the application of the forfeiture rule.⁵⁰⁵ Whelan JA was unconvinced of the logic or rationale of excluding homicide on the basis of inadvertence or negligence and/or manslaughter by negligence in relation to the use of a motor vehicle (as in the UK) from the operation of the forfeiture rule whilst including automatically voluntary homicide involving a deliberate and violent act. Whelan JA explained:

If there is an absolute and inflexible rule, and if the existing UK authorities concerning 'motor manslaughter' are correct, it seems that the rule would not apply to unlawful killings by culpable drivers notwithstanding that such conduct has, for at least the last two decades or so, been seen as criminal conduct potentially as serious and as culpable as any manslaughter in other contexts, attracting very substantial terms of imprisonment.⁵⁰⁶ If the existence of a deliberate unlawful act is the relevant qualifier to this absolute and inflexible rule then manslaughters by criminal negligence, which cannot be seen as anything other than seriously culpable and which attract very substantial terms of imprisonment, would also not be subject to the rule. Yet on the *Troja* approach, the offender in *Public Trustee v Evans*, who was discharged on the basis the punishment would be nominal, and the offender in *Re Keitley*, who was given a non-custodial disposition, in each case because of the domestic violence to which they had been subjected by the deceased, would be subject to the absolute and inflexible rule.⁵⁰⁷

3.5.17 Whelan JA stated that, even allowing for the majority view in *Troja*, the forfeiture rule does not apply to all categories of manslaughter and there is no formulation of the rule which can be said to apply generally to manslaughter and similar crimes.⁵⁰⁸ Whelan JA noted that

⁵⁰¹ Death by dangerous driving has not attracted the forfeiture rule in the UK: John Ross Martyn and Nicholas Cannick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (Sweet and Maxwell, 20th ed, 2013) 1316. Cf *Straede v Eastwood* [2003] NSWSC 280. See further below [6.1.60]–[6.1.62].

⁵⁰² *State Trustees Ltd v Edwards* [2014] VSC 392 [101]–[102].

⁵⁰³ *Edwards v State Trustees Limited* (2016) 257 A Crim R 529.

⁵⁰⁴ *Ibid* 537 [25].

⁵⁰⁵ *Ibid* 543 [52].

⁵⁰⁶ See further *Pasznyk v The Queen* (2014) 43 VR 169.

⁵⁰⁷ *Edwards v State Trustees Limited* (2016) 257 A Crim R 529, 534 [11]. See also at 542–43 [50].

⁵⁰⁸ *Ibid* 545 [63].

in cases of manslaughter culpability can vary between those which are close to murder and those which might warrant little or no criminal punishment at all. That is why in cases of manslaughter the nature of the particular crime must determine the application of the principle.⁵⁰⁹

Whelan JA was prepared to regard the majority view in *Troja* as ‘plainly wrong’.⁵¹⁰

3.5.18 Whelan JA provided the following observations of the scope and operation of the rule:

As to coherence with the criminal law, the forfeiture rule ought not to operate so as to preclude offenders whose criminality is such that they properly receive little or no punishment while not precluding offenders who commit crimes warranting substantial terms of imprisonment ... The only formulation which, in my opinion, can properly address this position, giving proper expression to the underlying public policy principle and to the need for coherence with the criminal law is one under which the nature of the particular crime determines the application of the principle ... Cases of murder are straightforward and would always result in the offender being precluded. Cases of manslaughter have to be considered on a case-by-case basis. The issue is: does the criminal culpability of the offender require that he or she should not be entitled to take a benefit arising from the death? The issue is not determined by reference to whether the conduct is advertent or inadvertent, whether it is by violent means or by other means, whether it is behind the wheel of a car or whilst in possession of a weapon.⁵¹¹

3.5.19 Santamaria JA considered that the High Court’s comments in *Helton* constituted ‘seriously considered dicta and binds this court’.⁵¹² He added that ‘it is true that the forfeiture rule did not strictly form part of the ratio of the case. However, the Court treated the existence of the rule as axiomatic; it did not conceive of the Court having a discretion in the matter.’⁵¹³ Santamaria JA held that the majority view in *Troja* was not ‘plainly wrong’ and it governed the present case.⁵¹⁴ Santamaria JA did not agree that a court possesses a discretion as contemplated by Kirby P and cases such as *Evans* and *Fraser* as to the application of the rule. He noted his opinion that there is no basis upon which a court

can confer upon itself the discretion which legislatures in other jurisdictions have conferred upon their courts ... While the scope of the rule must be determined, where it applies there is no basis to give relief from its operation in any particular case.⁵¹⁵

3.5.20 However, Santamaria JA accepted that, despite *Troja*, the forfeiture rule did not apply in all cases of manslaughter. Santamaria JA concluded that

the application of the rule is not always clear. Its application does not depend upon the way in which the conduct was prosecuted or dealt with in the criminal jurisdiction; it depends rather upon how that conduct is assessed in the civil jurisdiction. The authorities indicate that, at the very least, the rule will be applied where a person is guilty of ‘deliberate, intentional and unlawful violence,

⁵⁰⁹ Ibid 543 [55].

⁵¹⁰ Ibid 546 [66].

⁵¹¹ Ibid 545–46 [64]–[66].

⁵¹² Ibid 566–67 [145]. In *Farab Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151 [134], Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ admonished intermediate courts of appeal not to depart from ‘long-established authority and seriously considered dicta of a majority of this Court’. See also at: 159 [158].

⁵¹³ *Edwards v State Trustees Limited* (2016) 257 A Crim R 529, 566–67 [145].

⁵¹⁴ Ibid 568 [149]. See also at: 588 [190].

⁵¹⁵ Ibid 588 [190].

or threats of violence’;⁵¹⁶ it applies in circumstances in which there is no legal justification for the killing. That is not to say that it could not apply in other cases of culpable killing where the violence was not deliberate. However, it does not apply where, for some reason, the person was not aware of the nature of their acts or of the moral wrongdoing involved: cases of insanity or cases where, for example, rational judgment has been precluded.⁵¹⁷

3.5.21 SALRI notes that it is unsatisfactory that the detailed analysis in *Edwards* of three different judges still yields no clear and consistent formulation of the scope and a simple description of the offences or situations that activate the rule is impossible. Nor is it conclusively known whether a discretion exists at common law allowing a judge to refuse to apply the rule.⁵¹⁸ In addition, the destination of forfeited assets or financial benefits is not well-defined.⁵¹⁹

Concern About Harsh Outcomes in Cases of Reduced Culpability

3.5.22 The common law rule of forfeiture embodies a principle of public policy that a person who unlawfully kills another should not obtain a benefit.⁵²⁰ The underlying rationale for the forfeiture rule is widely accepted as sound (acceptance that also emerged in SALRI’s consultation), but its practical operation is far from straightforward, in terms of both clarity and fairness. In the opinion of critics, the forfeiture rule should be modified to better conform to the standards and values of contemporary society.⁵²¹

3.5.23 Courts have often called for reform,⁵²² as they state the strict application of the rule creates unjust outcomes when the case lacks a ‘sense of outrage’.⁵²³ The view is that ‘distinctions can be drawn between different types of killing’ which should be reflected in judgments.⁵²⁴ While removing the principle completely is untenable, it is possible to retain the core abhorrence of benefit from crime while also making provision for the apparent anomalies which can arise.⁵²⁵

3.5.24 Further, critics have stated that the current formulation, which has seen little, if any, change since its introduction in the early 20th century,⁵²⁶ is outdated and does not reflect the acceptance by the courts that reduced culpability should be a factor in determination if the rule should apply. This can particularly be seen in situations such as sentencing discretions. As put by Dillon, the principle can still be retained while accommodating modern notions of culpability:

[It] is apt to be updated by judges ... to ensure the principle conforms to contemporary standards and social values. The principle is inextricably linked to notions of unjust enrichment,

⁵¹⁶ *Gray v Barr* [1971] 2 QB 554.

⁵¹⁷ *Edwards v State Trustees Limited* (2016) 257 A Crim R 529, 588 [191].

⁵¹⁸ *Troja v Troja* (1994) 33 NSWLR 269, 299 (Meagher JA), cf 276 (Kirby P).

⁵¹⁹ Ken Mackie, ‘The Forfeiture Rule: The Destination of Property Interests on Homicide’ (1997) 2(2) *Newcastle Law Review* 30.

⁵²⁰ *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147. See also *Helton v Allen* (1940) 63 CLR 691, 709.

⁵²¹ Andrew Hemming, ‘Killing the Goose and Keeping the Golden Nest Egg.’ (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342, 345.

⁵²² ‘The problems associated with the so-called “forfeiture rule” have been referred to at length by judges and commentators’: *Permanent Trustee Co Ltd v Freedom from Hunger Campaign* (1991) 25 NSWLR 140, 154.

⁵²³ *Troja v Troja* (1994) 33 NSWLR 269 (Kirby P).

⁵²⁴ TG Youdan, ‘Acquisition of Property by Killing’ (1973) 89(2) *Law Quarterly Review* 235, 240.

⁵²⁵ *Permanent Trustee Co Ltd v Freedom from Hunger Campaign* (1991) 25 NSWLR 140, 154.

⁵²⁶ Professor Prue Vines, Submission No 1 to Victorian Law Reform Commission, *The Forfeiture Rule* (5 May 2014) 2.

unconscionability, appropriate behaviour and moral culpability. It is not rigid, but must compete with other principles of the modern age.⁵²⁷

3.5.25 Further, the abhorrence of the crime is already reflected in the punishment provided by the criminal justice system, with the denial of the inheritance becoming an additional punishment.

3.5.26 Applications are rarely seen in court, evident from the relative absence of Australian cases.⁵²⁸ However, the prevalence of unlawful killings and the complex moral questions they raise places a heavy onus upon the courts which, when bound by precedent, are ill-equipped to adapt rigid rules into a modern context. Unlike in the criminal context, the courts have been attempting to address this dilemma with no legislative guidance.

3.5.27 The application of the forfeiture rule to situations where there is reduced culpability is particularly problematic and produces harsh results.⁵²⁹ While there are clear examples where judges have refused to apply the rule in response to decreased culpability,⁵³⁰ the balance of authority suggests that the rule strictly applies to unlawful killings on the basis that all such killings are contrary to public policy. As such, if an unlawful killing falls within the scope of the forfeiture rule, it applies regardless of the degree of the 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 in terms of an offender's succession rights.⁵³¹ This automatic and inflexible application of the rule which is at odds with changes in community attitudes,⁵³² is 'reflected in the greater range of criminal offences and sentence options today compared to when the rule was first articulated'.⁵³³

3.5.28 A killer found guilty of manslaughter is subject to the rule, irrespective of the unique circumstances of the offender and/or the unlawful death.⁵³⁴ The Tasmania Law Reform Institute compared the application of the forfeiture rule to a fine of strict liability:

[T]he problem with the forfeiture rule is that it operates as an indiscriminate fine, with none of the checks and balances that control sentences (including fines) handed down by the courts ... and

⁵²⁷ Anthony Dillon, 'When Beneficiary Slays Benefactor: The Forfeiture "Rule" Should Operate as a Principle of General Law' (1998) 6(3) *Australian Property Law Journal* 254, 254.

⁵²⁸ However, it is likely that most cases where the rule could arise never reach a court. The number of cases to come before a court does not accurately reflect the instances the rule arises in practice

⁵²⁹ Nicola Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia.' (2002) 31(1) *Common Law World Review* 1, 3.

⁵³⁰ See, for example, *Public Trustee v Evans* (1985) 2 NSWLR 188; *Permanent Trustee Co Ltd v Freedom from Hunger Campaign* (1991) 25 NSWLR 140; *Re Keitley* [1992] 1 VR 583.

⁵³¹ Further, the application of the forfeiture rule is two tiered and can also have unfair consequences for third parties, affecting their rights to take a forfeited benefit.

⁵³² Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 9.

⁵³³ Ibid ix; Professor Prue Vines, Submission No 1 to Victorian Law Reform Commission, *The Forfeiture Rule* (5 May 2014) 2 highlighted these social changes in her submission, where she stated "In the 18th century, the death penalty was notoriously available for about 300 crimes ... Today we distinguish culpability for murder from manslaughter etc and views about the level of culpability have changed over time ... Assisting a suicide is also regarded as far less culpable, particularly when there is a terminal illness involved, than it was in the past."

⁵³⁴ *Public Trustee v Fraser* (1987) 9 NSWLR 433.

the extent of the detriment that the killer suffers as a result of the forfeiture rule is no way linked to the heinousness of their crime.⁵³⁵

3.5.29 The strict application of the rule, ‘whilst paying due regard to human life, can itself result in serious injustice in circumstances where, although the killer has been convicted of manslaughter, there are strong ameliorative factors involved in the killing’.⁵³⁶ For instance, in *Troja*,⁵³⁷ a victim of family violence who was convicted of manslaughter on the basis of diminished responsibility after killing her abusive husband, was subsequently prevented from benefitting under her husband’s will by virtue of the rule.

3.5.30 Hamilton LJ in the English case of *Re Hall*⁵³⁸ articulates this clearly in rejecting a distinction between the operation of the rule in cases of murder and manslaughter:

the distinction seems ... to encourage what, I am sure, be very noxious — a sentimental speculation as to the motives and degree of moral guilt of a person who has been justly convicted and sent to prison.⁵³⁹

3.5.31 Meanwhile in Australia, Meagher JA in *Troja* rejected the inclusion of unconscionability into the test:

The law as laid down in *Cleaver’s* case is that all felonious killings are contrary to public policy and hence, one would assume, unconscionable. Indeed, there is something a trifle comic in the spectacle of Equity judges sorting felonious killings into conscionable and unconscionable piles.⁵⁴⁰

3.5.32 These both seem to suggest the rule does not involve consideration of the moral culpability of the offender, but also that it should not.

3.5.33 The majority judgment in *Edwards v State Trustees Limited*⁵⁴¹ outlines the preferred approach, by suggesting that application of the principle relied on the nature of the crime. Whelan JA stated:

Cases of murder are straightforward and would always result in the offender being precluded.

Cases of manslaughter have to be considered on a case-by-case basis. The issue is: does the criminal culpability of the offender require that he or she should not be entitled to take a benefit arising from the death?⁵⁴²

⁵³⁵ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 16.

⁵³⁶ Ken Mackie, ‘The Troja Case: Criminal Law, Succession and Law Reform’ (1998) 5(1–2) *Canberra Law Review* 177, 188.

⁵³⁷ *Troja v Troja* (1994) 33 NSWLR 269.

⁵³⁸ [1914] P 1.

⁵³⁹ *Re Hall* [1914] P 1, 7.

⁵⁴⁰ *Troja v Troja* (1994) 33 NSWLR 269, 299.

⁵⁴¹ (2016) 257 A Crim R 529.

⁵⁴² *Edwards v State Trustees Limited* (2016) 257 A Crim R 529, 546 [66].

3.5.34 The discussion of criminal culpability, in contrast to moral culpability,⁵⁴³ is logical given the argument relies on ‘coherence with the criminal law’.⁵⁴⁴ However, *Edwards* highlights the uncertainty surrounding the rationale, application, and scope of the rule, given its apparent blatant contradiction with *Troja*. The majority in *Troja* established a blanket rule regarding manslaughter, which has been criticised as not appropriately considering that mitigating factors may arise from this variety of circumstances.⁵⁴⁵

3.5.35 Various commentators and law reform bodies have argued that the common law forfeiture rule requires a consideration of the level of culpability of the killer in the modern era, particularly in the context of victims of family violence.⁵⁴⁶ It is perceived to be unfair and harsh to deprive a victim of family violence if they have acted in a manner which society does not morally condemn.⁵⁴⁷ But, given the ‘infinite variety of circumstances which can lead to homicide’,⁵⁴⁸ the forfeiture rule requires flexibility to deal with the cases in which it does.

3.5.36 The New Zealand Law Commission identified that:

The abhorrence attaching to profiting from intentionally killing does not extend to accidental killing; ... as the adjective ‘negligent’ suggests, the law of succession, whatever it terms, can provide no conceivable incentive for killings by negligence (rather than conscious) act or omission.⁵⁴⁹

3.5.37 Professor Prue Vines highlights that the continued harsh application of the rule does not reflect modern perceptions of culpability:

In the 18th century, the death penalty was notoriously available for about 300 crimes ... Today we distinguish culpability for murder from manslaughter etc and views about the level of culpability have changed over time.⁵⁵⁰

Uncertainty about the Effect of the Rule

3.5.38 The forfeiture rule has drastic effect: ‘It results in the killer being disbarred from taking any benefit from the estate of the deceased, irrespective of the source of the right.’⁵⁵¹ Where it applies, the forfeiture rule extends the loss of ‘inheritance’ to property that does not belong to the deceased at death, such as rights of survivorship by reason of a joint tenancy,⁵⁵² proceeds of life insurance payable

⁵⁴³ Some parties in consultation, consistent with case law and academic commentary, preferred the term ‘moral culpability’ of the offender. The term ‘moral culpability’ is useful but it was pointed out to SALRI that the inclusion of the word ‘moral’ is problematic and subjective and may prove unnecessarily distracting. SALRI therefore favours the expression ‘culpability’.

⁵⁴⁴ *Edwards v State Trustees Limited* (2016) 257 A Crim R 529, 546 [66].

⁵⁴⁵ Ken Mackie, ‘The Troja Case: Criminal Law, Succession and Law Reform’ (1998) 5(1–2) *Canberra Law Review* 177, 181.

⁵⁴⁶ See, for example, Carla Spivack, ‘Killers Shouldn’t Inherit from Their Victims: Or Should They?’ (2013) 48(1) *Georgia Law Review* 145, 148–149; Nicola Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31(1) *Common Law World Review*, 1.

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Troja v Troja* (1994) 33 NSWLR 269, 284.

⁵⁴⁹ New Zealand Law Commission, *Succession Law: Homicidal Heirs* (Report No 38, 15 July 1997) 5.

⁵⁵⁰ *Re Hall* [1914] P 1, 2.

⁵⁵¹ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 5.

⁵⁵² *Rasmanis v Jurewitsch* (1970) 70 SR (NSW) 407; *Re Stone* [1989] 1 Qd R 351.

by reason of the deceased's death,⁵⁵³ a pension payable pursuant to legislation⁵⁵⁴ and a death benefit payable by a superannuation fund.⁵⁵⁵ The rule ensures that the killer obtains no benefit under the deceased's will and a specific gift to the killer will fall into the residuary estate.⁵⁵⁶

3.5.39 Where a court is satisfied that an individual is responsible for the unlawful death, the forfeiture rule can override express words in wills,⁵⁵⁷ contracts⁵⁵⁸ and even legislation.⁵⁵⁹ Although a simple proposition, there are 'complexities in the way in which the principle may be given effect.'⁵⁶⁰

3.5.40 In South Australia, there is no law that codifies or sets out the effect of the forfeiture rule on the killer and others or the destination of the victim's property under the forfeiture rule. There is a body of case law which provides some guidance as to the effect of the forfeiture rule and while the law is clear that the killer cannot benefit from the killing, the law is unclear as to the effect of the forfeiture rule on third parties and on who then becomes the beneficial owner of the deceased victim's property.

3.5.41 There is yet to appear a consistent basis for explaining the reason a person benefits where the offender's interest is forfeited. It was put this way in *Re Settree Estates*; *Robinson v Settree*:

The modern forfeiture rule lacks the clarity of focus ... it focuses attention on a killer's loss of benefits without certainty as to who, incidentally, acquires forfeited benefits. This is a problem inherent in the operation of the modern rule — determination of how far the rule operates derivatively and who takes the benefit of property the subject of a forfeiture.⁵⁶¹

3.5.42 This problem led the VLRC to observe:

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.⁵⁶²

The Need for Legislative Reform

3.5.43 SALRI considers that the forfeiture rule is in need of clarification and reform. The famed words of Winston Churchill are apt to characterise the current unclear and imprecise extent and application of the forfeiture rule as 'a riddle wrapped in a mystery inside an enigma'.⁵⁶³

⁵⁵³ *Amicable Society for a Perpetual Life Assurance Office v Bolland* (1830) 2 Dow & Clark 1; 6 ER 630; *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147.

⁵⁵⁴ *R v Chief National Insurance Commissioner, Ex Parte Connor* [1981] QB 758; *Re Field and Commonwealth of Australia* (1983) 5 ALD 571.

⁵⁵⁵ *Public Trustee of New South Wales v Fitter* [2005] NSWSC 1188.

⁵⁵⁶ *Re Dellow's Will Trusts* [1964] 1 All ER 771.

⁵⁵⁷ See *Troja v Troja* (1994) 33 NSWLR 269.

⁵⁵⁸ See *Cleaver v Mutual Reserve Fund Life Assurance* [1892] 1 QB 147.

⁵⁵⁹ See *Re Royse (dec'd)* [1985] Ch 22.

⁵⁶⁰ *Pike v Pike* [2015] QSC 134, [16] (Atkinson J); Ian Williams, 'How does the Common Law Forfeiture Rule Work?' in Birke Hacker and Charles Mitchell (eds), *Current Issues in Succession Law* (Bloomsbury, 2016) 51.

⁵⁶¹ [2018] NSWSC 1413, [26] citing *Public Trustee v Hayles* (1993) 33 NSWLR 154. See also *Egan v O'Brien* [2006] NSWSC 1398.

⁵⁶² Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) x.

⁵⁶³ Darryl Brown and Ruth Pollard, 'Where From and Where To With the Forfeiture Rule' (2018) 148 *Precedent* 14.

3.5.44 In several jurisdictions, reform of the common law forfeiture rule has occurred, both by judicial and legislative methods. Judicial efforts have focused on modifying the rule itself.⁵⁶⁴

3.5.45 As a judge-made rule, developed from public policy,⁵⁶⁵ it is possible to argue any reform of the forfeiture rule can, and maybe should, be left to the judiciary.⁵⁶⁶ Hamilton and Sheehy contend:

[I]t is the responsibility of the courts to re-fashion a rule reflective of public policy. The systemic barriers to justice presented by the criminal law make it essential that the judiciary in the civil law context does not abdicate its duty to rework and update legal principles in accordance with modern conceptions of justice and a more enlightened understanding of abused women. It is hardly fair to rely on the need for legislative change, when that route is frequently precarious, lags well behind community attitudes, and its results are patchy.⁵⁶⁷

3.5.46 In *Edwards*,⁵⁶⁸ a woman pleaded guilty to defensive homicide on the basis of excessive self-defence to the death of her abusive husband in the context of a prolonged history of family violence.⁵⁶⁹ Mrs Edwards' counsel, Mr Panna QC, noted 'the very low moral culpability'⁵⁷⁰ of Mrs Edwards and contended that it was open, if not necessary, for a court to be able to adjust or modify the operation of the forfeiture rule in such a case:

Because it is a judge-made rule grounded in public policy, it was submitted that the rule could not be static, for public policy changes over time ... public policy must reflect changes in society's values and morality. Though it once may have been against public policy to allow someone to take a benefit from a victim of homicide in all cases, society's values have now shifted to the point that this is no longer the case. Mr Panna submitted that it was an 'extraordinary proposition' that a judge made rule of public policy should have somehow ossified into an inflexible rule of law that could only be amended by legislation, as occurred in the United Kingdom and NSW.⁵⁷¹

3.5.47 However, other cases such as *Soukup*⁵⁷² and *Troja*,⁵⁷³ questioned whether it is appropriate for an individual judge to 'indulge in judicial legislation'⁵⁷⁴ and determine and set the limits of public policy, and that if the application of the rule should be qualified or changed, this is an issue for Parliament.⁵⁷⁵

⁵⁶⁴ See, for example, *Gray v Barr* [1971] 2 QB 554; *Public Trustee v Evans* (1985) 2 NSWLR 188; *Permanent Trustee Co Ltd v Freedom from Hunger Campaign* (1991) 25 NSWLR 140.

⁵⁶⁵ See above Part 2.

⁵⁶⁶ See, for example, *Public Trustee v Evans* (1985) 2 NSWLR 188, 192; Chris Triggs, 'Against Policy: Homicide and Succession to Property' (2005) 68(1) *Saskatchewan Law Review* 117, 118; Phillip H Kenny, 'Forfeiture Act 1982' (1983) 46(1) *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, 128–30.

⁵⁶⁷ Barbara Hamilton and Elizabeth Sheehy, 'Thrice Punished: Battered Women, Criminal Law and Disinheritance' (2004) 8 *Southern Cross University Law Review* 96, 128–129.

⁵⁶⁸ *State Trustees Ltd v Edwards* [2014] VSC 392 (McMillan J).

⁵⁶⁹ It should be noted that the violence was mutual.

⁵⁷⁰ *Ibid* [17].

⁵⁷¹ *Ibid* [34]–[35].

⁵⁷² *Re Estate of Soukup* (1997) 97 A Crim R 103, 114.

⁵⁷³ *Troja v Troja* (1994) 33 NSWLR 269.

⁵⁷⁴ *Re Estate of Soukup* (1997) 97 A Crim R 103, 114.

⁵⁷⁵ See also *Edwards v State Trustees Limited* (2016) 257 A Crim R 529, 588 [190] (Santamaria J).

3.5.48 The limitations and restraints of the judicial law reform method are well known.⁵⁷⁶ Courts do change the law (sometimes in a fundamental way)⁵⁷⁷ but they are ‘neither a legislature nor law reform agency’ as Mason J has outlined:

I do not doubt that there are some cases in which an ultimate court of appeal can and should vary or modify what has been thought to be a settled rule or principle of the common law on the ground that it is ill-adapted to modern circumstances. If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court’s facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or enquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature.⁵⁷⁸

3.5.49 Previous attempts at judicial reform have also proved unsuccessful. For example, as has been described, the majority view in *Troja* simply swept aside consistent efforts throughout the 1980s to incorporate an element of flexibility and notions of unconscionability.⁵⁷⁹

3.5.50 There have been judicial calls for legislative reform of the rule.⁵⁸⁰ In *The Public Trustee of Queensland v The Public Trustee of Queensland*,⁵⁸¹ de Jersey CJ noted the statutory reform in the NSW and ACT ‘to ameliorate what was perceived to be harshness in the otherwise necessary rigid application of the forfeiture rule’ and stated ‘if there is to be any change in that arena, it is a matter of high public policy appropriate for consideration by the legislature, not determination by the courts.’⁵⁸²

⁵⁷⁶ See, for example, Anthony Mason, ‘Law Reform in Australia’ (1971) 4(2) *Federal Law Review* 197, 202–3; Anthony Mason, ‘Law Reform and the Courts’ in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 314.

⁵⁷⁷ See, for example, *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

⁵⁷⁸ *State Government Insurance Commission v Trignell* (1979) 142 CLR 617, 633–4. See also at 628–9 (Stephen J). Kirby J has also acknowledged that the path of judicial reform is ‘highly problematic [as] it depends on many chance factors. These include: the presentation of a suitable case and the imagination of bold advocates; the composition and inclinations of the appellate court constituted to hear the case; the willingness of the judges to face down complaints and criticisms of “judicial activism”; the inclination of the judges to overcome suggested problems of funding and costs; and the capacity to confine the issues for decision to manageable proportions’ Michael Kirby, ‘Changing Fashions and Enduring Values in Law Reform’ (Speech, Conference on Law Reform on Hong Kong: Does it Need Reform?, University of Hong Kong, 17 September 2011) <<http://www.alrc.gov.au/news-media/2011/changing-fashions-and-enduring-values-law-reform>>.

⁵⁷⁹ *Troja v Troja* (1994) 33 NSWLR 269, 299.

⁵⁸⁰ See, for example, *Re Estate of Soukup* (1997) 97 A Crim R 103, 118; *Pike v Pike* [2015] QSC 134, [25].

⁵⁸¹ [2014] QSC 47.

⁵⁸² *Ibid* [13], [20].

3.5.51 Kourakis CJ, of the Supreme Court of South Australia, told SALRI that he favoured legislative, as opposed to judicial, reform of the forfeiture rule:

The authorities on the content and application of the forfeiture rule make plain that it is policy based. That provides reason in itself not to leave the future development of the rule, and any exceptions to it, to the common law with the attendant cost and uncertainty, but, rather to consider legislating ... That is to say, who should be caught by the rule and who should not, are questions for the executive and legislative branches of government, not the judicial.

3.5.52 With any reform of the forfeiture rule failing to be addressed by the National Committee for Uniform Succession Laws, Ken Mackie also suggested that ‘jurisdictions would be best to turn to legislative action to address this problem’.⁵⁸³ Professor Dal Pont considered that the present common law rule is infected with such uncertainty seeming rigidity that statutory intervention is necessary).

3.5.53 SALRI agrees with the views of de Jersey CJ, Kourakis CJ and Professor Dal Pont and Mr Mackie of the University of Tasmania. Any reform of something as complex as the forfeiture rule is better left for Parliament than the courts. This Report considers that it is timely and appropriate for legislative intervention of some sort.

Eroding the Public Policy Ideal

3.5.54 The main argument raised by those against reform of the rule is that this may erode its simple and effective rationale, to prevent an unlawful killer from benefitting from their crime. Arguably no reform should be made to reduce the sanctions provided by the law against unlawful homicide. Advocates state that taking a human life is the worst crime, and as such should still be treated with an absolute abhorrence. As Justice Cardozo expressed, the ‘social interest served by refusing to permit the criminal to profit by his crime is greater than that which is served by the preservation and enforcement of legal rights of ownership.’⁵⁸⁴

3.5.55 Further, morality is a difficult thing to define in any law. Giving a discretionary power to alter the rule risks the social acceptance of behaviours still prohibited by law, and could create legal uncertainty, resulting in more disputes and applications to the judiciary, rather than creating clarity.⁵⁸⁵ One experienced Adelaide civil lawyer, for example, told SALRI, that the forfeiture rule should remain in its current form and any judicial discretion to moderate the rule, no matter how tightly defined, will inevitably lead to ‘judicial tinkering’ and the erosion of the rationale of the rule and produce uncertainty.

3.5.56 Finally, the change would have very little practical effect. As seen in jurisdictions which have introduced new laws, very few cases have actually come before the courts and asked for judicial discretion in relation to assisted suicides, euthanasia and suicide pacts.⁵⁸⁶ It may be said that the

⁵⁸³ Ken Mackie, ‘The Troja Case: Criminal Law, Succession and Law Reform’ (1998) 5(1–2) *Canberra Law Review* 177, 201.

⁵⁸⁴ Benjamin Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 43.

⁵⁸⁵ While acknowledging the moral complexity of such a statement, this will not be explored in this paper.

⁵⁸⁶ However, the number of cases to come before a court does not accurately reflect the instances the rule arises in practice. ‘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. The majority of forfeiture rule cases also settle before litigation’: Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 23 [3.39].

parliamentary time, contention and energy debating and passing any such laws which could erode such a strongly held principle, would be for a change which would have virtually no application.

3.5.57 Although the results have sometimes been harsh, inconsistent and occasionally even irrational, the forfeiture rule has a sound underlying rationale. It remains crucial that an unlawful killer should not benefit or profit from his or her crime. SALRI considers that any reform must address the anomalies and concerns associated with the rule but without unduly eroding or undermining the fundamental principle that an unlawful killer should not benefit or profit from his or her crime. Other jurisdictions have tried to balance these competing concerns through implementing two different models: discretionary,⁵⁸⁷ that is providing the courts with a wide power to consider a case's individual circumstances and modify the rule where appropriate for manslaughter (though not murder); and codification,⁵⁸⁸ that is completely legislating the once common law rule and including fixed categories of unlawful killings as exceptions to the rule's operation.

3.5.58 There has not been much judicial application of the rule, in any context. In adversarial systems, the prosecuting lawyer possesses wide discretion in the exercise of their role and serves the community in the spirit of fairness as a 'minister of justice'.⁵⁸⁹ The commission of an offence is not of itself sufficient to lead to prosecution.⁵⁹⁰ Prosecutors must have regard to whether there is a reasonable prospect of conviction and if a prosecution is in the public interest. Prosecutors in Australia are constrained by professional guidelines which, while not explicitly mentioning assisted suicide, euthanasia or suicide pacts, require a prosecution to be only brought if it is in the public interest.⁵⁹¹ However, commentary suggests that there has been a marked lack of publicly compassionate non-prosecution compared to what has been seen in other jurisdictions.⁵⁹²

3.5.59 Another reason for the lack of cases applying the forfeiture rule may include a deficiency in education about an eligible person's right to make an application, or a lack of personal will to make such an application in these circumstances.

3.5.60 Finally, it can be opined that there may simply be a lack of cases where this principle may apply. However, this theory is unlikely. As the Tasmania Law Reform Institute commented, while there has not been an application made within their jurisdiction, there have been many situations where an application could have been made but did not arise.⁵⁹³

⁵⁸⁷ See, for example, *Forfeiture Act 1991* (ACT), *Forfeiture Act 1995* (NSW), *Forfeiture Act 1982* (UK). See generally, Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014); Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004).

⁵⁸⁸ See, for example, *Succession (Homicide) Act 2007* (NZ).

⁵⁸⁹ See generally David Plater and Lucy Line, 'Has the "Silver Thread" of the Criminal Law Lost its Lustre? The Modern Prosecutor as a Minister of Justice?' (2012) 31(2) *University of Tasmania Law Review* 55.

⁵⁹⁰ Ben White and Jocelyn Downie, 'Prosecutorial Guidelines for Voluntary Euthanasia and Assisted Suicide: Autonomy, Public Confidence and High Quality Decision-Making' (2012) 36(2) *Melbourne University Law Review* 656, 660.

⁵⁹¹ *Ibid* 662.

⁵⁹² *Ibid* 701. In England, the CPS has comprehensive specific guidelines relating to prosecution for assisted suicide. For example, the offending wife in *Ninian v Findlay* [2019] EWHC 297 (Ch) was not prosecuted.

⁵⁹³ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004). SALRI has heard in consultation that in many cases the parties do not challenge the operation of the forfeiture rule. The forfeiture rule is likely to arise far more often in practice than the limited number of cases that formally appear in a civil court. See, for example, Sean Frewster, 'Grant Dansie fights father and convicted murderer Peter Rex Dansie in court to safeguard mother's legacy', *The Advertiser* (online, 27 February 2020),

3.5.61 The prevailing counterargument to the approach proposed above is the attitude adopted by the majority in *Troja v Troja*; namely that there is

no difference where the killing is held to be manslaughter and not murder. The relationship between the killing and the claim to the benefit from it is direct. It is the killing which has brought about the operation of the will.⁵⁹⁴

3.5.62 The Crime Victims Support Association has advocated for the continued application of the strict rule, on the basis that all forms of killing are abhorrent:

When the crime is defined as not premediated, such as culpable driving, negligence, recklessness or dangerous acts of omission, it is still a crime and the perpetrator or his surviving family deserves not to profit from it, and even then, can we ever be absolutely sure that there was no premeditation when an inheritance was on offer? Was the car crash simply an accident or did the driver know he was exceeding a safe speed?⁵⁹⁵

3.6 Consultation Data Overview: Is There a Need for Reform?

3.6.1 The strong, though not universal, view that emerged in SALRI's consultation is that, whilst the rationale of the forfeiture rule is sound, there are major problems and concerns in the scope and operation of the common law rule and legislative reform is necessary.

3.6.2 The prevailing view expressed by the experts at SALRI's Adelaide Roundtables was that, while the public policy justification of the forfeiture rule is sound and continues to be valid, the common law rule as it presently applies in South Australia operates unfairly and is in need of legislative reform. It was agreed that the rule is 'outdated' and 'antiquated'. The primary concern expressed with the common law rule is that it is too inflexible, and that in certain limited circumstances it is inequitable and unjust. The rule may have unintended consequences, by depriving benefits to either the perpetrator or children of the perpetrator that the victim(s) would not have wished to occur (assuming it is possible to reasonably identify those wishes). There was perceived to be a need for a general judicial discretion to moderate or avoid the rule in appropriate instances.

3.6.3 The general view expressed was that the common law rule should not remain in South Australia and that a new law should be introduced to define the scope and operation of the rule. A number of the attendees identified their main concern as being the forfeiture rule's application in family violence situations. In particular, attendees identified the situation where a woman in a long-term abusive relationship is convicted (often pleading guilty)⁵⁹⁶ of manslaughter of her violent and abusive spouse, and where the victim of the abuse should not be 'punished again' by being precluded from inheriting.

<https://www.adelaidenow.com.au/truecrimeaustralia/police-courts/grant-dansie-fights-father-and-convicted-murderer-peter-rex-dansie-in-court-to-safeguard-mothers-legacy/news-story/caa5d7f0e8f02e07ca17b2cf93620e3d>.

⁵⁹⁴ (1994) 33 NSWLR 269, 278–9 (Mahoney JA).

⁵⁹⁵ Crime Victims Support Association, Submission No 8 to Victorian Law Reform Commission, *The Forfeiture Rule* (1 May 2014) 2.

⁵⁹⁶ Barbara Hamilton and Elizabeth Sheehy, 'Thrice Punished: Battered Women, Criminal Law and Disinheritance' (2004) 8 *Southern Cross University Law Review* 96, 104, 108–9. Many female victims of family violence who kill an abusive spouse, pragmatically plead guilty to manslaughter (even if they may have a viable defence such as self-defence) for fear of been convicted of murder should their case go to trial.

3.6.4 One attendee at an Adelaide Roundtable argued that the common law forfeiture rule should be wholly abolished. Her primary concern was that the rule is anachronistic, old fashioned law society has become more sophisticated in thinking about culpability and guilt since the moralistic time of *Cleaver* and *Hall*.⁵⁹⁷ Her view was that the ‘whole thing should just be put in the bin’ and that it is a ‘sledgehammer rule’ that ‘comes from a very different kind of society.’ The general view expressed at the Adelaide roundtables was that abolishing the forfeiture rule altogether was not appropriate and was going too far.

3.6.5 Strong support was also expressed by attendees at the Mount Gambier Roundtable for relaxation of the current forfeiture rule. However, this was not the unanimous view. The majority view noted that social attitudes have evolved since the late 19th century when the rule was first articulated in *Cleaver* and later extended in *Hall*. There is now a broad recognition that not all acts by a person resulting in the unlawful death of another person are morally equivalent. It was also acknowledged that views on related questions of law reform, such as whether or not euthanasia should be legalised, will differ markedly within and between communities. Similarly, while most would concede that suicide pacts or ‘mercy killings’ of terminally ill or severely disabled loved ones are materially different from intentional homicide, many would still see all of those acts to be morally unjustifiable.

3.6.6 One experienced Mount Gambier lawyer was in favour of maintaining the status quo. He based this view on his concern that ‘once the door is opened, even with a thin wedge, the press of applicants opens it ever wider’. He likened this type of reform to the changes to worker’s compensation law which he recalls have ‘gone through four major changes in my career, mostly to reverse the kindness or soft-heartedness of a judge(s)’.

3.6.7 A similar view was powerfully advanced to SALRI by an experienced Adelaide civil lawyer who argued that the forfeiture rule should be retained for both murder and manslaughter without any scope for flexibility. The lawyer stated that the rationale of the forfeiture rule remains valid and accords with public values and expectations. The lawyer was especially opposed to the suggestion of providing a judicial discretion, even if limited, to moderate the rule. The lawyer highlighted that the effect of any discretion will be that judges ‘will tinker and interfere’. The lawyer drew on the unsatisfactory experience of family provision laws where the lawyer noted that testamentary freedom has been undermined by courts who may well uphold greedy and speculative claims by often financially secure relatives with a sense of entitlement. The lawyer explained that underserving family provision claims are now routinely settled out of court with costs out of the estate as it is seen as too costly and risky for a claim to proceed to trial. SALRI notes in passing that these views as to the operation of family provision claims accords with SALRI’s previous research and consultation.⁵⁹⁸ The lawyer expressed

⁵⁹⁷ See also above Part 2.

⁵⁹⁸ SALRI, ‘*Distinguishing Between the Deserving and the Undeserving: Family Provision Laws in South Australia*’ (Report No 9, December 2017). There were a small number of submissions in SALRI’s consultation expressing concern about the potential costs in forfeiture modification cases involving the exercise of any judicial discretion. The cost issues involved in family provision cases where ‘greedy or opportunistic’ claims are made and ‘disproportionate costs’ are incurred were raised and there was concern that the same concerns may arise in forfeiture modification cases if an element of judicial discretion is permitted. It was feared that even undeserving claims would be settled, with costs coming out of the deceased estate. Cases to determine whether the forfeiture rule applies are likely to prove 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 solicitor’s fees, obtaining counsel’s opinion and filing fees amount to approximately \$10,000 to \$15,000: Submission 13 (Elder Law and Succession Committee of the Law Society of New South Wales). It is likely that forfeiture modification cases involving the exercise of any judicial discretion will prove even more costly. There is a strong public interest in

their fear to SALRI that the experience of family provision claims would translate to claims arising from an unlawful death and claims by unlawful killers would either be routinely granted by courts or routinely settled owing to the cost and uncertainty in outcome in a claim proceeding to trial.

3.6.8 The Law Society of South Australia considered the forfeiture rule should remain in South Australia. However, it was suggested that further clarity around the rule is required and that could be achieved by way of codification.

3.6.9 The Law Society of NSW advocated to SALRI for reform of the forfeiture rule, noting their concern of uncertainty as to the scope of the rule.

3.6.10 Dr Andrew Hemming also expressed his concern to SALRI with respect to the uncertainty surrounding the scope of the rule, but said that the real challenge is in specifying the exclusions to the rule without opening up ‘Pandora’s box’. Dr Hemming was opposed to the notion of judicial discretion as a solution, viewing this as leading to uncertainty and judicial inconsistency.⁵⁹⁹ He told SALRI such a solution will produce a ‘wilderness of single instances’.

3.6.11 STEP’s submission described the central problem with the common law rule as being ‘something of a “blunt instrument” which does not allow for any degree of nuance to take into account the particular circumstances of the case, and as such is liable to lead to injustice’. STEP argued to SALRI that social attitudes have evolved since the late 1800s when the rule was first articulated, and there is now a broad recognition that not all acts by a person resulting in the death of another person are morally equivalent. The examples given include those that commonly appear in existing legislation and law reform recommendations. However, STEP noted that it is equally clear that views on related questions of law reform, such as whether or not euthanasia should be legalised, will differ markedly within and between communities. Similarly, while most would concede that suicide pacts or ‘mercy killings’ of terminally ill or severely disabled loved ones are materially different from intentional homicide, many would still see all of those acts to be morally unjustifiable.

3.6.12 STEP noted that, although the factual circumstances in which forfeiture must be considered are relatively infrequent, the benefits of reform which provides a more structured and transparent basis for the forfeiture rule to operate are felt beyond those caught up in these matters and the legal professionals advising them. The submission notes that reform aimed at providing certainty and clarity in the law will benefit society as a whole by reducing costs incurred and court resources consumed and that the system of law overall will benefit from public perceptions of comprehensibility and congruence with societal norms.

promoting access to justice and discouraging speculative lawsuits and in addressing high legal costs, including in forfeiture matters. However, SALRI’s research and consultation did not find evidence that the well documented concerns regarding ‘greedy or opportunistic’ claims and/or ‘disproportionate costs’ that arise in family provision cases have also arisen in forfeiture modification cases under the NSW or ACT Acts. Accordingly, SALRI has not made any specific recommendations in this report to change the usual civil proceeding rules with respect to costs, though it reiterates the suggestions it has previously made in relation to costs in family provision claims. See further SALRI, *‘Distinguishing Between the Deserving and the Undeserving’: Family Provision Laws in South Australia* (Report No 9, December 2017) 89–110.

⁵⁹⁹ See also Andrew Hemming, ‘Killing the Goose and Keeping the Golden Nest Egg’ (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342.

3.7 SALRI's Observations and Conclusions

3.7.1 SALRI is of the view that the rationale for the forfeiture rule remains sound and accords with public policy and current concepts of morality and justice and it should be preserved in one form or another. As Hemming notes, there is 'no blunder in a law which forbids a person to take a benefit from her own wrong'.⁶⁰⁰ As a basic premise, offenders should not benefit or profit from their crimes.⁶⁰¹ This especially applies to crimes as serious as an unlawful homicide. SALRI accepts that arguments that the forfeiture rule should remain absolute are not untenable. There is a risk that diluting the forfeiture rule may result in unsatisfactory outcomes and 'undeserving' unlawful killers profiting from their crimes.

3.7.2 However, SALRI is of the view that the application of the rule in South Australia as it was formulated in the late 1800s and early 1900s England does not reflect contemporary public policy or social values. The present rule is too rigid and inflexible and there is a real risk of the rule applying harshly to certain unlawful killers whose culpability is less than other unlawful killers. The development of the forfeiture rule as an absolute and inflexible rule has resulted in its application in a manner inconsistent with contemporary values and attitudes. One notable example is where a victim of family violence kills an abusive spouse after a prolonged history of family violence. It has been suggested that courts could, and should, modify the rule incrementally, in order to achieve just outcomes in individual matters.⁶⁰² However, legislative reform and clarification will provide a far more comprehensive and effective response, rather than a piecemeal and incomplete development of the common law that will likely lead to continued inconsistencies and a high degree of uncertainty in application.

3.7.3 SALRI considers that the preferable solution is legislative reform, as to leave the rule in its current state would not resolve the confusion regarding its scope rule or address the legitimate concerns over its apparent strict application as well as the uncertainty about the practical effects of the rule. Overall the aim of the reform should be to allow for consideration of individual circumstances in an appropriate instance of reduced culpability, while ensuring that the underlying principle that an unlawful killer should not benefit from their crime is not unduly diminished or eroded.

3.7.4 The recommendations made by SALRI in this Report seek to formulate a scheme which will address practical issues of clarity and certainty and recognise the need for discretion in order to respond to cases of reduced culpability.

⁶⁰⁰ Ibid 343.

⁶⁰¹ See also *Criminal Assets Confiscation Act 2005* (SA). The preamble to the Act provides: 'An Act to provide for the confiscation of proceeds and instruments of crime; to provide for the confiscation of property of certain drug offenders as an additional punishment for their offending; and for other purposes.

⁶⁰² Barbara Hamilton and Elizabeth Sheehy, 'Thrice Punished: Battered Women, Criminal Law and Disinheritance' (2004) 8 *Southern Cross University Law Review* 96, 127–9; Chris Triggs, 'Against Policy: Homicide and Succession to Property' (2005) 68(1) *Saskatchewan Law Review* 117, 118; Anthony Dillon, 'When Beneficiary Slays Benefactor: the Forfeiture 'Rule' Should Operate as a Principle of the General Law' (1998) 6(3) *Australian Property Law Journal* 1, 2, 6; Nicola Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31(1) *Common Law World Review* 1, 3.

3.7.5 Recommendations

Recommendation 1

SALRI notes that the underlying rationale of the forfeiture rule in relation to unlawful homicide remains sound and therefore recommends that the rule should be preserved in one form or another in South Australia.

Recommendation 2

SALRI recommends that South Australia should introduce a standalone *Forfeiture Act* to respond to cases of reduced culpability in relation to unlawful homicide and address practical issues of clarity and certainty with respect to the effect of the present law.

Recommendation 3

SALRI recommends that the aim of the proposed *Forfeiture Act* should be to allow for consideration of individual circumstances, while ensuring that the underlying rationale of the forfeiture rule is not unduly diminished.

Part 4 - Models for Legislative Reform

4.1 Introduction

4.1.1 Two distinct models of legislative reform for the forfeiture rule have emerged: the discretionary model and the codification model. A third model of legislative reform is a hybrid model, which was recommended by the VLRC.⁶⁰³ These models will be discussed in turn below.

4.1.2 The discretionary approach acknowledges the common law rule but permits a court to modify its application in some cases of unlawful killings that do not amount to murder. Legislative reforms, for the most part, have adopted this model.⁶⁰⁴ The legislative models in the UK, ACT and New South Wales retain the common law rule but provide a court with the discretion to modify its application where it applies, allowing a court to ameliorate the effect of the rule where the court finds it is in the interests of justice to do so.⁶⁰⁵ This flexibility only arises to manslaughter. In relation to murder, the forfeiture rule remains rigid and there is no discretion to modify the rule.

4.1.3 The NSW Act goes further and overrules the common law position⁶⁰⁶ and permits a court to modify the application of the forfeiture rule, such as to permit a court to *apply the rule in a case where it would not apply under the common law*. This is limited to cases where the killer is found not guilty of murder by reason of mental impairment.

4.1.4 The Tasmania Law Reform Institute recommended new laws based on the NSW model by providing a discretion to a court to modify the effect of the rule (but not for murder). It also favoured including a greater level of guidance for a court to have regard to in deciding whether or not to exercise its discretion to avoid applying the forfeiture rule. The Tasmania Law Reform Institute also supported greater clarity with regard to the burden of proof and the disposal of disinherited assets.

4.1.5 The codification model involves enacting a statutory code which replaces the common law, but without permitting courts to modify the application of the rule in exercise of a discretion. Legislative reform in New Zealand has involved codifying the common law whilst providing some specific indemnities.⁶⁰⁷ The New Zealand law fully codifies the forfeiture rule, displacing all related rules of common law, equity, and public policy. Specific forms of unlawful homicide are wholly excluded from the effect of the rule, such as infanticide, those arising out of negligence, or pursuant to a suicide pact. There is no judicial discretion to modify the rule in other categories. The New Zealand approach also states the assets to which an unlawful killer is disentitled.

4.1.6 The hybrid model combines each of the discretionary and codification models. The VLRC in its 2014 Report supported a hybrid model combining aspects of the UK/NSW and New Zealand models. The VLRC proposals would define the scope and effect of the rule, with specific forms of homicide such as infanticide or causing death dangerous driving totally excluded from the rule. The VLRC would also include causing death by culpable driving within the rule. However, the VLRC proposals would also provide a discretion to a court to more broadly modify the rule in an appropriate

⁶⁰³ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 15.

⁶⁰⁴ *Forfeiture Act 1991* (ACT); *Forfeiture Act 1995* (NSW); *Forfeiture Act 1982* (UK).

⁶⁰⁵ *Forfeiture Act 1991* (ACT) s 3; *Forfeiture Act 1995* (NSW) s 5; *Forfeiture Act 1982* (UK) s 2.

⁶⁰⁶ *Forfeiture Act 1995* (NSW) s 11.

⁶⁰⁷ *Succession (Homicide) Act 2007* (NZ) s 4.

case, whilst setting out the factors to which a court is to have regard in deciding whether or not to exercise its discretion to avoid applying the rule. The VLRC supported retaining the rule in its absolute form for murder.

4.2 The Discretionary Model

4.2.1 The aim of a statute that seeks to *modify* the application of the forfeiture rule has been described as follows:

[N]ot to put on a statutory basis the rule of forfeiture itself but instead ... to provide a means for a court, in cases where there were strong mitigating circumstances, to allow the person who had carried out the killing to inherit.⁶⁰⁸

4.2.2 By contrast, it appears that the aim of a statute that seeks to *apply* the forfeiture rule where it otherwise would not apply under the common law is to ensure justice is done.

4.2.3 The UK, ACT and NSW Acts have sought either to permit modification of the application of the forfeiture rule and/or to permit it to be applied to cases of insanity or mental impairment (where the common law does not apply). The UK and ACT Acts are almost identical. The NSW Act (which includes provision for application of the rule to mental impairment cases) is more comprehensive but contains similarities to the earlier UK and ACT *Forfeiture Acts*.

England: *Forfeiture Act 1982* (UK)

4.2.4 Unlike in Australia, a line of authority developed in England to allow the courts some degree of flexibility where an unlawful death did not involve deliberate, intentional and unlawful violence or the threat of violence.⁶⁰⁹ However, whilst some flexibility was developed, it did not provide relief against the rule if the act was intentional but the killer had reduced moral culpability.⁶¹⁰ In 1982, out of 100 killings by people with no previous convictions, approximately 53 were found guilty of manslaughter on the basis of diminished responsibility and received custodial sentences.⁶¹¹ However the civil law had not kept abreast to develop similar concessions and the decisions in forfeiture often appeared at odds with developments in family relationship laws during the progressive 1970s.⁶¹² The English Law Commission failed to modify the forfeiture rule after a review of the *Inheritance (Provision for Family and Dependents) Act 1975* (UK), but a Private Members Bill in 1981 was successful in reform of the forfeiture rule.⁶¹³

⁶⁰⁸ *Tannock v Tannock* 2013 SLT (Sh Ct) 57, [35], describing the UK forfeiture legislation.

⁶⁰⁹ *Gray v Barr* [1971] 2 QB 554; *Re H (dec'd)* (1990) 1 FLR 441. Cf *Re Giles (dec'd)* [1972] Ch 544.

⁶¹⁰ *Gray v Barr* [1971] 2 QB 554, this test was followed by subsequent cases which approved this approach. See *R v Chief National Insurance Commissioner, Ex Parte Connor* [1981] QB 758 and especially *Re H (dec'd)* (1990) 1 FLR 441, in which Gibson J articulated the view that it is the nature of the act rather than the label attached to it which will determine whether public policy should deprive the killer.

⁶¹¹ Stephen Cretney, 'The Forfeiture Act 1982: The Private Member's Bill as an Instrument of Law Reform' (1990) 10(3) *Oxford Journal of Legal Studies* 289, 292.

⁶¹² *Ibid* 294.

⁶¹³ *Ibid*. The Bill was progressed by Leo Abse MP who was active in pursuit of social law reform. He was approached by another MP in 1981 who had received a low spot for a Private Member's Bill, and suggested a proposal of changes to the law (the expectation not actually being to affect change with this Bill, but just to draw attention to the problem). However, the Bill passed with surprisingly little debate or parliamentary awareness of its nature.

4.2.5 In *Gray v Barr*,⁶¹⁴ Barr sought to recover an indemnity payout for the unintentional fatal shooting of Gray. Salmon LJ acknowledged that ‘manslaughter is a crime which varies infinitely in its seriousness’.⁶¹⁵ The English Court of Appeal did not accept that the forfeiture rule had absolute application, rather adopting the test from the court below ‘the logical test ... is whether the person seeking [the benefit] was guilty of deliberate, intentional and unlawful violence or threats of violence.’⁶¹⁶ The Court of Appeal held that, as Barr’s act in threatening Gray with a gun was deliberate, intentional and unlawful, public policy precluded Barr taking the benefit, despite the death being unintended.⁶¹⁷

4.2.6 This reasoning was applied in *R v Chief National Insurance Commissioner, Ex Parte Connor*.⁶¹⁸ A woman was convicted of manslaughter for stabbing her husband and unintentionally causing his death. She was sentenced to probation, a lenient outcome.⁶¹⁹ The English Court of Appeal held that the forfeiture rule does not apply universally to all cases involving a finding of manslaughter. Approving *Gray v Barr*, Lord Lane CJ said:

[I]n each case it is not the label which the law applies to the crime which has been committed, but the nature of the crime itself which in the end will dictate whether public policy demands the court to drive the applicant from the seat of justice. Where that line is to be drawn may be a difficult matter to decide.⁶²⁰

In this case, the court held that the woman was precluded from receiving a widow’s pension as her ‘act was ... deliberate, conscious and intentional’.⁶²¹ The circumstances of the killing and the lenient sentence were not considered.

4.2.7 Despite the refinement of the forfeiture rule in *Connor* and *Gray v Barr*,⁶²² the English courts continued to apply the rule rigidly with no consideration of the moral culpability attached.⁶²³ Cases of manslaughter with diminished responsibility, including battered spouses, or where the killer received only nominal punishment in criminal proceedings,⁶²⁴ continued to attract the forfeiture rule.⁶²⁵

⁶¹⁴ [1971] 2 QB 554.

⁶¹⁵ Ibid 581. See also *R v Lavender* (2005) 222 CLR 67, 77 (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Attorney-General (Tas) v Wells* [2003] TASSC 78, [26]; *R v Forbes* (2005) 160 A Crim R 1, [133]–[134]; Mervyn D Finlay, *Review of the Law of Manslaughter in New South Wales* (Report, April 2003) 24–5 [6.1]–[6.4], 66–73 [11.7]. See also below [5.1.25], n 1189, n 1191.

⁶¹⁶ *Gray v Barr* [1971] 2 QB 554, 582.

⁶¹⁷ Ibid 582.

⁶¹⁸ [1981] QB 758.

⁶¹⁹ Ibid 762.

⁶²⁰ Ibid 763.

⁶²¹ Ibid 766.

⁶²² Phillip H Kenny, ‘Forfeiture Act 1982’ (1983) 46(1) *Modern Law Review* 66, 66; MP Thompson, ‘The Profits of Crime’ [1998] (Jan/Feb) *Conveyancer and Property Lawyer* 45, 48–49.

⁶²³ See, for example, *Re Dellow’s Will Trusts* [1964] 1 All ER 771; *Re Giles* [1972] Ch 544; Nicola Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31(1) *Common Law World Review* 1, 5, 8; MP Thompson, ‘The Profits of Crime’ [1998] (Jan/Feb) *Conveyancer and Property Lawyer* 45, 47; Dianne Caldwell, ‘Criminal Law and Estates: The Forfeiture Rule’ (2004–2005) 24(3) *Estates, Trusts and Pensions Journal* 269, 270.

⁶²⁴ Stephen Cretney, ‘The Forfeiture Act 1982: The Private Member’s Bill as an Instrument of Law Reform’ (1990) 10(3) *Oxford Journal of Legal Studies* 289, 289.

⁶²⁵ Dianne Caldwell, ‘Criminal Law and Estates: The Forfeiture Rule’ (2004–2005) 24(3) *Estates, Trusts and Pensions Journal* 269, 273; Chris Triggs, ‘Against Policy: Homicide and Succession to Property’ (2005) 68(1) *Saskatchewan Law Review* 117, 146.

4.2.8 Concerns about the rigidity of ‘the absolute rule’,⁶²⁶ and its potential to result in ‘real and substantial injustice’,⁶²⁷ prompted the introduction of the *Forfeiture Act 1982* (UK).⁶²⁸

4.2.9 The United Kingdom was the first jurisdiction to pass legislation to reform the common law rule.⁶²⁹ The UK Act does not displace the rule, but instead requires the court to undertake a two-stage process. The court must first determine whether a killing is ‘unlawful’ and therefore attracts the operation of the rule. If a killing is held to be unlawful, the court must then consider if modification is necessary depending on the ‘justice of the case’.⁶³⁰ It is a two-step process, with discretion to exempt individuals entirely separate from consideration of the rule itself.⁶³¹ This means British courts have the power to modify the rule at common law since the passage of the Act, although they have not yet done so.⁶³² This may actually strengthen the force of the common law rule from *Cleaver*, as the courts now instead concentrate on adjusting its effects in deserving cases, rather than modifying the underlying rule.⁶³³

4.2.10 The UK approach maintains the forfeiture rule, with the UK Act providing relief if it can be shown that the interests of justice require the rule to be modified.⁶³⁴ The court may not modify the effect of the rule unless it is satisfied that ‘having regard to the conduct of the offender and the deceased and to such circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified in that case’.⁶³⁵

4.2.11 In determining applications, courts have taken into account a range of factors, including the relationship between [the offender and the deceased]; the degree of moral culpability; the nature and gravity of the offence; the intentions of the deceased; the size of the estate and value of property in dispute; the financial position of the offender; and the moral claims and wishes of [other beneficiaries].⁶³⁶

This is a judicial as opposed to a statutory list of relevant factors.⁶³⁷

⁶²⁶ *Beresford v Royal Insurance Co Ltd* [1938] AC 586, 599.

⁶²⁷ Stephen Cretney, ‘The Forfeiture Act 1982: The Private Member’s Bill as an Instrument of Law Reform’ (1990) 10(3) *Oxford Journal of Legal Studies* 289, 301.

⁶²⁸ Dianne Caldwell, ‘Criminal Law and Estates: The Forfeiture Rule’ (2004-2005) 24(3) *Estates, Trusts and Pensions Journal* 269, 273; Andrew Hemming, ‘Killing the Goose and Keeping the Golden Nest Egg’ (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342, 352; Chris Triggs, ‘Against Policy: Homicide and Succession to Property’ (2005) 68(1) *Saskatchewan Law Review* 117, 274.

⁶²⁹ *Forfeiture Act 1982* (UK).

⁶³⁰ *Ibid* s 2.

⁶³¹ Nicola Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31(1) *Common Law World Review* 1, 23.

⁶³² *Ibid*.

⁶³³ Margaret Briggs, ‘Homicidal Heirs and Succession: The Scope of the Forfeiture Principle’ (1999) 3(3) *Butterworths Family Law Journal* 57, 61. For an example of the focus of the UK Courts on adjusting these effects, see *Dunbar v Plant* [1998] Ch 412 (Hirst, Phillips and Mummery LJ).

⁶³⁴ *Forfeiture Act 1982* (UK) s 5.

⁶³⁵ *Ibid* s 2(2). In practice, courts look at a wider range of factors. For a concise summary and example, see *Ninian v Findlay* [2019] EWHC 297 (Ch).

⁶³⁶ *Dunbar v Plant* [1998] Ch 412, 427–8. See also *Ninian v Findlay* [2019] EWHC 297 (Ch).

⁶³⁷ See also below [6.4.32]–[6.4.38].

4.2.12 A number of modification orders have been made in favour of women who have killed an abusive spouse in a severe family violence context. In *Re K (dec'd)*,⁶³⁸ for example, a husband was killed by the accidental discharge of a loaded firearm by his wife after she had threatened him with it to deter further violent attacks on her. She had suffered years of violence. She was charged with murder but pleaded guilty to manslaughter and received a sentence of probation.⁶³⁹ At first instance, Vinelott J found that the forfeiture rule applied as her conduct fell within the rule as defined in *Gray v Barr*, as her use of the firearm as a threat was intentional and violent, despite being done to deter violence from the deceased.⁶⁴⁰

4.2.13 Vinelott J then considered whether the justice of the case required modification of the rule, taking into account the many years of 'violent and unprovoked attacks' by the deceased upon his wife and that the killing had occurred during a lull in an ongoing episode of abuse.⁶⁴¹ Having regard to these factors, Vinelott J found that 'if cases vary infinitely in their gravity this is, I think, one of the cases which weighs least heavily.'⁶⁴² Accordingly, His Lordship held that, having regard to the low degree of the killer's moral culpability, 'it would be unjust that the widow should be deprived of any benefits'.⁶⁴³ The Court of Appeal upheld the decision and approved Vinelott J's reasoning.⁶⁴⁴

4.2.14 Similarly, in the 1986 Scottish case of *Paterson, Petitioner*,⁶⁴⁵ an order was made in favour of a woman convicted of the culpable homicide of her abusive husband. In the midst of an act of family violence, she seized a knife seeking to desist her husband from further violence but unintentionally struck him. The court took into account 'the cumulative effect on [the wife], physically and mentally, of the deceased's persistent brutality and violence exhibited against her', as well as the inadvertent nature of the crime and the lack of premeditation.⁶⁴⁶

4.2.15 In a 1997 decision,⁶⁴⁷ the court modified the forfeiture rule so that a woman, convicted of her husband's manslaughter, was entitled to receive a widow's allowance. The court held that the forfeiture rule was applicable as the woman caused her husband's death by 'an intentional, violent and unlawful act'.⁶⁴⁸ However, having regard to the circumstances of family violence in which the killing occurred, and the financial consequences for the woman and her children of the rule applying,⁶⁴⁹ the court made a modification order.

4.2.16 In contrast, the court was unwilling in *Henderson v Wilcox*⁶⁵⁰ to modify the forfeiture rule in a family violence context of both the unlawful killing and a history of violence inflicted by the

⁶³⁸ [1985] Ch 85.

⁶³⁹ This case also illustrates the difficulty in identifying voluntary manslaughter (it may have been provocation) or involuntary manslaughter (it could have been manslaughter by unlawful and dangerous act or gross negligence).

⁶⁴⁰ *Re K (dec'd)* [1985] Ch 85, 98.

⁶⁴¹ *Ibid* 92.

⁶⁴² *Ibid* 102.

⁶⁴³ *Ibid*.

⁶⁴⁴ *Re K (dec'd)* [1985] 3 WLR 234.

⁶⁴⁵ 1986 SLT 121.

⁶⁴⁶ *Ibid* 124.

⁶⁴⁷ *Re Forfeiture Act 1982* [1999] Pens LR 1.

⁶⁴⁸ *Ibid* 4.

⁶⁴⁹ *Ibid* 6.

⁶⁵⁰ [2016] 4 WLR 14.

killer.⁶⁵¹ A 62 year was convicted of manslaughter in relation to the death of his 87 year old mother. The relationship was very close, the son having lived at home throughout his life and never had a girlfriend. The deceased was over-protective. Social Services had been concerned that the son had been assaulting his mother. The deceased had made limited allegations only. She died as a result of a sustained assault including multiple fractures, punctured lung, brain damage and internal bleeding. The son was diagnosed as having ‘a combination of moderate depressive episode, mild learning disability and an autistic spectrum disorder’.⁶⁵² His plea to manslaughter was on the basis that he did not have an intention to kill, not diminished responsibility. The son was sentenced to a hospital order. Judge Cooke noted that the forfeiture rule applied and refused to grant relief to the son under the UK Act. The judge considered that ‘the offence in this case was of a very serious nature’⁶⁵³ and that, despite his intellectual disability, ‘it is plain that [the son] knew that his actions in assaulting his mother were wrong, and yet he continued’.⁶⁵⁴ The judge also noted the length of time over which the assaults took place and the lies told to Social Services.⁶⁵⁵

4.2.17 However, it is clear that application of the forfeiture rule in England is not confined to an unlawful homicide involving the deliberate use or threat of violence. *Dunbar v Plant* involved a suicide pact. The English Court of Appeal held that the forfeiture rule applied, although this was a suitable case to invoke the discretion to grant relief under the *Forfeiture Act*. The majority of the court held that the forfeiture rule applied to all forms of manslaughter.⁶⁵⁶ Phillips LJ observed:

So far as the [forfeiture] rule is concerned, it is hard to see any logical basis for not applying it in all cases of manslaughter ... in the crime of manslaughter the actus reus is causing the death of another. That actus reus is rendered criminal if it occurs in one of the various circumstances that are prescribed by law. Anyone guilty of manslaughter has ex hypothesi, caused the death of another by criminal conduct. It is in such circumstances that the rule against forfeiture applies.⁶⁵⁷

4.2.18 The UK legislation has been operational the longest, and the relevant cases indicate that a modification order is most likely to be successful where the offender suffers from severe diminished

⁶⁵¹ *Mack v Lockwood* [2009] EWHC 1524 (Ch). An 81 year old man, Mack, killed his wife during an argument by stabbing her 54 times. Mack pleaded guilty to manslaughter on the basis of provocation. This was ‘a particularly gruesome killing’: at [43]. The judge found that what Mack did was so close to murder as to make no difference in terms of his culpability: at [66]. The judge held the forfeiture rule should apply and there was no basis for relief under the UK Act. ‘I ask myself the question “does the justice of this case require that the forfeiture rule be modified?” or, to put it another way, is it unjust that having killed his wife in this deliberate and brutal fashion, Mr Mack should be precluded from inheriting her share of the matrimonial home, then the answer is plainly no’: at [71].

⁶⁵² [2016] 4 WLR 14, [45].

⁶⁵³ *Ibid* [54].

⁶⁵⁴ *Ibid* [58].

⁶⁵⁵ Leslie Blohm QC, ‘(Not) Getting Away with Murder or Some Reflections on the Principle of Forfeiture as Applied to the Administration of Estates’, *St John’s Chambers* (Online Article, October 2018) 9 <<https://www.stjohnschambers.co.uk/wp-content/uploads/2018/11/Some-reflections-on-the-principle-of-forfeiture-as-applied-to-the-administration-of-estates-1.pdf>>.

⁶⁵⁶ The court noted the ‘motor manslaughter’ exception.

⁶⁵⁷ *Dunbar v Plant* [1998] Ch 412, 435. ‘However, the harshness of applying the forfeiture rule inflexibly to all cases of manslaughter in all circumstances is such that I do not consider that, absent the statutory intervention which occurred, the rule could have survived unvaried to the present day’: at 435.

responsibility,⁶⁵⁸ the killer has been subjected to ongoing domestic abuse and the killing is in response to that violence⁶⁵⁹ or there has been a failed suicide pact.⁶⁶⁰

Australian Capital Territory: *Forfeiture Act 1991* (ACT)

4.2.19 Following the UK reform, the ACT implemented the *Forfeiture Act 1991* (ACT) which was closely based on the UK Act. The ACT Act vests the same discretion to a court as under the UK Act to modify the effect of the forfeiture rule.⁶⁶¹ Section 3(2) of the ACT Act provides:

On an application under subsection (1), the Supreme Court may make an order modifying the effect of the forfeiture rule if satisfied that, having regard to the conduct of the offender and of the deceased and to any other circumstances that appear to the court to be material, the justice of the case requires the effect of the rule to be modified.

4.2.20 This provision was implemented particularly in response to ongoing family violence in order to ameliorate the harsh effects of the forfeiture rule where the killer can be said to have reduced moral culpability.⁶⁶² There was little parliamentary debate and no opposition to the ACT Act. No cases of applications to modify the effect of the rule have been placed on the public record,⁶⁶³ and there do not appear to be any reported cases in which a court has considered the ACT Act.⁶⁶⁴

New South Wales: *Forfeiture Act 1995* (NSW)

4.2.21 In response to the uncertainty and perceived injustice of the majority decision in *Troja*, the New South Wales Parliament passed the *Forfeiture Act 1995* (NSW).⁶⁶⁵ The purpose of this Act was said to be to provide relief from the strict application of the rule in relation to situations of reduced moral culpability, specifically unlawful killings occurring in the context of family violence,⁶⁶⁶ assisted suicide,⁶⁶⁷ suicide pacts⁶⁶⁸ and culpable driving.⁶⁶⁹

⁶⁵⁸ *Re H (dec'd)* [1990] 1 FLR 441; *Re S (dec'd)* [1996] 1 WLR 235; *Gilchrist, Petitioner* 1990 SLT 494.

⁶⁵⁹ *Re K* [1985] Ch 85; *Paterson, Petitioner* 1986 SLT 121.

⁶⁶⁰ *Dunbar v Plant* [1998] Ch 412.

⁶⁶¹ *Forfeiture Act 1991* (ACT) s 3.

⁶⁶² Victorian Law Reform Commission, *The Forfeiture Rule* (Consultation Paper, March 2014) [2.45]–[2.47].

⁶⁶³ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 19 September 1991 (Terry Connolly, Attorney-General).

⁶⁶⁴ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) x.

⁶⁶⁵ Nicola Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31(1) *Common Law World Review* 1, 25; Ken Mackie, 'The Troja Case: Criminal Law, Succession and Law Reform' (1998) 5(1–2) *Canberra Law Review* 177, 188.

⁶⁶⁶ 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).

⁶⁶⁷ 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).

⁶⁶⁸ 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).

⁶⁶⁹ 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

4.2.22 The NSW Act applies to any homicide that is an offence and that occurs within New South Wales.⁶⁷⁰ Like the British approach, the NSW Act confers a discretion upon a court to modify the effect of the forfeiture rule (though not in a case of murder) if the court is satisfied that the interests of justice requires the modification.⁶⁷¹

4.2.23 The NSW Act seeks to give judges sufficient discretion to reflect ‘that there are varying degrees of moral culpability in unlawful killings’.⁶⁷² An example cited in the Second Reading Speech was ‘a woman found to have killed her partner while suffering from battered woman syndrome’.⁶⁷³

4.2.24 In introducing the *Forfeiture Act* (NSW), the Attorney-General explained that:

While it is clear as a matter of principle that a killer should not profit from his or her crime, the operation of the rule may be unduly harsh in some cases of unlawful killing, because the rule may operate regardless of the killer’s motive or degree of moral guilt ... [recognising] that there are varying degrees of moral culpability in unlawful killings, and legislation is necessary to give judges sufficient discretion to make orders in deserving cases in the interests of justice.⁶⁷⁴

4.2.25 Section 5 of the NSW Act allows any interested person to make an application to the Supreme Court to modify the effect of the rule.⁶⁷⁵ The Supreme Court may make such order if it is satisfied that the justice of the case so requires, by having regard to the conduct of the victim, conduct of the killer, the effect of the application of the rule on the killer or on any other person, and such other material matters.⁶⁷⁶ The NSW Act does not apply to murder.⁶⁷⁷

4.2.26 Although it also provides judicial discretion to exempt from operation of the rule, it possesses some noticeable differences to the UK Act.⁶⁷⁸ The NSW Act applies when ‘justice requires the effect of the rule to be modified’,⁶⁷⁹ with a limited list of factors the court must have regard to in making this determination.⁶⁸⁰ This slight difference in wording, when compared to the UK Act, means a court can take a broader view of the circumstances of the offender and other beneficiaries and seek to achieve equitable outcomes between these beneficiaries.⁶⁸¹

Burgmann); New South Wales, *Parliamentary Debates*, Legislative Council, October 1995, 2757 (JW Shaw) cited in Andrew Hemming, ‘Killing the Goose and Keeping the Golden Nest Egg’ (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342.

⁶⁷⁰ *Forfeiture Act 2005* (Vic) ss 3, 4(1).

⁶⁷¹ *Ibid* s 5.

⁶⁷² New South Wales, *Parliamentary Debates*, Legislative Council, 25 October 1995, 2257 (Jeffrey Shaw, Attorney-General).

⁶⁷³ *Ibid*.

⁶⁷⁴ *Ibid* 2256.

⁶⁷⁵ *Forfeiture Act 1995* (NSW) s 5(1).

⁶⁷⁶ *Ibid* ss 5(2)-(3).

⁶⁷⁷ *Ibid* s 4(2).

⁶⁷⁸ *Ibid* ss 25–6.

⁶⁷⁹ *Ibid* s 5(2).

⁶⁸⁰ *Ibid* s 5(3).

⁶⁸¹ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 38.

4.2.27 It was contemplated that the court would only exercise its discretion under the NSW Act in exceptional circumstances, such as when the unlawful killing occurred in response to ongoing family violence,⁶⁸² pursuant to a suicide pact,⁶⁸³ an assisted suicide⁶⁸⁴ or was caused by culpable driving.⁶⁸⁵

4.2.28 The court may revoke a forfeiture modification order if justice requires it, for example, if the offender is pardoned or their conviction quashed.⁶⁸⁶

4.2.29 The NSW Act does not apply to an unlawful killing that constitutes murder. The forfeiture rule will continue to be strictly applied in that case. However, if a person has been found not guilty of murder by reason of mental impairment, the court may make a forfeiture application order upon an application by an interested party which treats the person as if they had been convicted of the murder.⁶⁸⁷ A forfeiture application order overcomes the common law exception to the forfeiture rule that would otherwise apply.⁶⁸⁸

4.2.30 The NSW Act provides that if a person has unlawfully killed another person, a court may make a forfeiture modification order modifying the effect of the common law forfeiture rule 'in such terms and subject to such conditions as the court thinks fit'.⁶⁸⁹ The court may, for example, confine its order to the property interests of the offender to the exclusion of the interest of any other joint tenant, or confine its order to particular parts of the offender's real or personal property.⁶⁹⁰ This, for example may be where 'it may be appropriate to permit a former wife acquitted of manslaughter while suffering battered woman syndrome to inherit the family home but not personal assets of the deceased'.⁶⁹¹

4.2.31 Since the commencement of the NSW Act there have been several significant decisions regarding its operation. For example, in *Straede v Eastwood*,⁶⁹² the killer pleaded guilty to dangerous driving causing death, after his wife was killed in an accident while he was driving. Ultimately, the killer successfully applied to have the effect of the rule modified, as there was no indication of premeditation or intention to benefit on the killer's behalf.⁶⁹³

⁶⁸² 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).

⁶⁸³ 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).

⁶⁸⁴ 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).

⁶⁸⁵ 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).

⁶⁸⁶ *Forfeiture Act 1995* (NSW) s 8.

⁶⁸⁷ *Ibid* s 11.

⁶⁸⁸ See further below [5.2.2]–[5.2.12].

⁶⁸⁹ *Forfeiture Act 1995* (NSW) s 6(1).

⁶⁹⁰ *Ibid* s 6.

⁶⁹¹ *Ibid*.

⁶⁹² [2003] NSWSC 280.

⁶⁹³ See further below [6.1.67]–[6.1.70].

4.2.32 In *Leneghan-Britton v Taylor*,⁶⁹⁴ a granddaughter killed her grandmother and later sought for several months to cover up the crime. The granddaughter had moved in with her grandmother, but as a result of stress, depression and a personality disorder, she killed her grandmother during an assault. The DPP subsequently accepted a plea of manslaughter on the grounds of diminished responsibility. The granddaughter was sentenced to 11 years imprisonment. Hodgson CJ in Equity, whilst acknowledging ‘this was a crime of extreme seriousness’ and ‘the attempt to cover up the crime was deliberate and serious’, nevertheless found for the granddaughter because ‘there was no premeditation ... the plaintiff had no intention to profit by the crime ... [and there would be] at most a very short acceleration of an entitlement under the deceased’s will’.⁶⁹⁵ Hodgson CJ was prepared to make a modification order in favour of the granddaughter. This still seems a surprising result and has been criticised for undermining the rationale of the forfeiture rule.⁶⁹⁶

Tasmania Law Reform Institute (2004)

4.2.33 The Tasmania Law Reform Institute,⁶⁹⁷ recommended a new law similar to the NSW Act to allow a court, upon application by an interested person, to modify the effect of the forfeiture rule if satisfied that the interests of justice requires such a course of action.⁶⁹⁸ The power to modify would arise upon a conviction for any unlawful killing for which there is no lawful justification or excuse (including murder, manslaughter and causing death by culpable or dangerous driving).⁶⁹⁹ This would not extend to a finding of not guilty on the grounds of insanity or a case where no conviction was recorded.

4.2.34 The Tasmania Law Reform Institute recommended that, in determining whether to modify the effect of the rule, a court should be required to have regard to ‘the conduct of the killer, the conduct of the deceased person, the effect of the application of the rule on the killer or any other person, any findings of fact by the sentencing judge, the mental state of the killer, [and] such other matters as appear to the Court to be material’.⁷⁰⁰

4.2.35 Despite these recommendations, no reform has been implemented. Further, there have been no apparent cases where the forfeiture rule has been judicially considered in Tasmania.

⁶⁹⁴ (1998) 100 Crim R 565.

⁶⁹⁵ Ibid 571.

⁶⁹⁶ Given the calculated nature of the crime, ‘one might have thought this was ‘very near to murder’: Andrew Hemming, ‘Killing the Goose and Keeping the Golden Nest Egg’ 8(2) *Queensland University of Technology Law and Justice Journal* (2008) 342, 356. The case has been the subject of academic criticism: at 355–6. Peart is critical of the decision, calling it ‘rather surprising’ and a ‘very liberal application of the court’s power’, rightly pointing out that some of the factors relied upon were of ‘questionable relevance’ (profit motive) and even ‘quite improper’ (deceased’s impending death from cancer). See Nicola Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31(1) *Common Law World Review* 1, 27. See also below n 765.

⁶⁹⁷ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004).

⁶⁹⁸ Ibid 2.

⁶⁹⁹ Ibid.

⁷⁰⁰ Ibid.

4.3 The Codification Model

New Zealand: *Succession (Homicide) Act 2007* (NZ)

4.3.1 The New Zealand Law Commission proposed a different approach in 1997.⁷⁰¹ It favoured ‘a [statutory] code setting out in plain language all homicidal heirs rules’.⁷⁰² The Law Commission did not support the English and Australian judicial discretionary approach and recommended instead that the law should exhaustively specify which killings would attract the rule and which killings would be exempted. This was seen to be a more comprehensive approach, including detailed provisions regarding the consequences of applying the forfeiture rule and circumstances where the rule was completely excluded from operation. The Law Commission believed that this approach afforded greater clarity and was a clearer and more workable solution than the UK, NSW and ACT Acts.

4.3.2 The New Zealand Law Commission considered the discretionary system under the English and Australian statutes but was unimpressed because there were no guidelines beyond

the justice of the case ... Ultimately 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 that reason it should be settled clearly and completely by Parliament.⁷⁰³

4.3.3 The New Zealand Law Commission’s view was that the vexed question of exemptions involves complex policy considerations more properly dealt with by Parliament than by judges.

4.3.4 Justice PW Young was critical of this approach, opining that ‘it was disappointing to see that the Commission sidestepped the social issues involved and merely said that these were policy matters to be dealt with by Parliament’.⁷⁰⁴

4.3.5 The New Zealand Act was drafted as a result of legislation proposed by the New Zealand Law Commission.⁷⁰⁵ The policy intention of the New Zealand Act was to provide a comprehensive statute that could ‘reduce the work of trustees, the number of disputed estates and the negative impact of victims’,⁷⁰⁶ in contrast to discretionary models.⁷⁰⁷

4.3.6 The New Zealand Law Commission’s recommendations were accepted by Parliament; the New Zealand Act completely replacing the common law formulation. The 2007 Act disentitled unlawful killers from benefitting from the estate.⁷⁰⁸

⁷⁰¹ New Zealand Law Commission, *Succession Law: Homicidal Heirs* (Report No 38, 15 July 1997).

⁷⁰² Ibid 3. This proposal was broadly similar to the earlier draft provisions recommended by the Property Law and Equity Reform Committee, *The Effect of Culpable Homicide on Rights of Succession* (Report No 24, 1976).

⁷⁰³ New Zealand Law Commission, *Succession Law: Homicidal Heirs* (Report No 38, 15 July 1997), 5.

⁷⁰⁴ Justice PW Young, ‘Current Issues’ (1997) 71 (January) *Australian Law Journal* 659.

⁷⁰⁵ New Zealand Law Commission, *Succession Law: Homicidal Heirs* (Report No 38, 15 July 1997) 5.

⁷⁰⁶ New Zealand, *Parliamentary Debates*, House of Representatives, 8 May 2007, 8988–9 (Lynne Pillay).

⁷⁰⁷ Andrew Hemming, ‘Killing the Goose and Keeping the Golden Nest Egg’ (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342, 360.

⁷⁰⁸ *Succession (Homicide) Act 2007* (NZ) s 7.

4.3.7 The New Zealand Act displaced the ‘rules of law, equity and public policy’⁷⁰⁹ and codified an approach to forfeiture following an unlawful killing.⁷¹⁰ This Act sets out when the rule applies or not and how it affects the distribution of property.⁷¹¹ The scope of the rule specifically excludes killings caused by a negligent act or omission, infanticide, killings in pursuance of a suicide pact, and assisted suicides.⁷¹² However, there is no specific exemption for victims of family violence.⁷¹³

4.3.8 In contrast to the NSW and the ACT Acts, the New Zealand Act is a codified model which explicitly defines the categories of killing which will attract the forfeiture rule. Section 3 of the New Zealand Act provides:

The purpose of this Act is to codify the law that prevents a person (the killer) who kills another person (the victim) by committing homicide from benefitting as a result of the victim’s death from the victim’s estate or any other property arrangement.

4.3.9 Section 4(1) of the New Zealand Act defines ‘homicide’ to include killing, but explicitly states that a killing as a result of a negligent act or omission, infanticide, a killing in pursuance of a suicide pact and an assisted suicide do not constitute a homicide.⁷¹⁴ Such killings are exempt from the application of the forfeiture rule.

4.3.10 The most important point to note about this definition is that the broad dividing line is the fault element. An intentional or reckless killing comes within the forfeiture rule, while a killing caused by negligent act or omission is excluded. Whether this is an effective distinction is debatable.⁷¹⁵

4.3.11 The New Zealand Law Commission considered its preferred model as more effective and providing greater clarity than a statutory discretion provided to a court.⁷¹⁶ It has received some academic support for solving some of the problems experienced under the UK and NSW Acts.⁷¹⁷ Dr Hemming, for example, told SALRI that he preferred the New Zealand approach, noting that it provides clarity and certainty as to when the rule applies and is preferable to relying on the inconsistency of judicial discretion.⁷¹⁸

4.3.12 However, the New Zealand Act has received significant criticism, mainly for preventing courts from considering the circumstances of the killing and tailoring the application of the rule to the moral culpability of the killer.⁷¹⁹ In the context of providing justice for victims of family violence, this is crucial to any reform of the rule. Instead, the New Zealand Act is a blunt instrument, ill-equipped to achieve equitable outcomes in the wide, if not infinite, variety of situations that may require its

⁷⁰⁹ Ibid s 5(1).

⁷¹⁰ New Zealand Law Commission, *Succession Law: Homicidal Heirs* (Report No 38, 15 July 1997).

⁷¹¹ *Succession (Homicide) Act 2007* (NZ) ss 7(3), 8(2).

⁷¹² Ibid s 4.

⁷¹³ Nicola Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31(1) *Common Law World Review* 1, 27–28.

⁷¹⁴ *Succession (Homicide) Act 2007* (NZ) s 2.

⁷¹⁵ See further below [6.3.1]–[6.3.18].

⁷¹⁶ New Zealand Law Commission, *Succession Law: Homicidal Heirs* (Report No 38, 15 July 1997) 5.

⁷¹⁷ Andrew Hemming, ‘Killing the Goose and Keeping the Golden Nest Egg’ (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342, 356.

⁷¹⁸ Ibid 363.

⁷¹⁹ Nicola Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31(1) *Common Law World Review* 1, 30.

operation.⁷²⁰ Despite its practical advantages, the New Zealand Act provides no relief from the strict and absolute application of the rule in cases of diminished responsibility or provocation,⁷²¹ or other cases ‘deserving of sympathy’.⁷²²

4.3.13 The justification for this approach by the New Zealand Law Commission on the issue of family violence is that there is no principled basis for not applying the rule to family violence victims in comparison to other killers who successfully argue defences such as provocation.⁷²³ This illustrates the inflexibility of the ‘class of killings’ approach, which does not reflect that the degree of culpability may vary significantly depending on the circumstances of a killing. The underlying question under the New Zealand Act, whether ‘a particular class of killing is sufficiently abhorrent to attract the application of the bar on profits’,⁷²⁴ does not allow the court to go beyond sorting highly varied cases into ‘classes’. Given the modern understanding of the dynamics and reality of family violence, this lack of discretion is particularly problematic for cases which arise due to a fatal response to family violence. These concerns regarding family violence victims were voiced in the New Zealand parliamentary debate,⁷²⁵ but no changes to the Act were made.

4.3.14 The rationale for the specific exceptions as in the New Zealand Act was expressed by the VLRC:

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 ... 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.⁷²⁶

4.3.15 However, there was little support in SALRI’s consultation for this fixed classes approach. Mr Boucaut QC, for example, stated to SALRI that such a prescriptive approach is flawed and it is ‘impossible’ for any statute to ever capture the infinite situations that will arise where the rule should or should not be applied. Mr Boucaut and others also disagreed with the logic of excluding either manslaughter by negligence or death by culpable or dangerous driving from the rule as such offences are not necessarily of low culpability and may be of such gravity that the forfeiture rule should apply.

⁷²⁰ Ibid.

⁷²¹ Ibid 29.

⁷²² Ibid 30.

⁷²³ New Zealand Law Commission, *Succession Law: Homicidal Heirs* (Report No 38, 15 July 1997) 8.

⁷²⁴ Ibid 5.

⁷²⁵ New Zealand, *Parliamentary Debates*, House of Representatives, 8 May 2007, 8985 (Kate Wilkinson); New Zealand, *Parliamentary Debates*, House of Representatives, 9 October 2007, 12189 (Kate Wilkinson).

⁷²⁶ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) xi.

4.4 The Hybrid Model

The VLRC Approach

4.4.1 In 2014, the VLRC published its Report into the scope and operation of the forfeiture rule.⁷²⁷ The VLRC concluded that the common law rule should continue to apply but that legislative reform was necessary to resolve the relatively small number of cases where the rule operated unfairly.

4.4.2 The VLRC recommended that Victoria should introduce a *Forfeiture Act* which draws both on the codified and discretionary models. The VLRC thought this would strike a suitable balance between fairness and clarity. To overcome unfairness, the VLRC proposed that certain offences or situations would be excluded from the operation of the rule.⁷²⁸ The VLRC recommended that 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.

4.4.3 In addition, the VLRC proposed that a court should have a discretion to modify the effect of the rule on a case-by-case basis (though not for murder), where required by the justice of the case.

4.4.4 The VLRC's recommendations are yet to be implemented.

4.5 Issues

4.5.1 There are four broad potential models for reform for South Australia (though SALRI is not restricted to any one approach), which can be described as follows.

4.5.2 First, the common law forfeiture rule remains as it is in South Australia with no legislative scope for the modification of the rule. This can be described as the 'strict approach' (**Option A**).

4.5.3 Secondly, the common law forfeiture rule should remain as it is in South Australia, but a new *Forfeiture Act* should be introduced that allows a court to modify the effect of the rule. This modification could apply to murder and manslaughter or manslaughter and other offences of unlawful homicide, whilst keeping the rule absolute for murder (**Option B**).

4.5.4 Thirdly, to introduce a new *Forfeiture Act* in South Australia codifying the forfeiture rule as it is to apply in South Australia with no judicial scope for the modification of the rule. This would follow the New Zealand approach and would set out certain categories of unlawful killings where the rule does not apply, such as infanticide, assisted suicide and death by dangerous driving (**Option C**).

4.5.5 Fourthly, to introduce a new *Forfeiture Act* in South Australia to codify the forfeiture rule as it is to apply in South Australia, but which also allows a court to modify the effect of the rule in an

⁷²⁷ Ibid 15.

⁷²⁸ These categories were 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 and infanticide.

appropriate case. This ‘hybrid model’ was proposed by the VLRC and is perceived to recognise the benefits and faults of options B and C (**Option D**).

Option A – Maintain the Status Quo

4.5.6 As discussed in Part 3 of this Report, SALRI considers that the preferable solution is legislative reform, as to leave the rule in its current state will not resolve the confusion regarding the scope of the forfeiture rule or address the legitimate concerns over its strict application as well as the uncertainty arising from the practical effects of the rule. There was only limited support in SALRI’s consultation for maintaining the current position. The consistent theme in SALRI’s consultation was in favour of legislative reform which would allow for judicial consideration of individual circumstances in an appropriate case, while ensuring that the underlying principle of the rule is not unduly eroded.

Option B – Modifying the Effect of the Rule

4.5.7 The second option is that the common law forfeiture rule remains as it is in South Australia, but a new Act be introduced to empower a court to modify the effects of the rule in an appropriate case. There are three possible options as to how this discretionary model could operate.

4.5.8 Under this model, the court would have a complete discretion (subject to any particular considerations set out in the *Forfeiture Act*) to modify the effect of the forfeiture rule.

4.5.9 For clarity, this model would operate as follows:

- An applicant would make an application to the court for modification of the effect of the forfeiture rule;
- An applicant will be either the ‘offender’ or a person applying on the offender’s behalf, the executor or administrator of a deceased person’s estate or any other person who in the opinion of a court has a valid interest in the matter.
- The court would consider whether the forfeiture rule would apply at common law;
- If the court determined that the forfeiture rule would apply at common law, the court would then consider whether ‘justice requires the effect of the rule to be modified’,⁷²⁹ and make the necessary orders to achieve this;
- The court may be required to have regard to particular considerations in determining whether to make the order sought.⁷³⁰

4.5.10 This approach places confidence in the judiciary, recognising the ability of judges to make reasoned and informed decisions which will lead to sensible results. However, wide judicial discretion can produce inconsistency and result in different outcomes in cases with similar facts. This may reduce public confidence in the administration of justice as it may appear that outcomes are arbitrary.

⁷²⁹ This is the expression used in the *Forfeiture Act 1995* (NSW) s 5(2). Similar expressions are used in the *Forfeiture Act 1991* (ACT) s 3(2) and the *Forfeiture Act 1982* (UK) s 2(2).

⁷³⁰ See further below [6.4.32]–[6.4.38].

4.5.11 This discretionary approach has attracted criticism.⁷³¹ By simply providing a discretion, and failing to clarify the rule itself, the UK and NSW Acts overlook the issues associated with the vague nature of the rule.⁷³² The UK Act, for example, has been criticised as a simple and incomplete solution that ‘only nibbles at one corner of the principle’.⁷³³ More importantly, under all the current discretionary models, courts are provided insufficient guidance with respect to the exercise of the statutory discretion.⁷³⁴ Although some relevant factors are provided,⁷³⁵ there is no clear principle articulated for when the forfeiture rule should or should not apply.⁷³⁶ Instead, applicants must rely on winning the ‘judicial lottery’ of appearing before a sympathetic judge.

4.5.12 A key criticism of a discretionary approach is the comparative lack of guidance. The existing *Forfeiture Acts* provide a court discretion in determining both whether the forfeiture rule applies and what ‘the justice of the case’ requires.⁷³⁷ The uncertainty of the scope of the forfeiture rule at common law therefore remains an issue.⁷³⁸ In England, since the introduction of the UK Act, there has been no further judicial development of the common law rule.⁷³⁹ The English approach is for the court to apply the absolute rule and then consider whether a modification order should be made.⁷⁴⁰ There has also been criticism of the ‘liberal approach’ with which the NSW Supreme Court has exercised its discretion to modify the effect of the rule and therefore undermine its rationale.⁷⁴¹

4.5.13 Secondly, it is arguable that the implementation of the discretionary approach does not alleviate the uncertainty of the rule’s application, as courts are still required to implement the rule on a

⁷³¹ See, for example, Nicola Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31(1) *Common Law World Review* 1, 24; Phillip H Kenny, ‘Forfeiture Act 1982’ (1983) 46(1) *Modern Law Review* 66, 68–72; 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, 15 July 1997) 5; Paul Matthews, ‘Property, Pensions and Double Punishment: The Forfeiture Act 1982’ (1983) 5(3) *Journal of Social Welfare Law* 141, 147.

⁷³² RA Buckley, ‘Manslaughter and the Forfeiture Rule’ (1995) 111(2) *Law Quarterly Review* 196, 196.

⁷³³ PS Atiyah, ‘Common Law and Statute Law’ (1985) 48(1) *Modern Law Review* 1, 28.

⁷³⁴ See, for example, 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, 15 July 1997) 5.

⁷³⁵ *Forfeiture Act 1995* (NSW) s 5(3).

⁷³⁶ Nicola Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31(1) *Common Law World Review* 1, 24. See also *Dunbar v Plant* [1998] Ch 412.

⁷³⁷ John MacLeod and Reinhard Zimmermann, ‘Unworthiness to Inherit, Public Policy, Forfeiture: The Scottish Story’ (2013) 87(4) *Tulane Law Review* 741, 770; H Zimmermann and JJ Hockley, ‘A Forfeiture Act for Western Australia?’ (2009) 17 *Australian Property Law Journal* 218, 234; Stephen Cretney ‘The Forfeiture Act 1982: The Private Member’s Bill as an Instrument of Law Reform’ (1990) 10(3) *Oxford Journal of Legal Studies* 289, 302; Anthony Dillon, ‘When Beneficiary Slays Benefactor: the Forfeiture ‘Rule’ Should Operate as a Principle of the General Law’ (1998) 6(3) *Australian Property Law Journal* 1, 19.

⁷³⁸ RA Buckley, ‘Manslaughter and the Forfeiture Rule’ (1995) 111(2) *Law Quarterly Review* 196, 196.

⁷³⁹ Nicola Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31(1) *Common Law World Review* 1, 8.

⁷⁴⁰ See, for example, *Paterson, Petitioner* 1986 SLT 121; *Dunbar v Plant* [1998] Ch 412; *Ninian v Findlay* [2019] EWHC 297 (Ch).

⁷⁴¹ See, for example, *Lenghan-Britton v Taylor* (1998) 100 A Crim R 565. See also above [4.2.32] and below n 765.

case by case basis.⁷⁴² In his analysis of the NSW Act, Ken Mackie notes that ‘the Act does not prevent further account to be taken by judges of developments in the common law application of the rule’.⁷⁴³

4.5.14 Critics of the ‘justice of the case’ approach argue that it is tantamount to ‘legislative handball’, and means the judiciary is wrongly required to develop policy.⁷⁴⁴ It is argued that this approach leads to uncertainty. From a practical perspective, Dr Andrew Hemming notes that what constitutes the justice of the case will vary from judge to judge, as they ‘differ in the weight they apply to material matters’.⁷⁴⁵ An Adelaide civil lawyer suggested to SALRI that this formulation would be a recipe for inconsistency and unpredictability and judicial intervention as well as undermining the rationale of the rule.

Option C – Codify the Rule

4.5.15 Another option for legislative reform is to introduce a new Act to codify the forfeiture rule as it is to apply in South Australia, with no scope for the modification of the rule.

4.5.16 One such model would be to codify the current common law position regarding the forfeiture rule. This would result in the strict application of the rule, without allowing for modification. By clearly articulating the common law rule, this approach has the advantage that most trustees and administrators would be able to use the relevant Act to guide them through their duties without needing to institute costly court proceedings.

4.5.17 This law should make it quite clear which property is covered by the rule and how the rule should be applied to affect its devolution, particularly where the common law is not settled.

4.5.18 Another potential approach is to codify the common law, but specifically exclude some classes of unlawful killings. This approach would codify the current common law position on the forfeiture rule but would exclude some classes of killings from the definition of ‘unlawful killing’. This approach was adopted in New Zealand, and has been described as follows:

Ultimately 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.⁷⁴⁶

4.5.19 The New Zealand Act excludes some types of killings from its definition of ‘homicide’, namely: a killing caused by negligent act or omission; infanticide under s 178 of the *Crimes Act 1961* (NZ); a killing of a person by another in pursuance of a suicide pact; and an assisted suicide.⁷⁴⁷

⁷⁴² Andrew Hemming, ‘Killing the Goose and Keeping the Golden Nest Egg’ (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342, 354–63.

⁷⁴³ Ken Mackie, *Principles of Australian Succession Law* (LexisNexis Butterworths, 2007) 244.

⁷⁴⁴ Andrew Hemming, ‘Killing the Goose and Keeping the Golden Nest Egg’ (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342, 355.

⁷⁴⁵ Andrew Hemming, ‘Killing the Goose and Keeping the Golden Nest Egg’ (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342, 355. See also, New Zealand Law Commission, *Succession Law: Homicidal Heirs*, Report No 38 (1997) 5.

⁷⁴⁶ New Zealand Law Reform Commission, *Succession Law: Homicidal Heirs* (Report No 38, 15 July 1997) 5.

⁷⁴⁷ *Succession (Homicide) Act 2007* (NZ) s 4(1).

4.5.20 The codified approach seeks to enable ‘administrators and trustees to carry out their functions without the need for recourse to court proceedings’.⁷⁴⁸ However, while this approach offers certainty,⁷⁴⁹ its problem is its inflexibility. The difficulty with this approach is that it is difficult to predict and legislate for the almost infinite variety of circumstances where the rule may operate unfairly, given the diverse circumstances in which killings occur. Such laws are open to criticism for not permitting a fair result in circumstances where that might be achieved by allowing for judicial discretion.⁷⁵⁰

4.5.21 Regarding cases of unlawful killing in response to family violence, the pursuit of ‘more predictable and principled results’ may limit the ability of the law to properly consider the degree of culpability in individual cases.⁷⁵¹ This illustrates the tension between doing ‘justice to the individual claimant [and] the public good’.⁷⁵²

Option D – Hybrid Model

4.5.22 Another option for reform is to introduce a new law to codify the forfeiture rule as it is to apply in South Australia, but also allowing a court to modify the effect of the rule.

4.5.23 Under this approach, any proposed *Forfeiture Act* would exclude certain categories of unlawful killing from the operation of the rule and also allow a court to modify the effect of the rule in cases of unlawful killings in appropriate circumstances.

4.6 Consultation Data Overview: Which Model Should We Adopt in South Australia?

Option A

4.6.1 The overwhelming consensus during SALRI’s consultation was that there is a need for legislative reform of the forfeiture rule in South Australia.

Option B

4.6.2 The prevailing view among the attendees at all Adelaide Roundtables was that the preferred model is the UK/NSW approach, and that there is an inevitable need for courts to exercise some degree of discretion in forfeiture cases given the wide ranging circumstances of both murder and manslaughter cases. The general view was that the common law should remain and courts should be cautious to modify the rule given the sound premise that an offender should not benefit from their crime, but nevertheless there must be scope to modify the rule in an appropriate case. It was considered

⁷⁴⁸ Ibid 3–4.

⁷⁴⁹ Nicola Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31(1) *Common Law World Review* 1, 4.

⁷⁵⁰ See also Tasmania Law Reform Institute, *The Forfeiture Rule* (Issues Paper No 5, December 2003) 19: ‘The infinite array of circumstances in which people kill makes it more appropriate for a judge, considering the particular circumstances of the case, to decide whether it is an appropriate case for modification of the rule, by giving consideration to the factors set out in the UK based *Forfeiture Acts*.’

⁷⁵¹ Stephen Cretney, ‘The Forfeiture Act 1982: The Private Member’s Bill as an Instrument of Law Reform’ (1990) 10(3) *Oxford Journal of Legal Studies* 289, 303; MP Thompson, ‘The Profits of Crime’ [1998] (Jan/Feb) *Conveyancer and Property Lawyer* 45, 52; RA Buckley, ‘Manslaughter and the Forfeiture Rule’ (1995) 111(2) *Law Quarterly Review* 196, 198.

⁷⁵² Phillip H Kenny, ‘Forfeiture Act 1982’ (1983) 46(1) *Modern Law Review* 66, 67.

that a discretionary approach allows for the development of precedent and rules, and this will develop over time into a sensible and pragmatic approach. Giving a court the widest possible discretion allows a court to tailor its orders according to the particular factual situation before them. It was commented that judicial discretion ‘is the only way to address the multiplicity of situations that will arise’.

4.6.3 There was broad agreement that the New Zealand ‘carve out’ model is inappropriate and unduly rigid and ‘that you can’t define the undefinable’. The primary concern with an exhaustive list is that it prevents any further expansion or development of the rule at common law. The idea of a prescriptive statute with an exhaustive list of exclusions was seen as unhelpful and ‘doomed to failure’, as it cannot cover every situation that may arise. It was noted that, in the context of law reform, it is preferable to come up with a new law that has the capacity to do justice in every single case, and that there is a need for discretion to accommodate for dynamic societal changes. Any black letter law, it was considered, will become incompatible with changes in community attitudes. As such, legislation is necessary to provide clarity, but any such legislation should also make provision for a flexible approach.

4.6.4 Another concern expressed with the New Zealand model is that it is flawed as it fails to look at the conduct of the killer, and instead only looks at the specific label provided to the killer’s conduct. For example, causing death by culpable or dangerous driving or manslaughter by gross negligence cover a wide range of cases. Attendees widely considered (a view reiterated by Mr Boucaut QC) that in some cases, homicides of this nature may involve ‘heinous’ misconduct and grave culpability and it is illogical that the rule should not be capable of applying to such cases.⁷⁵³

4.6.5 There was little, if any, support for any specific carve outs. With respect to the death by dangerous driving exception in New Zealand, the example was given of a recent Victorian case, where the killer drove into a crowd and killed several people. Mr Boucaut also highlighted to SALRI the gravity of many examples of culpable or dangerous driving and that it is very rare for manslaughter to be charged in such circumstances. Mr Boucaut argued that this demonstrates the problem of specific categories. It is also relevant that culpable or dangerous driving causing death in South Australia are a single combined offence and not separate offences as elsewhere in Australia such as Victoria.⁷⁵⁴

4.6.6 There was discussion at SALRI’s Adelaide roundtables as to whether the defined categories of exceptions could draw from the work of SALRI on its provocation report.⁷⁵⁵ However, the general view is that it is problematic to link the rule to specific types of offences, and that it is preferable to look to the conduct of the killer.

4.6.7 The argument in favour of the New Zealand model that judicial discretion is unsound,⁷⁵⁶ a ‘lottery’, and a recipe for inconsistency was not accepted by attendees. The fear of a judicial lottery was seen by one party as ‘overrated’. The lack of trust in judicial officers was seen as unjustified, especially if a statutory list of relevant considerations is provided. It was noted that ‘occasionally you get bad judges’, but this is a ‘restricted problem’ and is what appeals are for. It was considered that

⁷⁵³ It was also thought that infanticide should not be exempted from the operation of the forfeiture rule.

⁷⁵⁴ In South Australia, the relevant offence under s 19A of the *CLCA* is a combined offence of causing death through driving ‘in a culpably negligent manner, recklessly, or at a speed or in a manner dangerous to any person.’

⁷⁵⁵ David Plater, David Bleby, Megan Lawson, Lucy Line, Amy Teakle, Katherine O’Connell and Kate Fitz-Gibbon, South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 2* (Report No 11, April 2018).

⁷⁵⁶ ‘All felonious killings are contrary to public policy: and hence, one would assume, unconscionable. Indeed, there is something a trifle comic in the spectacle of Equity judges sorting felonious killings into conscionable and unconscionable piles’: *Troja v Troja* (1994) 33 NSWLR 269, 299 (Meagher JA).

‘judicial discretion is better than the politicians’ setting out a rigid code for the rule’s application, as in New Zealand, and that judges would ‘not be affected by public outrage and police pressure’.

4.6.8 However, another attendee cautioned that, whilst not supporting the New Zealand model, there is a risk of uncertainty and inconsistency in leaving it just to judicial discretion and noted the example of the uncertainty and inconsistency in family provision claims under the *Inheritance (Family Provision) Act 1972* (SA).⁷⁵⁷ Another party similarly noted the uncertainty under the *Inheritance (Family Provision) Act 1972* (SA) and the difficulty in providing advice to clients in this context as having to rely entirely on judicial discretion. It may be unwise to rely excessively on judicial discretion. However, attendees reiterated the need for reform of the present rule, and their lack of support for the New Zealand model was clear.

4.6.9 The strong preference at the Mount Gambier Roundtable was also for the UK/NSW approach which allows judicial discretion to modify the rule in an appropriate case. There was only little support for the VLRC hybrid model. There was no support for the New Zealand approach and it was noted that this model is ‘troubled’ and ‘inappropriate’. The primary concern with the New Zealand statutory approach was that it cannot cover every situation that may arise, and that it consequently has the potential to result in unintended consequences.

4.6.10 Support for the judicial discretionary approach also came from the South Australian Victim Support Service, the Commissioner for Victims’ Rights as well as Mr O’Connell (the former Commissioner for Victims’ Rights). The New Zealand model was criticised by all three parties as being arbitrary, difficult to understand and having potential to lead to unjust outcomes, as there will always be cases that fall outside those express exclusions that permit a discretion to be exercised. Mr O’Connell gave the example of the codification of the criminal law in the *CLCA* as not making things better or clearer. It was also noted, however, that from a victim’s perspective, anything that says that one killing is worse than another is very problematic.

4.6.11 Jonathan Polnay, an English barrister at 5 Kings Bench Walk in London, considered that the English approach strikes a reasonable balance by providing an element of judicial discretion. Kellie Toole of the Adelaide University Law School was also supportive of the discretionary approach.

4.6.12 The NSW Law Society recommended that the NSW Act should be used as a model for South Australia. However, in a supplementary submission, the NSW Law Society clarified that, if the forfeiture rule is to be codified in South Australia, it should be a hybrid (VLRC) model that also allows for judicial discretion to modify the operation of the rule. In the NSW Law Society’s view, although a judicial discretion may not lead to simplicity or predictability to this area of law, it provides a mechanism for justice in what are likely to be difficult cases. It was noted that, whilst in practical terms, making a Supreme Court application may add time and expense to the process of distributing an estate, in these cases a judicial declaration may provide the best outcome for beneficiaries as well as protection for executors or administrators. The NSW Law Society, like many of the other submissions to SALRI, noted the challenge of codification to reflect the full range of circumstances in which the forfeiture rule could arise, so as to minimise the risk of unintended or unjust outcomes.

⁷⁵⁷ See further South Australian Law Reform Institute, *Distinguishing between the Deserving and the Undeserving? Family Provision Laws in South Australia* (Report No 9, December 2017).

4.6.13 Professor Prue Vines at the University of New South Wales, a leading authority in this area, told SALRI that she favours a discretionary model along the lines of the NSW and ACT Acts. She had misgivings in adopting a codified model due to the potential for a rigid, *Troja v Troja* type of approach that would become entrenched with little room for flexibility. Professor Vines noted that understandings of morality change over time, and it may be difficult to change laws in line with these.

4.6.14 Parties in SALRI's consultation acknowledged that the judicial discretion model risked inconsistency and unpredictability but this concern could be partly addressed through a statutory list of relevant considerations to guide the exercise of judicial discretion.⁷⁵⁸

4.6.15 There was some opposition to the judicial discretion model. Dr Andrew Hemming set out his objections to SALRI with this approach, notably that it would undermine the rationale of the rule. His concern with the discretionary approach was that in the 'headlong rush to embrace equitable solutions in the application of the forfeiture rule and to try to anticipate every conceivable permutation, there is a real danger that the reason for the rule will be overlooked, namely, that an unlawful killing has occurred and that the killer stands to benefit.' Dr Hemming submitted that 'once the door to "killing the goose and keeping the golden nest egg" has been opened, two outcomes can safely be anticipated: (1) beneficiaries will have a greater motivation to kill; and (2) lawyers will take advantage of legislation that allows modification of the rule upon application under the rubric of "in the interests of justice"'.⁷⁵⁹

Option C

4.6.16 Dr Hemming's submission to SALRI favoured a New Zealand style codified model. Dr Hemming has previously advocated against the discretion model and in favour of the New Zealand approach, observing:

Advocates of broad judicial discretion should bear in mind that public policy 'is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law'.⁷⁵⁹ This paper has sought to demonstrate that there is only one viable option. For the reasons outlined, this option is very similar to the New Zealand Law Commission's draft Act or code solution. The author contends that a code is the most appropriate method to deliver the proper objective of a forfeiture rule which is to ensure that, contrary to the title of this paper, the victim's bounty is received by a hand 'ever so chaste'.⁷⁶⁰ ... A code, passed by Parliament, can determine, given a manslaughter conviction can be very close to an accident or a shade below murder, under what circumstances society is prepared to amend the absolute forfeiture rule.⁷⁶¹

4.6.17 Dr Hemming cautioned to SALRI that, if the forfeiture rule is to be relaxed, it needs to be narrow and codified, so that administrators and trustees of estates, wills and bequests are provided with clarity and certainty and that keeping the operation of the forfeiture rule out of the courts should be a principal objective of any reform to the rule. Dr Hemming ruled out the 'seductive' hybrid model as failing the clarity test, albeit with slightly less scope for judicial discretion. Dr Hemming referred to

⁷⁵⁸ See further below [6.4.32]–[6.4.38], Rec 23.

⁷⁵⁹ *Richardson v Mellish* (1824) 2 Bing 229, 252; 130 ER 294, 303 (Burrough J).

⁷⁶⁰ TK Earnshaw and PJ Pace, 'Let the Hand Receiving It Be Ever So Chaste...' (1974) 37(5) *Modern Law Review* 481 quoting Lord Commissioner Wilmot in *Bridgeman v Green* [1757] Wilm 58, 65; 97 ER 22, 25.

⁷⁶¹ Andrew Hemming, 'Killing the Goose and Keeping the Golden Nest Egg' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342, 363.

the New Zealand Law Commission who referenced the case of *Re Pechar*⁷⁶² which involved a triple slaying, six different interests separately represented, and a judgment delivered four years after the killings. In *Re Lenjes*⁷⁶³ a similar period elapsed between the killing and the judgment.⁷⁶⁴

4.6.18 An Adelaide civil lawyer also outlined to SALRI their strong concerns over reliance on judicial discretion and that judges will be unable to resist the temptation to ‘tinker’ and ‘interfere’ and the forfeiture rule will be soon diluted and its rationale will be undermined.⁷⁶⁵

4.6.19 The Chair of the NSW Law Society Committee, David Browne, made a personal submission in support of the codified approach. Mr Browne said the advantages of codifying the rule would give an opportunity for introducing certainty and consistency to the law, prescribing the degree of criminality required to attract the rule, and stating the consequence of the exclusion of the forfeited beneficiary on distribution of the estate or benefit.

4.6.20 However, most parties in SALRI’s consultation opposed the inflexibility of the New Zealand approach and viewed it as unresponsive to unlawful killings of limited culpability such as by a victim of family violence.

Option D

4.6.21 There was some support for the hybrid VLRC model at one of the Adelaide Roundtables. Several attendees felt that this approach is better equipped to afford greater access to justice and would assist in guiding legal practitioners at the ‘lower end’ with respect to giving advice. It was recognised that the Human Rights Committee of the Law Society of South Australia was keen to introduce the VLRC model, particularly for disadvantaged groups. It was noted, however, that there was a need to get the balance right between judicial discretion and guidance in the law.

4.6.22 STEP also favoured the hybrid VLRC approach but noted the difficulty in passing any codified model given the fraught matters of public policy. STEP noted ‘that it would take either a very determined Parliament or a specific set of circumstances for a comprehensive codification to pass’. Its submission also notes that it is apparent from the New Zealand Act that any effort to fully codify the

⁷⁶² [1969] NZLR 575.

⁷⁶³ [1990] 3 NZLR 193.

⁷⁶⁴ New Zealand Law Reform Commission, *Succession Law: Homicidal Heirs* (Report 38, 15 July 1997) 2.

⁷⁶⁵ This concern is not misplaced. In *Lenaghan-Britton v Taylor* (1998) 100 A Crim R 565, for example, the plaintiff killed her grandmother and with her husband then took steps to make it appear that the deceased had been killed by a burglar by giving false accounts to the police. Eight months after the killing the pair for the first time admitted involvement, and the DPP subsequently accepted a plea of manslaughter on the grounds of diminished responsibility. The plaintiff was sentenced to 11 years imprisonment. Hodgson CJ in Equity, whilst acknowledging ‘this was a crime of extreme seriousness’ and ‘the attempt to cover up the crime was deliberate and serious’, nevertheless found for the plaintiff because ‘there was no premeditation ... the plaintiff had no intention to profit by the crime ... [and there would be] at most a very short acceleration of an entitlement under the deceased’s will’: at 571. This seems a surprising result. Given the calculated nature of the crime, ‘one might have thought this was ‘very near to murder’: Andrew Hemming, ‘Killing the Goose and Keeping the Golden Nest Egg’ (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342, 356. The case has been the subject of academic criticism: at 355–6. Peart is critical of the decision, calling it ‘rather surprising’ and a ‘very liberal application of the court’s power’, rightly pointing out that some of the factors relied upon were of ‘questionable relevance’ (profit motive) and even ‘quite improper’ (deceased’s impending death from cancer). See Nicola Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31(1) *Common Law World Review* 1, 27. Peart sums up by observing ‘the plaintiff’s conduct after the killing militated against leniency, as the criminal sentence suggests’: at 27.

rule could not adequately address all possible situations and remove all uncertainties and potential injustices. However, whilst acknowledging these challenges, STEP still preferred the hybrid approach, as better suited to guard against the potential uncertainty and inconsistency which would likely result from unrestricted judicial discretion. STEP referred to the degree of uncertainty in the application of the *Inheritance (Family Provision) Act 1972* (SA) which undermines the interests of justice for all relevant parties including will-makers, potential claimants, defendant beneficiaries and other family members. Its concern is that any new legislative framework for the forfeiture rule may similarly replace inflexibility with uncertainty. STEP described a hybrid model as being adequately predictable, while allowing sufficient flexibility to ensure just outcomes to meet the particular needs of an individual case.

4.6.23 The Legal Services Commission of South Australia noted that the inflexibility of the forfeiture rule means that it cannot take into account valid factors such as family violence and suicide pacts. The Legal Services Commission submitted that the forfeiture rule is outdated and should be entirely abolished. However, if the rule is not abolished, the Legal Services Commission considered that the next best option would be to replace the common law with appropriate legislative provisions which exclude the beneficiary but vest significant discretion in a court as to whether the exclusion applies wholly, partly, or not at all.

4.6.24 The Legal Services Commission made the interesting argument that any legislative changes should focus on entitlement to inherit rather than the nature of criminal culpability. The appropriate question and judicial discretion should focus on whether there is any reason that a beneficiary should not inherit the deceased's estate, taking into account public policy considerations.

4.6.25 Associate Professor Ben Livings of the University of South Australia, Glenn Carrasco of the English bar and Terry Evans agreed there is a need for an element of judicial discretion to moderate the rule in an appropriate case and favoured a 'hybrid' type approach, but with the only specific carve out being for 'informed consent' in which the deceased either consents to the killing or voluntarily engages with the killer in circumstances in which the volunteer's death is a foreseeable risk.⁷⁶⁶

4.7 SALRI's Observations and Conclusions

4.7.1 SALRI reiterates that legislative reform of the forfeiture rule is appropriate. SALRI's view is that, whilst excluding some categories or situations of unlawful killing might reduce the number of instances in which the application of the forfeiture rule is unjust, it is too inflexible to do so in all cases. While policy considerations are often regarded as a matter for Parliament to determine, the killer's degree of culpability will depend on the facts of each case.

4.7.2 As the cases discussed have demonstrated, simply considering whether a killer has committed a dangerous violent act,⁷⁶⁷ does not allow sufficient consideration of the circumstances and culpability of the individual. The commission of a violent act, whilst material, should not be conclusive to the application of the forfeiture rule in relation to an unlawful killing. The 'sense of outrage' described by Kirby P provides a preferable rationale for precluding a killer from taking a benefit, particularly as contemporary attitudes towards crime and punishment show a greater understanding of

⁷⁶⁶ See further below [6.1.101]–[6.1.106], [6.2.53]–[6.2.60], [6.3.10].

⁷⁶⁷ TG Youdan 'Acquisition of Property by Killing' (1973) 89(2) *Law Quarterly Review* 235, 240.

degrees and nuances of culpability. Kirby P's dissent in *Troja* is founded on the need for reformulation of the law, to prevent the law becoming 'a vehicle for serious injustice'.⁷⁶⁸

4.7.3 There are many different forms of killing and only a court hearing all the relevant facts will be in an informed position to consider the effect of all relevant factors in deciding whether or not the rule should apply.

4.7.4 For victims of family violence who kill, a codified approach may cause injustice, either by continuing to apply the rule rigidly where modification is justified, or by excluding all such killings, including cases where it is appropriate that the rule apply. A wholly codified approach may also be problematic in allowing family violence perpetrators to fit within a blunt, 'class' based code.

4.7.5 SALRI is of the view that it would impractical, if not impossible, to seek to formulate codified legislation in relation to the forfeiture rule that could cover the infinite variety of cases that will arise. Any such effort is an 'impossible task' as Professor Vines noted or will be 'doomed to failure' as Ms Kaela Dore noted in consultation.

4.7.6 SALRI's preferred position is that modification of the forfeiture rule should be available by the exercise of judicial discretion. Whilst SALRI accepts that the introduction of a judicial discretion to modify the rule will result in uncertainty in some cases, it will nonetheless mean that justice can be achieved in all cases by providing courts the power and crucial flexibility to deal with each case on its individual merits rather than by the application of a blanket or rigid rule. The concern of inconsistency or a judicial lottery can be addressed in part by a statutory list of relevant considerations with the primary statutory consideration of the degree of culpability of the unlawful killer.⁷⁶⁹ The judicial discretionary approach is a preferable model to flexibly respond to cases of family violence victims who kill an abusive domestic partner in response to ongoing family violence. This approach most effectively allows a court to consider the context and circumstances of the conduct in each case and recognise where the level of culpability of the killer is reduced.

4.7.7 Measures such as limitation periods for applications, as in other jurisdictions,⁷⁷⁰ would assist in providing some certainty for executors and potential beneficiaries without jeopardising a just result. Additionally, a provision, as in the New Zealand Act, where a conviction for an unlawful killing provides conclusive evidence of that question,⁷⁷¹ would reduce the issues at trial.⁷⁷²

4.7.8 However, SALRI acknowledges that the underlying premise of the forfeiture rule is sound and reflects public policy and community expectations that ordinarily an offender, especially in relation to a crime as grave as any form of unlawful killing within the *CLCA*, should not profit or benefit from the crime. It would bring the administration of justice into disrepute and be at odds with sound public policy if unlawful killers could too readily displace the forfeiture rule and benefit or profit from their crime. Whilst the strict application of the rule can produce unfairness in relation to killers with a limited degree of culpability, any ability to moderate the effects of the forfeiture rule must be tightly constrained. SALRI therefore favours a test of 'exceptional circumstances' to apply before a court can moderate the effects of the rule. The concept of 'exceptional circumstances' is a well understood phrase

⁷⁶⁸ *Troja v Troja* (1994) 33 NSWLR 269, 284.

⁷⁶⁹ See further below [6.4.32]–[6.4.38], Rec 23.

⁷⁷⁰ *Forfeiture Act 1991* (ACT) s 3(5); *Forfeiture Act 1995* (NSW) s 7; *Forfeiture Act 1982* (UK) s 2(3).

⁷⁷¹ *Succession (Homicide) Act 2007* (NZ) s 14. See below [5.5.24]–[5.5.29].

⁷⁷² Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 52.

and need not be further defined.⁷⁷³ Indeed, as Professor Vines noted, it is impossible of exhaustive definition. It could arise from the circumstances of the offender and/or the offence.

4.7.9 SALRI also notes the uncertainty of the common law and that, even post *Troja*, it is unclear what offences or situations fall within the forfeiture rule or not. For example, it is unclear whether manslaughter by gross negligence or causing death by culpable or dangerous driving fall within the rule or not. This is unsatisfactory. SALRI considers it is preferable for clarity and certainty that any *Forfeiture Act* clearly details those offences to which the forfeiture rule applies (namely those within the *CLCA*) and those which it does not (namely those outside the *CLCA*).⁷⁷⁴ However, the forfeiture rule should not be absolute. SALRI is of the view that a court should be able to modify the application of the forfeiture rule for an offence involving unlawful killing within the *CLCA* if the court is satisfied that it is in the interests of justice to do so and there are ‘exceptional circumstances’.

4.7.10 Recommendation

Recommendation 4

SALRI recommends that the proposed *Forfeiture Act* should draw on the common law forfeiture rule, but explicitly provide that the forfeiture rule should apply to offences involving unlawful homicide in the *Criminal Law Consolidation Act 1936* (SA), namely murder (s 11); all forms of manslaughter (ss 13, 13A and 268(3)); to aid, abet or counsel the suicide of another (s 13A(5)); causing the death of a child or vulnerable adult by criminal neglect (s 14) and causing death by driving in a culpably negligent manner, recklessly, or at a speed or in a manner dangerous to any person (s 19A). SALRI also recommends that, for consistency and completeness, this recommendation should also apply to anyone who aids, abets, counsels or procures the commission of one of these offences.⁷⁷⁵ However, the proposed *Forfeiture Act* should explicitly provide that the forfeiture rule should not apply to other forms of unlawful homicide outside the *Criminal Law Consolidation Act 1936* (SA) such as causing death by driving without due care or attention or without reasonable consideration for other persons using the road (s 45 of the *Road Traffic Act 1961* (SA)) or under employment or work safety laws (see the *Work Health and Safety Act 2012* (SA)).

⁷⁷³ See also above n 38, n 55.

⁷⁷⁴ See further below Part 5.

⁷⁷⁵ See also *CLCA* s 267; Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 22 [3.33]. See further Fiona Pepper and Damien Carrick, ‘A Murderer Can’t Inherit the Estate of Their Victim. What About Someone Who Covers Up the Crime?’ *ABC News* (online, 11 January 2019) <<https://www.abc.net.au/news/2019-06-11/tiffany-wan-annabelle-chen-case-estate-of-victim-forfeiture-law/11177022>>.

Part 5 - Scope of the Forfeiture Rule

5.1 Excluding Murder from Modification

5.1.1 The UK, ACT and NSW Acts apply to a person who has unlawfully killed another.⁷⁷⁶ However, none of these Acts apply when the unlawful killing constitutes murder.⁷⁷⁷ It has been observed that ‘in the case of murder, the application of the rule is clear and uncontroversial’.⁷⁷⁸

Issues

5.1.2 SALRI acknowledges that the question of whether to include or exclude murder from any ability to modify the application forfeiture rule is a difficult issue which requires the balancing of several competing considerations. There are valid and divergent views.

5.1.3 On the one hand, the gravity of the crime of murder must be considered as a powerful factor which favours excluding murder from any modification of the rule.⁷⁷⁹ Murder is one of the most (if not the most) serious crimes in the criminal law, and it would arguably be at odds with public policy and community expectations to include it within the scope of modification.⁷⁸⁰ Murder carries a unique label and culpability. The VLRC, for example, was of the view that the forfeiture rule should always apply in response to murder for this reason.⁷⁸¹ The Law Reform Commission of Ireland, presumably for the same reasons, was also of the view that modification orders should only be available in cases of manslaughter.⁷⁸² The Tasmania Law Reform Institute acknowledged that adverse community reactions to modification orders in the context of murder were likely, in light of the seriousness of the crime.⁷⁸³

5.1.4 On the other hand, it can legitimately be argued that the effect of the forfeiture rule should be flexible for an offender who has committed a murder with a lower degree of culpability, such as victims of family violence responding to prolonged abuse and killing a violent spouse where no defence such as self-defence or excessive self-defence may be available.⁷⁸⁴ This concern was shared by the Tasmania Law Reform Institute in its ultimate recommendation that modification orders should be available in appropriate cases of murder. The Tasmania Law Reform Institute emphasised that there

⁷⁷⁶ *Forfeiture Act 1991* (ACT) s 3(1); *Forfeiture Act 1995* (NSW) s 4(1); *Forfeiture Act 1982* (UK) s 2(1).

⁷⁷⁷ *Forfeiture Act 1991* (ACT) s 4; *Forfeiture Act 1995* (NSW) s 4(2); *Forfeiture Act 1982* (UK) s 5.

⁷⁷⁸ *Edwards v State Trustees Limited* (2016) 257 A Crim R 529, 532 [3] (Whelan JA); *Re Rattle* [2018] VSC 249, [42] (McMillan J).

⁷⁷⁹ See, for example, Law Commission of England and Wales, *The Forfeiture Rule and the Law of Succession* (Report No 295, 4 July 2005) 1 [1.2].

⁷⁸⁰ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 37 [4.12].

⁷⁸¹ *Ibid* 20 [3.18].

⁷⁸² Law Reform Commission of Ireland, *Prevention of Benefit from Homicide* (Report No 114, July 2015) 51.

⁷⁸³ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 25.

⁷⁸⁴ *Ibid* 37 [4.11]. Mr Boucaut QC gave the example to SALRI of *R v R* (1981) 28 SASR 321 where a victim of extreme domestic violence killed her abusive husband. She was eventually acquitted of murder and manslaughter. Mr Boucaut noted that, especially if the much criticised partial defence of provocation is abolished, the wife in *R v R* strictly had no defence available to her and was guilty of murder.

are likely to be cases of murder which carry lower levels of culpability in Tasmania, as no defence of provocation or diminished responsibility is available in that jurisdiction.⁷⁸⁵

5.1.5 It should also be recalled that making modification orders available in cases of murder is not tantamount to abolishing the forfeiture rule in cases of murder, but simply allows for an application to be made for a court to modify in a suitable rare case the effect of the rule.⁷⁸⁶

5.1.6 The artificiality of the distinction between murder and manslaughter was a consistent theme in both submissions and research undertaken by SALRI. This point can be illustrated by various South Australian homicide cases. For example, in *R v Vadjunec*, the defendant pleaded guilty to murder after repeatedly striking his father on the head with a ten kilogram dumbbell.⁷⁸⁷ This act appeared to be the culmination of the defendant's concerns about his father's controlling, if not abusive, behaviour towards the rest of the family. By contrast, in the case of *R v Curtis*,⁷⁸⁸ the defendant was found guilty of manslaughter after bludgeoning his *de facto* partner to death. Her death was a part of a cycle of violence, and she had previously been the subject of graphic and sustained family violence at his hands. Gray J described the conduct of Curtis as 'cowardly and despicable'.

5.1.7 The tenuous nature of the distinction between murder and manslaughter in the application of the forfeiture rule was highlighted to SALRI. It was often noted to SALRI, notably by Mr Boucaut QC, that a 'bad' manslaughter can be objectively more culpable than some cases of murder.

5.1.8 The reports of law reform bodies from the UK, New South Wales and New Zealand do not discuss this issue in any detail. The prevailing view appears to be that the gravity and culpability of the crime of murder should automatically preclude any moderation of the forfeiture rule.⁷⁸⁹

Consultation Data Overview: Should There be a Distinction Between Murder and Manslaughter?

5.1.9 The general view at the Adelaide Roundtables was that modification of the forfeiture rule should be available in cases of manslaughter. However, divergent views were expressed with respect to whether modification should be allowed in cases of murder. At one of the three Adelaide Roundtables, attendees agreed that modification of the rule should also be allowed in cases of murder. Those in favour of allowing modification for murder took this view as they had difficulty in rationalising the fact that some instances of manslaughter are a lot more serious than some instance of murders. 'Some murders are of a lower culpability than even some manslaughters.' All attendees acknowledged that a 'bad' manslaughter, such as a vicious drunken assault on a spouse (especially after a prolonged history of violence) which results in a killing but without murderous intent, may demonstrate culpability greater than in some cases of murder. It was recognised that 'the old separation of murder and manslaughter as completely separate may not be the same'. An example provided to

⁷⁸⁵ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 24. This is also valid in South Australia where there is no partial defence of diminished responsibility and the Attorney-General has recently foreshadowed the abolition of the controversial partial defence of provocation. See 'SA to Dump Provocation Defence', *Canberra Times* (online, 9 April 2019) <<https://www.canberratimes.com.au/story/6009329/sa-to-dump-provocation-defence/>>.

⁷⁸⁶ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 25.

⁷⁸⁷ See further below Appendix B.

⁷⁸⁸ See further below Appendix B.

⁷⁸⁹ See for example, New Zealand Law Commission, *Succession Law: Homicidal Heirs* (Report No 38, 15 July 1997) 6.

SALRI of a case where it may be suitable to moderate the rule in murder is where a victim of family violence kills a violent and abusive spouse, and is convicted of murder due to an inability to raise self-defence. The issue of provocation and its forthcoming abolition (as announced by the Attorney-General)⁷⁹⁰ was raised by one party as a complicating factor. Other examples were in the mercy killing, euthanasia and informed consent cases. On this view, some attendees expressed concern to SALRI at the absence of discretion to moderate the forfeiture rule in cases of murder.

5.1.10 Those attendees who supported modification of the forfeiture rule for murder agreed that it should only be done in extremely limited circumstances. In cases involving the ‘average murder’, there should be no modification allowed.

5.1.11 One suggestion was to link any flexibility to avoid the forfeiture rule in murder to the question of whether ‘special’ or ‘exceptional’ circumstances exist under South Australian sentencing laws to avoid the general mandatory 20-year minimum sentence for murder.⁷⁹¹ There was some support for this approach.

5.1.12 The alternative view relayed to SALRI was that the forfeiture rule should remain absolute for murder owing to the strong underlying public policy: ‘murder is murder — you have to intend to kill someone — the rule should be absolute.’ The attendees who held this view viewed euthanasia as the ‘bright line’, being a case where a strict view of murder should be taken and that allowing flexibility in cases of murder would be getting in front of a sensitive public policy decision, as mercy killing and assisted dying remain murder in South Australia.⁷⁹²

5.1.13 Whilst appreciating that some instances of manslaughter are worse than some examples of murder, a real concern expressed to SALRI was that ‘you are going to get into trouble with getting a court involved in moral judgement’ and it would undermine the criminal law to allow modification for murder. However, it was noted that courts have to make these judgements in sentencing. One attendee distinguished murder from manslaughter due to the ‘deliberate’ act of killing involved in murder, and commented that ‘this is why an absolute bar to murder is upheld in other jurisdictions’.

5.1.14 At one Adelaide Roundtable, the example was discussed of an English couple married 40 years, where the husband had a terminal illness and made an informed decision that he wanted to end his life.⁷⁹³ His wife tried to persuade him otherwise, but her efforts were in vain. The wife arranged for her husband to travel to Switzerland to lawfully end his life in that jurisdiction (though still unlawful under UK law). There was broad agreement that the rule should not apply in this situation. However, the example was extended to the more explicit case where the wife actively administers the lethal drug. In such a case, the wife could be found guilty of murder. The question was posed if it would be wrong for the civil law to step ahead of the criminal law in this sensitive area?

⁷⁹⁰ See Government of South Australia, *Attorney-General’s Department*, ‘State Government Moves to Abolish Provocation Defence’, (Web Page, 9 April 2019) <<https://www.agd.sa.gov.au/newsroom/state-government-moves-abolish-provocation-defence>>.

⁷⁹¹ See generally David Plater, David Bleby, Megan Lawson, Lucy Line, Amy Teakle, Katherine O’Connell and Kate Fitz-Gibbon, South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 2* (Report No 11, April 2018) 70–104, especially 101–3 [11.11.1]–[11.11.7].

⁷⁹² However, it was noted that there have been recent legislative developments in Victoria and Western Australia and there have been similar efforts in South Australia with respect to euthanasia or assisted dying.

⁷⁹³ See *Ninian v Findlay* [2019] EWHC 297 (Ch).

5.1.15 At the Mount Gambier Roundtable, the majority view was that the discretion to modify the forfeiture rule should be confined to manslaughter and that it was wrong in principle for the rule to be modified for murder. It was emphasised that ‘hard cases make poor law’. The fundamental rationale of the forfeiture rule was emphasised, and it was noted that it is difficult to see why in policy an intentional killing should avoid the rule. The underlying public policy was emphasised. It was accepted that there will be cases such as the mercy killing of a terminally ill spouse where application of the rule seems unfair, but ‘individual cases cannot make public policy’.

5.1.16 It was considered that, although the distinction between murder and manslaughter may sometimes be elusive, murder has a gravity that still requires the absolute application of the rule. In response to the mercy killing scenario, it was emphasised that the civil law cannot pre-empt or move ahead of the criminal law, and if something is murder under the criminal law, the civil law should not seek to undermine this fundamental premise.

5.1.17 Another view expressed at the Mount Gambier Roundtable was that the rule should allow modification for manslaughter and, in ‘exceptional’ cases, murder. This view was expressed by a smaller group of attendees, who doubted the distinction between murder and manslaughter. This view highlighted the fact that a bad case of manslaughter may well in fact be more ‘heinous’ than an example of murder such as a mercy killing. It was noted that applying the rule as an absolute proposition to murder may well disadvantage female victims of family violence, who finally kill an abusive spouse and are then found guilty of murder. This is due to all the property being held solely in the name of the husband, which SALRI was told happens often. The forfeiture rule should not unfairly prejudice female defendants in a family violence situation who are guilty of murder. In support of the view that any discretion should extend to both manslaughter and murder, the forthcoming abolition of the controversial partial defence of provocation was noted.

5.1.18 One suggestion, to link any flexibility to avoid the forfeiture rule in murder to the question of whether ‘special’ or ‘exceptional’ circumstances exist under the South Australian sentencing laws to avoid the general mandatory minimum 20 year sentence for murder, was raised but did not find support. This approach was seen as ‘arbitrary’ and ‘not very satisfactory’. It was noted that they are ‘linked’ but distinct questions. The considerations are different and it is too simplistic a parallel to draw from the very narrow discretion under the sentencing law for murder. This would be trying to solve the dilemma of the forfeiture rule by reference to an unsatisfactory parliamentary solution to another dilemma of how to sentence the crime of murder.

5.1.19 Outside the Roundtable discussions, all but one submission argued that the rule should remain absolute for murder with no scope for judicial modification. Submissions received from the South Australian Victim Support Service, the South Australian Commissioner for Victim’s Rights, Ken Mackie, Professor Gino Dal Pont, the Hon Geoffrey Muecke and Dr Hemming all argued that the rule should remain as it is for murder. The main argument expressed was the need to retain the sound rationale of the law that a murderer at least should not be able to profit from their crime and that it is problematic for the civil law to get ahead of the criminal law. Many parties argued that these issues are perhaps better solved by reforming other laws, rather than the common law forfeiture rule. For example, this could be done by reforming euthanasia laws or strengthening self-defence for women.

5.1.20 Mr Boucaut QC accepted that the forfeiture rule should ordinarily apply to cases of murder but there should be an ability in ‘exceptional’ circumstances for a court to be able to modify the rule in such cases. This suggestion was also raised by Professor Vines and at one of SALRI’s Adelaide roundtables. Mr Boucaut noted to SALRI that such an approach preserves the underlying

sound policy of the forfeiture rule but allows a court a narrow power to modify the rule in an appropriate case of murder. Mr Boucaut explained that ‘exceptional’ is a familiar and well understood expression in South Australian legislation and it is unnecessary and unhelpful to seek to define it.⁷⁹⁴ Mr Boucaut noted that ‘exceptional’ could involve the circumstances of the offence or the offender or the effects of applying the rule. Mr Boucaut stated that the concern of a ‘judicial lottery’ is overstated and this area can and should rely on the structured, careful and sensible exercise of judicial discretion. Professor Vines noted that there should be a limited discretion for a court to modify the rule for murder as in rare situations it will be ‘very unjust’ to apply the rule for murder. She considered the phrase ‘exceptional circumstances’ represented an apt test to govern this issue.

5.1.21 Kellie Toole argued that the forfeiture rule should allow for modification in some instances of murder. She noted that in South Australia, the framing of the offence of murder is broad and includes both the intention and recklessness⁷⁹⁵ to kill or cause grievous bodily harm. Ms Toole noted that this breadth may result in capturing ‘murderers’ that the rule was never intended to capture. Associate Professor Ben Livings expressed a similar view and submitted to SALRI that there will be circumstances where it will be harsh to apply the rule to murder and supported a discretion in ‘exceptional circumstances’ for a court to be able to modify the rule in cases of murder.

5.1.22 Dr Andrew Hemming took the opposing view that, given that the fault element for murder in South Australia is intention or reckless disregard for human life, there can be no room for a perpetrator to benefit from their unlawful killing.

5.1.23 Professor Dal Pont and Mr Mackie accepted that the distinction between murder and manslaughter may be fine and a ‘bad manslaughter’ may well be objectively worse than ‘a not so bad murder’ but murder still has its distinct elements and intention and label and any flexibility to modify the forfeiture rule should only extend to manslaughter and not to murder. Professor Dal Pont noted to SALRI that there is a unique culpability and criminality attached to murder and not to other unlawful killings. He reiterated that there are sad situations of murder such as euthanasia but the civil law should not overtake the criminal law in this sensitive context and as long as Parliament retains murder to cover such a situation, the civil law should not pre-empt this.

5.1.24 The Law Society of South Australia suggested that consideration should be given to the rule not applying in circumstances where there is defence of provocation, or if self-defence has successfully been raised in a murder charge.

SALRI’s Observations and Conclusions

5.1.25 SALRI notes the consistent theme in its consultation that it is impracticable and inappropriate to seek to distinguish between different forms of manslaughter as to the application or not of the forfeiture rule. Indeed, any such effort is ‘doomed to failure’. ‘Manslaughter is a crime which

⁷⁹⁴ Mr Boucaut QC also noted that the existing law in South Australia as to sentencing for unlawful homicide and other serious offences against the person already has reference to ‘special reasons’ to allow a court to depart from the usual prescribed statutory sentence. See *Sentencing Act 2017* (SA) s 48. It is also significant that one of SALRI’s suggestions for changes to the present law for sentencing for unlawful homicide and other serious offences against the person is to allow a court to depart from the usual prescribed statutory sentence if there are ‘exceptional’ circumstances.

⁷⁹⁵ See *R v Crabb* (1985) 156 CLR 464.

varies infinitely in its seriousness'.⁷⁹⁶ Manslaughter also varies widely in its gravity and an offender's culpability as to any individual category of manslaughter.⁷⁹⁷ For example, the gravity of manslaughter by gross negligence will vary between 'mere' momentary inadvertence and the callous and prolonged neglect of a vulnerable adult (such as in *Land v Land*⁷⁹⁸) or young child⁷⁹⁹ leading to death.

5.1.26 SALRI considers that no distinction can, or should, be drawn between the different categories of manslaughter and the forfeiture rule should apply to all forms of manslaughter,⁸⁰⁰ but equally the ability under any *Forfeiture Act* to modify the application of the rule should arise in an appropriate case to any form of manslaughter.

5.1.27 The majority of the English Court of Appeal in *Dunbar v Plant* concluded that it is sensible to provide statutory flexibility in the application of the forfeiture rule to cases of deliberate killing or the deliberate use or threat of violence and any suggestions to the contrary 'do not cater for cases of diminished responsibility or provocation [or excessive self-defence in South Australia] where the mitigating features may be such as to render it particularly harsh'.⁸⁰¹ SALRI notes that such cases are especially likely to arise in the context of assisted suicide or a suicide pact⁸⁰² or an unlawful killing committed out by a victim of family violence on an abusive family member. However, the majority in *Dunbar v Plant* also observed that, whilst it is likely a court in the exercise of its statutory discretion would not apply the forfeiture rule in a majority, if not most, cases of assisted suicide, there will still be 'serious' cases where it would be appropriate to apply the rule.⁸⁰³

5.1.28 The distinction between murder and manslaughter in governing the operation of the forfeiture rule was widely, though far from universally, doubted in SALRI's consultation. The artificiality of the distinction between murder and manslaughter was a consistent theme in both submissions and research undertaken by SALRI. It was noted that a 'bad' manslaughter can be objectively worse than a 'soft' murder. This point was eloquently made to SALRI by Mr Boucaut QC. Mr Boucaut noted that, aside from such cases as the mercy killing of a terminally ill spouse or a long suffering victim of family violence killing an abusive spouse (where a partial defence such as excessive self-defence may not be open), many murders are spontaneous and impulsive actions or responses to highly charged situations. Mr Boucaut noted that relatively few murders are the deliberate and premeditated crimes motivated by greed. On the other hand, Mr Boucaut noted that manslaughter (including manslaughter by gross negligence⁸⁰⁴ and death by culpable or dangerous driving)⁸⁰⁵ can cover

⁷⁹⁶ *Gray v Barr* [1971] 2 QB 554, 581. 'For more than 100 years, judges in all Australian jurisdictions, and in England, have observed that, of all serious offences, manslaughter attracts the widest range of possible sentences. The culpability of a person convicted of manslaughter may fall just short of that of a person guilty of murder or ... it may be such that a nominal penalty would suffice': *R v Lavender* (2005) 222 CLR 67, 77 (Gleeson CJ, McHugh, Gummow and Hayne JJ). See also *Attorney-General (Tas) v Wells* [2003] TASSC 78, [26]; *R v Forbes* (2005) 160 A Crim R 1, [133]–[134]; Mervyn D Finlay, *Review of the Law of Manslaughter in New South Wales* (Report, April 2003) 24–5 [6.1]–[6.4], 66–73. See further above n 615 and below n 1189, n 1191.

⁷⁹⁷ Mervyn Finlay, *Review of the Law of Manslaughter in New South Wales* (Report, April 2003) 69–72 [11.7].

⁷⁹⁸ [2007] 1 WLR 1009.

⁷⁹⁹ See, for example, *R v Polkinghorne and McPartland* [2014] SASFC 84.

⁸⁰⁰ See further below [6.1.40]–[6.1.77], [6.2.27]–[6.2.37], [6.3.1]–[6.3.18].

⁸⁰¹ *Dunbar v Plant* [1997] 4 All ER 289, 310 (Phillips LJ, Hirst LJ agreeing).

⁸⁰² *CLCA* s 13A.

⁸⁰³ *Dunbar v Plant* [1997] 4 All ER 289, 312.

⁸⁰⁴ See also below [6.1.50], [6.3.17].

⁸⁰⁵ See also below [6.3.19]–[6.3.24].

the most heinous and reprehensible conduct that exceeds some instances of murder in culpability. He gave the example of an abusive husband who has inflicted prolonged abuse and violence upon his wife and finally kills her in a savage attack but may only be convicted of manslaughter (or someone who under the influence of illicit drugs and/or alcohol embarks upon a prolonged course of wanton driving whilst accompanied by a family member who dies as a result).

5.1.29 Some respondents powerfully argued to SALRI that the forfeiture rule should remain absolute and unbending in cases of murder. SALRI, whilst recognising the force of this argument, was ultimately persuaded by the contrary argument that there will be very rare cases in which the culpability of a murderer is sufficiently diminished to justify not applying the forfeiture rule.

5.1.30 There is a broad spectrum of offending that can constitute murder, such that murder offences differ widely in both severity and character ‘probably more so than any other crime’. For instance, murder can encompass a single ‘mercy’ killing, or extremely violent, cruel, pre-meditated, multiple and contract killings.⁸⁰⁶ Additionally, there is a large spectrum of subjective blameworthiness and culpability of the person or persons responsible for the killing(s), which ranges from recklessness and intentional motives of compassion to intentional killings for financial gain or callous and calculating offenders.⁸⁰⁷ As one South Australian MP observed:

No two murders will be alike and that the range of circumstances is such that it is almost impossible to put into one bucket the offences that constitute what can be classified as murder. Murder can be everything from the most awful torture of an innocent child to someone who lovingly assists a longstanding partner who is terminally ill to die.⁸⁰⁸

5.1.31 The introduction of any law to modify the application of the forfeiture rule in relation to murder in South Australia may be seen as contentious, especially as South Australia would be the first jurisdiction to allow the rule to be modified in cases of murder. SALRI reiterates that, having regard to its consultation and research, notably the unconvincing distinction in this context between murder and manslaughter as Mr Boucaut and others have argued, a court should have an ability to depart from the forfeiture rule in cases of murder. The underlying rationale of the rule remains sound, but SALRI considers that the rule should not be absolute in an ‘exceptional’ case of murder. It must be emphasised that there will only be very rare instances where ‘exceptional circumstances’ will arise to require modification of the rule in a case of murder but such a situation may arise.

5.1.32 SALRI therefore favours a general judicial discretion in ‘exceptional circumstances’ in any *Forfeiture Act* to modify the forfeiture rule in murder, all forms of manslaughter and other offences of unlawful homicide within the *CLCA*.

⁸⁰⁶ Alex Bailin, ‘The Inhumanity of Mandatory Sentences’ [2002] (Aug) *Criminal Law Review* 641, 641 citing *Reyes v The Queen* [2002] 2 AC 235, 241–2 [11] (Lord Bingham). See also *R v Howe* [1987] 1 AC 417, 433.

⁸⁰⁷ John Anderson, ‘The Label of Life Imprisonment in Australia: A Principled or Populist Approach to an Ultimate Sentence’ (2012) 35(3) *University of New South Wales Law Journal* 747, 764; *R v Howe* [1987] AC 417, 433 (Lord Hailsham). See also David Plater, David Bleby, Megan Lawson, Lucy Line, Amy Teakle, Katherine O’Connell and Kate Fitz-Gibbon, South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 2* (South Report No 11, April 2018) 73 [11.2.3].

⁸⁰⁸ South Australia, *Parliamentary Debates*, House of Assembly, 6 March 2007, 1936 (Mrs Redmond).

Recommendation 5

SALRI recommends that a limited discretion should be included in the proposed *Forfeiture Act* to allow a court to modify the forfeiture rule in the cases of unlawful homicide described in Recommendation 4 where a court finds that it is in the interests of justice to do so and there are ‘exceptional’ circumstances’. The term ‘exceptional’ should not be defined.

5.2 Mental Impairment

Current South Australian Position

5.2.1 The common law has always treated a killer found not guilty of murder on the grounds of insanity as unaffected by the operation of the forfeiture rule and therefore eligible to inherit the victim’s estate.⁸⁰⁹ The basis for this is that the finding of insanity or mental impairment negates any relevant criminal intent or responsibility, preventing the killing from being unlawful. The killer is innocent in the eyes of the criminal law (though still liable for lengthy detention and treatment).

Position in Other Jurisdictions

5.2.2 The UK, ACT and NSW Acts allow courts to make orders modifying the effects of the forfeiture rule. However, only the NSW Act permits a court to apply the forfeiture rule to a person who is found not guilty of murder by reason of mental impairment.⁸¹⁰

5.2.3 A 2005 amendment to the NSW Act which commenced on 28 October 2005, overturned the common law position where a killer has been found not guilty of murder by reason of mental impairment. Any interested person may now apply to the Supreme Court for an order that the forfeiture rule apply as if the offender had been found guilty of murder.⁸¹¹ The court may make an order applying the forfeiture rule to an individual found not guilty of murder on the basis of mental impairment if it is satisfied that justice requires the rule to be applied.⁸¹² The NSW Act now provides for ‘forfeiture application orders’ in addition to ‘forfeiture modification orders’.

5.2.4 In exercising this power, the Supreme Court should have regard to the conduct of the killer, the conduct of the deceased person, the effect of the application of the rule on the killer or any other person and such other matters as to the court appear material.⁸¹³

5.2.5 There was limited discussion by the relevant Ministers of the rationale for this expansion of the forfeiture rule.⁸¹⁴ The discretion to apply the rule to killers acquitted on the basis of insanity

⁸⁰⁹ *Re Houghton* [1915] 2 Ch 173, 178; *Re Plaister; Perpetual Trustee Company v Crawshaw* (1934) 34 SR(NSW) 547; *Kemperle v Public Trustee* (Supreme Court of New South Wales, Powell J, 20 November 1985); *Re Estate of Soukup* (1997) 97 A Crim R 103.

⁸¹⁰ *Forfeiture Act 1995* (NSW) s 11.

⁸¹¹ *Ibid* s 11(1).

⁸¹² *Ibid* s 11(2).

⁸¹³ *Ibid* s 11(3).

⁸¹⁴ SALRI has heard in consultation that one reason for the expansion of the forfeiture rule to persons found not guilty of murder on the basis of mental impairment may be perceived disquiet over the prevalence of drug induced psychosis and the successful use of the mental impairment defence by persons whose mental impairment has been

(now mental impairment) was introduced to ‘prevent mentally ill murderers from profiting from their crime by applying the forfeiture rule’.⁸¹⁵

5.2.6 Lindsay J recently explained the apparent rationale for the 2005 changes:

Although the legislative history of the 2005 amendments to the *Forfeiture Act* provides little elaboration of policy reasons for extension of the operation of the forfeiture rule to persons found not guilty of murder on the ground of mental illness, the terms of the amendments to the *Forfeiture Act* and the tone of the second reading speech in support of them suggest a reluctance to differentiate between conviction of an offence less than murder and a finding of not guilty on a charge of murder on the ground of mental illness. To quote a passage of the second reading speech not here extracted, the reforms embodied in the amendment bill (including amendments to the *Forfeiture Act*) were presented as reforms designed to ‘benefit victims of crime’ ... for this purpose, accepting that ‘mentally ill people [may] commit serious offences’ evidence ... suggests that the 2005 amendments were the product of political representations made to the then NSW Attorney-General (Bob Debus) on behalf of Homicide Victim Support Groups⁸¹⁶ ... It is not altogether surprising that, in the fullness of time, questions of justice approached a similar point from opposite directions. It is not altogether surprising that ‘victims of homicide’ should call for the justice of a case to be more closely examined notwithstanding that a death was caused by a person found wanting in capacity for the ‘guilty mind’ required to constitute a crime. Although minds might differ about particular forms of order, there is a symmetry between the types of cases dealt with by sections 5 and 11 of the *Forfeiture Act*. That symmetry depends ultimately upon the Court being able to assess what ‘justice requires’ by reference to particular facts.⁸¹⁷

5.2.7 SALRI could find only five reported cases in which s 11 of the *Forfeiture Act 1995* (NSW) has been considered.⁸¹⁸ It is significant that in all five cases the forfeiture rule was invoked against individuals found not guilty on the basis of mental impairment of the murder of family members.⁸¹⁹ The contribution of illicit drugs to the mental impairment of a killer appears to have been a significant factor in the NSW decisions concerning the forfeiture rule.

caused, or at least contributed to, by the use of drugs or alcohol. ‘Statistics collected from a case file review undertaken by the Attorney-General’s Department indicated that almost a quarter of offenders who successfully used the mental incompetence defence were suffering from an impairment caused by drug induced psychosis or from substance abuse and dependence’: South Australia, *Parliamentary Debates*, House of Assembly, 4 August 2016, 6642 (Hon John Rau, Attorney-General). See also *Criminal Law Consolidation (Mental Impairment) Amendment Act 2017* (SA); South Australia, *Parliamentary Debates*, House of Assembly, 4 August 2016, 6640–6; South Australia, *Parliamentary Debates*, House of Assembly, 30 May 2017, 9882–3.

⁸¹⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 September 2005, 18042 (Graham West).

⁸¹⁶ *Public Trustee v Fitter* [2005] NSWSC 1188, [52](l)–(m), [53] (Lloyd AJ),

⁸¹⁷ *Re Settree Estates; Robinson v Settree* [2018] NSWSC 1413, [79]–[82].

⁸¹⁸ *Public Trustee v Fitter* [2005] NSWSC 1188 (the subject of an unsuccessful application in *Fitter v Public Trustee* [2007] NSWSC 1487 for orders to be set aside); *Guler v NSW Trustee and Guardian* [2012] NSWSC 1369; *Hill v Hill* [2013] NSWSC 524; 11 ASTLR 121; *Estate of Novosadek* [2016] NSWSC 554; *Re Settree Estates; Robinson v Settree* [2018] NSWSC 1413.

⁸¹⁹ The VLRC, whilst critical of the policy behind the 2005 NSW provision, found little concern over its operation. ‘Consultations undertaken with judges of the NSW Supreme Court, the Elder Law and Succession Committee of the New South Wales Law Society and other New South Wales-based legal professionals suggests 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’: Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, April 2014) 33 [3.91].

5.2.8 The first test of the operation of a forfeiture application order occurred in the case of *Public Trustee v Fitter*.⁸²⁰ In 2001, Fiona Fitter was killed when she was attacked with a knife by her husband and her son. The culprits were charged with murder, but both were found not guilty by reason of mental impairment. The Public Trustee, as the administrator of the intestate estate of Fiona Fitter, sought a ruling from the Supreme Court as to whether the forfeiture rule applied,⁸²¹ whilst the deceased's sister, Ann Robb, made a 'forfeiture application order' under s 11(1).⁸²² The Supreme Court upheld Ms Robb's cross-claim for a forfeiture application order, therefore preventing Fiona Fitter's killers from sharing in the deceased's estate.⁸²³

5.2.9 Subsequently, in *Guler v NSW Trustee and Guardian*,⁸²⁴ White J held that 'having regard to the second defendant's conduct, the absence of any provocation by the deceased, the lack of contrition, and the prior history of violent behaviour, that notwithstanding that the second defendant was found not guilty of murder on the grounds of mental illness, the forfeiture rule should apply'.⁸²⁵

5.2.10 In *Estate of Novosadek*, Young AJ observed that

in circumstances where the Legislature has chosen to extend the application of the rule to persons found not guilty of murder by reason of mental illness, it would be odd if criminal or moral culpability were the touchstone in determining whether the forfeiture rule should be applied. However, what authority there is seems to take into account the significant actions of the killer and the public revulsion that a person who has committed such actions should reap a financial benefit from them.⁸²⁶

5.2.11 Further, Young AJ applied the matters listed in s 11(3) above as follows:

Putting all these factors together, I consider that in all the circumstances which I have outlined and in particular the public abhorrence of what occurred, justice requires that I make an order under s 11 of the *Forfeiture Act* that the *Forfeiture Act* apply to the killings by the Defendant of his mother, step-father and brother Raul as if the Defendant had been found guilty of their murders.⁸²⁷

5.2.12 The *Forfeiture Act 1995* (NSW) therefore now provides for competing mechanisms under s 5(1) and s 11(1) where a killer has been found not guilty of murder by reason of mental impairment, to determine who may benefit from the deceased's estate.

Issues

5.2.13 The various issues relevant to the application of the forfeiture rule to persons found not guilty by reason of mental impairment were discussed by the VLRC.⁸²⁸ In particular, the VLRC recognised that the exception for those found not guilty by reason of insanity or mental impairment applies only to a very specific class of offenders. These offenders must be able to establish that, at the

⁸²⁰ [2005] NSWSC 1188.

⁸²¹ Ibid [3].

⁸²² Ibid [46].

⁸²³ Ibid [57].

⁸²⁴ [2012] NSWSC 1369.

⁸²⁵ Ibid [2].

⁸²⁶ *Estate of Novosadek* [2016] NSWSC 554, [32].

⁸²⁷ Ibid [71].

⁸²⁸ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 30–4 [3.74]–[3.102].

time of the offence, 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 did not know that the act was wrong.⁸²⁹ It is onerous for a person to establish that they were labouring under such a defect, and a finding of not guilty by reason of mental impairment is not treated lightly by either the DPP or the courts.⁸³⁰

5.2.14 The VLRC quoted the NSW Legislation Review Committee who were of 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’.⁸³¹ The VLRC emphasised that extending the forfeiture rule to an individual found not guilty of murder on the basis of mental impairment undermines the ‘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’.⁸³² The VLRC stated that the rule ‘should not be used in opposition to legal standards that determine an offender’s moral culpability or responsibility for an offence’.⁸³³ The VLRC explained that, whilst noting the concerns of victims, the forfeiture rule is a rule of public policy that prevents an offender from benefiting from their crime ‘and 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’.⁸³⁴ The VLRC considered that the exception for persons found not guilty by reason of mental impairment was sound and justifiable.

5.2.15 The Law Reform Commission of Ireland considered that it should continue to be the case that the common law forfeiture rule does not apply where a person has been found not guilty by reason of insanity.⁸³⁵ However, the Irish Commission acknowledged that there was no consensus among consultees as to whether this aspect of the law should or should not be retained.⁸³⁶

5.2.16 Reports by the UK, ACT, NSW, Tasmania and NZ law reform bodies did not discuss the issue.

5.2.17 One issue that was raised to SALRI is that the application of the forfeiture rule to individuals found not guilty of murder on the basis of mental impairment could leave them without any inheritance. The burden of supporting them would then fall on the State. This raises the question of whether the State should pay for this when, but for the forfeiture rule, there may be private funds available for it.

⁸²⁹ Ibid 25 [3.49], 30 [3.74]–[3.77].

⁸³⁰ Ibid.

⁸³¹ Ibid 32 [3.90].

⁸³² Ibid 34 [3.98].

⁸³³ Ibid 33 [3.96].

⁸³⁴ Ibid 34 [3.99].

⁸³⁵ Law Reform Commission of Ireland, *Report on Prevention of Benefit from Homicide* (Report No 114, July 2015) 66.

⁸³⁶ Ibid 64.

Consultation Data Overview: Should the Forfeiture Rule be Capable of Applying Where an Offender Has Been Found Not Guilty by Reason of Insanity or Mental Impairment?

5.2.18 SALRI's research (see Appendix C below) identified 11 cases in South Australia of individuals found not guilty of murder owing to mental impairment where otherwise the forfeiture rule may have arisen. There is a genuine question as to whether the NSW provision should be part of the law in South Australia. SALRI received divided views as to how cases where an individual found not guilty of murder by reason of mental impairment should be dealt with under the forfeiture rule.

5.2.19 The fact that an individual who has been found not guilty by reason of mental impairment has been deemed not legally responsible for their actions was viewed by many parties as conclusive justification for retaining the exclusion of such cases from the forfeiture rule. However, this approach was questioned by many parties who favoured extending the forfeiture rule, as in NSW, to a person found not guilty of murder on the basis of mental impairment. It was noted that cases of individuals killing family members and potentially benefitting from the killing (often dramatically) after being found to be mentally incompetent or insane were far from unknown.⁸³⁷ The rationale behind the 2005 NSW change was seen as being in response to genuine community disquiet, including a killer who may have 'contributed' to their condition by drug use.

5.2.20 One of the views expressed during the Adelaide Roundtables was that a verdict of not guilty owing to mental impairment means there is no culpability and that the fundamental issue to attract the forfeiture rule should be moral culpability. These killers are not guilty of any crime, but they are subject to detention and/or supervision for life. Those against the NSW provision asserted that the civil law would be undoing or undermining determinations of the criminal law and that it seems illogical to attach this issue to the forfeiture rule. It was asserted that deterrence is not a factor as the individual is mentally incompetent and is not responsible for his or her actions. However, other attendees favoured the NSW approach and noted that a killing under a mental impairment involves a wide range of situations and some circumstances may justify the application of the forfeiture rule. It was noted to SALRI that the property subject to the forfeiture rule, should not flow directly to the person found not guilty by reason of insanity or mental impairment, but should rather be under the control of SACAT.

5.2.21 There was strong, though not universal, support at SALRI's third Adelaide roundtable for the NSW approach. Attendees contemplated that there will be circumstances where it will be wrong to allow a killer to inherit as a result of a killing where they are found not guilty of murder by reason of insanity or mental impairment. If there should be judicial discretion to not apply the forfeiture rule to a an offender convicted of manslaughter or murder, attendees said that it would be a 'consistent revision' and 'logical' to allow a court at its discretion to apply the rule to someone found not guilty of murder by reason of insanity or mental impairment. It would depend on the relevant condition and the whole circumstances. It was commented that 'judicial discretion is the key to resolving this issue'. Those attendees in support of a reverse modification thought that it would not be beneficial to codify

⁸³⁷ See, for example, Jenny Noyes, 'Sister Fights to Stop Brother Inheriting Parents' Money After he Killed Them', *Sydney Morning Herald* (online, 24 October 2018) <<https://www.smh.com.au/national/nsw/sister-fights-to-stop-brother-inheriting-parents-money-after-he-killed-them-20181023-p50bhn.html>>. See also Ellen Coulter, 'Weston, Mooney Murder Trial: Family of Insane Killer Criticises WA Mental Health System', *ABC News* (online, 19 June 2014, <<https://www.abc.net.au/news/2014-06-19/soares-double-murder-verdict/5536016>>).

such a rule, and that such a reverse modification would have to be discretionary as social values change over years.

5.2.22 The recent decision of Lindsay J in *Re Settree Estates; Robinson v Settree*⁸³⁸ was cited by one party as an example of ‘a good outcome’, and was cited in support of the NSW approach of allowing a court the discretion to apply the rule in an appropriate case to a person found not guilty of murder by reason of mental impairment. The ‘creative’ approach taken by Lindsay J, in effect a second discretion, in deciding what happened to the estate after deciding the rule should apply, was also noted.

5.2.23 At the Mount Gambier Roundtable, the majority of attendees supported the NSW approach to allow the application of the forfeiture rule to a killer acquitted on the basis of insanity. It was noted that an individual found not guilty of murder by reason of mental impairment may be released into the community under supervision after a comparatively short period. Differing ‘kinds’ of mental impairment were also noted, such as a drug-induced psychosis. It was also highlighted that if there is to be a discretion to not apply the rule to an unlawful killer found guilty, logic and consistency suggest the rule should be capable of application to a person found not guilty by reason of mental impairment. The opposing view expressed by a small number of attendees was that, as a killer with a mental impairment will be formally found not guilty of murder, it would be fundamentally wrong in principle to apply the forfeiture rule to such an individual.

5.2.24 The South Australian Victim Support Service provided SALRI with various examples of cases involving a mentally impaired killer. The Victim Support Service noted how difficult these situations are for the wider family structure. One example given involved a mentally impaired man who killed his parents. One of his sisters supported him and the other did not. The sisters disagreed as to whether he should be entitled to a share of his parents’ estate. The Victim Support Service noted the issues of public policy involved. On the one hand, they noted the public interest in depriving the killer of a benefit as there are still victims of that crime. On the other hand, the Victim Support Service was sympathetic to the fact that the killer has been not found guilty by a court in this context, and that a mentally impaired person cannot realistically be capable of forming the intent to derive a benefit.

5.2.25 The Commissioner for Victims’ Rights held the view that the NSW approach to insanity and the forfeiture rule should apply in South Australia. The situation where a killer consumes illicit drugs and contributes to their condition was provided as an example of where reverse modification may be appropriate. Mr Boucaut QC was also open to the NSW approach, stating that situations may arise where a court can properly exercise a discretion to a person found not guilty of murder on the basis of mental impairment. Mr Boucaut raised the real concern of killings committed by persons with a mental impairment under the influence of drugs such as ice and gave the example of a person who contributes to their mental impairment and the resulting killing by consuming such illicit drugs.

5.2.26 Another option raised to SALRI was to hold the mentally impaired killer’s inheritance on trust to be used for their medical expenses. A victim impact statement was considered to be of the utmost importance when determining whether the reverse modification should apply.

5.2.27 The Hon Geoffrey Muecke, Associate Professor Livings and Glenn Carrasco favoured maintaining the common law position and that the forfeiture rule should not apply to a person found not guilty of murder by mental impairment. Mr Muecke’s view was that, if a person is not found guilty

⁸³⁸ [2018] NSWSC 1413.

at law, then the policy behind common law forfeiture rule would be eroded. The preferred position was that in these cases, SACAT or the Public Trustee should act as an administrator of the estate and can then use the inheritance to fund the killer's treatment. The Legal Services Commission made a similar submission to SALRI.

5.2.28 Dr Andrew Hemming criticised the operation of ss 5(1) and 11(1) of the NSW Act where the killer has been found not guilty of murder by reason of mental impairment, to determine who may benefit from the deceased's estate. He argues that 'such a contest does nothing to clarify the law for administrators of estates where the application of the forfeiture rule is relevant'. He argued that 'a far better solution would be for Parliament to make the decision as to whether a killer found not guilty of murder on the grounds of mental illness be precluded from taking the estate.' This decision would be reflected in the definition of homicide. Dr Hemming submitted that, given the public abhorrence of these types of killings, where the victims are often multiple family members, as in *Estate of Novosadek* (three killings),⁸³⁹ it would then be proper to include in the definition of homicide any person found not guilty of murder on the grounds of mental impairment. In his opinion, the definition of homicide should also include an alleged offender who is found unfit to plead, otherwise the distribution of the estate could be delayed indefinitely.

5.2.29 Professor Prue Vines strongly opposed the role and use of the NSW provision as offending basic principles of criminal responsibility. She described it as a 'quite severe provision'. In her opinion, s 11 of the NSW Act is 'incoherent, unprincipled and should not be followed'. She argued that 'it necessarily implies either that the court which decided there was no guilt by reason of insanity did not know what it was doing or that this is a fraudulent category'. In her opinion, it is dangerous and creates a situation where victims of crime can ignore the legal determination of culpability. Professor Vines viewed the NSW reverse modification as a 'backdoor challenge' to the jurisdiction of the court that should be done by appeal, not by a 'sideways move' like this. She noted that the fact that it applies to 'any interested person', which is read widely, simply makes the situation worse. Professor Vines told SALRI that if there are concerns over the scope of the mental impairment defence in relation to the presence and effect of illicit drugs, the preferable solution is to modify the defence of mental impairment and not to alter the application of the forfeiture rule.

SALRI's Observations and Conclusions

5.2.30 The issue of extending the forfeiture rule to an individual found not guilty of murder owing to mental impairment proved contentious in SALRI's consultation. There were a number of parties who argued that there will be circumstances where it will be inappropriate to allow someone to inherit as a result of a killing for which they were found not guilty of murder by reason of insanity or mental impairment. These parties were attracted to the NSW approach and were of the view that, if there should be judicial discretion to not apply the rule to manslaughter and murder, it would be a 'consistent revision' and 'logical' to allow the court, at their discretion, to apply the rule to someone found not guilty of murder by reason of insanity or mental impairment. SALRI accepts that the distinction between the 'defences' of intoxication and mental impairment/insanity can be blurred⁸⁴⁰

⁸³⁹ For example, see the South Australian case of Michael Glen Phillips who in 2014 killed his parents, Elizabeth and Maurice Phillips, and was found not guilty of murder on the grounds of mental incompetence. At common law, Michael Glen Phillips was eligible to inherit one third of his parents' estate, shared with his two other siblings.

⁸⁴⁰ See, for example, *Criminal Law Consolidation (Mental Impairment) Amendment Act 2016* (SA); South Australia, *Parliamentary Debates*, House of Assembly, 4 August 2016, 664–6 (John Rau, Attorney-General). 'Statistics collected

and acknowledges the real concern in the community of killings committed by persons with a mental impairment under the influence of illicit drugs such as ice and the specific example of a person who contributes to their mental impairment and the resulting killing by consuming such drugs.

5.2.31 Whilst recognising the force of these arguments, SALRI agrees with the compelling arguments presented by the VLRC⁸⁴¹ and Professor Vines that it remains unsound and at odds with basic principles of criminal responsibility to extend the forfeiture rule to a person who has been found not guilty of murder by reason of mental impairment. The defences of intoxication and mental impairment/insanity remain distinct and separate and, as Professor Vines observed to SALRI, it is for Parliament to change the law in this respect if it so wishes.⁸⁴² It must be noted that claims of mental impairment are carefully and closely scrutinised by both the prosecution and the court and such a person must establish on the balance of probabilities that they were mentally incompetent to have committed the relevant crime.⁸⁴³

5.2.32 SALRI is of the view that the underlying premise of the forfeiture rule is that a culpable killer should not be able to profit or benefit from his or her crime. If there is no crime because the killer is mentally incompetent to commit the crime, the killer cannot be considered culpable and the forfeiture rule should not apply. The forfeiture rule is a rule of public policy that prevents an offender from benefiting or profiting from their crime. 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 in a criminal court not to be legally responsible for an act.⁸⁴⁴ SALRI therefore does not support the NSW provision and suggests that the common law position that the rule does not apply to an individual found not guilty by reason on mental impairment should be retained in any *Forfeiture Act*.

5.2.33 In cases involving a mentally impaired killer, SALRI's preferred position is that the Public Trustee of South Australia or most suitable agency should step in and act as a trustee of the share of the victim's estate that has passed to the killer. The trustee can then use the inheritance to fund the killer's treatment and reasonable living expenses.

from a case file review undertaken by the Attorney-General's Department indicated that almost a quarter of offenders who successfully used the mental incompetence defence were suffering from an impairment caused by drug induced psychosis or from substance abuse and dependence': at 6642.

⁸⁴¹ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) Rec 5, 34 [3.97]–[3.102].

⁸⁴² See, for example, *Criminal Law Consolidation (Mental Impairment) Amendment Act 2016* (SA); South Australia, *Parliamentary Debates*, House of Assembly, 4 August 2016, 6640–6646 (John Rau, Attorney-General).

⁸⁴³ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 30 [3.77]. One of the authors of this Report can also support this proposition from personal knowledge and previous prosecution experience.

⁸⁴⁴ See also *Ibid* 34 [3.99].

Recommendation 6

SALRI recommends that the proposed *Forfeiture Act* should include the existing exception to the operation of the forfeiture rule for persons found not guilty by reason of mental impairment (previously termed insanity) and the NSW provision allowing a court to apply the forfeiture rule to a person found not guilty of murder on the basis of mental impairment should not be adopted in South Australia.

Recommendation 7

SALRI recommends that the proposed *Forfeiture Act* should provide that where a person is found not guilty of murder by reason of insanity or mental impairment and that person receives a benefit out of the estate of their deceased victim, that benefit should be held on trust by the Public Trustee of South Australia. The Public Trustee of South Australia should use the income and capital of the trust to fund the person's medical expenses and reasonable living expenses.

5.3 Conviction Overturned

Current South Australian Position

5.3.1 SALRI is unaware of any cases which set out the common law position on the application of the forfeiture rule in cases where a conviction has been later overturned.

Position in other jurisdictions

5.3.2 The NSW Act permits the Supreme Court to modify the effect of the forfeiture rule. While the general time frame for an application for a forfeiture modification order under the NSW Act it is 12 months, the Act specifically provides that the Supreme Court may give leave for a late application if 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.⁸⁴⁵ It was noted by the Attorney-General in the Second Reading Speech that, under this Act, the court will be able to consider making an order for the modification of the rule if a conviction of a person is quashed.⁸⁴⁶

5.3.3 The NSW Act also permits an interested person to make an application to a court for the revocation or variation of a forfeiture modification order made by the Supreme Court if the offender's conviction is quashed or set aside by a court after the making of the order.⁸⁴⁷

5.3.4 There have not yet been any cases before a NSW court which have considered the application of the NSW Act to persons whose convictions have been overturned.

⁸⁴⁵ *Forfeiture Act 1995* (NSW) s 7(2)(b).

⁸⁴⁶ New South Wales, *Parliamentary Debates*, Legislative Council, 25 October 1995, 2257–8 (JW Shaw MLC QC, Attorney-General).

⁸⁴⁷ *Forfeiture Act 1995* (NSW) s 8.

5.3.5 It should be noted that the quashing of an unlawful killer's conviction does not preclude the application of the forfeiture rule if it can still be established in a civil claim that the person was responsible for the unlawful killing.⁸⁴⁸

5.3.6 The complication of an overturned conviction in the context of the forfeiture rule is not addressed in the UK, ACT or New Zealand Acts.

Issues

5.3.7 The VLRC recognised that the primary issue is whether an order for the modification of the rule should be available in situations where the conviction of a person is quashed, to ensure that justice is done to a person who is found to have been wrongly convicted of a homicide.⁸⁴⁹ The policy behind the forfeiture rule is to ensure that a person who has unlawfully killed another person should not acquire a benefit in consequence of the killing, and that policy would seem to lack application in the scenario where a person has later been found to be not responsible for a killing.

5.3.8 The reports by the UK, ACT, NSW, Tasmania, NZ and Ireland law reform bodies did not discuss the issue.

Consultation Data Overview: How Should the Rule Operate When Convictions are Later Found to be Unsafe or When a Killer is Convicted Many Years After the Deceased's Death?

5.3.9 It was noted to SALRI that recent laws allowing a second right of appeal for convicted offenders if fresh and compelling evidence can be presented⁸⁵⁰ and/or scientific advances (such as DNA) mean that there is a real scope for a convicted killer to have their conviction overturned many years after the conviction.⁸⁵¹ Indeed, there is also now real scope for individuals to be charged and potentially convicted of the unlawful death of a family member many years after the crime.⁸⁵²

⁸⁴⁸ See also *Helton v Allen* (1940) 63 CLR 691.

⁸⁴⁹ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 48 [4.73]–[4.74]. See also the Second Reading Speech of the Attorney-General for NSW in support of the Forfeiture Bill (New South Wales, *Parliamentary Debates*, Legislative Council, 25 October 1995, 2257–8 (JW Shaw, Attorney-General)), cited in *Re Settree Estates; Robinson v Settree* [2018] NSWSC 1413, [64] (Lindsay J).

⁸⁵⁰ *Statutes Amendment (Appeals) Act 2013* (SA). This Act received Royal Assent on 28 March 2013 and commenced on 5 May 2013. The Act apply to appeals instituted after commencement of the Act, regardless of the date of the offence 'The Bill may not satisfy everybody. Some may claim that it goes too far, others that it does not go far enough. My response is simple. The Bill strikes a careful balance. South Australia is not Texas. This State is not awash with wrongful convictions and the falsely imprisoned. Equally no system of criminal justice is infallible and there needs to be some means for convicted defendants to bring fresh and compelling evidence that questions the safety of their original conviction before a court. The Bill is a fair and balanced measure to reconcile the conflicting interests in this area': South Australia, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3953 (John Rau, Attorney-General)

⁸⁵¹ See, for example, *R v Keogh (No 2)* [2014] SASCFC 136.

⁸⁵² See, for example, Kate McKenna, 'John Chardon Found Guilty of Manslaughter Over Wife Novy's 2013 Disappearance', *ABC News* (online, 10 September 2019) <<https://www.abc.net.au/news/2019-09-09/john-chardon-trial-wife-novy-manslaughter-verdict/11475936>>; 'John Bowie Charged With Murder of Wife Roxlyn Bowie, Which Happened 37 Years Ago', *ABC News* (online, 5 October 2019) <<https://www.abc.net.au/news/2019-10-05/john-bowie-charged-with-murder-of-roxlyn-bowie/11576954>>; Martin Evans, 'Andrew Griggs Guilty of Murdering Pregnant Wife, Debbie, Who Disappeared 20-Years Ago Without Trace', *The Telegraph* (online, 28 October 2019) <<https://www.telegraph.co.uk/news/2019/10/28/andrew-griggs-guilty-murdering-pregnant-wife-debbie-disappeared/>>; Meagan Dillon, 'South Australian Man Admits to Killing Colleen Adams, But Not Murdering

5.3.10 At the Adelaide Roundtables, two views were expressed as to how the rule should operate when the conviction of the alleged killer is later found to be unsafe and unsatisfactory and is overturned. One view was to take a point in time approach, and the other view was to determine whether there is anything that can be done historically. Attendees noted that if assets of the deceased victim are ‘all gone’, then no recourse can be taken, unless those assets can be traced. It was noted that the complication is where the deceased’s assets have passed to someone who legitimately believes they own them. The procedural question was asked that if a criminal case has concluded, is the civil case then a separate matter?

5.3.11 The Law Society of South Australia, the Commissioner for Victims’ Rights and the Hon Geoffrey Muecke agreed that, in situations where a killer is convicted many years after the killing, a clawback of assets should be permitted, but limited to assets that are traceable at the time of conviction.

5.3.12 Kellie Toole was of the opinion that the prosecutor can apply for a charge of the assets as they stood at the time of the killing if the prosecution is delayed. If, however, a conviction is later overturned, the preferable option would be for the killer who is later acquitted to sue the beneficiaries and, if the deceased’s estate has been eroded, the State.

5.3.13 Mr O’Connell was of the view that there should be no clawback of assets in both situations.

5.3.14 Dr Andrew Hemming was of the view that, where the crime is determined many years after the killing, the retrospective application of the forfeiture rule puts into question the distribution of estates that have previously been determined. As such, it is impractical, especially where innocent third parties have become involved. As to the person’s conviction being overturned, distribution of the deceased’s estate could be delayed until all avenues of appeal have been exhausted. Where the conviction is overturned many years later after a renewed appeal and the State has decided not to retry the person, then the same impracticality argument applies regarding the retrospective undoing of the forfeiture rule.

5.3.15 The Legal Services Commission of South Australia made note of the ‘timeline issues’ and argued that these are examples of the problems with the 19th century forfeiture rule in a modern legal and forensic setting and add weight to the need for its abolition.

5.3.16 Dr Mark Giancaspro of the University of Adelaide Law School made a submission on this point. He argued that if a murderer was found on appeal to have been wrongfully convicted of the crime, and was subsequently acquitted, they are immediately and significantly disadvantaged in that they have been denied their rightful entitlements. The forfeiture rule will have operated upon the assumption that they were guilty of the offence, as determined by the relevant judge(s) or jury (for practical purposes, this assumption must naturally follow conviction). The prospect of retrospective acquittal is not at all fanciful and has happened many times before. It is perhaps more likely to occur now in light of new and improved forensic investigation methods and technologies, which in recent times have helped shed light on old cases and found the original outcomes to have been wrong.

5.3.17 Dr Giancaspro submitted that, in this situation, the forfeiture rule does not accommodate this drastic change in circumstances. It might be the case that restoration of the accused’s position is

Her’, *ABC News* (online, 7 January 2020) <<https://www.abc.net.au/news/2020-01-07/geoffrey-adams-answers-cold-case-murder-charges/11846880>>.

impossible following the distribution of his or her assets and the likely passage of time between this occurring and their exoneration. He noted that this is likely why both the VLRC and the Tasmanian Law Reform Institute in their respective 2010 and 2004 Reports merely recommended that revocation by the Supreme Court be permitted, and grant a court discretion to make remedial orders it deems appropriate. However, the difficulty in undoing the damage done does not justify the law standing still on this issue. He argued that it would seem congruent with the interests of justice to allow those who have been wrongfully convicted of a crime and subsequently acquitted to seek relief from the operation of the forfeiture rule.

SALRI's Observations and Conclusions

5.3.18 It is important to note that the operation of the forfeiture rule is not dependent upon a formal guilty verdict. There will be situations where an offender never faces a criminal trial or is found not guilty⁸⁵³ but the forfeiture rule will still apply if civil proceedings can establish that the offender was responsible for the unlawful killing. Whilst a conviction in a criminal trial requires proof of guilt beyond reasonable doubt, the burden of proof in a civil case operates on the lesser standard on the balance of probabilities.⁸⁵⁴ The rules of evidence in a civil case are also less stringent than in a criminal case.

5.3.19 There will be cases where the killer's conviction is overturned long after the killing and after the other beneficiaries have received the share of the victim's estate that would have passed to the killer had the forfeiture rule not applied. There will also be cases where the killer is convicted long after the event and after the killer has received and perhaps spent the inheritance. The likelihood of either situation arising is increased through forensic and other scientific advances.

5.3.20 The best that can be done to rectify the wrong that has been done to either the alleged killer (in the case where the conviction is overturned) or those beneficiaries who should have inherited (where the killer is convicted after the event) is to give the court the power to trace the inheritance and make appropriate orders to rectify the situation.

5.3.21 Where a killer's conviction is overturned, the court should be given the power to order the beneficiaries who have benefited from the death of the victim, to relinquish their inheritance and the property derived from it to the extent that is reasonable in the circumstances having regard, in particular, to the intervening interests of innocent third parties.

5.3.22 In these cases, any person who has a financial interest in the deceased's estate or would have had such an interest, had the rule been applied earlier, should have standing to make an application.

5.3.23 SALRI acknowledges that seeking to rectify the distribution of the deceased's estate long after the original death, whether in relation to the overturning of the conviction of the alleged killer or the belated conviction of the killer, may prove impracticable after the passage of so much time.

⁸⁵³ This was commonly called the OJ Simpson scenario in SALRI's consultation. OJ Simpson was controversially acquitted at a sensational criminal trial of the murder of his estranged wife and a friend but a wrongful death civil action brought by the families of the deceased found that Simpson was responsible for the two murders and he was ordered to pay the families \$33.5 million. See B Drummond Ayers, 'Civil Jury Finds Simpson Liable in Pair of Killings', *New York Times* (5 February 1997) A1; B Drummond Ayers, 'Jury Decides Simpson Must Pay \$25 Million in Punitive Award', *New York Times* (11 February 1997) A1.

⁸⁵⁴ *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449.

Recommendation 8

SALRI recommends that the proposed *Forfeiture Act* should provide that, where a killer's conviction in relation to an unlawful homicide is overturned, a court should be given the power to order the beneficiaries who have benefited from the death of the victim to relinquish their inheritance to the extent that it is practicable and reasonable in the circumstances, having regard, in particular, to the intervening interests of innocent third parties.

Recommendation 9

SALRI recommends that the proposed *Forfeiture Act* should provide that, where a killer is convicted (or found to have committed the unlawful act in a civil court) long after the unlawful killing, a court should be given the power to order the unlawful killer who has benefited from the death of the victim, to relinquish their inheritance to the extent that it is practicable and reasonable in the circumstances, having regard, in particular, to the intervening interests of innocent third parties.

Recommendation 10

SALRI recommends that the proposed *Forfeiture Act* should provide that, where a killer's conviction in relation to an unlawful homicide is overturned or where a killer is convicted (or found to have committed the unlawful act in a civil court) long after the unlawful killing, any person who has a financial interest in the deceased's estate or would have had such an interest had the rule been applied earlier, should have standing to make an application for the court to rectify the wrong that has been done.

5.4 Unfit to Plead

Current South Australian Position

5.4.1 The common law has long recognised the notion of fitness to plead.⁸⁵⁵ An accused can only stand trial in a criminal court if they are fit to plead. The common law test of unfitness to plead is whether the accused can comprehend the course of the proceedings so as to make a proper defence.⁸⁵⁶ There is a presumption that an accused is fit to plead and an accused must establish on the balance of probabilities (as with the defence of mental impairment) that they are unfit to plead.⁸⁵⁷

5.4.2 The Victorian Supreme Court in *R v Presser*⁸⁵⁸ set out six factors relevant to the test of unfitness to plead:

- an understanding of the nature of the charges;

⁸⁵⁵ *R v Pritchard* (1836) 7 C & P 303; 173 ER 135; *R v Presser* [1958] VR 45.

⁸⁵⁶ *R v Pritchard* (1836) 7 C & P 303; 173 ER 135.

⁸⁵⁷ *R v Robertson* [1967] 1 WLR 1767.

⁸⁵⁸ [1958] VR 45.

- an understanding of the nature of the court proceedings;
- the ability to challenge jurors;
- the ability to understand the evidence;
- the ability to decide what defence to offer; and
- the ability to explain his or her version of the facts to counsel and the court.⁸⁵⁹

5.4.3 The common law as to fitness to plead is effectively restated in Part 8A of the *CLCA*.⁸⁶⁰ Section 269I provides that a person's mental fitness to stand trial is to be presumed unless it is established that the person is mentally unfit to stand trial. This needs to be shown on the balance of probabilities.⁸⁶¹

5.4.4 Section 269H of the *CLCA* provides that a person is mentally unfit to stand trial 'if the person's mental processes are so disordered or impaired that the person is —

- (a) unable to understand, or to respond rationally to, the charge or the allegations on which the charge is based; or
- (b) unable to exercise (or to give rational instructions about the exercise of) procedural rights (such as, for example, the right to challenge jurors); or
- (c) unable to understand the nature of the proceedings, or to follow the evidence or the course of the proceedings.'

5.4.5 This provision expressly draws on the common law and *Presser* remains applicable.⁸⁶² It is a high threshold for an accused to establish that he or she is unfit to plead.⁸⁶³ As was noted by Stanley J in a recent South Australian case:

A reduction in a capacity relevant to whether a person is unfit to stand trial is not sufficient for a finding a person is unfit. There must be an absence of capacity to understand and follow the proceedings as required in *Presser* ... the fact that an accused suffers from a mental disorder or impairment which reduces his capacity to follow the evidence or the course of the proceedings does not render him unfit to stand trial. The test of unfitness requires that the accused is entirely unable to follow the evidence or the course of the proceedings... Ultimately the test is whether the accused is so mentally impaired that he cannot obtain a fair trial. For that purpose, the accused's mental processes must be so disordered and impaired that he or she is wholly unable to satisfy the test in s269H.⁸⁶⁴

5.4.6 The consequence of a finding of unfitness to plead is that, providing the court is satisfied that the accused committed the objective (or physical) elements of the alleged offence,⁸⁶⁵ the court may

⁸⁵⁹ Ibid 48.

⁸⁶⁰ *R v W*, R [2019] SASCFC 33, [23]–[24] (Stanley J).

⁸⁶¹ Ibid.

⁸⁶² *R v W*, R [2019] SASCFC 33. See also *R v Abdulla* (2005) 93 SASR 208, 226–7.

⁸⁶³ *R v Berry* (1876) 1 QBD 447; *Ngatayi v R* (1980) 147 CLR 1, 8; *R v Moyle* [2009] Crim LR 586.

⁸⁶⁴ *R v W*, R [2019] SASCFC 33, [30]–[31] (Stanley J). See also *R v Hayles* [2018] SASCFC 58, [31].

⁸⁶⁵ *CLCA* s 269N.

deal with the individual by the powers contained in Part 8A of the *CLCA* as also arises for a person found not guilty by reason of mental impairment.

5.4.7 Unfitness to plead is usually associated in modern times with mental illness or some form of intellectual disability or cognitive impairment. There is an overlap between unfitness to plead and mental impairment but the two are distinct and separate questions. An accused who is found unfit to plead, unlike an individual who is found mentally incompetent, is not formally found not guilty. An accused also may be unfit to plead but not legally insane (or now mentally incompetent).⁸⁶⁶

Position in Other Jurisdictions

5.4.8 The operation of unfitness to plead and the forfeiture rule is illustrated by the New Zealand decision of *Re Pecchar*.⁸⁶⁷ A man called Gribic killed his wife, daughter and father in law. Gribic was found unfit to plead and was placed in a secure hospital. In the civil proceedings as to the disposition of the estates, Hardie Boys J noted the ‘overwhelming’⁸⁶⁸ evidence that Gribic was responsible for the deaths. Hardie Boys J noted that unfitness to plead and insanity (now mental impairment) are separate questions.⁸⁶⁹ Though Gribic had been found unfit to plead, Hardie Boys J found that the usual presumption of sanity applied and it had not been shown on the balance of probabilities that Gribic had been insane at the time of the killings.⁸⁷⁰ Therefore, Gribic was deemed sane and criminally responsible for the deaths and the forfeiture rule applied and public policy precluded him any benefit arising from the deaths.

Issues

The operation of the forfeiture rule in the context of fitness to plead is usually overlooked by law reform agencies.⁸⁷¹

Consultation data Overview: Should the Forfeiture Rule Apply in Those Cases Where the Killer is Found Unfit to Plead?

5.4.9 At the Adelaide Roundtables, the general consensus was that in cases where the killer had the intent to kill, but is later found unfit to plead, it would be ‘unfair’ not to apply the forfeiture rule. There was considered to be a distinction between a killer who is mentally impaired and held to be legally innocent at the time of the killing and a killer who is unfit to plead. The killer who is mentally incapacitated at the time they kill can be said to lack moral culpability, while someone who is unfit to plead who, at the time of the conduct had full intent, is morally culpable. The key question was seen as what is the level of moral culpability?

5.4.10 Mr Boucaut QC also considered that unfit to plead and mental impairment are separate and distinct and that the forfeiture rule should remain in those cases where the killer is unfit to plead.

⁸⁶⁶ *Governor of Stafford Prison, Ex Parte Emery* [1909] 2 KB 81.

⁸⁶⁷ [1969] NZLR 574.

⁸⁶⁸ Ibid 581.

⁸⁶⁹ Ibid 582.

⁸⁷⁰ See also *Re Pollock* [1941] 1 Ch 219; *Re Johnson Estate* [1950] 2 DLR 69.

⁸⁷¹ See, for example, Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 31 [3.78].

5.4.11 This position can be contrasted to the view of the Hon Geoffrey Muecke who did not see this distinction and thought that the rule should also not apply where the killer is unfit to plead.

5.4.12 Dr Andrew Hemming argued to SALRI that a better solution would be for Parliament to include an alleged offender who is found unfit to plead within the definition of homicide, otherwise distribution of the estate could be delayed indefinitely.

SALRI's Observations and Conclusions

5.4.13 SALRI has heard various views in consultation as to what should happen if the killer is found unfit to plead. The general view, including from Mr Boucaut QC, is that unfit to plead and mental impairment are separate and distinct. The forfeiture rule, as in *Pechar*, should still apply to the killer if a civil court is satisfied on the civil standard of proof that the individual was criminally responsible for the killing and the objective (or physical) and any mental elements of the offence are made out. SALRI concurs with this reasoning. A finding of unfit to plead is not a formal verdict of not guilty, unlike mental impairment where a court has pronounced the individual not guilty after the defence has been established on the balance of probabilities.

5.4.14 Peart observes that 'if there is no [criminal] trial because the killer is unfit to plead, or dead, the civil court has to examine the fact of the killing and determine on a balance of probabilities whether the killer is guilty of an unlawful killing which should attract the operation of the forfeiture rule'.⁸⁷² This seems sensible and logical. Indeed, the case of *Pechar* is a persuasive example of why and how the forfeiture rule should apply to a killer found unfit to plead.

5.4.15 Recommendations

Recommendation 11

SALRI recommends that the proposed *Forfeiture Act* should provide that a person charged with an unlawful killing within Recommendation 4 who is found unfit to plead should not be exempt from the operation of the forfeiture rule.

Recommendation 12

SALRI recommends that the proposed *Forfeiture Act* should provide that a person charged with an unlawful killing who is found unfit to plead (or any other interested person) should be able to apply for a forfeiture modification order under the *Forfeiture Act*.

5.5 Unlawful Killings in Civil Proceedings: The OJ Simpson Scenario

Current South Australian Position

5.5.1 Under the common law, there is no requirement that a person has been convicted, or even prosecuted, for an unlawful killing for the forfeiture rule to apply. The rule may be applied to a person who has not been convicted or even prosecuted at all, provided it is proved to the civil court,

⁸⁷² Nicola Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31(1) *Common Law World Review* 1, 12.

on the balance of probabilities,⁸⁷³ that the person unlawfully killed the deceased person.⁸⁷⁴ This was often called the OJ Simpson scenario in SALRI's consultation.⁸⁷⁵

5.5.2 The leading 1940 decision of the High Court in *Helton v Allen*⁸⁷⁶ remains good law. In this case, Mrs Roche, a widow, was conducting an affair with Helton who was married. Helton was her executor and trustee when she died of strychnine poisoning. Mrs Roche had already lent Helton £500 with further loans amounting to a grand total of £1400. Apart from a few small bequests, Mrs Roche had left her entire estate to Helton. Helton was acquitted of the murder of Mrs Roche. A civil action was then brought by the victim's mother, Isabelle Allen. The civil jury found that Helton had unlawfully killed Mrs Roche on the balance of probabilities. On the basis of this finding, the court then declared that Helton was not entitled to take under the deceased's will and any right or benefit passed to those persons who would have been entitled if there had been a lapse of Helton's interest under the will.⁸⁷⁷

5.5.3 Helton's appeal was considered by the High Court, who accepted that the civil verdict of unlawful killing could not 'be set aside on the ground that there was no sufficient evidence to support it'.⁸⁷⁸ The joint judgment went on to consider whether Helton's acquittal on the murder charge was a complete answer to the coming into operation of the forfeiture rule. The majority stated:

[I]t may be said that to retry as a civil issue the guilt of a man who has been acquitted on a criminal inquest is so against policy that a rule drawn from public policy ought not to authorise it. There is, however, no trace of any such conception in the history of the principle that by committing a crime no man could obtain a lawful benefit to himself. To *qualify the rule* in the manner suggested would, we think, amount to *judicial legislation*.⁸⁷⁹

5.5.4 The decision in *Helton v Allen* has two dimensions. First, there is the apparent acceptance of the absolute forfeiture rule to both murder and manslaughter by the High Court.⁸⁸⁰ Secondly, there is the explicit endorsement of the widest possible form of the rule by upholding that a verdict of 'unlawfully killed' in a civil action was sufficient to trigger the forfeiture rule and make the acquittal in the murder trial irrelevant for the purposes of the forfeiture rule.⁸⁸¹

⁸⁷³ *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449.

⁸⁷⁴ *Helton v Allen* (1940) 63 CLR 691.

⁸⁷⁵ This was commonly called the OJ Simpson scenario in SALRI's consultation. OJ Simpson was controversially acquitted at a sensational criminal trial of the murder of his estranged wife and a friend but a wrongful death civil action brought by the families of the deceased found that Simpson was responsible for the two murders and he was ordered to pay the families \$33.5 million. See B Drummond Ayers, 'Civil Jury Finds Simpson Liable in Pair of Killings', *New York Times* (5 February 1997) A1; B Drummond Ayers, 'Jury Decides Simpson Must Pay \$25 Million in Punitive Award', *New York Times* (11 February 1997) A1.

⁸⁷⁶ (1940) 63 CLR 691.

⁸⁷⁷ Ibid 697 (Starke J).

⁸⁷⁸ Ibid 709 (Dixon, Evatt and McTiernan JJ).

⁸⁷⁹ Ibid 710 [emphasis added].

⁸⁸⁰ Ibid 709, where the joint judgment approved Hamilton LJ's statement in *Re Hall* [1914] P 1, 7 'that the principle could only be expressed in the wide form'. Whether this is ratio or obiter remains unresolved. There is a view that the passage is not binding. 'The High Court has not answered this question definitively ... The Court's opinion on the application of the rule in manslaughter cases was strictly obiter dicta and therefore not technically binding': at *Re Edwards*; *State Trustees Ltd v Edwards* [2014] VSC 392, [30] (McMillan J). See also, for example, *Troja v Troja* (1994) 33 NSWLR 269, 280 (Kirby P).

⁸⁸¹ *Helton v Allen* (1940) 63 CLR 691, which was followed in *Rivers v Rivers* (2002) 84 SASR 426.

5.5.5 A civil action was necessary in *Helton v Allen* because of Helton's acquittal for murder against the standard of beyond reasonable doubt. In the civil action, to prevent Helton from taking under the will, the standard was on the balance of probabilities.⁸⁸² The High Court accepted that the verdict of unlawful killing could not 'be set aside on the ground that there was no sufficient evidence to support it'.⁸⁸³

5.5.6 *Helton v Allen* was followed in *Rivers v Rivers*,⁸⁸⁴ where the Full Court of the Supreme Court of South Australia faced a similar situation. Mrs Gina Rivers had shot and killed her husband, Donald Rivers. In the civil proceedings after the criminal trial, which was a contest between the deceased's son by a previous marriage and Gina Rivers, it was not disputed that the bullet was fired from a rifle held by Gina Rivers. Mrs Rivers admitted that she was holding the rifle at the time but asserted that she did not deliberately point it at the deceased. She admitted applying pressure to the trigger, but she denied that she had any intention to kill her husband or that she was acting recklessly at the time. She claimed she thought the rifle was unloaded. She was acquitted of both murder and manslaughter at the criminal trial.

5.5.7 The South Australian Full Court expressly followed *Helton v Allen* and held that the son could bring a civil action to apply the forfeiture rule against Mrs Rivers, notwithstanding her acquittal.⁸⁸⁵ Duggan J did not accept that any issue of abuse of process or double jeopardy arose in the case to prevent a civil claim that Mrs Rivers had unlawfully killed her husband and the forfeiture rule could therefore apply to deny her any benefit arising as a result.

5.5.8 Duggan J, with whom Williams and Martin JJ agreed, explained:

More importantly, the parties in the civil proceedings presently before the court are not the same as the parties in the criminal proceedings. The purpose of the criminal proceedings was to determine whether the prosecution could prove beyond reasonable doubt that the first defendant committed the offence of either murder or manslaughter. Those alleged offences can no longer be established as crimes rendering the first defendant liable to punishment. However, it remains open in civil proceedings for the court to determine whether there is proof in accordance with the standard applied in *Briginshaw v Briginshaw* (1938) 60 CLR 336, that the first defendant unlawfully killed the deceased, thus disentitling her to any benefit from his estate. It is important to bear in mind that the civil proceedings are not punitive in nature ... In order for the forfeiture rule to operate, a felonious killing must be established, but it is the fact of an unlawful killing established in proceedings outside the context of crime and punishment which gives rise to the public policy considerations which form the basis of the forfeiture rule. Nor is there cause for concern about public perception by reason of 'the scandal of conflicting decisions' ... The parties are not the same, the nature of the jurisdiction is not the same and the standard of proof is different. There is no risk of embarrassment arising from differing findings.⁸⁸⁶

⁸⁸² The same outcome resulted when OJ Simpson was acquitted of a double murder in the United States and the victims' families successfully brought a wrongful death suit against Simpson in a civil court. See B Drummond Ayers, 'Civil Jury Finds Simpson Liable in Pair of Killings', *New York Times* (5 February 1997) A1; B Drummond Ayers, 'Jury Decides Simpson Must Pay \$25 Million in Punitive Award', *New York Times* (11 February 1997) A1.

⁸⁸³ *Helton v Allen* (1940) 63 CLR 691, 709 (Dixon, Evatt and McTiernan JJ).

⁸⁸⁴ (2002) 84 SASR 426.

⁸⁸⁵ *Ibid* [65].

⁸⁸⁶ *Ibid* [55]–[57], [60].

5.5.9 SALRI supports the continuation of the ‘OJ Simpson scenario’ for the forfeiture rule.

Position in Other Jurisdictions

5.5.10 The New Zealand law does not limit the application of the forfeiture rule to persons who have been convicted or prosecuted.⁸⁸⁷

5.5.11 The ACT, NSW and UK Acts do not alter the position at common law; namely the forfeiture rule applies to persons who have not been convicted in relation to an unlawful death in a criminal court, provided that it can be established on the balance of probabilities that the person unlawfully killed the deceased.

Issues

5.5.12 The VLRC recognised that the common law forfeiture rule is not concerned with punishing a killer for their crime, but rather with enforcing the public policy principles that a person should not benefit from his or her crime and that no cause of action should arise from one’s wrongdoing. As such, it is logical to apply the rule to a person who has been found responsible for an unlawful death in civil proceedings.⁸⁸⁸ The Law Reform Commission of Ireland echoed this sentiment, and recommended that it be confirmed in legislation that the forfeiture rule apply if responsibility is established on the civil standard.⁸⁸⁹ SALRI concurs with this suggestion.

5.5.13 The Tasmania Law Reform Institute recognised that when considering how the forfeiture rule should apply to persons who have not been prosecuted, it should be borne in mind that it may still be appropriate for persons who have not been convicted in relation to the unlawful death of the deceased to have the forfeiture rule applied against them.⁸⁹⁰ For example, in some cases it may be clear that a person is responsible for another’s death, but the killer may not have been prosecuted due to crucial evidence being declared inadmissible, but such evidence being admissible in civil proceedings.⁸⁹¹

5.5.14 The Tasmania Law Reform Institute noted that some procedural issues arise when applying the forfeiture rule to such persons, in that where an application to apply the forfeiture rule follows an unsuccessful trial of a beneficiary for the unlawful killing of the deceased, many of the same issues will be considered at both the civil and criminal trial.⁸⁹² They considered this to be just and appropriate given the different rules of evidence and standard of proof between civil and criminal jurisdictions.⁸⁹³

5.5.15 The issue was not considered by the reports of the UK, ACT, NSW or NZ law reform bodies.

⁸⁸⁷ *Succession (Homicide) Act 2007* (NZ) s 4.

⁸⁸⁸ Victorian Law Reform Commission, *The Forfeiture Rule* (Consultation Paper, March 2014) 29.

⁸⁸⁹ Law Reform Commission of Ireland, *Report on Prevention of Benefit from Homicide* (Report 114, July 2015) 59, 66–7.

⁸⁹⁰ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 21.

⁸⁹¹ *Ibid.* The criminal rules of evidence are more restricted than the civil rules of evidence.

⁸⁹² *Ibid.*

⁸⁹³ *Ibid.*

Consultation Data Overview: Should the Forfeiture Rule be Determined on the Criminal or Civil Burden of Proof?

5.5.16 In relation to whether forfeiture should be determined on the criminal or civil standard of proof, the unanimous view at all Adelaide Roundtables was that it should continue to be determined on the civil standard of proof.⁸⁹⁴ It was agreed that the forfeiture rule should not be confined to cases where there is a formal conviction and should continue to be available in a civil case on the *Briginshaw* standard.⁸⁹⁵ The ‘OJ Simpson scenario’ was noted, as was the ‘sadly not unusual’ case of family violence where an abusive husband kills himself after murdering his wife.⁸⁹⁶

5.5.17 At the Mount Gambier Roundtable there was also agreement that the rule’s application under any approach should not depend upon a criminal conviction. The OJ Simpson situation was again raised. Also noted was the Mount Gambier case of *Hayward*, where the apparent main murderer,⁸⁹⁷ Neil Heyward, committed suicide before his trial. This case involved a wealthy estate.⁸⁹⁸

5.5.18 Mr Boucaut QC stated to SALRI that the forfeiture rule should not depend on a conviction in a criminal proceeding and should be available in a civil action under the civil *Briginshaw*

⁸⁹⁴ *Helton v Allen* (1940) 63 CLR 691.

⁸⁹⁵ *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362. This was explained by the High Court as follows: “The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent proof is necessary “where so serious a matter as fraud is to be found”. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct”: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, [2] (Mason CJ, Brennan, Deane and Gaudron JJ).

⁸⁹⁶ See, for example, Pallavi Singhal, ‘Family of Woman Killed in Suspected Murder-Suicide “Heartbroken” and Angry’, *Sydney Morning Herald* (online, 28 September 2019) <[smh.com.au/national/family-of-woman-killed-in-suspected-murder-suicide-heartbroken-and-angry-20190928-p52vsa.html](https://www.smh.com.au/national/family-of-woman-killed-in-suspected-murder-suicide-heartbroken-and-angry-20190928-p52vsa.html)>; Jon Kaila and Christopher Gillett, ‘Murder-Suicide: Man Kills Wife then Dies in Deliberate Crash into Truck’, *Herald Sun* (online, 14 December 2014) <<https://www.heraldsun.com.au/news/law-order/murdersuicide-man-kills-wife-then-dies-in-deliberate-crash-into-truck/news-story/6e06f40d73c20edca4a594395c13de6b>>; Angus Thompson, ‘Murder-Suicide Father in Debt, having an Affair with Teenager, Coronial Inquest Hears’ *Sydney Morning Herald* (online, 8 April 2019) <<https://www.smh.com.au/national/nsw/murder-suicide-father-in-debt-having-an-affair-with-teenager-coronial-inquest-hears-20190408-p51bzo.html>>; Edgar Sandoval and Azi Paybarah, ‘She Was Afraid of Her Husband. Days Later, She and Her 5-Year-Old Were Dead’, *New York Times* (online, 7 November 2019) <<https://www.nytimes.com/2019/11/07/nyregion/murder-suicide-nyc.html>>. The Brisbane case in February 2020 of Rowan Baxter is also illustrative. Baxter, after a history of domestic violence, murdered his estranged wife and their three young children in the most appalling circumstances before killing himself. See Annie Blatchford, ‘Rowan Baxter Murdered his Family and it is the Act of a Man and his Domestic Violence not a Senseless Monster’, ABC News, 21 February 2020, <https://www.abc.net.au/news/2020-02-21/rowan-baxter-hannah-darke-monster-myth-in-domestic-violence/11986976>.

⁸⁹⁷ *R v Heyward and Minter* [2010] SASFC 38, [6].

⁸⁹⁸ The roundtable noted the example of Neil Heyward who murdered his former wife, Glenys Heyward, after a dispute over the family’s estate of \$6.9 million. Heyward committed suicide in prison before the trial. A son, Matthew Heyward, and an employee called Minter were convicted of the murder. Another son, Thomas Heyward, was also charged but his case was discharged at committal. See Andrew Dowdell, ‘Guilty Verdicts in Glenys Heyward Supreme Court Murder Trial’, *The Advertiser* (online, 1 April 2010) <<https://www.adelaidenow.com.au/news/south-australia/jury-to-begin-deliberation-in-glenys-heyward-murder-case/news-story/b909e81aff2d066793104798dd33ec88>>. See also *R v Heyward and Minter* [2010] SASFC 38.

standard of proof.⁸⁹⁹ An offender may be found not guilty in a criminal trial, Mr Boucaut said, but can be held properly responsible for an unlawful death in a civil application.⁹⁰⁰

5.5.19 Michael O’Connell argued that there should be a separate civil standard. He made reference to international law and noted that a person is regarded as a victim, irrespective of whether there has been a prosecution or a conviction in a criminal court. Mr O’Connell gave the example of where a mother and her partner murder their child, but it is impossible to ‘pinpoint’ one or the other on the criminal standard.⁹⁰¹ He also provided the example of two young people who kill an older person where the same issue arises. Mr O’Connell also mentioned the death of Chloe Valentine as one where the parents should equally be unable to benefit from her estate. In this case, Polkinghorne and McPartland pleaded guilty to manslaughter by neglect in relation to the preventable death of Chloe Valentine, the four year old daughter of Ms Polkinghorne.⁹⁰²

5.5.20 The Legal Services Commission submitted that the application of the forfeiture rule is part of the civil law of inheritance and should not be decided in a criminal court using a criminal standard of proof. Their view was removing the forfeiture rule from the criminal law obviates the need to consider whether or not the beneficiary has been prosecuted.

5.5.21 The Law Society of South Australia submitted that there is a risk that perpetrators may not be prosecuted due to insufficient evidence to meet the criminal threshold and as such, it may well be appropriate that the rule apply in civil proceedings.

5.5.22 The opposing view was taken by the Hon Geoffrey Muecke and Kellie Toole who argued that, in accordance with the policy behind the forfeiture rule, the rule should only apply where there has been a criminal conviction and there should be no separate civil standard. It was commented that ‘if the rule is supposed to be enacted on the basis of criminal action, then it has to be proven’.

5.5.23 Dr Andrew Hemming submitted that the forfeiture rule should have no application to a person who has not been prosecuted. He referred to *Rivers v Rivers*,⁹⁰³ where Mrs Rivers unsuccessfully contended that to permit the plaintiff to attempt to prove the commission of the offence in civil proceedings is unfair as it amounts to double jeopardy and undermines the jury’s verdict.⁹⁰⁴ However, Dr Hemming said that the court should continue to reconsider proof of the offence constituting the

⁸⁹⁹ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

⁹⁰⁰ Mr Boucaut QC also gave the example of an offender who commits suicide before a criminal trial. Mr Boucaut also noted the example of Neil Heyward who murdered his former wife, Glenys Heyward, after a dispute over the family’s estate of \$6.9 million. Heyward committed suicide in prison before the trial. See Andrew Dowdell, ‘Guilty Verdicts in Glenys Heyward Supreme Court Murder Trial’, *The Advertiser* (online, 1 April 2010) <<https://www.adelaidenow.com.au/news/south-australia/jury-to-begin-deliberation-in-glenys-heyward-murder-case/news-story/b909e81aff2d066793104798dd33ec88>>. See also *R v Heyward and Minter* [2010] SASCF 38.

⁹⁰¹ The offence of criminal neglect causing the death of a child or vulnerable adult under s 14 of the *CLCA* addresses this problem.

⁹⁰² *R v Polkinghorne and McPartland* [2014] SASCF 84. The offence of causing the death of a vulnerable adult or child by criminal neglect under s 14 of the *CLCA* may also arise in this type of situation.

⁹⁰³ *Rivers v Rivers* (2002) 84 SASR 426.

⁹⁰⁴ *Ibid.*

death in civil proceedings, particularly where a conviction was not secured,⁹⁰⁵ as ‘criminal proceedings can be described as punitive in nature’⁹⁰⁶ and the standard of proof is lowered in civil proceedings.⁹⁰⁷

SALRI’s Observations and Conclusions

5.5.24 SALRI agrees with the strong theme to emerge in consultation that, consistent with *Helton v Allen* and *Rivers v Rivers*, the operation of the forfeiture rule should not depend upon a formal conviction in criminal proceedings. There will be various situations in which the rule can be properly applied in civil proceedings, notwithstanding that the killer was acquitted in the criminal proceedings (the OJ Simpson scenario) or never faced a criminal trial (such as where the killer committed suicide before any criminal trial).

5.5.25 The rationale behind the forfeiture rule is that a killer should not be allowed to profit from their crime. The rule is not intended to punish the killer. That is the role of the criminal law. The rationale for the rule is more akin to equity’s doctrine of unjust enrichment than to the criminal law’s concept of retribution and punishment. SALRI is of the view that the common law forfeiture rule is a rule of the civil law and not of the criminal law. For that reason, it should be applied in the civil courts and should not need a criminal conviction as a prerequisite to its operation. Rather, the operation of the rule should remain governed by the civil rules of evidence and the civil standard of proof.⁹⁰⁸

5.5.26 Conversely, an acquittal in the criminal court does not necessarily preclude a civil court from finding that the acquitted person was responsible for the unlawful killing.⁹⁰⁹ The purpose of the two proceedings, the parties and the standard of proof are different.⁹¹⁰ Similarly, if there is no trial because the killer is unfit to plead, or dead (such as having committed suicide after the killing), the civil court has to examine the facts of the killing and determine on a balance of probabilities whether the killer is guilty of an unlawful killing which should attract the application of the forfeiture rule. SALRI notes that it is especially important that the forfeiture rule should apply where the unlawful killer commits suicide after the crime,⁹¹¹ notably in the not uncommon family violence scenario.⁹¹² It would be inappropriate and contrary to the public interest that an unlawful killer could indirectly profit from their crime by committing suicide before any criminal trial.

5.5.27 SALRI emphasises that, in applying the forfeiture rule to killings on the civil standard, the key rationale is that the killer has been found to be responsible for an unlawful death. This is in contrast to, for example, where the forfeiture rule is not applied to a killer who has been found not to be responsible for a killing by reason of mental impairment. The crucial point is legal responsibility.

⁹⁰⁵ The Tasmania Law Reform Institute has pointed out that as a conviction is secured on a beyond reasonable doubt basis, it is likely that the accused will be held civilly responsible for the death on the civil standard of the balance of probabilities: Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 20.

⁹⁰⁶ *Rivers v Rivers* (2002) 84 SASR 426, 440 (Duggan J).

⁹⁰⁷ Nicola Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31(1) *Common Law World Review* 1, 12.

⁹⁰⁸ See *Re Batten’s Will Trusts* (1961) 105 SJ 529. See also *Re Pechar* [1969] NZLR 574 (Hardie Boys J), citing *R v Pritchard* (1836) 7 C & P 303; 173 ER 135; *R v Robertson* [1967] 1 WLR 1767.

⁹⁰⁹ *Rivers v Rivers* (2002) 84 SASR 426.

⁹¹⁰ *Ibid.*

⁹¹¹ See, for example, *Re Jensen Estate* (1963) 40 DLR (2d) 469; *R v Heyward and Minter* [2010] SASFC 38.

⁹¹² See, for example, *Re Pitts* [1931] 1 Ch 546; *Re Signorth* [1935] Ch 89; *Re Pollock* [1941] 1 Ch 219; *Re Kumar* [2017] VSC 81. See also above n 896.

5.5.28 SALRI notes that the ‘rule’ in *Hollington v Henthorn and Co Ltd*⁹¹³ has been overturned in South Australia and s 34A of the *Evidence Act 1929* (SA) allows a previous conviction to be used in civil proceedings.⁹¹⁴ Such evidence is material but not conclusive.⁹¹⁵

5.5.29 It is important that an unlawful killer convicted in a criminal court does not employ the civil application as an opportunity to relitigate or challenge his or her conviction in a criminal court. This was emphasised by Gray J in *Re Luxton*.⁹¹⁶ In this case, a man called Evans had been convicted of murder, but continued to dispute his conviction in the resulting civil proceedings. Gray J observed that ‘[t]hese proceedings are not an occasion to re-examine the guilt of Mr Evans. This has been determined by jury verdict.’⁹¹⁷ SALRI recommends that the proposed *Forfeiture Act* should provide that a conviction in South Australia or another Australian State or Territory in relation to murder or manslaughter is conclusive evidence (or at least shows *prima facie*) that an offender is responsible for the unlawful killing in any civil proceedings arising.

5.5.30 Recommendations

Recommendation 13

SALRI recommends that the proposed *Forfeiture Act* should provide that the common law forfeiture rule should operate as a rule of the civil law and not of the criminal law.

Recommendation 14

SALRI recommends that the proposed *Forfeiture Act* should provide that a conviction in South Australia or another Australian State or Territory is conclusive (or at least *prima facie*) evidence that an offender is responsible for the unlawful killing.

⁹¹³ *Hollington v Henthorn* [1943] KB 587, in which the English Court of Appeal held (at 594–5, 601–2) that the criminal conviction of the driver of a motor vehicle for negligent driving was inadmissible in a civil action by a passenger in that vehicle to recover damages for injuries received as a result of the driver’s negligence. The Court overruled the decision of Sir Samuel Evans P in *Re Crippen* [1911] P 108 admitting the conviction of the legal personal representative of a deceased person for murdering the deceased as proof that he had murdered her.

⁹¹⁴ *Hollington v Henthorn* has been widely criticised. See, for example, *Demeter v British Pacific Life Insurance Company* (1983) 150 DLR (3d) 249; *Mickelberg v Director of Perth Mint* [1986] WAR 365; *Nicholas v Bantick* (1993) 3 Tas R 47, 72. The rule has been overruled in this respect in South Australia. Section 34A of the *Evidence Act 1929* (SA) provides: ‘Where a person has been convicted of an offence or found by a court exercising criminal jurisdiction to have committed an offence and the commission of the offence is in issue or relevant to an issue in a civil proceeding, the conviction or finding is evidence of the commission of the offence and admissible in the proceeding against the person or a party claiming through or under the person.’ The rule in *Hollington v Henthorn* has also been overruled in the *Uniform Evidence Act* jurisdictions: at s 92.

⁹¹⁵ Under s 34A (and under similar provisions in other Australian jurisdictions), evidence of the criminal conviction, while admissible, is not conclusive proof of the conduct of the convicted person if this is in issue in a civil proceeding. See also *Public Trustee of New South Wales v Fitter* [2005] NSWSC 1188, [10], [11].

⁹¹⁶ (2006) 96 SASR 218.

⁹¹⁷ *Ibid* [23].

5.6 Imposing Conditions in the Forfeiture Modification Order

Position in Other Jurisdictions

5.6.1 The issue of whether courts should be able to impose conditions on a forfeiture modification order is not addressed in the UK and ACT Acts, but the NSW Act expressly permits conditions to be imposed.⁹¹⁸

5.6.2 This provision has not often arisen for consideration in the NSW Supreme Court. However, it was considered in depth by Lindsay J in the recent decision of *Re Settree Estates; Robinson v Settree*.⁹¹⁹ Under the NSW Act, the court had an express power to impose terms and conditions on a forfeiture modification order, but did not have an express power to impose terms and conditions on a forfeiture application order. In this case, Lindsay J held that the court was able to impose terms and conditions on forfeiture application order, despite the absence of any express power to this effect.⁹²⁰

5.6.3 In the circumstances of this case, Lindsay J held that the form of forfeiture application orders

that justice requires is one condition upon modest provision being made in favour of the defendant (administered via a trust or managed via protected estate orders), with terms requiring provision to be made, for his maintenance, education and advancement in life taking into account all of the circumstances of the case, as now known.⁹²¹

5.6.4 Lindsay J proposed that the provision made for the defendant be administered, or managed, by the NSW Trustee or another professional trustee or manager able to stand apart from members of the defendant's family, so as to enable the family to conduct their lives uncomplicated by ongoing monetary ties.⁹²² Lindsay J further proposed that the amount of the provision should include a reasonable allowance for fees charged by the administrator, and that the defendant's beneficial entitlement to trust property be subject to a condition that he not terminate the trust without leave.⁹²³

Issues

5.6.5 This issue of whether courts should be able to impose conditions on a forfeiture modification order was not considered by the NSW, NZ, ACT or Ireland law reform bodies.

5.6.6 The issue was not considered in any depth by the VLRC or the Tasmania Law Reform Institute, though both bodies supported legislation to the effect that a court should have the discretion to make a forfeiture modification order subject to any terms and conditions it thinks fit.⁹²⁴

5.6.7 Lindsay J's decision in *Re Settree Estates; Robinson v Settree* does, however, contain some discussion on why a power to make a forfeiture modification or application order with terms and

⁹¹⁸ *Forfeiture Act 1995* (NSW) s 6.

⁹¹⁹ [2018] NSWSC 1413.

⁹²⁰ *Ibid* [113].

⁹²¹ *Re Settree Estates; Robinson v Settree* [2018] NSWSC 1413, [172].

⁹²² *Ibid* [174].

⁹²³ *Ibid* [175]–[176].

⁹²⁴ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 2; Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 45.

conditions attached might be necessary. In particular, Lindsay J stated, regarding forfeiture application orders, that:

As centrally important as the fact of an unlawful killing and the forfeiture rule are, the need for a broader perspective suggests a correlative need for others to be able to be made, or withheld, on terms and conditions designed to accommodate what justice requires.⁹²⁵

Consultation Data Overview: Should Courts be Able to Impose Conditions in the Forfeiture Modification Order?

5.6.8 At one of the Adelaide Roundtables, the general view expressed was that a court should not be able to impose conditions in a forfeiture modification order. It was considered that judges need some clarity and that not all judges are as creative as Lindsay J.

5.6.9 The South Australian Victim Support Service considered this to be a complex issue, particularly with respect to how such a discretion would apply. It was considered that

once you decide that you are going to allow a discretion, ie to say that the rule does or does not apply in the particular case, do you then formulate a ‘second law’ to allow for apportionment? That is, to say that the killer will still get 95% or 50% or however much? This would require the exercise of a further discretion.

5.6.10 The Hon Geoffrey Muecke disliked the idea of allowing a court to impose conditions in a forfeiture modification order and considered the approach taken by Lindsay J to be unconvincing and too arbitrary.

5.6.11 Professor Prue Vines took the opposing view and suggested that a court should have a discretion about the extent to which they modify the forfeiture rule, whether that is complete or partial.

SALRI’s Observations and Conclusions

5.6.12 SALRI considered whether modification of the rule by the courts should be binary so that the killer gets all of their inheritance or more nuanced so that a court, in its discretion can award the killer part but not all of the inheritance or benefit. The argument for the nuanced approach is that it allows a court the flexibility to apportion culpability or responsibility between the killer and the victim to reach an appropriate result. The arguments against this approach are that the power to apportion exacerbates the uncertainty inherent in allowing a judicial discretion and adds another layer of complexity to the law. SALRI finds this a compelling argument. SALRI also notes that the nuanced approach taken by Lindsay J may risk undermining the rationale and operation of the forfeiture rule.

5.6.13 On balance, SALRI is of the view that the *Forfeiture Act* should not allow conditions to be imposed in a forfeiture modification order. It should be a case of ‘all or nothing’.

5.6.14 Recommendation

Recommendation 15

SALRI recommends that the proposed *Forfeiture Act* should not allow conditions to be imposed in a forfeiture modification order.

⁹²⁵*Re Settree Estates; Robinson v Settree* [2018] NSWSC 4143, [113].

5.7 Protecting the Property of the Deceased Victim from Dissipation

Current South Australian Position

5.7.1 A consistent theme raised to SALRI in consultation highlighted the need to put in place suitable safeguards in at least some instances (especially involving domestic violence) to protect the assets of the victim from dissipation by the alleged killer after the death of the victim until it has been determined, in either criminal or civil proceedings, whether the alleged killer unlawfully killed the victim. This is particularly problematic when assets were held between the alleged killer and the deceased as joint tenants. For example, cash held in a joint bank account which can easily be liquidated.

Position in Other Jurisdictions

5.7.2 New Zealand has a special caveat to prevent dealing with the land while the case is determined.⁹²⁶ The Registrar-General of Land must not register a transmission on survivorship to the alleged killer of an interest affected by the caveat of an interested person. No court order is required.

5.7.3 The ACT, UK and NSW Acts are silent on this issue.

Issues

5.7.4 That there is a need to protect the property of the deceased has been recognised by various law reform bodies. For example, the VLRC, taking its lead from New Zealand, saw ‘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’.⁹²⁷ It is worth noting that the statutory caveat for preventing dealings with land in New Zealand was introduced on the recommendation of the New Zealand Law Commission.⁹²⁸

5.7.5 The Law Reform Commission of Ireland acknowledged that it is ‘also important to put in place procedures to protect the integrity of the assets in an estate in the aftermath of a suspicious death and pending any criminal trial’. The Commission considered it to be appropriate that, where a person has died in suspicious circumstances and a trial or investigation is pending, an interested person may ‘lodge a caveat in probate proceedings and that, while that caveat is in force, there must be no transmission of any estate or interest affected by the caveat’.⁹²⁹

5.7.6 The reports of the Tasmania, UK, ACT and NSW law reform bodies did not discuss the issue.

Consultation Data Overview: What Mechanisms Should be Put in Place to Protect the Property of the Victim from Dissipation?

5.7.7 One of the key issues discussed in SALRI’s consultation was of the killer using the assets of the victim to fund their defence and living expenses prior to any criminal conviction. It was noted that this issue especially arises with jointly held assets where the suspect has killed the other joint owner

⁹²⁶ *Succession (Homicide) Act 2007* (NZ) s 13.

⁹²⁷ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 77 [5.107].

⁹²⁸ New Zealand Law Commission, *Homicidal Heirs* (Report No 38, 15 July 1997).

⁹²⁹ Law Reform Commission of Ireland, *Report on Prevention of Benefit from Homicide* (Report No 114, July 2015) 51.

(usually a spouse). It was noted to SALRI that this typically arises in a family violence context. In this situation, there is a risk that the suspect may deal with the assets before any conviction to the detriment of the beneficiaries of the victim. The questions raised were: who should be the party that takes on the responsibility to address this issue? Should it be appropriate that the killer access the resources of the victim to fund their defence? What happens to jointly owned property in such a situation?⁹³⁰

5.7.8 Attendees at the first Adelaide Roundtable agreed that there is a real need after an unlawful death to be able to act swiftly to preserve the victim's property and protect the interests of a beneficiary to the victim, especially any children. This was seen as crucial in family violence homicides, and its absence was seen as a real omission in the present law. A court needs to be able to make suitable orders at very short notice. The courts have an inherent jurisdiction to act immediately to grant an injunction. This would involve a party immediately making an *ex parte* application to protect the property of the deceased victim. The ability to rely on the beneficiary or their guardian doing this was seen as unreliable, owing to the likely trauma experienced by such persons from the victim's death and likely lack of legal knowledge or resources. The beneficiary should not be precluded from making such an application, but attendees highlighted the need for an additional party with standing and expertise to be able to intervene. It was agreed by attendees that the Attorney-General is well placed, and has the role and ability, especially through the Crown Solicitor's Office, to act and run a case of this nature.

5.7.9 The DPP was not seen as the appropriate person to make such an application due to a potential conflict of interest. The example given was that of a case where the DPP is representing a victim and looking over and managing the amount of money a battered woman accused of murder or manslaughter can access to mount their defence. There was doubt that the DPP would have either the wish or the expertise to manage such civil issues.

5.7.10 The prevailing view at the second Adelaide Roundtable favoured some sort of formal process to secure the victim's property swiftly and for a court to make suitable orders at very short notice. The discussion was based around who would have standing to apply to a court for injunctive or linked relief. It was agreed that the victim's family would have standing, but they may be traumatised and not act fast enough for their application to be effective. They may well also lack the resources.

5.7.11 Another suggestion raised was that the DPP should assume this role as they will know about the crime and have victim care facilities. It was raised that there may be a conflict of interest, as the DPP is also prosecuting the homicide, and civil issues such as this may fall outside their role and expertise. The Public Trustee was also mentioned. It was suggested that the Attorney-General's Department would be the preferable option to discharge this role. It was noted that there are many instances in which the Attorney-General is the 'legal entity' for the purposes of initiating or protecting something, and that this could be seen be a natural extension of that role. The Crown Solicitor's Office was noted in this context.

⁹³⁰ SALRI was told this is not an unrealistic fear. The recent case of *R v Dansie* [2019] SASC 215, for example, involved a husband murdering his wife for various reasons, including financial considerations. Following Dansie's arrest and prior to his conviction, the Supreme Court gave the son 'power to 'collect and protect' his mother's estate, pending the outcome of the trial': Sean Frewster, 'Grant Dansie fights father and convicted murderer Peter Rex Dansie in court to safeguard mother's legacy', *The Advertiser* (online, 27 February 2020), <https://www.adelaidenow.com.au/truecrimeaustralia/police-courts/grant-dansie-fights-father-and-convicted-murderer-peter-rex-dansie-in-court-to-safeguard-mothers-legacy/news-story/caa5d7f0e8f02e07ca17b2cf93620e3d>.

5.7.12 The Commissioner for Victims' Rights was also raised as a possibility. However, there were concerns about who the victims are and that the Commissioner for Victims' Rights would have to assess who they are protecting — the deceased husband or the children? There was also concern about whether the Commissioner would have the expertise.

5.7.13 There was agreement at the third Adelaide Roundtable that any scheme needs to allow a range of parties the standing and ability to bring applications urgently after an unlawful killing⁹³¹ (and before any conviction) to protect the interests of the parties, especially any children. Any such scheme must prevent the estate being dissipated, while at the same time allowing the accused to fund their defence. The presumption of innocence was emphasised. The need for a court to possess a wide range of interim or holding powers was noted.

5.7.14 The starting question was the issue of who should be able to make the application. The issue of how to freeze the assets prior to any formal conviction and the need for the killer to fund a reasonable defence was also raised to SALRI. It was noted that if the killer has ownership, the killer will be ineligible for legal aid on the basis of their assets.

5.7.15 The Victims of Crime Fund was raised as a source to fund any such application on behalf of the deceased or their beneficiaries, but the practical issues associated with this were also noted.

5.7.16 There was agreement that the DPP should not be involved with a pre-trial application relating to the forfeiture rule. The DPP acts as a 'minister of justice' on behalf of the community, and not a victim or deceased person.⁹³² There is a conflict of interest prosecuting the accused at the same time as civilly restricting his or her funds and therefore ability to instruct the lawyer of their choice. The need to balance the accused's right to fund a defence was highlighted. The Crown Solicitor was noted as preferable to the DPP and to possess the requisite 'bamboo curtain' and quality of objectivity.

5.7.17 The benefit of allowing a Government official or agency the ability to bring an action, especially prior to any conviction, in relation to the forfeiture rule was agreed. It was seen as 'crucial'. It was agreed that there are a range of parties who should have standing to bring a claim, but more often than not only a Government official or agency will have the resources to bring or maintain the application. The impracticality of requiring traumatised family members of the deceased to bring an application was noted. The NSW term 'any interested person' to define standing could cover this, but there would then be an education issue to inform the community of this ability. It was also noted that disabled adult children would have a guardian, and the guardian of such children should be included in the list of those with standing. The fact that the killer could well be the executor (especially in a case of family violence) was noted, and the need for the court's interim powers to include removing an unsuitable executor was raised.

5.7.18 An 'extreme interim measure' was raised to 'brute force' the estate by freezing it. This would entitle the accused to legal aid to fund a defence, with the distribution to be sorted after the outcome of the proceedings. This raises the problem about children, especially in a family violence context, that will still need to be fed and provided for if the assets are frozen.

⁹³¹ This was likened to 'seeing the Registrar or Master over lunch'.

⁹³² *Cannon v Tabche* (2002) 5 VR 317. See also David Plater and Lucy Line, 'Has the "Silver Thread" of the Criminal Law Lost its Lustre? The Modern Prosecutor as a Minister of Justice?' (2012) 31(2) *University of Tasmania Law Review* 55.

5.7.19 The Acting Director of Public Prosecutions, Ms McDonald SC, told SALRI ‘that it may well appropriate for a suitable party to act swiftly after an unlawful killing to protect the interests of third parties as suggested’. However, the Acting Director expressed her strong opposition to any recommendation that the Office of the DPP is the suitable agency and outlined two cogent reasons of both practice⁹³³ and principle why it would not be appropriate for her office to be involved in taking steps to protect third party interests in the scenario given. Ms McDonald highlighted the crucial fact that the prosecutor acts as an impartial minister of justice on behalf of the community at large and is not the lawyer for any third party.⁹³⁴ As Ms McDonald explained:

More importantly, taking action to protect the financial interests of third parties (who may also be victims and witnesses in any subsequent prosecution), would be antithetical to my role. The primary obligation on a prosecutor is the obligation of fairness — and of ensuring a fair trial for persons accused of criminal offences. Prosecutorial obligations to the court, the community, the accused, victims, witnesses and defence counsel flow from this concept. Any legislative requirement for me or my office to take steps to protect or somehow favour the financial interests of one of these parties, or a third party, vis-a-vis the accused, would require a partisan approach. This would clearly both undermine my independence, and create an apprehension of bias in the performance of my prosecutorial duties.

5.7.20 The Public Trustee, the Crown Solicitor and the Commissioner for Victims’ Rights (all raised as suitable agencies in consultation) told SALRI that any such role raised resource, practical and other implications. The Commissioner for Victims’ Rights expressed the view that a government department should be given the statutory power to apply for a forfeiture order. One suggestion was that a special unit in Crown Solicitor’s Office work together with private practitioners in conjunction with government departments in order to expedite the process.

5.7.21 The Victim Support Service referred to executors of the victim’s estate, the Attorney-General’s office or the Commissioner of Police as parties that may have standing to bring an application under the forfeiture rule. The Victim Support Service noted that a wide injunction power with a tracing provision and different discretions would be appropriate.

5.7.22 The Commissioner for Victims’ Rights provided a case study of a husband who murdered his wife and then began to dissipate the assets. It was noted that it would have cost a large amount to protect the property. The maternal grandparents assumed responsibility for the child of that marriage. Whilst the offender was remanded in custody, he instructed his family to prevent the victim’s family from having access to the family home. Soon thereafter, he began to dispose of assets to fund his legal representation.

⁹³³ ‘The first relates to the practicality of the proposed action. I assume that one of the reasons my office has been suggested is on the expectation that we are involved in the matter at a very early stage, and would thus be in a good position to take action in a timely way. However, since the commencement of the *Summary Procedure (Indictable Offences) Amendment Act 2017*, my office does not, in the ordinary course, have conduct of a prosecution file until such time as a charge determination has been made. In the case of an unlawful killing, it may be several months before a preliminary brief is submitted to my office. It may be that no charge determination is made, and my office never undertakes a prosecution. In those circumstances, my office is not in any better position than the other suggested parties to undertake the action proposed.’

⁹³⁴ See, for example, *R v Milton Keynes Magistrates’ Court; Ex parte Roberts* [1995] Crim LR 225; *R v Tkachuk* (2001) 159 CCC (3d) 434, 441–442; *Cannon v Tabche* (2002) 5 VR 317. See also David Plater and Lucy Line, ‘Has the “Silver Thread” of the Criminal Law Lost its Lustre? The Modern Prosecutor as a Minister of Justice?’ (2012) 31(2) *University of Tasmania Law Review* 55.

5.7.23 The Commissioner intervened to obtain a freezing order in the civil court.⁹³⁵ An order was granted that preserved 50% of the property for the children. After the father was convicted in relation to the unlawful death of his wife, the Commissioner sought 25% of the father's remaining interest for the children. The Commissioner for Victims' Rights noted that their intervention was a costly one off exercise and would likely not prove financially viable for most victims or next of kin.⁹³⁶ The costs of looking after the children, including the cost of counselling, were borne by the grandparents, who could not afford to do so. Working grandparents would have to give up their jobs to stay home with the children.

5.7.24 The issues described by the Commissioner were reflected in the South Australian homicide cases examined by SALRI.⁹³⁷ For example, in 2017 in *R v Archer*,⁹³⁸ the defendant murdered his partner by strangling her with a cord from a hoodie jumper. After he murdered her, he went to the bank with her mother and withdrew money from the deceased's account. This case suggests that it is not unusual for killers to seek access to the funds of their victims, and indicates that there may be a need to protect a victim's assets from dissipation before the killer's guilt has been determined.

5.7.25 The Commissioner for Victims' Rights raised the additional question of who should fund the civil application, and noted that children may not have the funds to make a claim for the forfeiture rule to operate. The Commissioner stated that her office could not perform this role as matter of routine but believed that, with sufficient resources, their office would be well placed to be given standing. The Commissioner also noted that the Crown may have an interest as they deal with compensation, and that the DPP's role should be to inform the responsible agency. Another option could be for the responsibility to be jointly shared between the Crown, who would start the process, and the Commissioner for Victims' Rights, who would manage victims. The Public Trustee was not considered an appropriate body to be given standing as their role is not victim-focused.

5.7.26 Kellie Toole agreed that there should be a charge or a hold on assets between the initiation of prosecution and the end of the trial. In her view, the DPP should have to apply to the court to put a charge over these assets, and the defendant should have a right to apply to defend their position.

5.7.27 Dr Hemming noted that New Zealand has a special caveat to prevent dealing with the land while the matter is determined, and submitted that this approach should be followed in SA.⁹³⁹

5.7.28 The Legal Services Commission of South Australia submitted that the property of the deceased victim should be protected and placed under the administration of a trustee company, whether public or private. Trustee companies are well-equipped and highly experienced in protecting and administering estate property.

⁹³⁵ The Commissioner for Victims' Rights possesses various powers, notably under the *Victims of Crime Act 2001* (SA), including to appear in and/or bring legal proceedings on behalf of a victim. The Commissioner for Victims' Rights noted to SALRI that their office has limited resources to bring such actions.

⁹³⁶ The Commissioner for Victims' Rights noted to SALRI that their office did not have the resources to routinely bring such actions.

⁹³⁷ See below Appendix B.

⁹³⁸ See below Appendix B.

⁹³⁹ *Succession (Homicide) Act 2007* (NZ) s 13.

SALRI's Observations and Conclusions

5.7.29 There was considerable discussion in SALRI's consultation about the need for urgent orders to be made in cases where the killer controls the deceased's estate and could dissipate it before a preserving order or injunction is granted. This was seen as a real practical omission.

5.7.30 SALRI is of the view that, to give full effect to the forfeiture rule, a court should have the power to make whatever interim or incidental orders are necessary from time to time to preserve the deceased's property until a finding of guilt is made in a criminal court and/or any application made by or on behalf of the killer or an interested party for application or relief from the rule has been finalised. A civil court should not have to wait until a formal criminal charge is laid to make such an interim order: it should be enough that there are reasonable grounds to suspect there has been an unlawful killing and an individual who otherwise may benefit from the killing was responsible. Of course, the court will need the power to discharge the orders if no prosecution is brought within a reasonable time.

5.7.31 Any party who has a financial interest in the deceased's estate or could have such an interest if the rule were to apply should have standing to make an application for an interim preserving order. It may be that the usual eligible parties, such as the relative of a deceased person, may be too distressed and/or not have the resources to bring such an urgent application. This was identified as a real concern in SALRI's consultation. The need for some other party or agency to have the standing to bring such an urgent application was repeatedly identified to SALRI in consultation.

5.7.32 SALRI therefore recommends that the proposed *Forfeiture Act* should explicitly provide the Attorney-General with the standing to apply for preserving orders in a suitable case, if the Attorney-General is of the view it is appropriate.⁹⁴⁰ The Attorney-General should be at liberty to delegate or assign this role to whichever agency or office holder is considered most suitable and equipped to discharge this role. SALRI accepts that, as articulated by Ms McDonald SC, the DPP is inappropriate in this context and should not assume this role, but otherwise SALRI does not wish to be prescriptive. If there are privacy or confidentiality concerns, the proposed *Forfeiture Act* should authorise the DPP, SAPOL and any other government agency with an interest in the case, to disclose to the Attorney-General any information that the Attorney-General might need about the case to assist the Attorney-General to bring the application.

5.7.33 There is benefit in a protocol to be formulated for the Director of Public Prosecutions, the South Australian Police and any other government agency with a relevant interest or role in the case to disclose to the Attorney-General any information that the Attorney-General (or the office holder or agency to which the Attorney-General may choose to delegate such a role) might need about the case to assist in bringing any application.

5.7.34 SALRI is concerned about the possibility of an accused person being able to seize assets other than real estate which do not or may not require a grant of probate, particularly joint bank accounts or other accounts with which the accused may be authorised to deal, for example, as an authorised signatory or under a power of attorney. While interim preservation orders can be made, they still take time, especially where government action is required. An accused person also may want such protection themselves from others who start interfering with their entitlement while maintaining

⁹⁴⁰ This can be seen as an extension of the Attorney-General's existing powers in relation to the Supreme Court's inherent *parens patriae* power.

their innocence. SALRI is of the view that in these cases, a swifter process is needed. SALRI recommends a statutory form of caveat able to be served by any person claiming an interest in property held by another, being a bank account, the interest of a nominated beneficiary in a superannuation fund, an interest in a unit, discretionary or other trust or other property for which no grant of probate is necessary. The caveat would prevent any dealings with the property without an order of the court, or until expiry of the caveat if no order of the court is served within one month of service of the caveat. This would not affect any of the interim preservation order procedures proposed. A caveat would not be necessary in the case of real property or where a grant of probate is necessary.

5.7.35 SALRI considers there is benefit in including provision for a statutory caveat in any *Forfeiture Act*.

5.7.36 Recommendations

Recommendation 16

SALRI recommends that the proposed *Forfeiture Act* should provide that a court should have the power to make whatever interim orders are necessary from time to time to preserve the deceased's property and/or protect the interests of third parties until a finding of guilt is made and any application made by or on behalf of the killer for relief from the forfeiture rule has been finalised.

Recommendation 17

SALRI recommends that the proposed *Forfeiture Act* should provide that a court should not have to wait until a formal charge is laid to make such an interim order and that it should be sufficient that there are reasonable grounds to suspect an unlawful killing has taken place.

Recommendation 18

SALRI recommends that the proposed *Forfeiture Act* should provide that a court should have the power to discharge an interim order if no prosecution is instituted within a reasonable time.

Recommendation 19

SALRI recommends that the proposed *Forfeiture Act* should provide that any person who has a financial or other interest in the deceased's estate or could have such an interest if the rule were to apply, should have standing to make an application for interim preserving orders.

Recommendation 20

SALRI recommends that the proposed *Forfeiture Act* should confirm that the Attorney-General has the standing to apply for preserving orders if the Attorney-General (or the office holder or agency to which the Attorney-General may choose to delegate such a role) considers it is appropriate.

Recommendation 21

SALRI recommends that a protocol be formulated for the Director of Public Prosecutions, the South Australian Police and any other government agency with a relevant interest or role in the case to disclose to the Attorney-General any information that the Attorney-General (or the office holder or agency to which the Attorney-General may choose to delegate such a role) might need about the case to assist in bringing any application.

Recommendation 22

SALRI recommends a statutory form of caveat able to be served by any person claiming an interest in property held by another, being a bank account, the interest of a nominated beneficiary in a superannuation fund, an interest in a unit, discretionary or other trust or other property for which no grant of probate is necessary. The caveat would prevent any dealings with the property without an order of the Court, or until expiry of the caveat if no order of the Court is served within one month of service of the caveat.

Part 6 – Modification of the Common Law Forfeiture Rule

6.1 Classes of Unlawful Killing Where Modification May be Appropriate

'Mercy Killings' or Euthanasia

6.1.1 The different classes of unlawful homicide where the rule should or should not apply has occasioned considerable examination and debate by law reform bodies and academic commentators. It was also a question that often arose in SALRI's consultation. The situations of 'mercy killings' or euthanasia was the type of unlawful homicide that arose most often in SALRI's consultation.

6.1.2 Assisted suicide is an act of deliberately assisting or encouraging another person to kill themselves and remains a serious offence.⁹⁴¹ A similar area is active euthanasia,⁹⁴² which is currently unlawful in Australia, which involves deliberately ending a person's life to relieve suffering through a direct action in response to their request.⁹⁴³ This issue has received judicial consideration in Australia.⁹⁴⁴

6.1.3 This was an issue that proved a prominent theme in SALRI's consultation as to the scope of the forfeiture rule.⁹⁴⁵

6.1.4 The UK, NSW and ACT *Forfeiture Acts* define unlawful killing to include aiding, abetting, counselling or procuring a homicide.⁹⁴⁶ Only the NSW Act also includes unlawfully aiding, abetting, counselling or procuring a suicide.⁹⁴⁷

6.1.5 The codified model in New Zealand explicitly excludes such killings from the forfeiture rule. It does so by first confining the scope to 'intentional and reckless' killings, but also by expressly excluding assisted suicide from the operation of the rule.⁹⁴⁸ While beneficial to create certainty, it is unclear whether a blanket prohibition on assisted suicide would also encompass euthanasia.

6.1.6 Definitional problems aside, this formulation allows no scope to alleviate the rule to avoid harsh results.⁹⁴⁹ This could be particularly problematic as, unlike the situation of a suicide pact, an offender who assists with a suicide or claims to have committed a mercy killing could be primarily motivated to benefit in some way from the deceased person. A blanket rule excluding these unlawful killings from the forfeiture rule would not ensure vulnerable people are protected from those who may prey upon their vulnerabilities for financial gain. As such, the codified model appears to be ill-equipped

⁹⁴¹ *CLCA* s 13A(5).

⁹⁴² This Report will not attempt to explore the obvious moral, medical and legal debate and complexities regarding euthanasia.

⁹⁴³ Though now see *Voluntary Assisted Dying Act 2017* (Vic); *Voluntary Assisted Dying Act 2019* (WA).

⁹⁴⁴ *The Public Trustee of Queensland v The Public Trustee of Queensland* [2014] QSC 47.

⁹⁴⁵ See further below [6.2.1]–[6.2.16].

⁹⁴⁶ UK Act s 1(2); ACT Act s 2, Dictionary; NSW Act s 3.

⁹⁴⁷ NSW Act s 3.

⁹⁴⁸ New Zealand Act s 4.

⁹⁴⁹ Nicola Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31(1) *Common Law World Review* 1, 5.

to deal with a diverse range of circumstances, and could potentially develop into a similarly inflexible system as the one it was implemented to resolve.

6.1.7 The discretionary model has not been tested in the context of assisted suicide or euthanasia, and so the success of its application is uncertain. However, the jurisprudence does suggest that there are many cases in which the court would have used a discretion where the circumstances lacked a sense of moral outrage.

6.1.8 A recent example can be found in the UK case of *Ninian*.⁹⁵⁰ Mr Ninian was a successful businessman who, after being diagnosed with an incurable and debilitating disease, organised to end his life through an assisted suicide clinic in Switzerland. Mrs Ninian, his wife of 30 years, actively discouraged this decision, but ultimately respected her husband's wishes and reluctantly assisted him in making such arrangements. Mrs Ninian was at risk of being prosecuted under the *Suicide Act 1961*, but the Crown Prosecution Service ultimately determined that it would not be in the public interest to prosecute, given the act was compassionate and not malicious. In this case, Mrs Ninian successfully applied to have the forfeiture rule excluded in her case, to allow her to inherit her husband's estate.

6.1.9 The decision in *Ninian* suggests that the courts will be willing to exercise a discretion to exclude the forfeiture rule in cases which involve personal tragedy for all involved, where the individuals in question are motivated by compassion and a desire to end the suffering of the deceased person. However, this position does remain untested in Australia.

6.1.10 For both euthanasia and assisted suicide, a discretionary model appears to adequately address concerns from both the opposing arguments, which call for exceptions to the rule in only the most compelling or 'exceptional' circumstances. This approach would also be flexible enough to develop with any changes to euthanasia laws and be well-equipped to resolve new challenges, as seen in the UK where the courts are grappling with the new phenomenon of 'euthanasia tourism' (that is travel to jurisdictions like Switzerland where euthanasia is lawful) and the consequences for assisting families.⁹⁵¹

6.1.11 In the Queensland case of *The Public Trustee of Queensland v The Public Trustee of Queensland & Ors*,⁹⁵² the court was asked to consider whether the executor and sole beneficiary of a valid will ('Nielsen'), who had been convicted of assisting the testator ('Ward') to commit suicide, was subject to the common law forfeiture rule. The law in Queensland was unclear as to whether 'assisted suicide' fell within the definition of an 'unlawful killing' to attract the application of the rule.

6.1.12 Nielsen had acted entirely in accordance with Ward's wishes as a friend and his crime was at the explicit request of the deceased (though his financial interest should not be discounted).⁹⁵³

⁹⁵⁰ *Ninian v Findlay* [2019] EWHC 297 (Ch).

⁹⁵¹ Dana M Cohen, 'Looking for a Way Out: How to Escape the Assisted Suicide Law in England' (2010) 24(2) *Emory International Law Review* 697; BBC News, 'More Britons Seeking Suicide Help', *BBC News* (online at 17 November 2008) <http://news.bbc.co.uk/2/hi/uk_news/7732640.stm>. See, for example, *Ninian v Findlay* [2019] EWHC 297 (Ch).

⁹⁵² [2014] QSC 47 (21 March 2014).

⁹⁵³ This does need to be noted. The criminal trial judge commented at sentence: 'And, of course, you had a personal financial interest in the death. It is not put as your main motive but I don't think this matter can be ignored. It is just not possible in any setting to ignore such a conflict of interest. It is also not irrelevant that at the time you had little in the way of personal assets. You had almost no money in the bank and a credit card debt, so that your net position was that you were about \$12,000 in debt... There is also evidence in the records of interview that you had been dishonest in what you told the deceased's relatives about the details of his death. And the dishonesty

However, de Jersey CJ found that, upon being convicted of assisted suicide in relation to Ward's death, Nielsen forfeited any entitlement under the estate, and was no longer capable of acting as executor under the will. The Chief Justice applied *Troja* and held that the application of the forfeiture rule in Queensland where a death is the result of a crime is 'inflexible and absolute'⁹⁵⁴ and there is no element of judicial discretion to modify its effects.

6.1.13 Another powerful example of relevance is the 'mercy killing', where a patient suffering from an incurable and often painful disease may be assisted in dying through the actions of a third party, generally a medical practitioner or nurse. The common law has long held that such conduct, even if entirely benevolent, still amounts to murder or manslaughter.⁹⁵⁵

6.1.14 This issue has been discussed by various law reform bodies. The New Zealand Law Commission was of the view that there is a clear line between murder and assisting suicide, in that it is the victim, not the killer, who is deciding that they are to die in the case of assisted suicide. As such, the NZLC considered that there should not be a bar on profiting in the case of assisting suicide.⁹⁵⁶ While it was recognised that a party assisting suicide may have some motive of self-interest, the NZLC was of the view that a requirement to establish the absence of self-interest was unworkable.⁹⁵⁷

6.1.15 However, the NZLC was not convinced that mercy killings should be excluded from the forfeiture rule. Indeed, it considered that mercy killings should remain within the scope of the forfeiture rule. Mercy killings were distinguished from assisted suicide, on the basis that, in a mercy killing, it is not the victim who is deciding that they are to die.⁹⁵⁸

6.1.16 The VLRC recognised that there may be some need for a discretion to accommodate for compassionate killings such as mercy killings, but did not suggest that killings in this class should be excluded from the operation of the rule altogether.⁹⁵⁹ The VLRC approach was that the forfeiture rule should remain applicable in any case of murder, no matter the mitigating circumstances.⁹⁶⁰

6.1.17 In *Dunbar v Plant*, the majority of the English Court of Appeal saw the value of statutory discretion in this context and discussed that, whilst in many (if not most) cases of assisted suicide it

with the police and the dishonesty with the relatives does, I think, obscure the motives with which you acted, particularly in circumstances where you were sole beneficiary of the will, and particularly in a case where your motives are less clear and less understandable than a case... where a spouse or a child kills their spouse or parent in circumstances where they have been a long-term carer with a clear compassionate and altruistic motive for someone in a hopeless and extreme medical situation': *R v Nielsen* [2012] QSC 29 (Dalton J).

⁹⁵⁴ *Public Trustee of Queensland v Public Trustee of Queensland* [2014] QSC 47 [16].

⁹⁵⁵ See, for example, *R v Cox* (1992) 12 BMLR 38; *R v Justins* [2011] NSWSC 568.

⁹⁵⁶ New Zealand Law Commission, *Succession Law: Homicidal Heirs* (Report No 38, 15 July 1997) 6 [7].

⁹⁵⁷ *Ibid* 6 [8].

⁹⁵⁸ *Ibid* 7 [9].

⁹⁵⁹ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 43 [4.49].

⁹⁶⁰ '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". 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': Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 20 [3.19]–[3.20].

would be harsh to apply the forfeiture rule, there would be ‘serious’ cases where in the exercise of the statutory discretion the rule should be applied.⁹⁶¹

Family Violence

6.1.18 A strong theme of research and commentary is the injustice that can arise when the forfeiture rule interacts with victims of family violence, especially where it applies to a victim of family violence who responds to such violence and unlawfully kills an abusive spouse.⁹⁶² It is now widely recognised that survivors of family violence who kill an abusive spouse or other family member may well have a lower level of culpability than other unlawful killers. Due to the prevalence of family violence killings, there are numerous examples in case law of individuals, predominantly women, who have suffered ongoing family violence and eventually respond with fatal consequences against the abuser.⁹⁶³ Yet the rule, when strictly applied, fails to acknowledge the varying degrees of culpability that can attach to unlawful killing.⁹⁶⁴ Clear examples of the rule’s problematic rigidity in these circumstances exist in both Australia and the UK.⁹⁶⁵

6.1.19 The phrase ‘family violence’ is defined to mean ‘acts of violence that occur between people who have, or have had, an intimate relationship.’⁹⁶⁶ It is, in all forms, a violation of basic human rights.⁹⁶⁷ Everyone has the right to feel safe and be safe everywhere, but particularly at home,⁹⁶⁸ and yet this is where family violence primarily occurs.⁹⁶⁹

6.1.20 According to the Family, Domestic and Sexual Violence in Australia Report prepared by the Australian Institute of Health and Welfare, worldwide almost two in five murdered women were killed by a domestic partner.⁹⁷⁰ Between 1982 and 2011, partner homicides accounted for 13% of all homicides globally. Almost two in five (38%) murdered women and 1 in 20 (6%) murdered men were

⁹⁶¹ *Dunbar v Plant* [1998] Ch 412, 425.

⁹⁶² Barbara Hamilton and Elizabeth Sheehy, ‘Thrice Punished: Battered Women, Criminal Law and Disinheritance’ (2004) 8 *Southern Cross University Law Review* 96.

⁹⁶³ See, for example, *Troja v Troja* (1994) 33 NSWLR 269; *Re K, dec’d* [1985] 3 WLR 234; *Bain v Morabito* (Supreme Court of New South Wales, Powell J, 14 August 1992); *Edwards v State Trustees Limited* (2016) 257 A Crim R 529; *Re Kumar* [2017] VSC 81.

⁹⁶⁴ Ken Mackie, ‘The Troja Case: Criminal Law, Succession and Law Reform’ (1998) 5(1–2) *Canberra Law Review* 177, 181.

⁹⁶⁵ See, for example, *Troja v Troja* (1994) 33 NSWLR 269; *R v Chief National Insurance Commissioner; Ex parte Connor* [1981] 1 QB 758; *Re Giles (dec’d)* [1972] Ch 544.

⁹⁶⁶ Council of Australian Governments, *The National Plan to Reduce Violence against Women and their Children 2010–2022* (COAG Document, 2010) 2.

⁹⁶⁷ Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, 28 February 2015) 49.

⁹⁶⁸ *Ibid* 49.

⁹⁶⁹ Government of South Australia, *Domestic Violence* (Discussion Paper, July 2016) 45.

⁹⁷⁰ Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia 2018* (Report, 28 February 2018) 30.

killed by a partner. In developed countries, 41% of female homicide victims were killed by an intimate partner.⁹⁷¹ The figures in Australia are similar.⁹⁷² In South Australia, the figures are comparable.⁹⁷³

6.1.21 In South Australia, in the twelve months to 31 July 2018, there were 8504 family and domestic abuse related offences against the person reported to SA Police, or roughly 24 per day.⁹⁷⁴ This number is alarming, particularly as most family violence offences are not reported to police.⁹⁷⁵ The majority of victims of family violence are female, whilst the perpetrators are predominantly male.⁹⁷⁶ SAPOL statistics further ‘reveals a high proportion of perpetrators [of family violence] who are partners or ex-partners of their victim... Perpetrators who were ex-partners and partners of their victims accounted for 55% of offences in 2014-15 for female victims.’⁹⁷⁷

6.1.22 These themes are supported by SALRI’s review of recent homicide cases in South Australia.⁹⁷⁸ Of the 119 cases of murder and manslaughter, SALRI identified 42 cases to which the forfeiture rule would have likely had some application.⁹⁷⁹ Many of these cases (14 were identified) involved men killing their intimate partners as part of a pattern of abuse and violence. The 2009 murder case of *Yost*⁹⁸⁰ is a vivid example. Yost bashed his female partner to death. From the beginning of their relationship to her death, he had subjected her to continuous and ‘obscene’ violence, which he often filmed. The case of *Curtis* in 2009 is also illustrative.⁹⁸¹ Curtis was found guilty of manslaughter on the basis of an unlawful and dangerous act. It was a ‘very serious’ crime. Curtis had bludgeoned his de facto partner to death. Her death was a part of a systematic cycle of abuse, and she had previously been

⁹⁷¹ Ibid.

⁹⁷² See, for example, Australian Institute of Criminology, *Homicide in Australia 2012–13 to 2013–14: National Homicide Monitoring Program Report* (Report No 2, 2017) 20, which indicates that 54% of female homicide victims between 2012 and 2014 were killed by an intimate partner.

⁹⁷³ In South Australia in 2014 and 2015, almost half (46%) of homicide and related offences resulted from domestic violence. Government of South Australia, *Domestic Violence* (Discussion Paper, July 2016) 30.

⁹⁷⁴ ‘Offences Reported or Becoming Known to Police to: 31/07/2018’, *South Australian Police* (Web Page, 9 October 2018)

<<https://www.police.sa.gov.au/about-us/crime-statistics-map>>. See further Government of South Australia, *Domestic Violence* (Discussion Paper, July 2016) 24–29, 31–36.

⁹⁷⁵ Enrique Gracia, ‘Unreported Cases of Domestic Violence against Women: Towards an Epidemiology of Social Silence, Tolerance and Inhibition’ (2004) 58(7) *Journal of Epidemiology and Community Health* 536.

⁹⁷⁶ Ibid. See also Government of South Australia, *Domestic Violence* (Discussion Paper, July 2016) 27–28. The proportion of female victims of family violence remains above 80%: at 29. Though men are clearly also victims of family violence, ‘Family violence disproportionately affects women and children, and a disproportionate number of men are perpetrators’: *Royal Commission into Family Violence* (Summary and Recommendations, March 2016) 57. See further at 57–58.

⁹⁷⁷ Government of South Australia, *Domestic Violence* (Discussion Paper, July 2016) 26. In contrast, perpetrators who were ex-partners and partners of their victims accounted for 38% of offences of family violence in 2014–15 for male victims. The proportion of male victims of family violence by a parent/guardian or son or daughter was much higher than for female victims. A male victim of domestic violence was more likely to have suffered abuse at the hands of a parent or son or daughter than a female victim: at 26.

⁹⁷⁸ See also above n 105. See further below Appendix B.

⁹⁷⁹ The recent case of *R v Dansie* [2019] SASC 215 is a further recent example of a murder involving domestic violence and financial motivation and a case where the forfeiture rule should be applied. The victim’s son noted that the victim had ‘belonged to three vulnerable groups — she had a disability, she was elderly, and she was a victim of domestic violence’: Meagan Dillon, ‘Peter Dansie Found Guilty of Murder after Pushing Wife’s Wheelchair into Adelaide Pond’, ABC News, 20 December 2019, <https://mobile.abc.net.au/news/2019-12-20/peter-dansie-found-guilty-of-murdering-wife-in-wheelchair/11817410>.

⁹⁸⁰ *R v Yost* [2010] SASFC 4

⁹⁸¹ *R v Curtis (No 2)* (2009) 105 SASR 411.

the victim of domestic violence by Curtis. Gray J noted that the conduct of Curtis ‘was cowardly and despicable and falls into the worst category of domestic violence’. The 2012 murder case of *Ziaollah Abrahamzadeh* is also telling.⁹⁸² Abrahamzadeh fatally stabbed his wife, from whom he was separated, at the Adelaide Convention Centre on the Persian New Year’s Eve in front of their daughter. Abrahamzadeh had been persistently violent towards both the victim and their children, and was particularly angry about the prospect of a property settlement upon separation. Obviously, in any such situation as these, the forfeiture rule should apply.

6.1.23 However, other cases may not be as clear cut. Several homicide cases (four were identified) found by SALRI from its study conversely involved women killing their intimate partners, in response to the sustained domestic violence that they had experienced. For instance, in *R v Narayan* in 2011,⁹⁸³ the case that promoted this reference, the defendant killed her husband by pouring petrol on him and setting him alight following years of psychological and physical abuse. Mrs Narayan was convicted of manslaughter on the basis of provocation. She received a wholly suspended sentence of imprisonment from Sulan J. The 2009 case of *Weetra* is also illustrative.⁹⁸⁴ Ms Weetra had been in a violent and volatile relationship with the deceased for several years. The police often had to attend their home. On the night of the killing, the deceased was again physically and verbally aggressive, and grabbed Ms Weetra by the throat. In ‘spontaneous’ response, she stabbed and killed the deceased. She pleaded guilty to manslaughter on the basis of excessive self-defence. Nyland J described the case as ‘somewhat unique’ and noted the ‘many’ mitigating factors, including strong community support, and imposed a wholly suspended sentence of imprisonment.

6.1.24 The now outdated notion that ‘what happens in the family home is no-one else’s business’, is no longer accepted by society as a justification for ignoring family violence.⁹⁸⁵ Australian society is gradually seeing the acute problem of family violence in a new light, and to appreciate the profound impact that family violence can have on its victims and survivors.⁹⁸⁶ These changing social attitudes include a re-evaluation of the degree of culpability of victims of family violence, and whether they should bear any responsibility for crimes committed as a result of their domestic situation.

6.1.25 The problem with rigidly applying the common law forfeiture rule to all unlawful killings is that it may lead to unjust outcomes. The argument for modifying the application of the rule in situations involving family violence where a victim of family violence kills their abuser is simple: it may be harsh and unjust to allow the rule to operate given the decreased culpability of such an offender.⁹⁸⁷

6.1.26 However, the argument for modification is predicated on two vital assumptions: first, that the victim of family violence who kills the perpetrator attracts a lower level of culpability than an ordinary killer, and secondly, that the rule requires, or should require, culpability to operate. Of course,

⁹⁸² *R v Abrahamzadeh* [2012] SASFC 112.

⁹⁸³ *R v Narayan* [2011] SASFC 61.

⁹⁸⁴ *R v Weetra* (Supreme Court of South Australia, Nyland J, 10 August 2009)

⁹⁸⁵ Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, 28 February 2015) 49.

⁹⁸⁶ *Ibid* 65.

⁹⁸⁷ Carla Spivack, ‘Killers Shouldn’t Inherit from Their Victims: Or Should They?’ (2013) 48(1) *Georgia Law Review* 145, 148–149.

the precise context and circumstances surrounding the killing are central. The fact that an individual suffers from family violence obviously does not justify the killing of the perpetrator.⁹⁸⁸

6.1.27 While ideally the effect and scope of the rule should be determined on an independent basis, the effect of the forfeiture rule, especially post *Troja*, in situations of family violence can prove particularly harsh and detrimental.⁹⁸⁹ On a strict application, the survivor cannot inherit from their deceased partner, including having joint tenancies severed.⁹⁹⁰ The survivor will have suffered the trauma of the relationship, the trauma of the actual killing, the trauma of their interactions with the legal system, and at the end may potentially lose the majority of their assets.⁹⁹¹ It is in this context that any legislative reform of the forfeiture rule should be considered.

6.1.28 The divergence in moral culpability between ‘ordinary’ killers and persons who kill perpetrators of family violence against them has been recognised by the courts. For example, in *Troja v Troja*, Kirby P stated:

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.⁹⁹²

6.1.29 Kirby P’s powerful dissent to the strict application of the forfeiture rule in *Troja v Troja* became the catalyst for the NSW Government’s decision to ‘import’ the *Forfeiture Act 1982* (UK) which took the form of the *Forfeiture Act 1995* (NSW), and provides judicial discretion to modify the rule in all cases of unlawful killings other than murder.

6.1.30 The NSW courts had previously exercised their discretion in such cases. For example, in *Evans*, the forfeiture rule was not applied to a woman convicted of manslaughter who had killed her husband after he had assaulted her and her daughter, and had then told her that he was going to kill the children.⁹⁹³

6.1.31 By way of illustration of the issue, in the Victorian case of *Edwards*,⁹⁹⁴ the relationship between the deceased husband and his wife was characterised by family violence (the violence was mutual). The deceased ultimately died at the hands of his wife.⁹⁹⁵ The husband had begun to act

⁹⁸⁸ Gail Hubble, ‘Feminism and the Battered Woman: The Limits of Self-Defence in the Context of Domestic Violence’ (1997) 9(2) *Current Issues in Criminal Justice* 113, 114. The law clearly should not allow killings, even by abused spouses, in retaliation or revenge to amount to a lawful defence. ‘The law of a well-ordered and civilized society cannot countenance deliberate killing, even to the extent of treating it as extenuated, as a response to the conduct of another however abhorrent that conduct might be. Nor can society countenance killing as a means of averting some apprehended harm in the future’: *The Queen v R* (1981) 28 SASR 321, 325–326 (King CJ). See also *R v Craig* (2011) 276 OAC 117 [35] (Doherty JA).

⁹⁸⁹ Barbara Hamilton and Elizabeth Sheehy, ‘Thrice Punished: Battered Women, Criminal Law and Disinheritance’ (2004) 8 *Southern Cross University Law Review* 96, 109.

⁹⁹⁰ Ken Mackie ‘The Troja Case: Criminal Law, Succession and Law Reform’ (1998) 5(1–2) *Canberra Law Review* 177, 182.

⁹⁹¹ Barbara Hamilton and Elizabeth Sheehy, ‘Thrice Punished: Battered Women, Criminal Law and Disinheritance’ (2004) 8 *Southern Cross University Law Review* 96, 149.

⁹⁹² (1994) 33 NSWLR 269, 285.

⁹⁹³ *Public Trustee v Evans* (1985) 2 NSWLR 188.

⁹⁹⁴ See also above [3.5.12]–[3.5.24].

⁹⁹⁵ *Edwards v State Trustees Limited* (2016) 257 A Crim R 529.

violently towards her in 1999, and the violence was frequent and ongoing. The wife's mental health declined and at the time of the civil hearing, she suffered from anxiety and depression and was bipolar.

6.1.32 On the day of the killing, the deceased was drunk and threatened to set his wife on fire to disfigure her. She panicked and fired a spear gun at the deceased, which he had used on her in the past. When the spear bounced off the deceased, he became extremely wild and angry, and came towards her with a kitchen knife. A struggle ensued and the wife eventually grabbed the knife and stabbed the deceased. The wife pleaded guilty to the then Victorian offence of defensive homicide on the basis that she believed her conduct was necessary to defend herself from the threat of death or really serious injury but her force in the circumstances was excessive.⁹⁹⁶

6.1.33 The civil court accepted the background of family violence but held that no discretion arose to avoid the forfeiture rule and that it applied here to deny the wife any benefit arising from the husband's death.⁹⁹⁷ The court was swayed by the nature and gravity of the wife's actions.⁹⁹⁸

6.1.34 The VLRC endorsed the view of Kirby P in *Troja v Troja* in the context of the abolition of the offence of defensive homicide in the *Crimes Act 1958* (Vic) in 2014.

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. 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.⁹⁹⁹

6.1.35 The VLRC also cited three Victorian cases in support of this recommendation.¹⁰⁰⁰ In the first, a woman stabbed her partner in the course of a violent dispute, and received a wholly suspended sentence of imprisonment.¹⁰⁰¹ In the second, a woman disarmed her partner and then shot him as he moved toward her during a violent dispute, and received a five-year prison sentence.¹⁰⁰² In the third, a woman who experienced 50 years of family 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.¹⁰⁰³

6.1.36 The VLRC justified its recommendation that victims of family violence should be able to apply for relief from the operation of the rule on the grounds of financial hardship. It was stated that:

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.

⁹⁹⁶ This is similar to the defence in South Australia of excessive self-defence that reduces murder to manslaughter.

⁹⁹⁷ Ibid. See further above [3.5.12]–[3.5.21].

⁹⁹⁸ See also above [3.5.12].

⁹⁹⁹ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 38 [4.15].

¹⁰⁰⁰ Ibid 42 [4.41].

¹⁰⁰¹ *R v Tran* [2005] VSC 220.

¹⁰⁰² *R v Uttley* [2009] VSC 79.

¹⁰⁰³ *R v Gazdovic* [2002] VSC 588.

6.1.37 As the VLRC pointed out, the English courts have modified the effect of the rule where the unlawful killing formed part of the offender's response to ongoing family violence.¹⁰⁰⁴

6.1.38 The NZLC recognised that sympathy may be felt for battered women who deliberately kill their abusers.¹⁰⁰⁵ The Commission noted that being a 'battered woman' may be relevant to an issue of self-defence, provocation or duress. However, the NZLC made no recommendation to the effect that battered women should fall outside the scope of the forfeiture rule. Such a recommendation was considered inappropriate for the Report, and the NZLC noted that 'the question whether a particular class of killing is sufficiently abhorrent to attract the bar on profits is one of policy that should be settled by Parliament.'¹⁰⁰⁶

6.1.39 The Tasmania Law Reform Institute also recognised that women who have been subjected to family violence should rightly be an exception in some cases, but considered this a reason to allow for modification of the effects of the forfeiture rule, as opposed to a general exclusion from the operation of the rule.¹⁰⁰⁷ SALRI concurs with this approach.

Manslaughter, Gross Negligence and Death by Culpable or Dangerous Driving

6.1.40 In South Australia, the common law recognises two distinct forms of involuntary manslaughter: manslaughter by unlawful and dangerous act,¹⁰⁰⁸ and manslaughter by criminal negligence.¹⁰⁰⁹ Both forms of involuntary manslaughter arise when the mental fault element of murder, namely an intention to either kill or inflict grievous bodily harm, is not made out.¹⁰¹⁰

6.1.41 Manslaughter by unlawful and dangerous act does not involve an intention or subjective recklessness to kill or inflict grievous bodily harm. It is entirely objective. The unlawful and dangerous act involved must be an intentional and voluntary one and crucially it must be established that a reasonable person in the position of the accused would have realised that he or she was exposing the victim to an appreciable risk of serious injury.¹⁰¹¹ Manslaughter by negligence occurs where the accused owes a duty of care to the deceased and the accused's act or omission causing death is not unlawful, but falls far short of the standard of care required of a reasonable person in the circumstances.¹⁰¹² The

¹⁰⁰⁴ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 3 [1.11], citing *Re K, (dec'd)* [1985] Ch 85; *Re K, dec'd* [1986] Ch 180 (Court of Appeal). In this case, 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.

¹⁰⁰⁵ New Zealand Law Commission, *Succession Law: Homicidal Heirs* (Report No 38, 15 July 1997) [11] 7.

¹⁰⁰⁶ *Ibid* 8–9 [12].

¹⁰⁰⁷ Tasmania Law Reform Institute, *The Forfeiture Rule* (Final Report No 6, December 2004) 15–17.

¹⁰⁰⁸ *R v Holzer* [1968] VR 481; *Wilson v The Queen* (1992) 174 CLR 313; *R v Fragomeli* [2008] SASC 96.

¹⁰⁰⁹ *R v Lavender* (2005) 222 CLR 67; *Nydam v The Queen* [1977] VR 430.

¹⁰¹⁰ Kellie Toole, 'Unlawful Homicide' in Caruso David et al, *South Australian Criminal Law: Review and Critique* (LexisNexis Butterworths, 2014) 155, 192 [5.38]; Tasmania Law Reform Institute, *The Forfeiture Rule* (Issues Paper No 5, December 2003) 4. In contrast, voluntary manslaughter is said to be where the mental fault element for murder exists but a partial defence such as excessive self-defence or provocation operates to reduce the crime to manslaughter: at 4–5.

¹⁰¹¹ *Wilson v The Queen* (1991) 174 CLR 313, 333. See also *Burns v The Queen* (2012) 246 CLR 334; Kellie Toole, 'Unlawful Homicide' in David Caruso et al, *South Australian Criminal Law: Review and Critique* (LexisNexis Butterworths, 2nd ed, 2016) 165.

¹⁰¹² *Nydam v The Queen* [1977] VR 430, 444; *R v Lavender* (2005) 222 CLR 67. See also Kellie Toole, 'Unlawful Homicide' in David Caruso et al, *South Australian Criminal Law: Review and Critique* (LexisNexis Butterworths, 2nd ed, 2016) 165, 193–195.

‘circumstances... involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.’¹⁰¹³ It is often called ‘gross’ negligence and ‘mere’ civil or tort negligence is not enough.¹⁰¹⁴

6.1.42 South Australia likewise recognises voluntary manslaughter, whereby ‘all the elements of murder are established, but a partial defence operates to lessen the level of culpability to manslaughter’.¹⁰¹⁵ Voluntary manslaughter arises in South Australia where the partial defences of provocation¹⁰¹⁶ or excessive self-defence¹⁰¹⁷ arise.¹⁰¹⁸ Voluntary manslaughter¹⁰¹⁹ is often a defence raised by victims of family violence, who as a result of abuse kill their abusers.¹⁰²⁰

6.1.43 The distinction between voluntary and involuntary manslaughter is significant in the context of the forfeiture rule. As the Tasmania Law Reform Institute observes:

Traditionally, the two main categories of manslaughter have been divided into “voluntary” and “involuntary” manslaughter. This distinction is important for the purposes of the forfeiture rule as courts have sometimes been prepared to modify the rule in cases of “involuntary” manslaughter but have declined to do so in cases of “voluntary” manslaughter.¹⁰²¹

6.1.44 The rationale of this approach is that voluntary manslaughter involves the mental element for murder, namely an intention to inflict either death or grievous bodily harm, and the rule should apply here but not to involuntary manslaughter where there is absence of intention to inflict either death or grievous bodily harm.¹⁰²²

6.1.45 The suggestion of a distinction between voluntary and involuntary manslaughter for the application of the forfeiture rule received little support in SALRI’s consultation. It was noted to SALRI that although there are different categories of manslaughter — some involving the requisite intent for murder, others not — there is no hierarchy of seriousness between voluntary and involuntary

¹⁰¹³ *Nydam v The Queen* [1977] VR 430, 444.

¹⁰¹⁴ *R v Adomako* [1995] 1 AC 171.

¹⁰¹⁵ Kellie Toole, ‘Unlawful Homicide’ in Caruso David et al, *South Australian Criminal Law: Review and Critique* (LexisNexis Butterworths 2014) 155, 175.

¹⁰¹⁶ *Lindsay v The Queen* (2015) 255 CLR 272. It should be noted that SALRI has recommended the abolition of the much-criticised partial defence of provocation. See David Plater, David Bleby, Megan Lawson, Lucy Line, Amy Teakle, Katherine O’Connell and Kate Fitz-Gibbon, South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 2* (Report No 11, April 2018).

¹⁰¹⁷ See, for example, *R v McCarthy (No 2)* [2013] SASFC 132, [65] (Peek J, Kourakis CJ and Bampton J agreeing).

¹⁰¹⁸ For completeness, manslaughter also arises to the survivor of a suicide pact (*CLCA* s 13A(3)) and where voluntary intoxication may reduce murder to manslaughter under s 268(4) of the *CLCA*.

¹⁰¹⁹ Other jurisdictions recognise other partial defences to murder. See, for instance, the defence of diminished responsibility: *Crimes Act 1900* (NSW) s 23A, *Crimes Act 1900* (ACT) s 14, *Criminal Code Act 1983* (NT) s 37; *Criminal Code 1899* (Qld) s 304A.

¹⁰²⁰ *Troja v Troja* (1994) 33 NSWLR 269; *Public Trustee v Evans* (1985) 2 NSWLR 188; *R v Tran* [2005] VSC 220.

¹⁰²¹ Tasmania Law Reform Institute, *The Forfeiture Rule* (Issues Paper No 5, December 2003) 4. See, for example, *Leggett v Smith* (1955) 85 SE 2d 576 (SC); *Estate of Mahoney* (1966) 220 A 2d 475 (Vt).

¹⁰²² See, for example, New Zealand Law Commission, *Succession Law: Homicidal Heirs* (Report No 38, 15 July 1997) 5. The Commission recommended that unlawful killings resulting from negligent acts or omissions be excluded from the codified forfeiture rule, as allowing an offender to inherit in such cases is unlikely to incentivise further such conduct due to the unintended nature of the crime.

manslaughter.¹⁰²³ Indeed, it was emphasised to SALRI that manslaughter as a crime covers a wide variety of circumstances and the level of gravity and an offender's culpability are not determined by classification.¹⁰²⁴ Indeed, even within one category of manslaughter, the gravity of the crime and the offender's culpability will vary widely from case to case.¹⁰²⁵

6.1.46 It makes little sense to confine the forfeiture rule to murder and voluntary manslaughter and exclude manslaughter by unlawful and dangerous act. There will be, as Mr Boucaut QC and others pointed out to SALRI, cases of manslaughter by unlawful and dangerous act where the culpability of the killer is such that it would be inappropriate and at odds with public policy for the killer to be able to profit from the crime. It would be wrong for the perpetrator of an unlawful death inflicted in a family violence context such as in *Henderson v Wilcox*¹⁰²⁶ to benefit from such a crime. Mr Boucaut noted that it would be objectionable to exclude manslaughter by unlawful and dangerous act from the rule. He gave the example to SALRI of a prolonged history of violence committed by an abusive husband upon his wife who finally subjects his wife to a brutal beating that proves fatal but without the intention to cause death or grievous bodily harm.

6.1.47 It is significant that some formulations of the forfeiture rule exclude inadvertent acts or manslaughter by gross negligence from the rule.¹⁰²⁷ The rationale of this formulation is that there is no intentional or deliberate act and such killings are accompanied by less culpability than other forms of manslaughter.¹⁰²⁸ The New Zealand Act incorporates this approach.

6.1.48 It is unclear whether the forfeiture rule applies to manslaughter by gross negligence.¹⁰²⁹ However, an example of the application of the forfeiture rule to manslaughter by negligence is provided by *Land v Land*.¹⁰³⁰ This was a confronting manslaughter by gross neglect case where a son pleaded guilty to manslaughter on the basis of gross negligence and sentenced to four years imprisonment for failing to get help to assist his aged, domineering, bed-ridden mother who died in her own squalor at their home.¹⁰³¹ The court rejected an argument that the forfeiture rule did not apply to this case

¹⁰²³ *R v Isaacs* (1997) 41 NSWLR 374, 381.

¹⁰²⁴ See also, for example, *R v Forbes* (2005) 160 A Crim R 1. 'Manslaughter is almost unique in its protean character as an offence... In its objective gravity it may vary, as has been pointed out, from a joke gone wrong to facts just short of murder. It is also relevant to recognise that, although manslaughters can be characterised in different ways, particularly in the various contexts which may reduce what would otherwise be a murder to manslaughter, the degree of variation *within* any such category is generally also over a wide range. Matters of fact and degree arise in all categories of manslaughter': at [133]–[134] (Spigelman CJ). See also *Attorney-General (Tas) v Wells* [2003] TASSC 78, [26]; *R v Lavender* (2005) 222 CLR 67, 77 (Gleeson CJ, McHugh, Gummow and Hayne JJ); Mervyn D Finlay, *Review of the Law of Manslaughter in New South Wales* (Report, April 2003) 24–5 [6.1]–[6.4], 66–73 [11.7].

¹⁰²⁵ Mervyn D Finlay, *Review of the Law of Manslaughter in New South Wales* (Report, April 2003) 69–72 [11.7]. See also above [5.1.25] and below n 1189, n 1191.

¹⁰²⁶ [2016] 4 WLR 14.

¹⁰²⁷ See, for example, *Gray v Barr* [1971] 2 QB 554; *Estate of Soukup* (1997) 97 A Crim R 103, 115; *Re: Edwards; State Trustees Ltd v Edwards* [2014] VSC 392 (22 August 2014) [101]–[102]. Dr Andrew Hemming also raised in consultation that the forfeiture rule should not extend to negligence or inadvertence.

¹⁰²⁸ Graham Virgo, *The Principles of the Law of Restitution* (3rd ed) (Oxford University Press, 2015) 547–548.

¹⁰²⁹ Victorian Law Reform Commission, *The Forfeiture Rule*, Report (2014) 19 [3.7].

¹⁰³⁰ [2007] 1 WLR 1009.

¹⁰³¹ Leslie Blohm QC, '(Not) Getting Away with Murder or Some Reflections on the Principle of Forfeiture as Applied to the Administration of Estates', *St John's Chambers* (Online Article, October 2018) <<https://www.stjohnschambers.co.uk/wp-content/uploads/2018/11/Some-reflections-on-the-principle-of-forfeiture-as-applied-to-the-administration-of-estates-1.pdf>>.

(although the court creatively granted relief to avoid the operation of the rule).¹⁰³² Such cases of manslaughter by acute neglect in relation to a vulnerable family member are far from unique.¹⁰³³

6.1.49 SALRI considers that there are several reasons why the forfeiture rule should extend to manslaughter by inadvertence or gross negligence.¹⁰³⁴ First, the distinction under the criminal law between manslaughter by gross negligence and manslaughter by unlawful and dangerous act is tenuous and has been questioned.¹⁰³⁵ Secondly, in practice these two categories of manslaughter often overlap¹⁰³⁶ and it may well be impossible to identify on what basis the jury returned a guilty verdict.¹⁰³⁷ Thirdly, the distinction between an intentional or deliberate act and a ‘mere omission’ or inadvertence is very tenuous, if not metaphysical,¹⁰³⁸ and provides an unsound basis to define the application or not of the forfeiture rule.¹⁰³⁹

6.1.50 Finally, the assumption that manslaughter by gross negligence involves lower culpability than other forms of manslaughter so as to justify automatically excluding the rule is untenable. For example, cases involving the unlawful death through the acute neglect of a vulnerable relative such as

¹⁰³² The court considered that s 3 of the *Forfeiture Act 1982* (UK) enabled an order to be made under the *Inheritance (Provision for Family and Dependents) Act 1975* (UK), irrespective of the fact it was the forfeiture rule as opposed to the terms of the deceased’s will that had created the situation by which reasonable financial provision had not been made for the son. Cf *Re Royse (dec’d)* [1985] Ch 22; *Troja v Troja* (1994) 35 NSWLR 182.

¹⁰³³ See, for example, *R v Polkinghorne and McPartland* [2014] SASFC 84. See also below Appendix B.

¹⁰³⁴ For consistency, the forfeiture rule should also extend to the offence in South Australia under s 14 of the *CLCA* of criminal neglect causing death. See further below [6.1.51], [6.3.2], [6.3.17].

¹⁰³⁵ See, for example, Model Criminal Code Officers Committee, *Chapter 5: Fatal Offences against the Person* (Discussion Paper, June 1998) 145–161; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 3rd ed, 2010) 51–542 [9.175]. There have been suggestions that manslaughter by an unlawful and dangerous act and gross negligence should form one combined category of involuntary manslaughter. Cf *Wilson v The Queen* (1992) 174 CLR, 313, 333.

¹⁰³⁶ See, for example, *R v Meeking* [2013] RTR 4, the defendant, who was having a row with her husband while he was driving them home, suddenly pulled the handbrake when the car was travelling at 60 mph. The intention was get him to stop. The result, however, was to put the car into a spin, resulting in a fatal collision. The wife was convicted of unlawful and dangerous act manslaughter, that act being endangering road users. The English Court of Appeal upheld the conviction on that basis. The court noted that the jury would have reached the same verdict on the basis of manslaughter by gross negligence: at [14]. In the subsequent civil proceedings, *Meeking v Meeking* [2013] All ER (D) 25, Judge Horowitz QC found that the forfeiture rule applied but found that the degree of blameworthiness coupled with genuine remorse brought the discretionary statutory relief into play and in light of the nature of the relationship between the deceased and the claimant and all of the other circumstances, granted full relief. See Leslie Blohm QC, ‘(Not) Getting Away with Murder or Some Reflections on the Principle of Forfeiture as Applied to the Administration of Estates’, *St John’s Chambers* (Online Article, October 2018) <<https://www.stjohnschambers.co.uk/wp-content/uploads/2018/11/Some-reflections-on-the-principle-of-forfeiture-as-applied-to-the-administration-of-estates-1.pdf>>.

¹⁰³⁷ Mervyn D Finlay, *Review of the Law of Manslaughter in New South Wales* (Report, April 2003) 43–44 [10.13]–[10.14], 56–57 [11.1]. ‘It is important to understand that the members of a jury, in reaching a verdict of guilty of manslaughter, do not have to be agreed on the basis of liability for manslaughter. It does not matter if any particular juror was satisfied on manslaughter consequent upon provocation or by an unlawful and dangerous act. This highlights how unfeasible it is to create statutory definition(s) of categories of manslaughter’: at 44 [10.14]. See also *R v Dally* (2000) 115 A Crim R 582, 588.

¹⁰³⁸ The distinction between a positive act and a ‘mere’ omission is not always clear. As Maurice Kay J notes: ‘A great deal of undesirable complexity has bedevilled our criminal law as a result of quasi-theological distinction between acts and omissions’: *DPP v Santa-Bermudez* (2004) 168 JP 373, [10].

¹⁰³⁹ *Edwards v State Trustees Limited* (2016) 257 A Crim R 529, 534 [11] (Whelan J). See also at 542–543 [50].

a young child,¹⁰⁴⁰ an elderly relative¹⁰⁴¹ or a relative with disability¹⁰⁴² ‘would allow offenders who are responsible for very serious forms of criminal negligence to inherit from the deceased person.’¹⁰⁴³ In *BW v The Queen*,¹⁰⁴⁴ for example, the court accepted that the manslaughter by gross negligence involved was in the worst category.¹⁰⁴⁵ In this case, the applicant’s seven year-old daughter died after a period of ‘protracted and cruel neglect where the applicant showed not a shred of care to [her] suffering ... over a long period of time’.¹⁰⁴⁶ The NSW Court of Appeal concluded that the non-parole period of 12 years with a balance of term of four years whilst heavy was well within the permissible range.¹⁰⁴⁷ SALRI is of the view that it is an unacceptable proposition that a killer could inherit from such a crime.

6.1.51 SALRI is of the view that for policy and consistency the forfeiture rule should also extend to the offence in South Australia of causing the death of a child or vulnerable adult by criminal neglect under s 14 of the *CLCA*. This offence is similar to manslaughter by gross negligence. The offence under s 14 of the *CLCA* arises where a child or a vulnerable adult dies or suffers harm as a result of an act; and the defendant had, at the time of the act, a duty of care to the victim; and the defendant was, or ought to have been, aware that there was an appreciable risk that harm would be caused to the victim by the act the defendant failed to take steps that he or she could reasonably be expected to have taken in the circumstances to protect the victim from harm and the defendant's failure to do so was, in the circumstances, so serious that a criminal penalty is warranted.

6.1.52 There is a line of authority in the UK that the forfeiture rule does not apply to manslaughter by the driver of a motor vehicle where insurance policies against third party liability were enforceable by the killer.¹⁰⁴⁸ This argument has been accepted in Australia.¹⁰⁴⁹

6.1.53 However, the motor manslaughter exception to the forfeiture rule has been doubted.¹⁰⁵⁰ ‘Those [UK] cases may need to be reconsidered given the change in public policy over the last few decades to the circumstances in which people are killed by the drivers of motor vehicles.’¹⁰⁵¹ It is clear that Parliament, the courts and the community now regard causing death by culpable or dangerous

¹⁰⁴⁰ See, for example, *R v Wilkinson* [1999] NSWCCA 248; *R v O'Brien* [2003] NSWCCA 121; *BW v The Queen* (2011) 218 A Crim R 10; *R v Polkinghorne and McPartland* [2014] SASCFC 84.

¹⁰⁴¹ See, for example, *R v George* (2004) 149 A Crim R 38; *Land v Land* [2007] 1 WLR 1009.

¹⁰⁴² Candice Marcus, ‘Adelaide Mother Spared Jail Over Malnutrition Manslaughter of Disabled Daughter’, *ABC News* (online at 22 August 2013) <<https://www.abc.net.au/news/2013-08-22/mother-spared-jail-over-malnutrition-manslaughter/4905964>>; *R v Daves* [2004] NSWCCA 363.

¹⁰⁴³ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 19 [3.12].

¹⁰⁴⁴ (2011) 218 A Crim R 10.

¹⁰⁴⁵ *Ibid* [63], [73].

¹⁰⁴⁶ *Ibid* [63].

¹⁰⁴⁷ *Ibid* [73].

¹⁰⁴⁸ *Tinline v White Cross Insurance Association Ltd* [1921] 3 KB 327; *James v British General Insurance Co Ltd* [1927] 2 KB 311. In *Gray v Barr* [1971] 2 QB 554, 581, Salmon LJ referred to the ‘motor manslaughter’ cases and said that they ‘may be sui generis’.

¹⁰⁴⁹ See, for example, *Australian Aviation Underwriting Pty Ltd v Henry* (1988) 12 NSWLR 121; *State Trustees Ltd v Edwards* [2014] VSC 392; *Horsell International Pty Ltd v Divetvo Pty Ltd* [2013] NSWCA 368.

¹⁰⁵⁰ These decisions were also doubted by Gillard J in *Re Estate of Soukup* (1997) A Crim R 103, 109, 112, who noted they may have been influenced by the fact that they concerned the constructions of insurance legislation.

¹⁰⁵¹ *Edwards v State Trustees Limited* (2016) 257 A Crim R 529, 571 [155] (Santamaria JA).

driving more seriously than a generation ago,¹⁰⁵² and especially when the English motor manslaughter cases were decided.

6.1.54 Whelan JA in *Edwards* was unimpressed with the argument that the forfeiture rule should apply to voluntary manslaughter and manslaughter by unlawful and dangerous act but not manslaughter by gross negligence. His Honour commented:

If there is an absolute and inflexible rule, and if the existing UK authorities concerning “motor manslaughter” are correct, it seems that the rule would not apply to unlawful killings by culpable drivers notwithstanding that such conduct has, for at least the last two decades or so, been seen as criminal conduct potentially as serious and as culpable as any manslaughter in other contexts, attracting very substantial terms of imprisonment. If the existence of a deliberate unlawful act is the relevant qualifier to this absolute and inflexible rule then manslaughters by criminal negligence, which cannot be seen as anything other than seriously culpable and which attract very substantial terms of imprisonment, would also not be subject to the rule. Yet on the *Troja* approach, the offender in *Public Trustee (NSW) v Evans*, who was discharged on the basis the punishment would be nominal, and the offender in *Re Keitley*, who was given a non-custodial disposition, in each case because of the domestic violence to which they had been subjected by the deceased, would be subject to the absolute and inflexible rule.¹⁰⁵³

6.1.55 Whelan JA in *Edwards* considered that the application of the forfeiture rule ‘is not determined by reference to whether the conduct is advertent or inadvertent, whether it is by violent means or by other means, whether it is behind the wheel of a car or whilst in possession of a weapon.’¹⁰⁵⁴

6.1.56 Whelan JA regarded a focus on a ‘deliberate’ or ‘intentional’ act as opposed to inadvertence in determining the application of the forfeiture rule as unhelpful.

... reliance on intention and deliberateness is potentially confusing. The offender in *Gray* did not fire “deliberately” but his relevant conduct in taking the loaded weapon to the scene, using it to threaten the deceased and attempting to push past him was deliberate. Likewise, a drunken or drug-affected driver drives deliberately, and a drunken or drug-affected person handling a firearm also does so deliberately.¹⁰⁵⁵

6.1.57 The VLRC also did not support excluding manslaughter by negligence or inadvertence from the forfeiture rule:

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. Inadvertent, involuntary and negligent acts or omissions might result in charges for indictable offences such as manslaughter; culpable driving causing death; dangerous driving causing death; or failure to control a dangerous, menacing or

¹⁰⁵² *R v Jurisic* (1998) 45 NSWLR 209.

¹⁰⁵³ *Edwards v State Trustees Limited* (2016) 257 A Crim R 529, 534 [11]. Santamaria JA agreed that the UK motor manslaughter cases excluding the application of the forfeiture rule ‘may need to be reconsidered given the change in public policy over the last few decades to the circumstances in which people are killed by the drivers of motor vehicles. See, for example, the offences provided for in Div 9 of Pt 1 of the *Crimes Act* including, in particular, “culpable driving causing death”’: at 571 [155].

¹⁰⁵⁴ *Ibid* 546 [66].

¹⁰⁵⁵ *Ibid* 543 [54].

restricted breed dog that kills a person. Generally, deaths resulting from these offences are unintended, although foreseeable, consequences of the offender's conduct. 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.¹⁰⁵⁶

6.1.58 SALRI is of the view that it is inappropriate and impracticable to distinguish between involuntary and voluntary manslaughter, or between manslaughter by unlawful and dangerous act and gross negligence, in the role and application of the forfeiture rule.¹⁰⁵⁷ SALRI considers that it is inappropriate and impracticable to distinguish between the different categories of manslaughter as to the application of the forfeiture rule and any such effort is 'doomed to failure'. The forfeiture rule should apply to all forms of manslaughter, subject to a court's ability to modify its operation if it is in the interests of justice to do so and there are 'exceptional circumstances'.

6.1.59 There is also the offence in South Australia of causing death by driving in a culpably negligent manner, recklessly or at a speed or in manner dangerous to the public.¹⁰⁵⁸ Similar to involuntary manslaughter, 'there is no need to prove any fault in respect of the physical element of causing death'.¹⁰⁵⁹ The culpable or dangerous driving aspect is purely objective and the focus is simply on the standard of driving.¹⁰⁶⁰ It is relevant to note that this is a single combined offence in South Australia and not separate offences as elsewhere in Australia such as Victoria.

6.1.60 The question of whether the forfeiture rule applies to death by dangerous driving (or similar offences) is unclear. One view, reflecting the English motor manslaughter exception to the forfeiture rule,¹⁰⁶¹ is that the forfeiture rule does not apply to death by dangerous driving in either

¹⁰⁵⁶ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 19 [3.10]–[3.12]. The VLRC received a range of submissions that suggested that the forfeiture rule should not apply to accidental, unintended or negligent unlawful killings. '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': at 19 [3.9]. SALRI concurs with the suggestion of the NSW judges.

¹⁰⁵⁷ See also below [6.2.27]–[6.2.37], [6.3.1]–[6.3.18].

¹⁰⁵⁸ This and similar offences were introduced because of the traditional reluctance, if not unwillingness, of juries to convict drivers of negligent manslaughter. See Model Criminal Code Officers Committee, *Chapter 5: Fatal Offences against the Person* (Discussion Paper, June 1998) 161. See also *Callaghan v The Queen* (1952) 87 CLR 115, 120; *R v Seymour* [1983] 2 All ER 1058, 1061.

¹⁰⁵⁹ Patrick Leader-Elliott, 'Driving Offences in David Caruso et al, *South Australian Criminal Law: Review and Critique* (LexisNexis Butterworths, 2014) 64, 89.

¹⁰⁶⁰ The speed or manner in which the accused drove must involve a serious breach of the proper management or control of the vehicle. This test will only be satisfied if the speed or manner in which the accused drove posed a real, and not just speculative, danger to other members of the public who may have been in the vicinity. It is unnecessary to prove that the accused intended to drive dangerously, or was aware that his or her conduct was dangerous to the public. See *McBride v The Queen* (1966) 115 CLR 44; *King v The Queen* (2012) 245 CLR 588.

¹⁰⁶¹ *Tinline v White Cross Insurance Association Ltd* [1921] 3 KB 327; *James v British General Insurance Co Ltd* [1927] 2 KB 311. In *Gray v Barr* [1971] 2 QB 554, 581, Salmon LJ referred to the 'motor manslaughter' cases and said that they 'may be sui generis'.

England¹⁰⁶² or Australia.¹⁰⁶³ However, another view holds that, if the rule applies (as it appears) inflexibly to murder and all forms of manslaughter, it logically also applies to other forms of unlawful killing such as causing death by dangerous driving.¹⁰⁶⁴

6.1.61 The question of if, or how, the forfeiture rule should apply to causing death by culpable or dangerous driving under s 19A of the *CLCA* was an issue that troubled many parties in SALRI's consultation.

6.1.62 The VLRC did not support extending the forfeiture rule to death by dangerous driving¹⁰⁶⁵ (though it did for the more serious crime in Victoria of causing death by culpable driving).¹⁰⁶⁶

6.1.63 It would obviously be open to Parliament to expressly exclude the offence of causing death by culpable or dangerous driving under s 19A from the operation of the forfeiture rule, whether in whole or in part.¹⁰⁶⁷

6.1.64 The VLRC was of the view that the forfeiture rule should extend to the offence of causing death by 'culpable' driving, noting the higher degree of fault associated with this crime as opposed to causing death by dangerous driving.¹⁰⁶⁸

6.1.65 In contrast, the VLRC was of the view that the forfeiture rule should not apply to dangerous driving causing death.¹⁰⁶⁹ In coming to this view, the VLRC emphasised that dangerous driving causing death ordinarily involves a relatively low level of culpability¹⁰⁷⁰ and that a court will exercise a judicial discretion to modify the effect of the rule in the vast majority of these cases.¹⁰⁷¹ The VLRC also recognised the interests of certainty and reducing costs in coming to this conclusion.¹⁰⁷²

¹⁰⁶² Death by dangerous driving has not attracted the forfeiture rule in the UK: John Ross Martyn and Nicholas Cannick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (Sweet and Maxwell, 20th ed, 2013) 1316.

¹⁰⁶³ *State Trustees Ltd v Edwards* [2014] VSC 392 [101]–[102].

¹⁰⁶⁴ Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd ed, 2015) 547. In *Straede v Eastwood* [2003] NSWSC 280, the court proceeded on the assumption that the forfeiture rule applied to death by dangerous driving.

¹⁰⁶⁵ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 25 [3.49]. See also at 24–25 [3.42]–[3.48].

¹⁰⁶⁶ *Ibid* 22 [3.28]. The VLRC noted that this offence is similar to manslaughter by negligence and the minimum degree of negligence that needs to be proven is the same degree as that required to support a charge of manslaughter: at 21 [3.25]. See also *R v Shields* [1981] VR 717.

¹⁰⁶⁷ Thus, assuming Parliament considered that a conviction under s 19A of the *CLCA* should be excluded from the definition of homicide for the purposes of the forfeiture rule, if killing caused by negligent act or omission is to be excluded from the forfeiture rule, it would be necessary to either: qualify the definition of recklessness to exclude an offence where culpable negligence was an alternative fault element to recklessness; or only apply the forfeiture rule where the charge under s 19A specifically applied the fault element of recklessness; or abandon the distinction between recklessness and culpable negligence; or simply make dangerous driving causing death a separate exception to the rule.

¹⁰⁶⁸ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 21–22 [3.25]–[3.28]. The VLRC noted that the degree of fault for this offence is the same as the 'gross' negligence required for manslaughter by negligence.

¹⁰⁶⁹ *Ibid* 24–25 [3.42]–[3.49].

¹⁰⁷⁰ *Ibid* 25 [3.49].

¹⁰⁷¹ *Ibid* 25 [3.48].

¹⁰⁷² *Ibid* 25 [3.49].

6.1.66 In modern society, the VLRC observed, people regularly drive with their families, and a death can occur on the roads from even a momentary lapse of concentration and a ‘fatal mistake’ by a usually careful driver.¹⁰⁷³ The VLRC explained that in cases of death by dangerous driving, the offender and the deceased person typically are in a close, personal and often familial relationship. In cases involving a fatal motor vehicle collision they will have generally been travelling together in the same vehicle. The VLRC explained:

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. 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... 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.... 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.¹⁰⁷⁴

6.1.67 A case on point can be found in *Straede v Eastwood*¹⁰⁷⁵ which was decided under the NSW *Forfeiture Act* (NSW). Section 5(1) allows an interested person to make an application to the Supreme Court for an order modifying the effect of the rule.¹⁰⁷⁶

6.1.68 Straede had pleaded guilty to dangerous driving causing death in relation to the death of his wife, Cheryl, and had been sentenced to two years imprisonment, with a 12 months non-parole period, the non-parole period to be served by periodic detention.¹⁰⁷⁷ Straede, Cheryl and a woman called Truda had been involved in a ‘ménage à trois’ for about 20 years.¹⁰⁷⁸ Straede applied under the NSW Act seeking modification of the rule so as to permit him to obtain the benefit of interests in land owned by him in a joint tenancy with his late wife, and so as to permit him to obtain the interests devolving to him under his late wife's will. Cheryl's relatives opposed the application.

6.1.69 The facts of the dangerous driving in *Straede v Eastwood* were set out as follows:

On 31 August 2000, John was driving Cheryl to work, as he did every day. It was about 6.20am and still dark. The road was wet from recent rain. The car was gaining ground on a car ahead. Just below the crest of a hill, John decided to overtake the car in front. He crossed over the unbroken double lines. Just as he did so, another car came over the crest of the hill towards him. Both drivers swerved but the two cars collided, passenger side front to passenger side front. Cheryl, who was sitting next to John in the passenger seat, was killed.¹⁰⁷⁹

¹⁰⁷³ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 25 [3.46]. Contrast to other forms of involuntary manslaughter, where the defendant had longer than a ‘moment’ to consider their actions.

¹⁰⁷⁴ Ibid 25 [3.47]–[3.49].

¹⁰⁷⁵ [2003] NSWSC 280.

¹⁰⁷⁶ Section 5(1) of the NSW Act states: ‘If a person has unlawfully killed another person and is thereby precluded by the forfeiture rule from obtaining a benefit, any interested person may make an application to the Supreme Court for an order modifying the effect of the rule.’

¹⁰⁷⁷ *Straede v Eastwood* [2003] NSWSC 280 [5].

¹⁰⁷⁸ Ibid [24]. Straede married Truda after Cheryl's death.

¹⁰⁷⁹ Ibid [4].

6.1.70 The issue of jurisdiction, perhaps surprisingly, was not raised and Palmer J proceeded on the basis that death by dangerous driving fell within the forfeiture rule. Cheryl's relatives opposed Straede's application on the basis that he had been 'guilty of immoral conduct during his marriage to Cheryl', namely the longstanding extra-marital relationship with Truda, and 'it would outrage the community that John should take a benefit under his wife's will and should, in order to do so, have the assistance of the Court under the *Forfeiture Act*'.¹⁰⁸⁰ Palmer J held that this conduct had no bearing on the unlawful killing of the deceased, namely 'how Cheryl came to die and upon John's role in her death'.¹⁰⁸¹ Palmer J therefore made a modification order allowing Straede to avoid the application of the rule.

6.1.71 Dr Andrew Hemming submitted to SALRI this case 'involved hostile relatives... seeking to take pecuniary advantage of a tragic accident, and in a speculative action devoid of merit, the defendant's costs in opposing the application made by the plaintiff were met by the [wife's] estate'.¹⁰⁸² He submitted that cases like *Straede v Eastwood* should not have come to court, and can be properly dealt with under a comprehensive code solution sanctioned by Parliament. Dr Hemming asserted that this case illustrates the dangers of breaching the forfeiture rule with a broad based judicial exclusion for manslaughter cases rather than specifying the particular offence as an exclusion or using a litmus test such as 'a killing caused by negligent act or omission'.

6.1.72 SALRI is unable to agree with Dr Hemming or the New Zealand approach that excludes causing death by dangerous driving from the scope of the forfeiture rule. SALRI considers that the forfeiture rule should apply to the offence of causing death by culpable or dangerous driving under s 19A of the *CLCA*,¹⁰⁸³ subject to the court's power to modify the operation of the rule if it is in the interests of justice to do so and there are 'exceptional circumstances'.

6.1.73 For completeness, SALRI notes the offence of causing death by careless driving.¹⁰⁸⁴ This offence involves a relatively low level of culpability (the driving falls below the standard expected of an ordinary prudent driver). Several parties such as Professor Dal Pont and Mr Boucaut noted that it would be harsh to extend the forfeiture rule to an offence of comparative low culpability.

6.1.74 There are other forms of unlawful death such as arise under employment or work safety laws (see the *Work Health and Safety Act 2012* (SA)).

6.1.75 The VLRC considered that certain offences, by their nature, ought not to attract the application of the forfeiture rule as a matter of public policy. These were noted as offences for which

¹⁰⁸⁰ Ibid.

¹⁰⁸¹ Ibid [35]. Palmer J noted that, in order to qualify as conduct to which the court should have regard under the *Forfeiture Act*, the offender's conduct must have some bearing on the very fact which brings into operation the forfeiture rule, that is, the unlawful killing of the deceased. So, for example, in *Re K (dec'd)* [1985] 1 Ch 85, the history of a marriage in which the wife had been violently assaulted by the husband had a direct bearing on the culpability of the wife when, without premeditation, she shot the husband during a violent argument and subsequently sought relief under the UK *Forfeiture Act*: at [33].

¹⁰⁸² It should be noted that while Palmer J was critical, His Honour was not of the view that it was a wholly unreasonable claim. In particular, His Honour stated at [58]: 'I have come to the conclusion that the evidence which the Second Defendant placed before the Court as to marital conduct was not relevant to the ultimate determination. However, I could not come to the conclusion that it would have been totally unreasonable for any competent lawyer to believe that such evidence could have been relevant to the Court's exercise of discretion. It is a position upon which some minds, I think, may reasonably differ.'

¹⁰⁸³ See further below [6.2.27]–[6.2.37], [6.3.19]–[6.3.24].

¹⁰⁸⁴ *Road Traffic Act 1961* (SA) s 45.

any person committing the offence would have a relatively low level of moral culpability and responsibility.¹⁰⁸⁵ The VLRC noted that it received wide support for excluding some crimes from the forfeiture rule.¹⁰⁸⁶ The Crime Victims Support Association submitted to the VLRC 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. The VLRC did not agree, ‘in view of the unfair consequences that applying the rule without exception can cause’.¹⁰⁸⁷

6.1.76 The VLRC noted the potential for the forfeiture rule to apply to what may be termed as regulatory offences outside the *Crimes Act*. 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) — but which would not amount to the level of negligence required to sustain charges for an indictable offence related to the death itself. The VLRC considered that ‘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.’¹⁰⁸⁸ While a court is unlikely to apply the forfeiture rule in these circumstances, the VLRC in the interests of clarity and certainty, recommended that the proposed *Forfeiture Act* should specify that the forfeiture rule applies only where the killing is or would be murder or another indictable offence under the Crimes Act (unless specifically excluded by the *Forfeiture Act*).¹⁰⁸⁹

6.1.77 SALRI considers that, consistent with the position of the VLRC,¹⁰⁹⁰ the forfeiture rule should not apply to such forms of unlawful death involving relatively limited culpability as causing death by careless driving or arising under employment or work safety laws. SALRI is of the view that the forfeiture rule should be confined to crimes involving unlawful death under the *CLCA*.

Suicide pacts

6.1.78 A suicide pact is entered into with the intention that none of the parties will survive. In South Australia it is an offence to incite another to commit suicide,¹⁰⁹¹ or to aid or abet another in the commission of a suicide.¹⁰⁹² The survivor of a suicide pact who kills the deceased will be guilty of manslaughter.¹⁰⁹³ The forfeiture rule applies to preclude those who commit these offences from inheriting if they survive in a suicide pact scenario.¹⁰⁹⁴

6.1.79 A typical scenario is demonstrated by one English case,¹⁰⁹⁵ in which the pact was:

...between a couple engaged to be married. The tragic consequence was that the female partner survived, but her fiancé was killed. The trial judge held that the defendant (the female partner) had

¹⁰⁸⁵ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 23 [3.34].

¹⁰⁸⁶ *Ibid* 23 [3.35].

¹⁰⁸⁷ *Ibid* 23 [3.36].

¹⁰⁸⁸ *Ibid* 23 [3.38].

¹⁰⁸⁹ *Ibid* 23 [3.39].

¹⁰⁹⁰ *Ibid* 30.

¹⁰⁹¹ *CLCA* s 13A(3).

¹⁰⁹² *Ibid* s 13A(5).

¹⁰⁹³ *CLCA* s 13A(4).

¹⁰⁹⁴ *Dunbar v Plant* [1998] Ch 412.

¹⁰⁹⁵ *Ibid*.

committed the criminal offence of aiding and abetting her fiancé's suicide and that the forfeiture rule applied to prevent her from succeeding to her fiancé's interest in the jointly owned home and from entitlement to the proceeds of an insurance policy on the fiancé's life written for her benefit.¹⁰⁹⁶

6.1.80 In this case, the trial judge held that the defendant, who had been a party to a suicide pact with her fiancé, had illegally aided and abetted his suicide. The forfeiture rule therefore applied to preclude her from succeeding to his interests and entitlements. On appeal, the Court of Appeal held that at common law the rule remained absolute and inflexible. However, the court exercised its statutory discretion under the UK Act¹⁰⁹⁷ to modify the effect of the forfeiture rule and allow the survivor to inherit.

6.1.81 It was only by operation of the UK Act¹⁰⁹⁸ allowing a court to modify the strict application of the rule in cases other than murder that the court in this case was able to permit the killer to have these benefits. Otherwise, the common law rule would have been applied strictly, compounding already tragic circumstances.

6.1.82 The discretionary model provides the court with the ability to avoid unpalatable judicial treatment of an emotionally sensitive and morally difficult situation. Given the limited culpability of the offender and the tragic circumstances in which a suicide pact generally occurs, any court would be likely to exercise any judicial discretion in favour of the offender in these cases.

6.1.83 Suicide pacts¹⁰⁹⁹ have attracted judicial consideration because it is a serious offence to assist in a suicide or a suicide attempt.¹¹⁰⁰ The survivor of a suicide pact who kills the deceased will be guilty of manslaughter,¹¹⁰¹ and if the forfeiture rule is applied then the person will be precluded from inheriting from another member of the pact. While there are no South Australian authorities, the issue has been considered interstate.

6.1.84 In *Permanent Trustee Company v Freedom from Hunger Campaign*,¹¹⁰² the court considered a tragic scenario regarding a suicide pact of an elderly couple suffering from dementia, where the court called for legislative intervention for such a problematic application of the law.¹¹⁰³

6.1.85 Further, in the Victorian case of *DPP v Rolfe*,¹¹⁰⁴ an 81-year-old man was convicted of manslaughter following an attempted joint suicide with his wife. His wife was going to be placed in an aged care home and they had wanted to avoid separation. Both the husband and wife were found unconscious after attempting to gas themselves, but only one of them was able to be saved. Mr Rolfe was later found to have been suffering severe psychiatric distress and depression at the time and received a non-custodial sentence.

¹⁰⁹⁶ Ken Mackie, 'The Troja Case: Criminal Law, Succession and Law Reform' (1998) 5(1–2) *Canberra Law Review* 177, 183–184.

¹⁰⁹⁷ *Forfeiture Act 1982* (UK).

¹⁰⁹⁸ *Ibid.*

¹⁰⁹⁹ A pact which is entered into with the intention that none of the parties will survive. See *CLCA* s 13A.

¹¹⁰⁰ *Ibid* s 13A(5).

¹¹⁰¹ *Ibid* s 13A(3).

¹¹⁰² (1991) 25 NSWLR 140.

¹¹⁰³ *Permanent Trustee Company v Freedom from Hunger Campaign* (1991) 25 NSWLR 140, 155.

¹¹⁰⁴ *DPP v Rolfe* [2008] VSC 528.

6.1.86 In sentencing Rolfe, the court accepted that the proper function of sentencing was to deter people from the unlawful taking of life. The court also found that the principle of general deterrence was modified by Rolfe's psychiatric condition of major depression.

6.1.87 The codified model in New Zealand expressly excludes suicide pacts from the definition of homicide. If a suicide pact is proven there is a decreased possibility that an ill-meaning beneficiary can benefit, as the intention was clearly for both parties to end their lives. This exclusion was endorsed by the NZLC, who considered that, for consistency, both the defendant who assists a suicide and the defendant who kills in furtherance of a suicide pact should be excluded from the bar on inheriting.¹¹⁰⁵

6.1.88 The VLRC recommended excluding manslaughter pursuant to a suicide pact with the deceased person from the scope of the rule altogether. It was emphasised that the decision to commit the offence is entered into by agreement, and the parties have the intention that none of them will survive.¹¹⁰⁶ Given the low moral culpability of the offender and the tragic circumstances that attach to a suicide pact generally, the VLRC recommended that deaths in pursuance of a suicide pact should not result in the application of the forfeiture rule.¹¹⁰⁷

6.1.89 The Tasmania Law Reform Institute recognised that modifying the effect of the forfeiture rule may be appropriate in the case of some suicide pacts.¹¹⁰⁸

6.1.90 SALRI is of the view that, consistent with the present law, the forfeiture rule should apply to both the suicide pact situation and the offence to aid, abet or counsel the suicide of another under s 13A(5) of the *CLCA*. SALRI notes that, although a court may be likely to find 'exceptional circumstances' to modify the rule in such cases, there will be situations of increased gravity and culpability where it would be appropriate to apply the forfeiture rule.¹¹⁰⁹

Infanticide

6.1.91 South Australia does not have a separate offence of infanticide under the *Criminal Law Consolidation Act 1935* (SA).¹¹¹⁰ SALRI agrees with the suggestion of Dr Hemming in consultation that such an exemption to the forfeiture rule is inappropriate for South Australia unless in the unlikely event the *CLCA* is amended in the future to include such a specific offence.¹¹¹¹

¹¹⁰⁵ New Zealand Law Commission, *Homicidal Heirs* (Report No 38, 15 July 1997) [10] 7.

¹¹⁰⁶ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 24 [3.52].

¹¹⁰⁷ *Ibid* 26 [3.54], 28 [3.63].

¹¹⁰⁸ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 24.

¹¹⁰⁹ See also *Dunbar v Plant* [1998] Ch 412, 435.

¹¹¹⁰ See *Crimes Act 1900* (NSW) s 22A.

¹¹¹¹ There seems no case for the introduction of infanticide as a separate offence. It is very rare for to arise even in those jurisdictions like NSW that retain infanticide as a separate offence. According to the statistics recorded in the NSW Judicial Information Research System, there was only one case of infanticide in NSW between January 2006 and June 2017. The offender received a suspended sentence. In an earlier case, *R v Pope* [2002] NSWSC 397, the offender, who suffered from post-natal psychotic episodes and drowned her 12-week-old daughter in a baby bath, received a three-year good behaviour bond: <<https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/manslaughter.html>>.

6.1.92 This is by contrast to the New Zealand law, under which infanticide is essentially a species of mental impairment as to fall within s 178(1) of the *Crimes Act 1961* (NZ).¹¹¹²

6.1.93 On the topic of infanticide, the VLRC noted that women who commit infanticide generally suffer from severe psychiatric difficulties, which cause an altered state of mind at the time of the offence.¹¹¹³ Often offenders will not have a history of criminality or mental illness, but will likely need ongoing treatment and will continue to suffer considerably as a result of their crime.¹¹¹⁴ It was considered that the blameworthiness and responsibility of such offenders is significantly reduced compared to other offenders;¹¹¹⁵ that the crime is very rare;¹¹¹⁶ and that offenders are likely to suffer after the offence.¹¹¹⁷ Given these factors, the VLRC was of the view that infanticide should be exempted from the common law rule of forfeiture.¹¹¹⁸

6.1.94 The NZLC was also of the view that infanticide should be excluded from the operation of the rule, noting it is ‘sufficiently analogous’ to an acquittal on the ground of insanity.¹¹¹⁹

6.1.95 It is significant that SALRI’s consultation found very little support for exempting any offence of infanticide from the forfeiture rule.¹¹²⁰

Diminished Responsibility

6.1.96 The defence of diminished responsibility operates to partially excuse the killing of a person by an offender. The defence does not apply to any offence other than homicide. Diminished responsibility applies in situations of an offender’s substantial mental impairment (though short of the defence of mental impairment or insanity) and acts as a partial defence which, as with provocation, if made out reduces an offence of murder to manslaughter.¹¹²¹ Diminished responsibility exists as a partial

¹¹¹² Section 178(1) of the *Crimes Act 1961* (NZ) states: ‘Where a woman causes the death of any child of hers under the age of 10 years in a manner that amounts to culpable homicide, and where at the time of the offence the balance of her mind was disturbed, by reason of her not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation, or by reason of any disorder consequent upon childbirth or lactation, to such an extent that she should not be held fully responsible, she is guilty of infanticide, and not of murder or manslaughter, and is liable to imprisonment for a term not exceeding 3 years.’

¹¹¹³ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 28 [3.65].

¹¹¹⁴ *Ibid* 8 [3.67].

¹¹¹⁵ *Ibid* 29 [3.69].

¹¹¹⁶ *Ibid* 29 [3.71].

¹¹¹⁷ *Ibid* 29 [3.72].

¹¹¹⁸ *Ibid* 29 [3.72].

¹¹¹⁹ New Zealand Law Commission, *Homicidal Heirs* (Report No 38, 15 July 1997) 10 [13].

¹¹²⁰ See also below [6.2.42]–[6.2.44].

¹¹²¹ Diminished responsibility can be contrasted with the related statutory defence of mental impairment set out in Part 8A of the *CLCA* which derives from the common law defence of insanity. Mental impairment (as with insanity) is a complete defence that entirely absolves an offender of responsibility for an offence, though the court may make a supervision order committing the defendant to detention (see *CLCA* s 269O). Mental impairment is available to any offence, not only homicide. For mental impairment to be demonstrated, at the time of the conduct giving rise to the offence, the defendant must suffer from a mental impairment and as a consequence, not know the nature or quality of their conduct; or not know their conduct is wrong or be unable to control their conduct (*CLCA* s 269C). The defence of mental impairment is narrow in that it requires total impairment in one of these three respects to be demonstrated. In contrast, diminished responsibility only applies to murder, but offers a broader defence, in that it is intended to provide for defendants who suffer mental conditions that mean their moral responsibility is less than that of an unaffected person, but where the mental conditions are not so extreme

defence in the United Kingdom, the ACT, NSW, Queensland and the Northern Territory. It does not exist as a partial defence in South Australia, Victoria, Western Australia or Tasmania.

6.1.97 SALRI has previously considered the partial defence of diminished responsibility.¹¹²² SALRI acknowledged the real problem (especially under South Australia's strict laws as to sentence and non-parole periods for murder and manslaughter) of homicide and other offenders with a mental illness, intellectual disability or cognitive impairment whose culpability may be substantially impaired or mitigated as a result.¹¹²³ There are particular implications for Aboriginal offenders.¹¹²⁴ However, given the various concerns with respect to any defence of diminished responsibility,¹¹²⁵ SALRI ultimately recommended that such a defence should not be introduced in South Australia.¹¹²⁶

6.1.98 Sometimes a person is found guilty of unlawful homicide in circumstances where their responsibility is diminished, for example by the effects of long term domestic abuse at the hands of

such that they possess no responsibility for the killing. This is why diminished responsibility operates to alter the conviction that otherwise would apply, but it does not completely excuse the conduct.

¹¹²² David Plater, David Bleby, Megan Lawson, Lucy Line, Amy Teakle, Katherine O'Connell and Kate Fitz-Gibbon, South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 2* (Report No 11, April 2018) 105–125.

¹¹²³ It is clear that a considerable proportion of offenders possess some form of mental illness, cognitive impairment or intellectual disability. About half of all offenders suffer from some form of mental illness. See Lubica Forsythe and Antonette Gaffney, Australian Institute of Criminology, 'Mental Disorder Prevalence at the Gateway to the Criminal Justice System' (2012) 438 *Trends and Issues in Crime and Criminal Justice* 1. 'People with mental health disorders and cognitive impairment are significantly over-represented in the criminal justice system. This is the case for defendants through to the population in custody. For example, in NSW people with mental health disorders and cognitive impairment currently make up a significant proportion of people entering the criminal justice system, being three to nine times more likely to be in prison than the general NSW population': Ruth McCausland et al, *People with Mental Health Disorders and Cognitive Impairment in the Criminal Justice System: Cost-Benefit Analysis of Early Support and Diversion* (Final Report, University of New South Wales, 2013) 1.

¹¹²⁴ There are particular issues for Aboriginal defendants as research consistently suggest that Aboriginal offenders have higher levels of cognitive impairment than non-Aboriginal offenders. See, for example, Matthew Frize, Dianna Kenny and Christopher Lennings, 'The Relationship between Intellectual Disability, Indigenous Status and Risk of Reoffending in Juvenile Offenders on Community Orders' (2008) 52 *Journal of Intellectual Disability Research* 510; Shasta Holland and Peter Persson, 'Intellectual Disability in the Victorian Prison System: Characteristics of Prisoners with an Intellectual Disability Released from Prison in 2003–2006' (2011) 17 *Psychology, Crime and Law* 25; Eileen Baldry, Leanne Dowse and Melissa Clarence, Department of Family and Community Services NSW, *People with Intellectual and other Cognitive Disability in the Criminal Justice System* (Report, 2012); Stephane Shepherd et al, Australian Institute of Criminology, 'Aboriginal Prisoners with Cognitive Impairment: is this the Highest Risk Group?' (2017) 536 *Trends and Issues in Crime and Criminal Justice* 1. This over-representation may be because of brain damage or injury from causes such as fetal alcohol spectrum disorder, economic disadvantage, drug use, alcohol use, inhalant use, accidents and violence. See Melissa MacGillvray and Eileen Baldry, 'Indigenous Australians, Mental and Cognitive Impairment and the Criminal Justice System: A Complex Web' (2013) 8(9) *Indigenous Law Bulletin* 22, 23. Those Aboriginal offenders with a cognitive or mental impairment are more likely to be in contact with the criminal justice system and consequently more likely to be either remanded in custody or sentenced to a term of imprisonment: at 24.

¹¹²⁵ David Plater, David Bleby, Megan Lawson, Lucy Line, Amy Teakle, Katherine O'Connell and Kate Fitz-Gibbon, South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 2* (Report No 11, April 2018) 110–118 [12.4.1]–[12.4.49].

¹¹²⁶ *Ibid* rec 10, 125. SALRI concluded that a new partial defence of diminished responsibility in South Australia was problematic and inappropriate. Rather, consistent with SALRI's view in relation to the issue of provocation, the preferable solution for homicide offenders with an intellectual disability, cognitive impairment or mental illness who are sentenced for murder is to provide greater flexibility to courts in sentencing to recognise these factors if appropriate and to be able to properly reflect the protection of the community, the gravity of the crime, the offender's culpability and any genuine mitigating factors, especially an offender's mental illness, cognitive impairment or intellectual disability. See further at 105 [12.1.7], 123–125 [12.7.1]–[12.7.7].

the victim¹¹²⁷ or by an adverse reaction to prescription drugs.¹¹²⁸ Until the case of *Troja v Troja*,¹¹²⁹ some courts refrained from strictly applying the forfeiture rule in such cases.¹¹³⁰ However, the majority in *Troja* took a different approach and held that the rule should apply strictly, even in circumstances of diminished responsibility (even in the context of sustained family violence).¹¹³¹ The operation of the rule does not depend on the moral culpability of the offender or the degree of punishment deserved for the underlying crime.¹¹³² *Troja* has been followed in South Australia,¹¹³³ and as such, the forfeiture rule will apply at common law despite any diminished responsibility on the part of the killer.

6.1.99 The New Zealand law does not specifically refer to diminished responsibility.¹¹³⁴ The ACT and NSW Acts also do not specifically refer to diminished responsibility, though both laws allow a court to use its statutory discretion to modify the effect of the rule in cases of manslaughter on the basis of diminished responsibility.¹¹³⁵ In NSW, the court has exercised its discretion in this context on several occasions.¹¹³⁶ It is similarly open to courts in the UK to modify the effect of the forfeiture rule because of diminished responsibility,¹¹³⁷ and the court has done so on occasion.¹¹³⁸

6.1.100 The Tasmania Law Reform Institute gave its consideration to diminished responsibility, noting that the primary issue is that in some cases where a person is found guilty of unlawful homicide in the context of diminished responsibility, public policy does not necessarily require that the killer be disinherited.¹¹³⁹ To the contrary, the application of the forfeiture rule in such cases may operate against public policy by not granting a beneficial interest.¹¹⁴⁰

Informed Consent

6.1.101 The notion of informed consent was raised to SALRI as an illustration of where it may be harsh to apply the forfeiture rule to an unlawful killer.¹¹⁴¹ This was said to be a situation where the deceased requested, agreed or contemplated that they would be killed by the killer and the victim would still want the killer to inherit. In such circumstances, it was raised by several parties to SALRI that it

¹¹²⁷ See, for example, *Troja v Troja* (1994) 33 NSWLR 269; *Public Trustee v Fraser* (1987) 9 NSWLR 433; *Kemperle v Public Trustee* (Supreme Court of New South Wales, Powell J, 20 November 1985); *Re Tucker* (1920) 21 SR (NSW) 175; *The Complainant (Husband of the Deceased Member) v The Trustee* (2003) SCT D02-03\256; *Jans v Public Trustee* [2002] NSWSC 628; *Leneghan-Britton v Taylor* [1998] 100 A Crim R 565.

¹¹²⁸ *Re H (dec'd)* [1990] 1 FLR 441.

¹¹²⁹ *Troja v Troja* (1994) 33 NSWLR 269.

¹¹³⁰ See, for example, *Public Trustee v Evans* (1985) 2 NSWLR 188; *Re Keitley* [1992] 1 VR 583.

¹¹³¹ *Troja v Troja* (1994) 33 NSWLR 269

¹¹³² *Re Giles (dec'd)* [1972] Ch 544.

¹¹³³ See, for example, *Rivers v Rivers* (2002) 84 SASR 426, where the court, although recognising the abuse, applied the rule strictly under the authority of *Troja v Troja* (1994) 33 NSWLR 269. It must be noted that South Australia does not allow diminished responsibility as a partial defence to murder, unlike some other jurisdictions.

¹¹³⁴ New Zealand Act.

¹¹³⁵ ACT Act s 3(2); NSW Act s 5(3).

¹¹³⁶ See, for example, *R v R* (Supreme Court of New South Wales, Hodgson CJ in Eq, 14 November 1997); *Leneghan-Britton v Taylor* [1998] 100 A Crim R 565.

¹¹³⁷ *Forfeiture Act 1982* (UK) s 2(2).

¹¹³⁸ See, for example, *Re H (dec'd)* [1990] 1 FLR 441; *Re S (dec'd)* [1996] 1 WLR 235; *Gilchrist, Petitioner* [1990] SLT 494.

¹¹³⁹ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December (2004) 5.

¹¹⁴⁰ *Ibid.* See also *Troja v Troja* (1994) 33 NSWLR 269, 284.

¹¹⁴¹ See the consultation overview below [7.2.16]–[7.2.21].

may be inappropriate to apply the forfeiture rule. This would typically arise in an assisted suicide or mercy killing scenario.¹¹⁴² The example was raised to SALRI of the recent UK case of *Ninian*.¹¹⁴³

6.1.102 The risks of any such approach to avoid the forfeiture rule were emphasised in consultation. SALRI notes the recent cases of *Public Trustee of Queensland v Public Trustee of Queensland & Ors*¹¹⁴⁴ and *Justins v Shakespeare*¹¹⁴⁵ which illustrate the risks of any informed consent approach.

6.1.103 *Justins* illustrates this issue.¹¹⁴⁶ In *Justins*, a former Qantas pilot, Graeme Wiley, who had been diagnosed with Alzheimer's disease and had twice previously attempted to commit suicide, made a will drafted by a solicitor a week before his death. The deceased and his de facto partner, Shirley Justins, attended on the solicitor for the purpose of having his will changed. Under this will he left his \$2.4 million estate to Ms Justins, and only relatively small legacies to his two daughters. Under his previous will, Mr Wiley's estate was divided between Justins and his two daughters (the daughters being entitled to share one half of his estate). The daughters commenced proceedings to challenge the will for lack of capacity. It was reported that the new will was held invalid for lack of testamentary capacity and his destruction of the earlier will was flawed, although the matter was ultimately settled with the parties agreeing to divide the estate closer to the terms of the original will.¹¹⁴⁷

6.1.104 The forfeiture rule should have been a relevant factor as Shirley Justins at this time had been convicted of Wiley's manslaughter,¹¹⁴⁸ though the conviction was later overturned¹¹⁴⁹ and her plea of guilty to assisting suicide was accepted.¹¹⁵⁰ Questions were raised about the lawyer taking instructions for a new will when Mr Wiley had Alzheimer's disease and had twice previously attempted to commit suicide. Further instructions were taken in the presence of his de facto partner for a will substantially in her favour, which changed the former dispositions in favour of his daughters markedly. However, according to a press report, the lawyer testified that she believed that her client had capacity and was not subject to undue influence.¹¹⁵¹ Ms Justins also testified that she had no knowledge that the deceased had Alzheimer's disease, or that he had previously attempted to commit suicide.¹¹⁵² In his sentencing remarks, Howie J noted that the solicitor was misled by Justins by failing to disclose relevant facts¹¹⁵³ and was not made aware of Wiley's mental problems.¹¹⁵⁴

¹¹⁴² See also above [6.1.1]–[6.1.17].

¹¹⁴³ *Ninian v Findlay* [2019] EWHC 297 (Ch).

¹¹⁴⁴ [2014] QSC 47.

¹¹⁴⁵ (Supreme Court of NSW, Palmer J, 18 May 2009).

¹¹⁴⁶ See Tina Cockburn and Barbara Hamilton, 'Assisting A Suicide: Potential Succession Law Consequences' (2013) 33(1) *Queensland Lawyer* 67–74.

¹¹⁴⁷ Harriet Alexander, 'Family of Euthanasia Victim Settle on Estate', *Sydney Morning Herald* (online at 19 May 2009) <<http://www.smh.com.au/national/family-of-euthanasia-victim-settle-on-estate-20090518-bcp5.html>>.

¹¹⁴⁸ *R v Justins* [2008] NSWSC 1194.

¹¹⁴⁹ *R v Justins* (2010) 79 NSWLR 544.

¹¹⁵⁰ *R v Justins* [2011] NSWSC 568.

¹¹⁵¹ 'Lawyer Unaware of Client's Dementia Before New Will Drafted', *AAP* (Sydney, 21 May 2008).

¹¹⁵² *Ibid*.

¹¹⁵³ *R v Justins* [2008] NSWSC 1194, [38].

¹¹⁵⁴ *Ibid* [21].

6.1.105 In the Queensland case of *The Public Trustee of Queensland v The Public Trustee of Queensland & Ors*,¹¹⁵⁵ the Supreme Court was asked to consider whether the executor and sole beneficiary of a valid will ('Nielsen'), who had been convicted of assisting the testator ('Ward') to commit suicide, was subject to the common law forfeiture rule. Nielsen had acted entirely in accordance with Ward's wishes as a friend. His crime was at the explicit request of the deceased. However, Dalton J in sentencing Nielsen raised less than altruistic motives on his part for his actions in assisting Ward to commit suicide:

And, of course, you had a personal financial interest in the death. It is not put as your main motive but I don't think this matter can be ignored. It is just not possible in any setting to ignore such a conflict of interest. It is also not irrelevant that at the time you had little in the way of personal assets. You had almost no money in the bank and a credit card debt, so that your net position was that you were about \$12,000 in debt... There is also evidence in the records of interview that you had been dishonest in what you told the deceased's relatives about the details of his death. And the dishonesty with the police and the dishonesty with the relatives does, I think, obscure the motives with which you acted, particularly in circumstances where you were sole beneficiary of the will, and particularly in a case where your motives are less clear and less understandable than a case... where a spouse or a child kills their spouse or parent in circumstances where they have been a long-term carer with a clear compassionate and altruistic motive for someone in a hopeless and extreme medical situation.¹¹⁵⁶

6.1.106 In the subsequent civil proceedings, the Chief Justice found that upon being convicted of assisted suicide, Nielsen had forfeited any entitlement under the estate, and was no longer capable of acting as executor under the will. The case also raises the question as to whether, if Ward had made a will in anticipation of his suicide, he could have expressly prevented the application of the forfeiture rule to his estate with respect to Nielsen, enabling Nielsen to be entitled to a bequest for his assistance.

6.2 Consultation Data Overview: In Which Classes of Unlawful Killing Would Modification of the Forfeiture Rule be Appropriate?

Moral Culpability

6.2.1 It was noted and agreed by attendees at all Roundtable sessions that the underlying rationale of the forfeiture rule is sound and accords with public policy, as a killer should be generally unable to benefit from his or her crime. However, the prevailing view was also that the application of the forfeiture rule to unlawful killings in various situations where a lesser degree of moral culpability is recognised has demonstrated that strict application of the rule may lead to unfair outcomes.

6.2.2 Ken Mackie and Professor Gino Dal Pont, leading authors in this area, with their customary erudition expressed to SALRI the same view and considered that the degree of moral culpability should be the main test in the law. They agreed with the recommendations of the VLRC with respect to cases where modification should apply. Professor Dal Pont added that, if a list of statutory considerations is to be included, the primary factor must be the moral culpability of the killer.

¹¹⁵⁵ [2014] QSC 47.

¹¹⁵⁶ *R v Nielsen* [2012] QSC 29 (Dalton J).

6.2.3 Kellie Toole noted that her primary concern was with the law not recognising mitigating circumstances where the killer was not motivated by obtaining access to the inheritance, and disadvantage greatly exceeds their moral culpability.

6.2.4 Dr Andrew Hemming took an opposing view and argued that he does not support judicial discretion in the application of the forfeiture rule, let alone the consideration of moral culpability. Consideration of moral culpability falls squarely within the observation of Meagher JA, that ‘there is something a trifle comic in the spectacle of Equity judges sorting felonious killings into conscionable and unconscionable piles’.¹¹⁵⁷ Dr Hemming noted that a rule of thumb can reasonably be stated: ‘The more open ended the judicial discretion and the larger the value of the estate, the greater the likelihood of a forfeiture contest in the courts’. The main objective of any modification of the forfeiture rule is to avoid contests and provide certainty.

‘Mercy Killings’ or Euthanasia

6.2.5 The issue of whether the forfeiture rule should be modified in cases of mercy killings or euthanasia was a prominent theme in SALRI’s consultation with differing views.

6.2.6 This question generated considerable discussion at all Roundtables. Many of the views expressed were part of the overall discussion of the murder and manslaughter distinction. The argument was raised that as assisted dying or mercy killings strictly remain murder under the present criminal law, it is wrong for the civil law to pre-empt the criminal law. It was considered that the civil law should not get in front of criminal law in such a sensitive and topical area (the point also highlighted to SALRI by Professor Dal Pont). Attendees suggested that to allow flexibility to the forfeiture rule to murder in the assisted dying scenario could be seen as ‘a backdoor way’ to allow assisted dying.

6.2.7 There was disagreement with this line of argument. Those attendees who disagreed considered the operation of the forfeiture rule to be a separate and distinct question. Any discretion to relax the forfeiture rule ‘is an ancillary question. You have to take things in a logical order.’

6.2.8 One of the attendees at an Adelaide Roundtable provided a case study which they had been involved with. The case involved an elderly couple; the wife was incapacitated, and her husband killed her and then killed himself. The attendee was ‘angry’ and stated that the killer husband had no right to take his wife’s life. It was noted, however, that this set of circumstances would not be considered a ‘mercy killing’.

6.2.9 Michael O’Connell was of the opinion that the mercy killing situation is one category of offence where judges could modify the operation of the forfeiture rule. He argued that ‘mercy killings happen every day — people overseeing medication that is above the prescribed dose. We hide that but it is a form of mercy killing’. Mr O’Connell also provided the example of an elderly parent who kills their severely disabled child, out of fear that they will not be cared for when they die, as another case requiring some flexibility to avoid any injustice resulting.

6.2.10 Dr Hemming made the point that in cases involving ‘mercy killing’ or euthanasia, it is difficult to conceive of a genuine case where a murder verdict would be brought in by the jury as

¹¹⁵⁷ *Troja v Troja* (1994) 33 NSWLR 269, 299.

opposed to manslaughter.¹¹⁵⁸ In favour of the codification model, he noted that, irrespective of the classification of an unlawful killing, it is be open to Parliament (as in New Zealand) to exclude from the definition of homicide both a killing of a person by another in pursuance of a suicide pact, and an assisted suicide.¹¹⁵⁹ Victoria has recently legislated to make euthanasia legal under strict circumstances, but only to persons normally resident in Victoria.¹¹⁶⁰ Dr Hemming raised that it is open to South Australia to follow suit, and obviate any need for a euthanasia exception to the forfeiture rule.

6.2.11 A member of the community, Clive Moore, made the following submission to SALRI after hearing discussion of SALRI's reference on Radio Adelaide:

I am 80 years old and fortunately at present in good health. I have for the past 25 years written many letters to politicians to change the laws about what I see as a basic human right, viz. to die at a time and place and in circumstances chosen by an individual. Many politicians have answered my letters, some agreeing with the common sense of euthanasia, but there has been no meaningful progress at all over that period. My wife who was with me in the car when we heard your conversation, knows of my intention to end my life if ever I am faced with a terminal illness, and my determination to follow the example of the man you referred to in your talk with Sonya. She was deeply upset by the prospect of being encumbered with legal harassment should I go ahead with any plan to take my own life and I seek your assistance in discovering whether this would be the inevitable situation she would have to face if I chose to go overseas to end what would be for me an intolerable situation. It seems outrageous to me that something permissible overseas and carried out there could ever come within the purview of Australian law.

6.2.12 Dr Mark Giancaspro of the University of Adelaide noted that the mercy killing or euthanasia situation often involves a loved one taking the life of another to end their suffering. He argued that modification of the forfeiture rule should be permitted in circumstances such as this, but with the qualification that the case in question must be *appropriate* for such modification. In Dr Giancaspro's view, the forfeiture rule should be modified to permit the courts to alleviate the rigidity of its application in situations where a person has assisted a person of capacity with a terminal and incurable illness, short life expectancy and desire to die to end their struggle. He suggested that this could be accomplished in situations of mercy killing by determining whether the killer's act satisfies the criteria justifying voluntary assisted dying under s 9 of the *Voluntary Assisted Dying Act 2017* (Vic). He saw the benefits of this model as being twofold. First it provides a specific framework which can be consistently applied in cases where the killer alleges their act was a mercy killing. Secondly it accords with the rationale of the *Voluntary Assisted Dying Act 2017* (Vic), which is to ensure that those who seek assistance to die are provided with such assistance under carefully controlled socially, medically and legally acceptable circumstances.

6.2.13 STEP's submission made reference to the treatment of assisted suicide under the New Zealand Act, which provides:

s.4 Interpretation

(1) In this Act, unless the context otherwise requires,-

¹¹⁵⁸ SALRI respectfully questions this proposition. Murder remains murder whatever the motivation, even for a 'mercy killing'. See also *R v Inglis* [2010] EWCA Crim 2637, [37] (Lord Judge CJ)

¹¹⁵⁹ See s 4(1) Homicide ss (c) and (d) of the New Zealand Act which exclude from the definition of homicide both a killing of a person by another in pursuance of a suicide pact, and an assisted suicide.

¹¹⁶⁰ *Voluntary Assisted Dying Act 2017* (Vic).

assisted suicide-

- (a) means the killing of a person by another person directly or indirectly if, immediately before death, the deceased asked the other person to help them to commit suicide; but
- (b) does not include a killing where the deceased formed the wish to commit suicide, or resolved to commit suicide, or acted on that wish or resolve, as a consequence of any form of persuasion by the other person

6.2.14 STEP referred to the number of obvious difficulties arising out of this codified model as follows:

- (a) Why must the request arise ‘immediately’ before death? Is it more acceptable to act on a request to help a person commit suicide in that moment than to (for example) source and provide the means to do so on behalf of a person with the will and capacity to commit suicide but not the means and has asked for help in advance? Indeed, is it not possible that the Act should be discouraging people from offering assistance in the ‘heat of the moment’, where there has not been time or opportunity to consider the situation?
- (b) How is the Court to determine whether the deceased formed a wish or resolve or acted upon it as a consequence of ‘any form of persuasion’, particularly in circumstances where the only living witness is likely to have a financial stake in the question?
- (c) What does the expression ‘any form of persuasion’ encompass? Would you need to demonstrate that the person actively encouraged the deceased to commit suicide, or is it enough to show that the dynamics of the relationship over time resulted in a loss of self-worth for the deceased and an attendant opinion that suicide was the best of available options?

6.2.15 STEP noted that none of those questions are addressed by the New Zealand Act, and no guidance is provided to a court as to how to approach these matters.

6.2.16 Professor Dal Pont reiterated that, whilst sympathetic to an individual who is involved in the unlawful death of a close relative suffering from a terminal illness, it is important to note that murder remains murder and the civil law should not move ahead of criminal law developments.¹¹⁶¹

Family Violence

6.2.17 The prevailing view in SALRI’s consultation is that, whilst evidence of family violence is significant and should be taken into account in the application or not of the forfeiture rule, it is inappropriate to make specific provision for family violence in any *Forfeiture Act*. Rather the presence of family violence should be taken into account, whether directed by the deceased at the unlawful killer and/or vice versa¹¹⁶² as part of the general test in determining if the forfeiture rule should apply or not. It was regarded as unrealistic or inappropriate to make the presence of family violence directed by the deceased at the unlawful killer as a specific category to avoid the operation of the forfeiture rule.

¹¹⁶¹ See *R v Inglis* [2010] EWCA Crim 2637, [37] (Lord Judge CJ): ‘the law of murder does not distinguish between murder committed for malevolent reasons and murder motivated by familial love. Subject to well established partial defences, like provocation or diminished responsibility, mercy killing is murder.’

¹¹⁶² See, for example, *State Trustees Ltd v Edwards* [2014] VSC 392 where the violence was mutual.

6.2.18 The consensus view at all Roundtables was that, in relation to killings involving family violence, the moral culpability of the killer is a factor a court should take into account in determining whether to modify the operation of the forfeiture rule. The unanimous view expressed at all Roundtables was that, whilst the presence of family violence is very significant, it is unrealistic or inappropriate to make this a specific category to avoid application of the rule. Indeed, there was agreement that family violence, whilst a material factor, should not be a distinct consideration or category but, rather, dealt within whatever general law is applied. A similar view was expressed to SALRI by Professor Prue Vines.

6.2.19 The Commissioner for Victims' Rights agreed with this approach and also noted that whilst the focus is on female victims, male victims of family violence should not be forgotten. This is especially so in the case of same sex couples.¹¹⁶³

6.2.20 Kellie Toole made the point that in cases involving family violence, the effect of the rule for family violence is that all of the battered killer's previous disadvantage is compounded. She noted that self-defence is very difficult for abused women to successfully argue. For example, if a battered woman's abuser is asleep at the time of the fatal injury, a conviction is likely.

6.2.21 Michael O'Connell made reference to the *Narayan*¹¹⁶⁴ case, and argued that, in cases involving family violence, the effect of the rule is that the battered killer receives a second punishment. He noted that the female is often not the primary breadwinner and is therefore reliant on their spouse for income. As such, the effect of the rule means that not only has that source of income gone, but also the opportunity. He noted that if there are children of the relationship who apply for compensation, then the killer will be pursued for recovery by the state for the debt, leaving them destitute and homeless. Based on his experience, this can lead the battered killer to suicide.

6.2.22 Relationships Australia was of the view that the operation of the forfeiture rule in a blanket manner in cases where a perpetrator of family violence is killed at the hands of their victim could in many cases give rise to unfairness.

6.2.23 Professor Rick Sarre and Dr Xianlu Zeng of the University of South Australia expressed their concern to SALRI about the strict application of the present forfeiture rule, especially in a family violence context. Dr Zeng said the strict application of the rule is 'bizarre and outdated'. Dr Zeng agreed that the rationale of the forfeiture rule to deny the unlawful killer any profit resulting from crime still makes sense, but not in its present absolute sense. Rather, a court should have a general discretion to moderate the effect of the forfeiture rule in a suitable case where the application of the rule would be especially unfair. She said the present rule has especially unfair and harsh consequences in various situations. The example of a wife who kills her abusive husband after a long course of family violence was noted. Dr Zeng highlighted to SALRI the often overlooked situation of children and that examples of children killing their parents or other family members is not unknown. Given their age and immaturity and likely less culpability, it may be wrong to apply the forfeiture rule to such killers. Dr Zeng noted that there are an infinite variety of cases of not only manslaughter but also murder. The distinction between murder and manslaughter 'may well be very tenuous'. She supported the need for

¹¹⁶³ See also above n 165.

¹¹⁶⁴ *R v Narayan* [2011] SASCF 61.

flexibility, especially in the context of where a killer is either a child or a victim of family violence. She noted these two categories may well overlap.

6.2.24 The Law Society of South Australia considered that the presence of domestic violence should affect the operation of the forfeiture rule. Particularly, where there is a history of the accused having suffered prolonged domestic violence from the deceased family member.

6.2.25 STEP submitted that the forfeiture rule is often considered as inherently in accordance with public policy. Public policy is, however, not immutable. What is contrary to public policy is something that varies ‘according to the state and development of society and conditions of life in a community’.¹¹⁶⁵ Family and domestic violence appears to be an increasing problem in our society and one where societal norms have altered over time.

6.2.26 Dr Andrew Hemming expressed the opposing view that family violence cases are not appropriate cases for modification of the operation of the forfeiture rule. He argued that those advocating judicial discretion in the operation of the forfeiture rule see this flexibility, based on the circumstances of the case, as a significant strength of the NSW model. He argues against the NSW model, submitting that ‘money is the root of all evil’, and that allowing victims of family violence to be a special exception to the forfeiture rule opens up a dangerous road in light of:

- (1) the reality that the killer is often the only witness;
- (2) the opportunity for the killer to stain the victim’s character;
- (3) the opportunity to be rid of a troublesome partner and secure his or her assets;
- (4) the number of killings involving family violence; and
- (5) the possibility that the male killer will allege the female victim was being violent to him.¹¹⁶⁶

Gross Negligence and Death by Culpable or Dangerous Driving

6.2.27 The prevailing view in SALRI’s consultation was that it is impossible to distinguish between the different forms of manslaughter as to the application of the forfeiture rule.

6.2.28 There was little support for the view that an offence should not be excluded from the scope of the rule simply because the act or omission was inadvertent, involuntary or negligent. There was very little, if any, support for singling out culpable or dangerous driving causing death or manslaughter by gross negligence for specific exemption, as in New Zealand, from the forfeiture rule. Indeed, the contrary view was expressed and it was widely thought that the forfeiture rule should be capable of extending to such situations. The serious view with which the courts,¹¹⁶⁷ Parliament and the

¹¹⁶⁵ *Stevens v Keogh* (1946) 72 CLR 1, (Dixon J).

¹¹⁶⁶ See *R v Middendorp* [2010] VSC 202, where the jury found Middendorp not guilty of murder, but guilty of the lesser offence of defensive homicide after stabbing his former female partner four times in the back (by reaching over her shoulder), after she ‘came at [him] with a raised knife in her right hand’ (at [10] (Byrne J)). This case triggered the abolition in 2014 of s 9AD of the *Crimes Act 1958* (Vic), the much-criticised defence of defensive homicide.

¹¹⁶⁷ ‘The offence of causing death by dangerous driving, and the related offences the subject of the application, are serious offences. The offence of causing death by dangerous driving is particularly serious, because it involves the taking of a life. While not a common offence, or apparently increasing, it contributes to a tally of road fatalities and injuries that cause great financial cost and human cost. The public are rightly concerned about the deaths and injuries that are caused on our roads’: *R v Payne* (2004) 89 SASR 49, [68]. See also *R v Jurisic* (1998) 45 NSWLR 209; *Pasznyk v The Queen* (2014) 43 VR 169, 185–7; *R v Manok* [2017] NSWCCA 232.

community now regard death by culpable or dangerous driving, especially if compounded by drugs, alcohol or a high speed police chase, was highlighted to SALRI. This point was powerfully made to SALRI by Mr Boucaut QC.¹¹⁶⁸

6.2.29 The general consensus at all Adelaide Roundtables was that killings by gross negligence and death by culpable or dangerous driving should not be codified as an express exclusion to the forfeiture rule. Rather there should be a discretion that courts can exercise to modify the operation of the rule to apply in these cases. At one of the Adelaide Roundtables, the example was given of a person driving into a crowd of people who is prosecuted for death by dangerous driving. In such a case, if there was a general exception, this could potentially result in unintended consequences.

6.2.30 Similarly, at the Mount Gambier Roundtable, the consensus view was that it is inappropriate to single out certain categories of unlawful killing such as infanticide, causing death by culpable or dangerous driving and manslaughter by negligence from the rule's operation. It was highlighted that death by culpable or dangerous driving, as with manslaughter, is a label applied to offenders who possess varying degrees of moral culpability. More than one attendee noted that manslaughter by gross negligence (especially arising from the use of a motor vehicle) and death by culpable or dangerous driving may well be of such gravity that the forfeiture rule should operate.

6.2.31 Professor Dal Pont accepted that there are compelling grounds for the forfeiture rule and a forfeiture modification order to apply to all categories of manslaughter. Manslaughter covers a vast range of cases from 'near murder to mere inadvertence'. It is impossible to try and distinguish between the different forms of manslaughter, including voluntary and involuntary manslaughter, as to when the rule should or should not apply. He added that seeking to exclude manslaughter by gross negligence from the operation of the rule as opposed to manslaughter by unlawful and dangerous act is untenable as there is often little, if any, distinction between these two categories of involuntary manslaughter.

6.2.32 Professor Dal Pont stated that the situation of death by culpable or dangerous driving presents more difficulty and 'opens the door to some challenging situations'. This aspect has been overlooked by many law reform agencies and commentators. It is not entirely clear but the present view seems to be that death by dangerous driving does not fall within the forfeiture rule. There is a large degree of overlap between manslaughter and death by dangerous driving when driving which falls far below the requisite standard leads to death. It becomes a question of labels as the prosecuting authorities in relation to motor manslaughter rarely, if ever, charge manslaughter and instead prefer death by dangerous driving owing to the perceived reluctance of juries to convict of manslaughter in relation to even the most culpable and blameworthy driving causing death. Indeed, Professor Dal Pont remarked that even the most culpable driving causing death aggravated by alcohol, illicit drugs or high speed police chases is still charged as death by dangerous driving as opposed to manslaughter.

6.2.33 Professor Dal Pont noted that death by dangerous driving is a serious offence and, not without some hesitation, perceived reasons in logic and consistency to justify death by dangerous driving falling within the rule. He flirted, however, with a 'reverse onus' in this context, to give the relevant persons standing to apply for forfeiture in death by dangerous driving cases as opposed to throwing the onus upon the killer to sustain a forfeiture modification order. His concern was the need for a consistent approach to death by dangerous driving cases, a concern that informed his belief that

¹¹⁶⁸ Mr Boucaut QC noted that death by culpable or dangerous driving is invariably charged in preference to manslaughter in even the most gross and blameworthy cases of poor driving leading to an unintentional death.

statutory criteria be specified to moderate the rule's application here. A routine case (such as driving through a red light) should not be the subject of the application of rule whereas an 'outrageous' example of death by dangerous driving may trigger the prima facie application of the rule.

6.2.34 Professor Dal Pont noted that there is a large overlap between manslaughter and death by dangerous driving and that even the most blameworthy driving causing death is usually charged by the prosecuting authorities as causing death by dangerous driving as opposed to manslaughter.

6.2.35 The Hon Geoffrey Muecke mentioned a case of death by dangerous driving that he presided over, involving two boys who were cousins and had been drink driving one night. They were in a car accident and one of the boys died. The mother of the boy who died, in her victim impact statement, said that if the other boy were to be sent to prison it would be like losing two sons. Mr Muecke noted that death by dangerous driving is a very unique offence. He explained that it used to be manslaughter, but juries would not convict, which is why the law was changed to create a new offence.¹¹⁶⁹ He noted that most people sentenced for this offence were driving without the intention to have an accident, let alone with intention to kill or harm someone. He commented that, in respect of this offence, it is just a matter of circumstance, which is very different to murder or manslaughter.

6.2.36 The Commissioner for Victims' Rights gave the example of failing to feed an elderly relative or failing to obtain medical attention when it is required for a vulnerable family member as a case that may result in a person being convicted of manslaughter by gross negligence. In such a case, the Commissioner was of the view that the forfeiture rule should apply. The Commissioner noted that her Office is seeing more cases of elder abuse by sons and daughters directed against their parents. It is also relevant to note in this situation the possible application under s 14 of the *CLCA* of causing the death of a child or vulnerable adult by criminal neglect.

6.2.37 Dr Hemming was in favour of an expressly codified category of offences in exclusion to the forfeiture rule and considered that the preferable view is to specify a short list of offences that do not offend the public conscience in modifying the forfeiture rule. He referred to the *Crimes Act 1900* (NSW), which sets out a table of offences of specific intent in s 428B for the purpose of the application of Part 11A Intoxication. Another option proposed by Dr Hemming is to specify a list of offences excluded from the forfeiture rule, along with a generic measuring rod of 'the killing was caused by *negligent* act or omission'. In this context, Dr Hemming says that it is important to distinguish between a reckless killing and a culpably negligent killing. He sees a viable option as being to use the definition of 'recklessness' and 'negligence' in Chapter 2 of the *Criminal Code 1995* (Cth).

Suicide Pacts

6.2.38 There was not a great deal of discussion around suicide pacts and the operation of the forfeiture rule at the Adelaide or Mount Gambier Roundtables. However, there was unanimous agreement that in many cases involving suicide pacts there is reduced moral culpability, and the courts should be given the discretion to modify the operation of the forfeiture rule.

¹¹⁶⁹ Model Criminal Code Officers Committee, *Chapter 5: Fatal Offences against the Person* (Discussion Paper, June 1998) 161.

6.2.39 Ken Mackie and Professor Gino Dal Pont noted that suicide is not frowned on in the same way that it was decades ago. It is no longer regarded as a ‘mortal sin’ that should be the subject of the criminal law.

6.2.40 Dr Hemming was concerned that manslaughter pursuant to a suicide pact with the deceased person is more troublesome as it is clearly open to abuse. The survivor can claim there was a pact, while the deceased is unable to contradict the survivor’s version of events. Dr Hemming referred to the tragic cases of *DPP v Rolfe*¹¹⁷⁰ and *R v Marden*,¹¹⁷¹ where elderly people with severe physical and mental illnesses had little quality of life. However, these cases are not examples of the offender intending to benefit from the death. Rather cases like these explain the humanitarian desire to exclude suicide pacts from the reach of the forfeiture rule, though exceptions may have unintended consequences and such an exception should be approached with caution. For example, the exception could be qualified by specifying the circumstances and type of scenario in the *Rolfe* and *Marden* cases that the exception was designed to address.

6.2.41 STEP also referred to the tragic case of *Rolfe*, and expressed concern that, under the current forfeiture rule, persons such as Mr Rolfe would be unable to inherit in South Australia. This would result in the loss of a home jointly owned with the other member of the suicide pact, and potentially the loss of other assets.

Infanticide

6.2.42 There was very little support for singling out infanticide for specific exemption, as in New Zealand, from the forfeiture rule.

6.2.43 The consensus view at all Roundtables was that the category of infanticide should be dealt with in the same manner as the other categories of unlawful killing by allowing judicial discretion to determine whether the forfeiture rule should operate given the diverse facts of each case. The general view was that, on the face of it, when a mother kills her baby, there is likely to be some sympathy. However, it was also acknowledged that there may be situations where an infant dies with large estates, such as where they have inherited assets through a deceased grandparent, and it may be appropriate to invoke the rule. Excluding the category of crime through codification was not supported, and the general view was that there has to be a gatekeeper given the diverse facts involved in each infanticide.

6.2.44 The Commissioner for Victims’ Rights and Mr Boucaut QC agreed with these views.

Diminished Responsibility

6.2.45 Diminished responsibility exists as a partial defence¹¹⁷² in the United Kingdom, the ACT, NSW, Queensland and the Northern Territory. It does not exist as a partial defence in South Australia, Victoria, Western Australia or Tasmania.

¹¹⁷⁰ [2008] VSC 528.

¹¹⁷¹ [2000] VSC 558.

¹¹⁷² See generally David Plater, David Bleby, Megan Lawson, Lucy Line, Amy Teakle, Katherine O’Connell and Kate Fitz-Gibbon, South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 2* (Report No 11, April 2018) 105–125.

6.2.46 The partial defence of diminished responsibility or ‘substantial impairment’ (as it is now known in NSW)¹¹⁷³ provides what otherwise would be murder will be reduced to manslaughter in cases where it can be established, on the balance of probabilities, that the defendant’s ‘capacity to understand events, or to judge whether the person’s actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition.’¹¹⁷⁴ Diminished responsibility is premised on the notion that if insanity can completely excuse an intentional killing, then ‘partial insanity’ should reduce the criminal responsibility of a defendant in relative proportion. The rationale for this partial defence reflects the view that there should be recognition of reduced levels of culpability for some defendants who would otherwise be guilty of murder, based on the fact that their state of mind was impaired at the time of the killing.¹¹⁷⁵

6.2.47 Though the precise language formulating the defence of diminished responsibility varies between jurisdictions, the common elements of the defence in Australia are:

- (1) That at the time of the acts or omissions causing the death the defendant was suffering from an abnormality of mind;
- (2) The abnormality of mind or mental function arose from an underlying condition; and
- (3) At the time of the offence the defendant had a significantly impaired ability to:
 - a. understand the events or the nature of his or her conduct;
 - b. judge whether their actions were right or wrong; or
 - c. control himself or herself.¹¹⁷⁶

6.2.48 Law Reform agencies are divided as to the benefit of such a defence.¹¹⁷⁷

6.2.49 SALRI accepts that there are cogent concerns in relation to the sentencing of homicide offenders with an intellectual disability, cognitive impairment or mental illness for murder under the current strict regime which restricts, or even precludes, a court from taking into account an intellectual disability, cognitive impairment or mental illness as a mitigating factor in sentencing for murder (unlike for any other crime). However, SALRI notes that the question of diminished responsibility as a partial defence is complex and raises difficult questions of policy and practice. SALRI concluded after careful consideration that a new partial defence of diminished responsibility in South Australia is problematic and inappropriate.¹¹⁷⁸ SALRI explained:

¹¹⁷³ *Crimes Act 1900* (NSW) s 23A.

¹¹⁷⁴ *Ibid* s 23A(1)(a).

¹¹⁷⁵ Select Committee on the Partial Defence of Provocation, Parliament of New South Wales, *Partial Defence of Provocation* (Final Report, April 2013) 15 [2.40]; Judith Ablett-Kerr, ‘A Licence to Kill or an Overdue Reform? The Case of Diminished Responsibility’ (1997) 9 *Otago Law Review* 1.

¹¹⁷⁶ See Model Criminal Code Officers Committee, *Model Criminal Code: Chapter 5: Fatal Offences against the Person*, (Discussion Paper, June 1998) 115; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 2nd ed, 2005) 284.

¹¹⁷⁷ David Plater, David Bleby, Megan Lawson, Lucy Line, Amy Teakle, Katherine O’Connell and Kate Fitz-Gibbon, South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 2* (Report No 11, April 2018) 109 [12.2.6]–[12.2.7].

¹¹⁷⁸ *Ibid* 107 [12.1.5].

SALRI, after much consideration, is unconvinced of the benefits of a new partial defence of diminished responsibility and recommends that it should not be adopted in South Australia. SALRI accepts that the suggestion of diminished responsibility as a partial defence is tenable but any such defence raises its own issues and complications. SALRI notes the width and vagueness of such a defence and the prospect of ‘trial by expert’. SALRI echoes the VLRC’s concern that if the defence of provocation is to be abolished, diminished responsibility could be used as a replacement defence and it would be illogical to create a new defence which might have many of the same defects to take its place. SALRI considers that diminished responsibility risks reintroducing many of the problems of provocation, notably its gender bias, into the law. Tasmania, Victoria and Western Australia do not have diminished responsibility and these jurisdictions have been described as ‘functioning perfectly well without the defence.’¹¹⁷⁹

6.2.50 SALRI concluded, consistent with SALRI’s view in relation to the issue of provocation, the preferable solution for homicide offenders with an intellectual disability, cognitive impairment or mental illness who are sentenced for murder is to provide greater flexibility to courts in sentencing to recognise these factors if appropriate and to be able to properly reflect the protection of the community, the gravity of the crime, the offender’s culpability and any genuine mitigating factors, especially an offender’s mental illness, cognitive impairment or intellectual disability.¹¹⁸⁰

6.2.51 SALRI therefore recommended that any new partial defence of diminished responsibility is inappropriate and should not be adopted in South Australia.¹¹⁸¹

6.2.52 Dr Andrew Hemming argued against a defence of diminished responsibility on three grounds. First, the fault element for murder is present but the successful ‘defence’ of diminished responsibility on the balance of probabilities has led to a manslaughter conviction. Secondly, the defence of diminished responsibility is seriously flawed.¹¹⁸² Thirdly, it would be anomalous for South Australia to allow this defence for the purpose of the forfeiture rule, while not providing for such a defence in the *Criminal Law Consolidation Act 1935* (SA). He refers to the case of *Lenaghan-Britton v Taylor*¹¹⁸³ as providing an example of both the inappropriateness of allowing the defence of diminished responsibility to breach the forfeiture rule, and the dangers of allowing judicial discretion in the application of the forfeiture rule for manslaughter cases under the rubric of ‘in the interests of justice’.

¹¹⁷⁹ Ibid 123 [12.7.1].

¹¹⁸⁰ Ibid 107 [12.1.5].

¹¹⁸¹ Ibid 125 Rec 10.

¹¹⁸² See Andrew Hemming, ‘It’s Time to Abolish Diminished Responsibility, the Coach and Horses’ Defence Through Criminal Responsibility for Murder’ (2008) 10 *University of Notre Dame Australia Law Review* 1. The Model Criminal Law Officers Committee (MCLOC) correctly identified the critical issue when it stated that: ‘The practical problems with the partial defence of diminished responsibility will not be remedied by further changes to the test. This is because the concept of this partial defence is fundamentally confused ... Diminished responsibility is inherently vague. All three elements of the defence are immersed in uncertainty’: Model Criminal Law Officers Committee, *Model Criminal Code Chapter 5: Fatal Offences Against the Person* (Discussion Paper, June 1998) 123. The Victorian Law Reform Commission in its *Defences to Homicide* (Report No 5, October 2004), at [5.132], concluded in similar terms to the MCLOC as follows: ‘Not only is the current formulation vague and therefore open to manipulation, the defence of diminished responsibility mixes two separate concepts that do not sit easily together. These include the notion of the ‘mind’ which may be the subject of expert psychiatric opinion, and ‘responsibility’ which is essentially an ethical notion which psychiatrists have no expertise in.’

¹¹⁸³ (1998) 100 A Crim R 565. See also above [4.2.32], n 765.

Informed Consent

6.2.53 At the first Adelaide Roundtable, there was a discussion as to whether the intention of the killer should be a factor that the courts should take into account when determining whether the forfeiture rule should be modified. This was particularly the case with respect to the assisted suicide situation, where the victim has either expressly or impliedly expressed their intention that if their spouse assists in helping them die, that they should not be precluded from receiving their estate. SALRI notes that the suggestion of informed consent or ‘contracting out’ the forfeiture rule was contentious and there was limited support for such a proposition. Whilst it was agreed that the forfeiture rule cannot be contracted out of, the general view was that the intention of the deceased should be a relevant factor that the courts take into account when determining whether a modification order should be made.

6.2.54 At the second Adelaide Roundtable, attendees expressed the view that an informed consent exception could be unsafe and that it would be difficult to determine whether an elderly person was under duress or persuaded into making their decision to die. The risk of undue influence and coercion was highlighted.

6.2.55 There was no support from attendees at the third Adelaide Roundtable for an informed consent exception. It was seen as a ‘bizarre situation’. Issues of undue influence, duress and capacity would be inevitably raised. The unanimous view expressed was that a killer should not be able to contract out of the rule: ‘it would be a very unusual question to ask when taking will instructions.’

6.2.56 The erudite Professor Gino Dal Pont at the University of Tasmania raised the risks involved with such an approach and emphasised that the civil law should not pre-empt developments in the criminal law.

6.2.57 The Hon Geoffrey Muecke was also very uncomfortable with introducing a notion of informed consent, and felt that informed consent can be open to abuse. He gave the example of a person being told by their doctor that they only have two to four years to live. The person is in a nursing home and the family can see that all that person’s money is going towards the nursing home. The person feels guilty that they are depleting the assets that will pass to their family and says: ‘I do not want to be here.’ The children may convince the person that this is the best way to go, and the outcome will be that everyone’s life is improved, so the parent agrees. Parents that want to die may sometimes be doing it for the wrong reasons. Mr Muecke was of the view that we should not want to see that rewarded. He also expressed concern that it can potentially open a Pandora’s box.

6.2.58 The South Australian Victim Support Service argued that the answer to the informed consent question goes back to the social contract question, and that society has to decide whether they support euthanasia or assisted suicide first. Basically, it has to be a higher conversation than a change to the common law forfeiture rule.

6.2.59 Dr Andrew Hemming disagreed with the informed consent exception and considered that this would open up a ‘Pandora’s box’ of speculation and speculative claims. He also felt that it would be inconsistent with the code solution championed in his submission.

6.2.60 STEP’s submission referred to the case of *The Public Trustee of Queensland v The Public Trustee of Queensland & Ors*¹¹⁸⁴ as being a scenario in which the law may need flexibility in application. It also

¹¹⁸⁴ [2014] QSC 47.

raises the question as to whether, if Ward had made a will in anticipation of his suicide, he could have expressly prevented the forfeiture rule being applied to his estate with respect to enabling Neilsen to be entitled to a bequest for the assistance provided.

6.3 SALRI's Observations and Conclusions

6.3.1 The premise of the forfeiture rule remains fundamental. Plainly, taking the life of another constitutes a moral wrong and it is against community values and public policy to ordinarily allow an unlawful killer to profit from their crime. However, as society has evolved, there is wide recognition that culpability in relation to an unlawful death varies depending on the circumstance. Not every unlawful killing possesses the same level of culpability. This is the basis for the basic distinction between murder and manslaughter. Society views intentional killing as a greater moral sin than accidental killing.

6.3.2 SALRI notes the consistent theme in its consultation that it is impracticable and inappropriate to seek to distinguish in any *Forfeiture Act* between the different forms of manslaughter as the application or not of the forfeiture rule. The distinction between involuntary manslaughter (forfeiture rule to apply) and voluntary manslaughter (forfeiture rule not to apply) is unsound in defining the application of the rule and should not be incorporated within any *Forfeiture Act*.¹¹⁸⁵ Any approach which excludes manslaughter by the commission of an unlawful and dangerous act makes little sense.¹¹⁸⁶ The distinction between manslaughter by an unlawful and dangerous act (forfeiture rule to apply) and manslaughter by gross negligence (rule not to apply) is also unsound in defining the application of the rule and should not be incorporated within any *Forfeiture Act*.¹¹⁸⁷ The distinction between these two categories of manslaughter is tenuous.¹¹⁸⁸ It is also inappropriate and at odds with public policy and community expectations to exclude such examples of manslaughter by gross negligence as the callous neglect of a child, elderly parent or family member with disability leading to death from the potential operation of the forfeiture rule. It is also illogical that the offence under s 14 of the *CLCA* of causing the death of a child or vulnerable adult by criminal neglect should not fall within the scope of the forfeiture rule.

6.3.3 SALRI is of the view that it is inappropriate to distinguish between the different forms of manslaughter as to the application of the forfeiture rule. 'Manslaughter is a crime which varies infinitely in its seriousness. It may come very near to murder or amount to little more than inadvertence, although in the latter class of case the jury only rarely convict.'¹¹⁸⁹

¹¹⁸⁵ See further above [6.1.40]–[6.1.77], [6.2.27]–[6.2.37].

¹¹⁸⁶ See further above Ibid.

¹¹⁸⁷ See further above Ibid.

¹¹⁸⁸ See, for example, Model Criminal Code Officers Committee, *Chapter 5: Fatal Offences against the Person* (Discussion Paper, June 1998) 145–161; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 3rd ed, 2010) 51–542 [9.175]. There is a large degree of overlap in practice between manslaughter by an unlawful and dangerous act and negligence. See further above [6.1.49].

¹¹⁸⁹ *Gray v Barr* [1971] 2 QB 554, 581–582. See also above n 615, [5.1.25]. The 2009 South Australian case of *R v Curtis* is an example of a 'very serious' case of manslaughter by unlawful and dangerous act that approached murder. It should be contrasted with the 'tragic' 2013 case of *R v Puhle* of manslaughter by negligence by a mother in relation to her profoundly disabled adult child where a wholly suspended sentence was imposed. See further below Appendix B.

6.3.4 Society has rightly come to view family violence as unacceptable. Tragically, there are situations in which victims of such violence are forced to kill their partners, the perpetrators of family violence. The traditional defences to a murder charge, and the reduced moral blame they engender, are often unsuitable in these cases.

6.3.5 Other categories of killing which modification of the forfeiture rule may be appropriate include mercy killings and assisted suicide, gross negligence and death by culpable or dangerous driving, suicide pacts and infanticide.

6.3.6 Depending on the nuanced question of precise circumstance and context, it is clear these ‘unlawful killers’ do not deserve the same moral condemnation as other individuals who have killed.

6.3.7 SALRI is of the view that modification to the forfeiture rule should not be based on classes of killings as this approach fails to look at the conduct of the killer, and instead only looks at the specific label provided to the killer’s conduct. For example, death by culpable or dangerous driving or manslaughter by gross negligence cover a wide range of cases. In some cases, homicides of this nature may involve ‘heinous’ misconduct which the rule should apply to. The preferable approach as discussed earlier in this Report is to permit a court to modify its application in some cases of unlawful killings, where the court finds it is in the interests of justice to do so and there are exceptional circumstances to do so.

6.3.8 SALRI considers that it is unnecessary, even unhelpful, to make specific provision in any *Forfeiture Act* for such factors as the killer’s diminished responsibility (such as intellectual disability), mercy killing or euthanasia scenarios or infanticide (noting this not a defence in South Australia). Rather these factors should be generic factors, as with any other relevant consideration, a court will take into account in deciding if the rule should apply or be modified.

6.3.9 Two specific issues require further mention.

6.3.10 First, the notion of informed consent to somehow bypass the forfeiture rule is highly problematic and open to abuse. SALRI notes that both *Justins* and *Neilsen* demonstrate the caution expressed by Professor Dal Pont, the Hon Geoffrey Muecke and others during consultation is well founded. SALRI does not support any exception to the rule based on the notion of ‘informed consent’.

6.3.11 Secondly, there is no doubt that the presence of family violence is a significant factor in determining if the forfeiture rule should apply. However, consistent with the strong view in consultation (especially advocated by Professor Vines), SALRI is of the view that family violence should not be a specific ground to apply the rule or not or even a specific statutory consideration. Rather it is a significant generic factor the court will take into account in deciding if the rule should be modified and amounts to ‘exceptional circumstances’ in the situation of a victim of family violence responding to such violence and killing an abusive spouse or other family member. Family violence is also significant for a court to consider where the killer has committed acts of domestic violence leading up to the killing (an obvious aggravating factor) and where a court would be unlikely to modify the application of the rule in such a situation. SALRI concurs with the approach of the Tasmania Law Reform Institute, who recognised that women who have been subjected to family violence should

rightly be an exception in some cases, but this should be a reason to allow for modification of the effects of the forfeiture rule, as opposed to a general exclusion from the operation of the rule.¹¹⁹⁰

6.3.12 The question of manslaughter and death by culpable or dangerous driving requires separate consideration.

6.3.13 Manslaughter covers an infinite variety of circumstances.¹¹⁹¹ The distinction between voluntary and involuntary manslaughter to attract the operation of the forfeiture rule is untenable. The suggestion that voluntary manslaughter should attract the forfeiture rule and involuntary manslaughter should fall outside the rule received very little support in SALRI's consultation and any such distinction was widely perceived as untenable. The alternative suggestion that manslaughter by an unlawful and dangerous act should attract the forfeiture rule and manslaughter by inadvertence or gross negligence should fall outside the rule also received very little support in consultation and any such distinction was widely perceived as untenable.

6.3.14 The distinction between manslaughter by unlawful and dangerous act and manslaughter by inadvertence or gross negligence (even in relation to motor manslaughter) is tenuous.¹¹⁹² SALRI is of the view that a homicide offence should not be excluded from the scope of the forfeiture rule simply because the relevant act or omission was inadvertent, involuntary or negligent.

6.3.15 Whelan JA in *Edwards* was unconvinced of the rationale of confining the forfeiture rule to homicides involving the deliberate use or threat of violence and excluding manslaughter by inadvertence or gross negligence from the rule. He considered that the application of the rule 'is not determined by reference to whether the conduct is advertent or inadvertent, whether it is by violent means or by other means, whether it is behind the wheel of a car or whilst in possession of a weapon.'¹¹⁹³ The focus on a 'deliberate' or 'intentional' act as opposed to inadvertence is confusing and unhelpful.¹¹⁹⁴ Whelan JA also was unconvinced of the non-application of the rule to unlawful killings by culpable drivers notwithstanding that such conduct has, for at least the last two decades or so, been seen as criminal conduct potentially as serious and as culpable as any other manslaughter.¹¹⁹⁵

6.3.16 SALRI agrees with the insightful comments of Whelan J. The English motor manslaughter exceptions are a product of their time and fail to take into account the gravity with which Parliament, the courts and community now view driving leading to death that falls far below the proper

¹¹⁹⁰ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 15–17.

¹¹⁹¹ See, for example, *Attorney-General (Tas) v Wells* [2003] TASSC 78, [26]; *R v Forbes* (2005) 160 A Crim R 1, [133]–[134]; Mervyn D Finlay, *Review of the Law of Manslaughter in New South Wales* (Report, April 2003) 24–25 [6.1]–[6.4], 66–73 [11.7]. This fact has long been recognised. The 1901 Memorandum of Lord Alverstone CJ said: 'In almost every class of crime, and pre-eminently in the case of manslaughter, the judge, in fixing the punishment, has to discriminate between widely different degrees of moral culpability, and to weigh an infinite variety of circumstances and situations': at 25. See further above n 615, [5.1.25], n 1189.

¹¹⁹² See, for example, *R v Meeking* [2013] RTR 4. See also Model Criminal Code Officers Committee, *Chapter 5: Fatal Offences against the Person (Discussion Paper, June 1998)* 145–161; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 3rd ed, 2010) 541–542 [9.175]. See further above [6.1.49].

¹¹⁹³ *Edwards v State Trustees Limited* (2016) 257 A Crim R 529, 546 [66].

¹¹⁹⁴ *Ibid* 543 [54].

¹¹⁹⁵ *Ibid* 534 [11]. Santamaria JA agreed that the UK motor manslaughter cases excluding the application of the forfeiture rule 'may need to be reconsidered given the change in public policy over the last few decades to the circumstances in which people are killed by the drivers of motor vehicles. See, for example, the offences provided for in Div 9 of Pt 1 of the Crimes Act including, in particular, "culpable driving causing death": 571 [155].

standard. It is wrong to somehow treat manslaughter by gross negligence involving a motor vehicle as less serious than other forms of manslaughter. As Ipp J stated in *R v McKenna*,¹¹⁹⁶ the ‘criminality is not reduced simply because the crime can be categorised as “motor vehicle manslaughter”’.¹¹⁹⁷ In *R v Lawler*,¹¹⁹⁸ the NSW Court of Criminal Appeal reiterated: ‘It is to be clearly understood that manslaughter is no less serious a crime because it is committed by the use of a motor vehicle.’¹¹⁹⁹

6.3.17 SALRI is of the view that manslaughter by gross negligence should fall within the forfeiture rule (subject to the court’s ability to make a modification order in a suitable case) and the motor manslaughter exception is unsound and should not appear in any new *Forfeiture Act*. There are sound reasons why the forfeiture rule should extend to any act of manslaughter by gross negligence. For policy and consistency, the forfeiture rule should also extend to the serious similar offence in South Australia under s 14 of the *CLCA* of criminal neglect causing the death of a child or vulnerable adult.¹²⁰⁰

6.3.18 SALRI reiterates that it is inappropriate and impracticable to distinguish between either involuntary and voluntary manslaughter, or manslaughter by unlawful and dangerous act and gross negligence, in the role and application of the forfeiture rule.¹²⁰¹ SALRI also reiterates that it is inappropriate and impracticable to distinguish between the different categories of manslaughter as to the application of the forfeiture rule and any such effort is ‘an impossible task’ and ‘doomed to failure’. The forfeiture rule should apply to all forms of manslaughter, subject to a court’s ability to modify its operation if it is in the interests of justice to do so and there are ‘exceptional circumstances’.

6.3.19 SALRI accepts that the question of whether to include death by culpable or dangerous driving within the scope of the forfeiture rule is not straightforward.

6.3.20 On the one hand, SALRI notes the legitimate concerns expressed by the VLRC and by Professor Dal Pont, the Hon Geoffrey Muecke and others to SALRI that death by dangerous driving is likely to involve limited culpability such that it is unlikely that a court would invoke the forfeiture rule. The example of death resulting from momentary inattention or misjudgement was raised. SALRI also notes the significant legal costs that will be incurred in a court ‘rubber stamping’ the likely non-application of the forfeiture rule to a ‘standard’ case of death by dangerous driving.

6.3.21 However, on the other hand, death by culpable or dangerous driving may well involve egregious blameworthiness that is comparable to a grave example of manslaughter by gross negligence. SALRI notes the example often presented to it in consultation in favour of including death by culpable or dangerous driving within the forfeiture rule of wanton high speed driving under the influence of drink or drugs that results in the death of a spouse or family member. Parliament, the courts and the community now view the offence of causing death by dangerous driving with the utmost

¹¹⁹⁶ (1992) 63 A Crim R 452.

¹¹⁹⁷ *Ibid* 452.

¹¹⁹⁸ (2007) 169 A Crim R 415.

¹¹⁹⁹ *Ibid* [41].

¹²⁰⁰ This offence arises where a child or a vulnerable adult dies or suffers harm as a result of an act; and the defendant had, at the time of the act, a duty of care to the victim; and the defendant was, or ought to have been, aware that there was an appreciable risk that harm would be caused to the victim by the act the defendant failed to take steps that he or she could reasonably be expected to have taken in the circumstances to protect the victim from harm and the defendant's failure to do so was, in the circumstances, so serious that a criminal penalty is warranted.

¹²⁰¹ See also above [6.1.40]–[6.1.77], [6.2.27]–[6.2.37], [6.3.1]–[6.3.18].

seriousness.¹²⁰² It is also significant that, as Mr Boucaut QC and Professor Dal Pont reminded SALRI, even the most serious and egregious case of an unlawful death arising from the use of a motor vehicle is likely to be charged by the prosecuting authorities as death by culpable or dangerous driving as opposed to manslaughter by gross negligence.

6.3.22 The VLRC, whilst supporting the offence of causing death by culpable driving¹²⁰³ falling within the forfeiture rule,¹²⁰⁴ did not support extending the forfeiture rule to death by dangerous driving.¹²⁰⁵ In coming to this view, the VLRC asserted that dangerous driving causing death ordinarily involves a relatively low level of culpability.¹²⁰⁶

6.3.23 SALRI questions the approach of the VLRC, at least in a South Australian context. The assumption that dangerous driving causing death ordinarily involves a relatively low level of culpability is debatable. In Victoria, causing death by culpable and dangerous driving are separate and distinct offences whilst in South Australia the relevant offence is a single offence that covers driving a vehicle in a culpably negligent manner, recklessly or at a speed or in manner dangerous to the public.¹²⁰⁷

6.3.24 The increased gravity with which society now regards causing death by culpable or dangerous driving, the fact that such cases may well exceed ‘mere inadvertence’ and involve the most blameworthy and egregious driving compounded by alcohol or drugs, the fact that manslaughter by gross negligence is very rarely charged in even the most blameworthy and egregious driving causing death and the fact that s 19A of the *CLCA* is a combined offence that includes both culpable and dangerous driving all support extending the forfeiture rule in South Australia to the offence of causing death by culpable or dangerous driving. This is subject to a court’s ability to modify the application of the rule in an appropriate case where it is in the interests of justice and there are ‘exceptional circumstances’. It is likely that ‘exceptional circumstances’ will arise more often in practice to causing death by dangerous driving than with murder. *Straede v Eastwood* illustrates where it would be appropriate to modify the forfeiture rule. However, there will be egregious cases of causing death by culpable or dangerous driving where it would be appropriate to apply the rule.

6.3.25 SALRI reiterates its view that, consistent with the present law, the forfeiture rule should clearly apply to both the suicide pact situation and the offence to aid, abet or counsel the suicide of another under s 13A(5) of the *CLCA*. SALRI notes that, although a court may be likely to find ‘exceptional circumstances’ to modify the rule in such cases, there will be situations of increased gravity and culpability where it would be appropriate to apply the forfeiture rule.¹²⁰⁸

¹²⁰² *R v Payne* (2004) 89 SASR 49; *R v Jurisic* (1998) 45 NSWLR 209; *Pasznyk v The Queen* (2014) 240 A Crim R 505, 521–523; *R v Manok* [2017] NSWCCA 232.

¹²⁰³ *Crimes Act 1958* (Vic) s 318. The VLRC noted that this offence is similar to manslaughter by negligence and the minimum degree of negligence that needs to be proven is the same degree as that required to support a charge of manslaughter: Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 21 [3.25]. See also *R v Shields* [1981] VR 717.

¹²⁰⁴ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 22 [3.28].

¹²⁰⁵ *Crimes Act 1958* (Vic) s 319. See Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 25 [3.49]. See also at 24–25 [3.42]–[3.48].

¹²⁰⁶ *Ibid* 25 [3.49].

¹²⁰⁷ *CLCA* s 19A(1).

¹²⁰⁸ See also *Dunbar v Plant* [1998] Ch 412, 435.

6.4 Exercise of Judicial Discretion

Position in Other Jurisdictions

6.4.1 The NSW, ACT and UK *Forfeiture Acts* provide a court with guidance in the exercise of their discretion to modify the forfeiture rule.

6.4.2 The NSW Act provides that a court should 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 in determining whether the exercise the discretion.¹²⁰⁹

6.4.3 Under the ACT Act, the Supreme Court may make an order modifying the effect of the forfeiture rule if it is satisfied that, having regard to the conduct of the offender and of the deceased and to any other circumstances that appear to the court to be material, the justice of the case requires the effect of the rule to be modified.¹²¹⁰

6.4.4 Under the UK Act, the court shall not make an order modifying the effect of the rule unless satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified in that case.¹²¹¹

6.4.5 The English courts supplement these factors in practice. A useful summary of the exercise of the court's discretion is provided in the recent case of *Ninian* by the Chief Master:

Although the court is given a discretion it is one, as it appears to me, that is limited. Once the court is satisfied that the forfeiture rule applies, the court may have regard to both conduct and other material circumstances. I can see no justification for putting a constraint upon the circumstances that the court may regard as being material. Mummery LJ dissented from the majority decision in *Dunbar v Plant* about the application of the court's discretion under the *Forfeiture Act*. However, his observations about the scope of the discretion are of assistance: "The court is entitled to take into account a whole range of circumstances relevant to the discretion, quite apart from the conduct of the offender and the deceased; the relationship between them; the degree of moral culpability for what has happened; the nature and gravity of the offence; the intentions of the deceased; the size of the estate and the value of the property in dispute; the financial position of the offender; and the moral claims and wishes of those who would be entitled to take the property on the application of the forfeiture rule."¹²¹²

6.4.6 As such, all three jurisdictions permit modification of the rule 'when justice requires it',¹²¹³ and all three jurisdictions also require the court to have regard to the conduct of the offender, the

¹²⁰⁹ NSW Act s 5(3).

¹²¹⁰ ACT Act s 3(2).

¹²¹¹ UK Act s 2(2).

¹²¹² *Ninian v Findlay* [2019] EWHC 297 (Ch) [47]–[48].

¹²¹³ UK Act s 2(2) refers to the justice of the case requiring the effect to be modified in that case. ACT Act s 3(2) is similar. NSW Act s 5(2) simply talks of justice requiring the effect of the rule to be modified.

conduct of the deceased and any other circumstances that appear material.¹²¹⁴ Only the NSW Act also requires a court to have regard to the effect of the rule on the offender or any other person.¹²¹⁵

Issues

6.4.7 The VLRC recognised that it is important that any judicial discretion which is introduced for the modification of the forfeiture rule is sufficiently broad to respond to the unusual and unpredictable circumstances that might require a departure from the regular application of the forfeiture rule.¹²¹⁶ It considered that any legislation should both direct the court's attention to the specific circumstances of the case at hand, and ensure that modification orders are made in view of the offender's moral culpability and responsibility for the unlawful killing.¹²¹⁷

6.4.8 The VLRC specifically recommended that the evaluation of the 'justice of the case' required consideration of the moral culpability of an unlawful killing.¹²¹⁸ The VLRC further recognised that moral culpability is, in itself, a concept which a court may need guidance in determining and provided a specific list of factors, going beyond those in the NSW Act, that the court should have regard to in determining moral culpability.¹²¹⁹ These include:

- (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.

6.4.9 It is also recognised that particular circumstances may of themselves indicate a low level of culpability, including 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, or the offender was a minor.¹²²⁰

6.4.10 The discussion by the VLRC highlights the question of whether any *Forfeiture Act* in South Australia should also include a provision which directs a court to have regard to the effect of the application of the rule on other persons, as required under the NSW Act. This approach has been criticised on the basis that forfeiture rule modification orders should not be sought or made for the

¹²¹⁴ UK Act s 2(2); ACT Act s 3(2); NSW Act s 5(3).

¹²¹⁵ NSW Act s 5(3).

¹²¹⁶ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 38 [4.16]; see also Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 23–24.

¹²¹⁷ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 38 [4.17]; see also Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 23–24.

¹²¹⁸ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 38.

¹²¹⁹ *Ibid* 41.

¹²²⁰ *Ibid* 41 [4.34].

purpose of redistributing property to the most deserving beneficiary, particularly in light of other statutory avenues for such persons to have property redistributed in their favour.¹²²¹

6.4.11 The Tasmania Law Reform Institute largely echoed the considerations of the VLRC. It also recognised the factors recognised by Mummery J in *Dunbar v Plant*,¹²²² being the relationship between the deceased and the killer; the deceased's intentions; the degree of moral culpability, the nature and gravity of the offence; the size of the estate and the value of the property in dispute; the financial position of the killer; and the more general claims of those whose benefits would be assured if the forfeiture rule was applied.¹²²³

6.4.12 The Law Reform Commission of Ireland also considered that a court should be empowered to 'modify or disapply completely the disinheritance rule in the context of specific cases of manslaughter.'¹²²⁴ The Irish Commission recommended that, in exercising this discretion, the court should have regard to all circumstances of the case, including:

- (a) In a case where the offender and the victim were spouses of each other, or civil partners or cohabitants, or were parents or guardians of or in *loco parentis* to a child or other dependent person, the contributions, direct or indirect, made by the offender and the victim to the welfare of their family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse, civil partner, cohabitant or dependent and any contribution made by either of them by looking after the home or caring for the family;
- (b) Any income or benefits to which the offender or the victim is entitled, including by or under contract, trust or statute;
- (c) The age and financial needs, obligations and responsibilities of any dependent, including a child, of the victim;
- (d) The age and financial needs, obligations and responsibilities of the offender;
- (e) The nature of the offender's conduct related to the offence, that is, whether the offence was voluntary or involuntary manslaughter;
- (f) The presence of diminished responsibility, where relevant; and
- (g) Any other matters which may appear to the court to be relevant.

6.4.13 The law reform reports of the UK, ACT, NSW and New Zealand did not discuss the point.

¹²²¹ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) [4.19] 38; see also Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 23–24.

¹²²² [1998] Ch 412, 425–7.

¹²²³ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, 2004) 23–4.

¹²²⁴ Law Reform Commission of Ireland, *Report on Prevention of Benefit from Homicide* (Report No 114, July 2015) 51.

Consultation Data Overview: Should Courts be Guided in the Exercise of Their Discretion?

6.4.14 At the first Adelaide Roundtable, the majority of attendees considered that there should be mandatory factors that a court is required to take into account in the exercise of any discretion. This was referred to as ‘guided discretion’. The view was that a statutory list would include factors such as the conduct of the offender and of the deceased, the impact of a modification order on innocent third parties and the presence of family violence. The general consensus was that South Australia should adopt a list of factors similar to NSW which was considered simple, broad and not too prescriptive.

6.4.15 Legal practitioners also viewed a statutory list as promoting clarity and consistency and as a positive addition for the courts and clients and such a list could be utilised as a helpful guide when making a case or offering advice to their clients. The alternative view expressed to SALRI was that a statutory list was unnecessary, that there is a risk that it may be irrelevant in 20 years’ time and that such guidance is better placed as a law society publication and does not sit with major law reform legislation. It was said that ‘the more factors there are, the less likely they will keep up with justice’.

6.4.16 Attendees at the second Adelaide Roundtable did not favour the introduction of a statutory list. With respect to the NSW list of factors that the court must take into account, some attendees were of the opinion that it might be preferable to provide the court a discretion, and the court can set the factors which can be modified as time goes on.

6.4.17 Attendees at the third Roundtable favoured the introduction of a statutory list of relevant factors. There was strong support for the NSW list. It was noted that the common law gloss on the English statute¹²²⁵ includes other factors such as the relationship between the killer and the deceased, moral culpability, the nature and gravity of the crime, the intention of the deceased, the size and value of the estate, the financial position of the offender and others, moral claims and the wishes of those entitled to claim on application of rule. It was considered that the financial position of the offender and others, such as children of the deceased, was a material factor to add to any statutory list.

6.4.18 At the Mount Gambier Roundtable, the overwhelming preference was for a model that encompasses a wide degree of judicial discretion with a statutory list of relevant considerations to be taken into account. The Commissioner for Victims’ Rights was also in favour of introducing a statutory list of factors and strongly argued for the victim impact statement and any statement of the Parole Board to be one of the factors to be taken into account. Kellie Toole also supported a statutory list which would include consideration of the circumstances of the offending and the circumstances of the offender. Ms Toole gave examples of an offender who was drug affected, but not enough to constitute a defence to murder, and of exceptional and compelling personal circumstances. She also considered that the intention of the deceased person, if it can be determined, should be considered. Ben Livings and Ken Mackie also favoured the idea of a statutory list and were of the view that a list should include the effect on third parties and the extent of culpability.

6.4.19 Mr O’Connell also supported a statutory list and supported such a list being accompanied by a series of examples in the legislation to guide the court. The list of factors Mr O’Connell supported included the degree of moral culpability, the circumstances leading up to unlawful killing, the culpability of the deceased and the contribution the victim played to their own demise.

¹²²⁵ See *Dunbar v Plant* [1998] Ch 412; *Ninian v Findlay* [2019] EWHC 297 (Ch).

6.4.20 Ms Kaela Dore, a local legal practitioner, highlighted to SALRI the benefit of a statutory list of relevant considerations in providing clarity and guidance to not just a court but also legal practitioners and their clients. It would also address the concerns of an unregulated judicial ‘lottery’.

6.4.21 The Law Society of SA submitted that, while an element of judicial discretion is necessary and should be retained, a statutory a list of factors should be considered on each occasion.

6.4.22 Professor Dal Pont highlighted the importance of statutory factors to guide the exercise of judicial discretion. ‘If you are opening a wider door to a modification order, the greater the need for some statutory indications of the factors to govern the exercise of the discretion.’ Such an approach assists clients, lawyers and judges and aims to promote (at least the appearance of) a sensible and consistent exercise of judicial discretion and also allows appeals against irrational or arbitrary decisions. There is a risk of such criteria been applied in a mechanical or even token manner but the benefits of such criteria are clear and will ‘require judges to justify themselves’.

6.4.23 Professor Dal Pont saw value in a list beyond the limited statutory list in the NSW Act and accepted that the list in *Dunbar v Plant* cited in *Ninian*¹²²⁶ presents a useful starting point for consideration (albeit possibly modified to make it more generic). Any statutory list should not be exhaustive. Professor Dal Pont highlighted that, given the supposed rationale for the rule, the primary or paramount consideration must be the moral culpability of the unlawful killer and the statute should make this clear and any other listed factors such as the resources and positions of the parties should be secondary.

6.4.24 At a follow-up consultation attended by four Adelaide practitioners, the preferred position was that the court should take into account a list of factors, the primary consideration being the culpability of the unlawful killer. The practitioners were of the view that the list should not be exhaustive and also include factors such as the impact on third parties which would allow the judge to take into account all the circumstances of the cases when determining whether to modify the application of the forfeiture rule.

6.4.25 Professor Prue Vines also supported a statutory list and noted that ‘discretion needs guidance’ and did not support a general unstructured judicial discretion. Professor Vines suggested that the court should take into account the following factors:

- The extent of culpability of the killer. She noted that there are many circumstances, such as where the deceased asked for euthanasia or the killing occurred as a result of longstanding family violence, where many people today would suggest that the forfeiture rule should be applied more leniently or not at all. This would draw on the intention of the killer.
- The probable or foreseeable intention of the deceased in respect of the application of the rule. This could draw on aspects of the rectification power in the ACT Act,¹²²⁷ which allows for consideration of the probable intention where the circumstances or events were not known to the testator or anticipated or fully appreciated by the testator. Forfeiture modification might allow the rectification of the will in this way.

¹²²⁶ *Ninian v Findlay* [2019] EWHC 297 (Ch).

¹²²⁷ ACT Act s 12A(2).

6.4.26 Professor Vines stated that, whilst the focus should be on the killer's culpability, the conduct of the deceased may be relevant in considering whether the forfeiture rule should apply or not in any case. She gave an example of the assisted suicide scenario (as in *Ninian*) or where the deceased had engaged in a prolonged history of violence upon a family member who eventually responds and kills their abuser where the victim's conduct should be properly relevant.

6.4.27 STEP expressed concern that there is a risk that unless any Act is quite specific as to the scope of the court's discretion and the factors to be taken into account, the final determination as to whether or not a perpetrator is 'morally deserving' of forfeiting their interest would always rest with an individual judge and as such would be uncertain. STEP submitted that, notwithstanding the fact that judges are commonly called upon to make such moral distinctions, it is difficult to accept that, without legislative guidance, the outcome of any particular case would be in any way predictable or that perpetrators in similar circumstances might be consistently treated by the courts.

6.4.28 In contrast to the views expressed in support of a judicial list of factors, Berman J and the Hon Geoffrey Muecke preferred full judicial discretion. However, Mr Muecke noted that, if a list is to be introduced into any statute, then it should include the circumstances relating to the killing, the circumstances leading up to the killing, the victim's wishes, the consequences of non-inheritance in a suicide pact scenario and the policy of the law.

6.4.29 The South Australian Legal Services Commission was not supportive of a statutory list of relevant considerations and argued that such a list will swiftly become outdated in the same way that the original forfeiture rule has.

6.4.30 Dr Andrew Hemming made the point that, under the judicial discretion approach adopted by NSW and the ACT, the broad brush of 'determining whether justice requires the effect of the rule to be modified'¹²²⁸ is academic. He noted that, unless a narrower focus is introduced with a list of certain factors that is closed, and the generic 'in the interests of justice' approach abandoned, then the question even under a judicial discretion approach is academic.

6.4.31 Several parties in consultation told SALRI that a court should be able to have regard to the circumstances of the killer and particularly of the killer's children, in deciding whether and to what extent to modify the rule.

SALRI's Observations and Conclusions

6.4.32 SALRI is of the view that any judicial discretion to modify the forfeiture rule should not be unrestricted but rather should be guided by a list of the relevant statutory considerations. Such a list promotes clarity and consistency and is, as Professor Dal Pont, Ms Dore and others noted in consultation, of assistance not just for courts but also legal practitioners and their clients. In contrast, a general unstructured judicial discretion risks uncertainty.

6.4.33 SALRI concurs with the suggestion of Professor Dal Pont who saw value in a list beyond the limited statutory list in the NSW Act and that the list in *Dunbar v Plant* cited in *Ninian* presents a useful starting point for consideration (albeit possibly modified to make it more generic). Any statutory list should not be exhaustive.

¹²²⁸ See, for example, NSW Act s 5(3).

6.4.34 SALRI agrees with Professor Dal Pont that, given the supposed rationale for the rule, the primary or paramount consideration under the *Forfeiture Act* must be the culpability of the unlawful killer and the statute should make this clear.¹²²⁹ SALRI concurs with the recommendation of the VLRC that culpability is, in itself, a concept which a court may need guidance in determining and is of the view that a statutory list of factors, going beyond those in the NSW Act, that the court should have regard to in determining moral culpability should be included in the *Forfeiture Act*.¹²³⁰ These factors should include:

- (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 culpability.

6.4.35 Any other listed factors such as those listed in *Dunbar v Plant*,¹²³¹ being the relationship between the deceased and the killer; the deceased's intentions; the nature and gravity of the offence; the offender's relevant conduct;¹²³² the size of the estate and the value of the property in dispute; the financial position of the killer; and the more general claims of those whose benefits would be assured if the forfeiture rule was applied should be secondary factors.¹²³³

6.4.36 One issue that arises is the relevance of the conduct of the deceased victim. It was widely agreed in SALRI's consultation that the focus of any consideration of the application of the forfeiture rule is the killer's culpability. The killer's relevant conduct and culpability in any individual case are integral to any determination of the application or not of the rule but this is not to say other factors or

¹²²⁹ Some parties in consultation, consistent with case law and academic commentary, preferred the term 'moral culpability' of the offender. The term 'moral culpability' is useful but it was pointed out to SALRI that the inclusion of the word 'moral' is problematic and subjective and may prove unnecessarily distracting. SALRI therefore favours the expression 'culpability'.

¹²³⁰ Ibid 41.

¹²³¹ [1997] 4 All ER 289, 302–303.

¹²³² See *Straede v Eastwood*, [2003] NSWSC 280. In this case, Palmer J noted that, in order to qualify as conduct to which a court should properly have regard, the offender's conduct must have some bearing on the very fact which brings into operation the forfeiture rule, that is, the unlawful killing of the deceased. So, for example, in *Re K (dec'd)* [1985] 1 Ch 85, the history of a marriage in which the wife had been violently assaulted by the husband had a direct bearing on the culpability of the wife when, without premeditation, she shot the husband during a violent argument and subsequently sought relief under the UK *Forfeiture Act*. Straede had pleaded guilty in relation to causing his wife's death by dangerous driving. Straede, his wife and a woman called Truda had been involved in a 'ménage à trois' for about 20 years. The deceased wife's relatives opposed Straede's application for relief under the NSW Act from the forfeiture rule on the basis that he had been 'guilty of immoral conduct during his marriage to Cheryl', namely the longstanding extra-marital relationship with Truda, and 'it would outrage the community that John should take a benefit under his wife's will and should, in order to do so, have the assistance of the Court under the *Forfeiture Act*': at [36]. Palmer J held that this conduct had no bearing on the unlawful killing of the deceased, namely 'how Cheryl came to die and upon John's role in her death': at [35]. SALRI commends the approach of Palmer J as a sound guide to the significance of an offender's conduct in determining if the forfeiture rule applies.

¹²³³ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 23–4.

considerations are irrelevant. Indeed, various considerations, as the court outlined in *Plant v Dunbar*, may prove material. For example, the relevant conduct of the deceased may prove a significant factor in determining if the forfeiture rule should apply and this should not be omitted or ignored. This is not to engage in gratuitous victim blaming (a fear expressed by the Victim Support Service and the present and former Commissioners for Victims' Rights), but rather to acknowledge that there will be circumstances where the conduct of the deceased victim is properly relevant to the application or not of the rule. Professor Prue Vines, for example, identified the situation of an abusive husband who subjects their wife to a long history of violence and the wife eventually responds and kills her husband. In such a situation, the conduct of the deceased husband should be rightly relevant to any determination regarding the application or not of the rule. Another situation where the conduct of the deceased would be rightly relevant is where a terminally ill spouse implores their reluctant partner as in *Ninian* to assist in the carrying out of their suicide.

6.4.37 SALRI acknowledges the sound premise of the forfeiture rule in that an unlawful killer should not be able to profit from their crime and the need to ensure that any discretion is limited to ensure that the rule is not eroded or undermined. SALRI is of the view that any discretion to modify the application of the rule should only arise in 'exceptional circumstances'.¹²³⁴

6.4.38 It is also worth noting here that later in this report, SALRI recommends changing the way the rule has been applied by the courts to give greater protection to the children of the killer.¹²³⁵

6.4.39 Recommendation

Recommendation 23

SALRI recommends that the proposed *Forfeiture Act* should provide that the primary consideration the Supreme Court should have regard to in exercising its discretion to modify the forfeiture rule, must be the culpability of the unlawful killer and that, in determining the culpability of an offender, the Supreme Court must have regard to the:

- (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) The mental state of the offender at the time of the offence;
- (e) The nature and gravity of the offence;
- (f) The offender's relevant conduct;¹²³⁶
- (g) The victim's relevant conduct; and
- (h) Such other matters that in the court's opinion appear to be material to the offender's moral culpability.

The *Forfeiture Act* should provide that the Supreme Court may have regard to:

¹²³⁴ See above Rec 5.

¹²³⁵ See further below Part 7.

¹²³⁶ See *Straede v Eastwood* [2003] NSWSC 280. See also below n 1232.

- (a) The relationship between the deceased and the killer;
- (b) The deceased's intentions;
- (c) The size of the estate and the value of the property in dispute;
- (d) The financial position of the killer;
- (e) The more general claims of those whose benefits would be assured if the forfeiture rule was applied; and
- (f) Any other circumstances that appear to the court to be material.

Position in Other Jurisdictions

6.4.40 At common law, the forfeiture rule affects all rights of the killer to property, entitlements and other benefits that may flow to the killer as a result of the death of the deceased person.

6.4.41 The UK, ACT and NSW *Forfeiture Acts* refer to beneficial interests that the killer would have acquired but for the operation of the rule as property that can be subject of a forfeiture modification order.

6.4.42 The UK Act stipulates how that interest is acquired:

- (a) under the deceased's will or intestacy,
- (b) on nomination by the deceased under statute,
- (c) as a gift by the deceased in prospect of death,
- (d) under a special destination, or
- (e) property which, before the death, was held on trust for any person.¹²³⁷

6.4.43 The ACT Act simply refers to 'an interest in any property' and 'any interest in property'.¹²³⁸

6.4.44 The NSW Act refers to a 'benefit',¹²³⁹ defined as including any interest in property and any family provision entitlement.¹²⁴⁰

6.4.45 The UK, ACT and NSW *Forfeiture Acts* provide that, when a court makes a forfeiture modification order, 'the forfeiture rule shall have effect for all purposes (including purposes relating to anything done before the order is made) subject to the modifications made by the order.'¹²⁴¹

Issues

6.4.46 The VLRC favoured broad legislation in similar terms to the NSW Act. It was recommended that 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

¹²³⁷ UK Act ss 2(1), 2(4).

¹²³⁸ ACT Act ss 3(1), 3(3), 5(2).

¹²³⁹ NSW Act ss 5(1), 7(1).

¹²⁴⁰ Ibid s 3.

¹²⁴¹ UK Act s 2(6); ACT Act s 3(4); NSW Act s 6(3).

jurisdiction. The VLRC recommended that the following property, entitlements and other benefits should be specified in the proposed *Forfeiture Act* as benefits that may be affected by a forfeiture rule modification order:

- (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.

6.4.47 The Tasmania Law Reform Institute was also in favour of broad legislation in similar terms to the *Forfeiture Act* (NSW).¹²⁴² It was noted that the use of the language ‘benefit’ would likely ensure that pensions and superannuation entitlements came within the scope of forfeiture modification orders, and that there is no reason to limit the ability to apply for modification of the effects of the rule to cases involving only strict property rights.¹²⁴³

6.4.48 While the Law Reform Commission of Ireland did not specifically discuss what property should come within the scope of a modification order, it appears that the Irish Commission was of the view that all property should be included. This is said because the Commission explicitly recommended that the scope of the forfeiture rule extend to ‘all forms of property of whatever kind in which the victim has an interest, whether real or personal property or any part or combination of such property, including land, goods, money, property held under a trust, or the proceeds of an insurance policy or of a pension’.¹²⁴⁴ The Commission then broadly recommended that the court have a power to make an order to modify or disapply completely the forfeiture rule, it is assumed that forfeiture modification orders were thought appropriate for all kinds of property.¹²⁴⁵

6.4.49 This issue was not explicitly considered by the law reform bodies of the UK, ACT, NSW, New Zealand or Victoria.

Consultation Data Overview: What Property can be the Subject of a Forfeiture Modification Order?

6.4.50 The general consensus at the Adelaide Roundtables was that the property the subject of a forfeiture modification order should extend to all property of the deceased victim and even extend to property such as trust assets that are controlled by the killer. The approach which was unanimously supported was to take an approach similar to that of the law regulating property division in the *Family Law Act 1975* (Cth). This would require any codified *Forfeiture Act* to look behind the legal title of all items of property. Under such a model, ownership between parties may be changed, notwithstanding whose name an item of property is in.

¹²⁴² Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 26.

¹²⁴³ Ibid.

¹²⁴⁴ Law Reform Commission of Ireland, *Report on Prevention of Benefit from Homicide* (Report No 114, July 2015) 42–43.

¹²⁴⁵ Ibid 51.

6.4.51 The Legal Services Commission submitted that all property and interests of the deceased victim should be included under the terms of an order.

6.4.52 STEP's submission was consistent with the views expressed at the Adelaide Roundtables. STEP noted that it is important to recognise the world has changed in the last few hundred years. In particular, the benefits to be gained on the death of an individual have changed. At one time, the most significant financial benefits to be gained from a death would have been expected to arise from the estate of the deceased person. This is frequently no longer the case. For the average South Australian, the single highest value benefit to be obtained after his or her death is at least as likely to be from his or her superannuation balance, which usually includes a life insurance payout received by the trustee of the fund, as from his or her estate. For higher wealth individuals, the control of privately held entities, particularly trust structures which do not form part of the estate, may well hold far greater value than the estate itself.

SALRI's Observations and Conclusions

6.4.53 SALRI favours a broad definition of property which can be subject of a forfeiture modification order. All of the property in which the deceased had a proprietary interest, or an equitable interest vested either in interest or in possession at her or his death should be subject of a forfeiture modification order. This broad definition of property will allow the following benefits to be received by the killer to come within the scope of a forfeiture modification order:

- (a) real property or other assets (cash or investments, chattels or personal items, shares, debts owed to the deceased personally) that the deceased owned solely or owned with others as a tenant in common;
- (b) real property or other assets (cash or investments, chattels or personal items, shares, debts owed to the deceased personally) that the deceased owned as joint tenants with the killer or the killer and third parties;
- (c) superannuation proceeds of the deceased;
- (d) life insurance policy proceeds of the deceased;
- (e) a beneficial interest in trust assets;
- (f) eligibility to make an application for family provision under the *Inheritance (Family Provision) Act 1972* (SA);
- (g) social security benefits that arise from the killer's relationship with the victim and his or her death
- (h) any other benefit or interest in property that vests in the killer.

6.4.54 Recommendations

Recommendation 24

SALRI recommends that the proposed *Forfeiture Act* should provide that all of the property in which the deceased had a proprietary interest, or an equitable interest vested either in interest or in possession at their death should come within the scope of the forfeiture rule.

Recommendation 25

SALRI recommends that the proposed *Forfeiture Act* should provide that all of the property in which the deceased had a proprietary interest, or an equitable interest vested either in interest or in possession at their death should come within the scope of a forfeiture modification order.

6.5 Status to Apply for a Modification Order

Position in Other Jurisdictions

6.5.1 In NSW, any ‘interested person’ can apply for a modification order.¹²⁴⁶ An interested person is defined to mean an offender; the executor or administrator of the deceased estate; a beneficiary under the deceased’s will or a person entitled under the rules of intestacy should the victim die intestate; a person claiming through an offender; and any other person with a special interest in the outcome of an application for a forfeiture modification order.¹²⁴⁷

6.5.2 Status to apply is not addressed in the UK or ACT laws.

Issues

6.5.3 The Tasmania Law Reform Institute and the VLRC noted that the inclusion of a provision specifying who can apply for a forfeiture modification order is important, because there may arise situations where a killer cannot or does not wish to apply for a modification order. In such circumstances, it is desirable that other interested persons, such as those who stand to inherit through the killer or the killer’s creditors, are able to make such an application.¹²⁴⁸

6.5.4 As such, other law reform bodies have considered that it may be desirable to adopt a definition of an ‘interested person’ which accommodates the broad range of circumstances in which a person may have a special interest in making such an application.¹²⁴⁹ For example, the VLRC favoured the broad definition of an ‘interested person’ within the NSW Act, noting that this would enable a child of the offender who is also the grandchild of the deceased person to apply for a forfeiture modification order to inherit from their grandparent’s estate.¹²⁵⁰

6.5.5 The Law Reform Commission of Ireland acknowledged that it is ‘also important to put in place procedures to protect the integrity of the assets in an estate in the aftermath of a suspicious death and pending any criminal trial’.¹²⁵¹ The Commission considered it to be appropriate that, where a person has died in suspicious circumstances and a trial or investigation is pending, an interested person may ‘lodge a caveat in probate proceedings and that, while that caveat is in force, there must be no transmission of any estate or interest affected by the caveat’.¹²⁵² As such, while not directly

¹²⁴⁶ NSW Act s 5(1).

¹²⁴⁷ Ibid s 3.

¹²⁴⁸ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 25; Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 46 [4.63]–[4.67].

¹²⁴⁹ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 46 [4.65].

¹²⁵⁰ Ibid 46 [4.65].

¹²⁵¹ Law Reform Commission of Ireland, *Report on Prevention of Benefit from Homicide* (Report No 114, July 2015) 66.

¹²⁵² Ibid 73.

addressing the issue of who should be able to apply, there is an undertone of concern by the Commission about protecting the assets of the deceased. This is a principle which might be considered when determining who can apply for a forfeiture modification order.

6.5.6 The reports of the UK, ACT, NSW and NZ law reform bodies did not consider this issue.

SALRI's Observations and Conclusions

6.5.7 SALRI's view is that situations may arise where the killer may not apply for a forfeiture modification order and in these situations, it is appropriate to allow other interested persons such as those who may stand to inherit from the deceased, the killer or the killer's creditors to make an order.

6.5.8 It is worth noting here that later in this report, SALRI recommends changing the way the rule has been applied by the courts to give greater protection to the children of the killer, making children less likely to apply for a forfeiture modification order.¹²⁵³

6.5.9 Recommendations

Recommendation 26

SALRI recommends that the proposed *Forfeiture Act* should provide that, where a person has unlawfully killed another person and is therefore precluded by the forfeiture rule from obtaining a benefit, that person or another 'interested person' should be able to apply to the Supreme Court for a forfeiture modification order.

Recommendation 27

SALRI recommends that the proposed *Forfeiture Act* should provide that an 'interested person' should mean either the 'offender' or a person applying on the offender's behalf, the executor or administrator of a deceased person's estate or any other person who in the opinion of a court has a valid interest in the matter.

6.6 Time Limits on Applying for a Modification Order

Position in Other Jurisdictions

6.6.1 The UK and ACT laws require an application to be made within three months of the date on which the killer was convicted of an offence of which unlawful killing is an element.¹²⁵⁴

6.6.2 The NSW law requires the application to be made within 12 months of the date of the victim's death if the forfeiture rule operates immediately upon the victim's death.¹²⁵⁵ Where the forfeiture rule prevents a killer from receiving a particular benefit until sometime after the date of the victim's death, an application must be made within 12 months of the date on which the forfeiture rule

¹²⁵³ See further below Part 7.

¹²⁵⁴ UK Act s 3(3); ACT Act s 3(5).

¹²⁵⁵ NSW Act s 7(1).

operates to prevent the killer from obtaining that benefit.¹²⁵⁶ Late applications may be made by the leave of the court in certain circumstances.¹²⁵⁷

6.6.3 There is no provision for applications, or time limits specified, under the New Zealand Act.

Issues

6.6.4 The Tasmania Law Reform Institute noted that normally, an estate is not distributed until at least three months after the date of grant of probate or letters of administration. For the purpose of not further delaying the distribution of estates, it was recommended that applications for an order that the forfeiture rule applies should be made within that time, subject to exceptions made by the court. The Institute noted that, if an application is made to determine whether the forfeiture rule does apply, and it does apply, a further three months should be allowed for an application for a modification order.¹²⁵⁸ It was further recommended that, in the case of an undetermined homicide charge, the time for making an application should be extended to three months after such charge is determined.¹²⁵⁹

6.6.5 The VLRC recognised that, in the interests of certainty, the proposed *Forfeiture Act* should specify a time limit within which an application for a forfeiture modification order can be made.¹²⁶⁰ The VLRC recommended 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 of that State. However, it was recognised as important that the court has the ability to grant leave to make a late application to accommodate the length of criminal proceedings.¹²⁶¹

6.6.6 The reports of the NZ, ACT, UK, NSW and Ireland law reform bodies did not consider the issue.

Consultation Data Overview: What Time Limits Should Apply to the Making of a Modification Order?

6.6.7 The Legal Services Commission submitted that the time limit for making an order should be in keeping with other statutory limits for inheritance claims.

6.6.8 Professor Prue Vines agreed that the time limits that should apply to making an order may need to line up with usual probate processes. She identified this as probably at least a year after death, subject to whether the criminal law processes have been completed.

6.6.9 STEP made the point that any rights to appeal the application of the rule should exist only for a limited time, to protect the rights of third parties.

¹²⁵⁶ NSW Act s 7(1).

¹²⁵⁷ NSW Act s 7(2).

¹²⁵⁸ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 27.

¹²⁵⁹ *Ibid.*

¹²⁶⁰ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 49 [4.28].

¹²⁶¹ *Ibid.*

SALRI's Observations and Conclusions

6.6.10 SALRI is of the view that, in the interests of certainty, the proposed *Forfeiture Act* should specify a time limit within which an application can be made for an order that the forfeiture rule applies, and a time limit for which an application for a forfeiture modification order can be made.

6.6.11 The time limit imposed must allow the parties sufficient time to make an application but must not unduly delay the administration of the deceased's estate. The time limit should also be consistent with time limits for making inheritance claims under SA law where possible.

6.6.12 Under s 8(1) of the *Inheritance Family Provision Act 1972 (SA)*, the general rule is that a claim for family provision must be made within six months from the date of the grant of probate or letters of administration. Sections 8(2) and (3) provide for an extension of time. The discretion to grant an extension is expressed in unqualified terms but it will not be granted as a matter of course. The court will consider each individual case on its merits, having regard to matters including the strength of the claim, the length of the time delay, the amount of estate which remains undistributed and the motives of the applicant in applying for an extension of time. Section 8(4) requires an application for an extension of time to be made before the final distribution of the estate. Section 8(5) protects estate already distributed from an application on extended time (all the estate, even those parts distributed, is available for an application within time).

6.6.13 It is recommended that applications for an order that the forfeiture rule applies should be made within six months from the date of the death of the deceased person, subject to exceptions made by the court.

6.6.14 Where there is uncertainty as to whether the forfeiture rule will apply because there is an undetermined charge of unlawfully killing against the accused, the time for making any application under the proposed *Forfeiture Act* should be extended to three months after such a charge is finally determined.

6.6.15 If the court determines that the forfeiture rule does apply, a further three months should be allowed for an application for a modification order.

6.6.16 The court should be permitted to give leave for a late application for a forfeiture rule modification order if:

- (a) the offender's conviction is overturned 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.
- (b) the fact that the offender committed the unlawful killing is discovered after the expiration of the relevant period, or
- (c) the Court considers it just in all the circumstances to give leave.

Recommendation 28

SALRI recommends that the proposed *Forfeiture Act* should provide that, if the forfeiture rule operates immediately on the death of a deceased person, then unless a court gives leave for a late application to be made, an application for an order that the forfeiture rule applies should be made within six months from the date of death of the deceased person.

Recommendation 29

Where there is uncertainty as to whether the forfeiture rule will apply because there is an undetermined charge of unlawfully killing against the accused, the proposed *Forfeiture Act* should provide that the time for making any application should be extended to three months after such a charge is finally determined.

Recommendation 30

SALRI recommends that the proposed *Forfeiture Act* should provide that, unless a court gives leave for a late application to be made, an application for a forfeiture rule modification order must be made within three months of a court determining that the forfeiture rule applies.

Recommendation 31

SALRI recommends that the proposed *Forfeiture Act* should provide that a court should be able to give leave for a late application for a forfeiture rule modification order if:

- (a) 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;
- (b) the fact that the offender committed the unlawful killing is discovered after the expiration of the relevant period; or
- (c) the court considers it just and reasonable in all the circumstances to give leave.

6.7 Judge to Preside Over Forfeiture Proceedings

Position in Other Jurisdictions

6.7.1 The NSW, UK, ACT and New Zealand *Forfeiture Acts* do not provide any guidance as to the identity of the judge to conduct or preside over any civil forfeiture rule proceedings.

Issues

6.7.2 The VLRC discussed that it is arguably appropriate for the sentencing judge to exercise the discretion to modify the application of the forfeiture rule in the first instance, because they will

have considered all relevant matters and are consequently best placed to do so.¹²⁶² However, the VLRC also acknowledged that there are significant practical barriers to intervening in the administration of the court list to have the sentencing judge decide on a forfeiture rule modification order.¹²⁶³ Further, the sentencing judge may not be in an appropriate position to assess the responsibility of an offender to a civil standard, after having found the offender guilty beyond reasonable doubt.¹²⁶⁴

6.7.3 The issue was not considered in the reports of the UK, ACT, NSW, Tasmania, NZ or Ireland law reform bodies.

Consultation Data Overview: Who Should be the Judge who Presides Over Forfeiture Proceedings?

6.7.4 Attendees at one Adelaide Roundtable said that there is nothing to prevent the judge who dealt with the criminal case arising from the killing also determining the forfeiture question as a separate civil application. It was noted that the judge may have to consider another body of evidence that was not necessarily admissible in the criminal proceedings, but it was considered that judges do this all the time. For example, this is done by judges when different evidence is used at trial and in sentencing.

6.7.5 At the Mount Gambier Roundtable, there was lengthy discussion about whether the court which makes a decision as to whether the forfeiture rule applies should be the criminal sentencing court or a separate civil court. The benefit of allowing the criminal court to look at everything, including the forfeiture rule, was highlighted. However, the risk of delay and complications to the criminal court by introducing civil issues was also highlighted. It was noted that although interested parties could apply to be heard at the criminal court, the criminal proceedings were at risk of being delayed and complicated due to the time required to identify the assets which are subject to the operation of the forfeiture rule.

6.7.6 Kellie Toole, Ben Livings and Ken Mackie all expressed the view that, for practical purposes, the judge who has already heard the matter should also hear the civil application. It was noted that, since South Australian judges can hear both criminal and civil matters, this is workable.

6.7.7 Dr Andrew Hemming noted that the benefit of a codified model is that there is no role for the courts to play in the application of the forfeiture rule.¹²⁶⁵ He submitted that if the courts are to have a role in modifying the forfeiture rule, it would be preferable to have the judge who tried the criminal charges arising from the killing and who sentenced the offender to determine the potential modification of the rule as a separate civil application.

SALRI's Observations and Conclusions

6.7.8 There were several submissions in favour of giving the judge who tried the criminal charges arising from the killing and who sentenced the offender to also determine the potential modification of the rule as a separate civil application.

¹²⁶² Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 39 [4.27].

¹²⁶³ *Ibid* 40 [4.28].

¹²⁶⁴ *Ibid*.

¹²⁶⁵ New Zealand Act s 5(1).

6.7.9 However, it was also pointed out that the forfeiture rule is a civil application and governed by a civil standard of proof and the less stringent rules of evidence and should be kept separate and distinct from the criminal proceedings. It was noted that sentencing by a criminal court is already involved and to combine the forfeiture rule and sentencing in criminal proceedings will unnecessarily complicate any forfeiture proceedings and blur the distinction between the criminal and civil spheres.

6.7.10 SALRI is of the view that there is the risk of delay and complications to the criminal court by introducing civil issues. SALRI considers that the proposed *Forfeiture Act* should provide that the judge who deals with the criminal charges arising from the unlawful killing and who sentences the offender should not be involved in determining the potential modification of the rule as a separate civil application. They are separate and distinct questions.

6.7.11 Recommendation

Recommendation 32

SALRI recommends that the proposed *Forfeiture Act* should provide that the judge who tries the criminal charges arising from the killing and who sentences the offender should not be involved in determining the potential modification of the rule as a separate civil application.

Part 7 – The Effect of the Forfeiture Rule

7.1 Codifying the Effect of the Forfeiture Rule

Current Position in South Australia

7.1.1 The common law forfeiture rule operates to prevent an individual who has unlawfully killed from benefitting financially from that death.¹²⁶⁶ The effect of the rule is wide, denying direct (and in some cases, indirect) inheritance of the estate and non-estate assets of the deceased victim.

7.1.2 The forfeiture rule acts to prevent the killer from obtaining a financial benefit which would otherwise pass to the killer through the estate of the deceased victim including specific and residuary gifts,¹²⁶⁷ and inheritance through intestacy rules.¹²⁶⁸ The High Court has defined the concept of an ‘estate’ as follows:

assets of which the testator might at his death dispose and which have come or could come to the hands of the personal representative by reason of the grant of probate or letters of administration.¹²⁶⁹

7.1.3 Assets held in the deceased person’s estate that are likely to be affected by the operation of the forfeiture rule include:

- (a) real property or other assets (cash or investments, chattels or personal items, shares, debts owed to the deceased personally) that the deceased owned solely or owned with others as a tenant in common;
- (b) superannuation that is paid to the deceased member’s legal personal representative; and
- (c) the proceeds of a life insurance policy paid to a legal personal representative.

7.1.4 The forfeiture rule also acts to prevent the killer from benefitting from those assets which fall outside of the estate of the deceased. Non-estate assets are those assets which the deceased owned as joint tenants with another party(ies) or assets which the deceased did not personally own, but which they may have had control or from which they may have benefitted. Assets which fall outside of the deceased’s estate that are likely to be affected by the operation of the forfeiture rule include:

- (a) Real property or *other* assets (cash or investments, chattels or personal items, shares, debts owed to the deceased personally) that the deceased owned as joint tenants with the killer or the killer and third parties;¹²⁷⁰

¹²⁶⁶ Gino Dal Point and Ken Mackie, *Law of Succession* (LexisNexis, 1st ed, 2013) 190.

¹²⁶⁷ See, for example, *Davis v Worthington* [1978] WAR 144; *Public Trustee v Fraser* (1987) 9 NSWLR 433; *Public Trustee v Hayles* (1993) 33 NSWLR 154.

¹²⁶⁸ See, for example, *Re Tucker* (1920) 211 SR (NSW) 175; *Re Sangal (dec’d)* [1921] VLR 355; *Re Sigsworth* [1935] Ch 89; *Re Callaway* [1956] Ch 559.

¹²⁶⁹ *Easterbrook v Young* (1977) 136 CLR 308, 318.

¹²⁷⁰ See, for example, *Re Barrowcliff* [1927] SASR 147; *Re Thorp and the Real Property Act* [1962] 80 WN (NSW) 61; *Rasmanis v Jurewitsch* (1969) 70 SR (NSW) 407; *Kemp v Public Curator of Queensland* [1969] Qd R 145; *Re Stone* [1989] 1 Qd R 351.

- (b) superannuation proceeds that are not paid to a legal personal representative (for example, paid to a spouse or dependant of the deceased under a binding death benefit nomination);¹²⁷¹
- (c) the proceeds of a life insurance policy that are not paid to a legal personal representative;¹²⁷² and
- (d) a beneficial interest in trust assets.¹²⁷³

7.1.5 Where a court is satisfied that an individual is responsible for the unlawful death, the forfeiture rule can override express words in wills,¹²⁷⁴ contracts¹²⁷⁵ and even legislation.¹²⁷⁶ Although a simple proposition, there are ‘complexities in the way in which the principle may be given effect.’¹²⁷⁷ In South Australia, there is no legislation codifying the effects of the forfeiture rule on the killer and others or the destination of the victim’s property under the forfeiture rule. There is a body of case law which provides some guidance as to the effect of the forfeiture rule and while the law is clear that the killer cannot benefit from the killing, the law is unclear as to the effect of the forfeiture rule on third parties and on who then becomes the beneficial owner of the deceased victim’s property.

Position in Other Jurisdictions

7.1.6 The New Zealand Act deals with the disentitlement of killers under will or intestacy,¹²⁷⁸ disentitlement to the victim’s non-probate assets,¹²⁷⁹ disentitlement under the *Family Protection Act 1955* (NZ),¹²⁸⁰ restriction of the killer’s claims to matrimonial property, testamentary promises and the restitution and of killer to enhanced benefits generally.¹²⁸¹

7.1.7 The UK Act leaves the 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.¹²⁸² The ACT and the NSW Acts are to similar effect.¹²⁸³

Issues

7.1.8 There is considerable uncertainty about the effect of the forfeiture rule and how it should be applied. Its interaction with other legal principles, particularly in the fields of succession, family and property law, has been problematic. This aspect of the forfeiture rule is often overlooked by law reform

¹²⁷¹ *Public Trustee of New South Wales v Fitter* [2005] NSWSC 1188. The rule can even preclude the receipt of state pensions. See, for example, *R v Chief of National Insurance Commissioner, Ex Parte Connor* [1981] QB 758; *Burns v Secretary of State for Social Services* [1985] SLT 351.

¹²⁷² *Cleaver v Mutual Reserve Fund Life Assurance* [1892] 1 QB 147.

¹²⁷³ *Permanent Trustee Co Ltd v Gillett* (2004) 145 A Crim R 220.

¹²⁷⁴ See *Troja v Troja* (1994) 33 NSWLR 269.

¹²⁷⁵ See *Cleaver v Mutual Reserve Fund Life Assurance* [1892] 1 QB 147.

¹²⁷⁶ See *Re Royse (dec’d)* [1985] Ch 22.

¹²⁷⁷ *Pike v Pike* [2015] QSC 134, [16] (Atkinson J); Ian Williams, ‘How does the Common Law Forfeiture Rule Work?’ in Birke Hacker and Charles Mitchell (eds), *Current Issues in Succession Law* (Bloomsbury, 2016) 51.

¹²⁷⁸ *Homicide (Succession) Act 2007* (NZ) s 7.

¹²⁷⁹ *Ibid* s 8.

¹²⁸⁰ *Ibid* s 9.

¹²⁸¹ *Ibid* ss 10 and 11.

¹²⁸² UK Act.

¹²⁸³ ACT Act; NSW Act.

reports. The courts have also commented that the modern forfeiture rule lacks the clarity of focus of an old style forfeiture to the Crown by focusing attention on a killer's loss of benefits without certainty as to who, incidentally, acquires forfeited benefits.¹²⁸⁴ Some commentators and judges have called for legislation to clarify precisely how the forfeiture rule interacts with other legal principles.¹²⁸⁵

7.1.9 The UK Act, the ACT Act and 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.¹²⁸⁶

7.1.10 The VLRC noted that codifying the effect of the rule would operate to remove uncertainty, simplify the administration and distribution of the deceased person's estate, and lead to time and costs savings.¹²⁸⁷ The VLRC noted, for example, that the New Zealand Act codifies not only the application of the rule but its effect in a simple and accessible way.¹²⁸⁸ Ultimately, the VLRC was of the view that any legislation should set out the scope and effect of the rule.¹²⁸⁹

7.1.11 The Tasmania Law Reform Institute did not discuss codification in any great detail, and their consultation on the point was primarily directed to codifying the forfeiture rule and its exceptions rather than its effect. However, the Institute did note that no responses in their consultation supported codification, and that they did not recommend it.¹²⁹⁰

7.1.12 The Law Reform Commission of Ireland recognised codification efforts in other jurisdictions, but did not dedicate much discussion to the issues around codification.¹²⁹¹

7.1.13 The New Zealand Act codifies the rule, specifying when the rule may apply and how it affects the distribution of property in cases where the forfeiture rule applies.¹²⁹² This Act was based on draft legislation prepared and recommended by the New Zealand Law Commission, who recommended codification on the basis that it would be clearer and more workable.¹²⁹³ The New Zealand Law Commission made clear the need to set out the effect of the rule, so as 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)

¹²⁸⁴ *Public Trustee v Hayles* (1993) 33 NSWLR 154; *Egan v O'Brien* [2006] NSWSC 1398.

¹²⁸⁵ See, for example, the remark of Laffoy J of the High Court of Ireland that:

'...ideally, there should be legislation in place which prescribes the destination of co-owned property in the event of the unlawful killing of one of the co-owners by another co-owner. Such legislation would have to...address from a policy perspective the complications which arise in a situation where there are three or more co-owners': *Canley & Ors v Lillis* [2011] IEHC 515 [11.1].

¹²⁸⁶ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 14 [2.39].

¹²⁸⁷ *Ibid.*

¹²⁸⁸ *Ibid* 12 [2.25].

¹²⁸⁹ *Ibid* 15 [2.25].

¹²⁹⁰ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 22.

¹²⁹¹ Law Reform Commission of Ireland, *Report on Prevention of Benefit from Homicide* (Report No 114, July 2015) 47–50.

¹²⁹² New Zealand Act.

¹²⁹³ New Zealand Law Commission, *Succession Law: Homicidal Heirs* (Report No 38, 15 July 1997) 5.

the considerable expense of legal proceedings. Resolving these proceedings often requires the involvement of many legal counsel...There are also the problems of delay.¹²⁹⁴

7.1.14 The reports of the ACT, NSW and UK law reform bodies did not discuss this issue.

7.1.15 SALRI notes that the effect of the common law forfeiture rule in the following areas requires further legislative clarification:

- (a) the disqualification of the killer from the office of executor or administrator of the deceased person's estate.
- (b) the timing of the distribution of the benefit by an executor or administrator of the deceased person in accordance with the application of the forfeiture rule.
- (c) the property, including estate and non-estate assets of the deceased person impacted by the forfeiture rule.
- (d) the construction of the deceased person's will, particularly with gift-overs and the forfeiture rule's interaction with provisions such as the rectification provisions in the *Wills Act 1936* (SA).
- (e) the interaction of the forfeiture rule with the law of intestacy, family provision law and on property division proceedings.
- (f) determining what property can be accessed by the accused to fund their defence against the homicide charge.
- (g) the treatment of property owned as joint tenants between the killer and the deceased (and third parties).
- (h) the treatment of trust assets, superannuation proceeds, insurance proceeds, social security and other public benefits.

7.1.16 In the sections below, consideration is given to how these issues are currently dealt with under the common law, the position in jurisdictions outside of South Australia and the key issues that arise in each area.

Consultation Data Overview: Should the *Effect* of the Forfeiture Rule be Codified?

7.1.17 The view expressed at the Adelaide Roundtables is that the current law concerning how the assets of the victim are dealt with after it is determined that the forfeiture rule applies is unclear and that the law in this area should be codified, with limited judicial discretion. It was considered that constantly going back to court is costly (especially for small estates), timely and stressful and that having a clear legislative framework setting out the effects of the forfeiture rule on the disposition of the victim's assets would be favourable. Attendees noted that there is much 'technical uncertainty in the common law rule'. For example, whether it applies on the basis where the killer predeceased the victim or on a constructive trust basis.

¹²⁹⁴ New Zealand Law Commission, *Succession Law: Homicidal Heirs* (Report No 38, 15 July 1997) 2.

7.1.18 Attendees at the Mount Gambier Roundtable were also in support of introducing a codified Act to provide clarity and comprehensiveness to administrators of estates caught up in the application of the forfeiture rule.

7.1.19 Dr Andrew Hemming advocated for a codified solution that should address the effect of the homicide on all aspects of the rights of succession, as with the New Zealand Act.

SALRI's Observations and Conclusions

7.1.20 SALRI is of the view that the current law with respect to the effects of the forfeiture rule is unclear. SALRI considers that the proposed *Forfeiture Act* should provide greater clarity and certainty about the effects of the rule on the killer and other parties. The effect of the forfeiture rule on the succession rights of third parties should be codified to provide certainty and clarity and avoid unjust outcomes.

7.1.21 All relevant provisions under South Australian legislation should be covered by any *Forfeiture Act*. The *Wills Act 1936* (SA), the *Trustee Act 1936* (SA) and Part 3 of the *Administration and Probate Act 1919* (SA) should be drafted consistently with any *Forfeiture Act*.

7.1.22 Recommendations

Recommendation 33

SALRI recommends that the proposed *Forfeiture Act* should codify the effect of the forfeiture rule on the killer and on the succession rights of third parties.

Recommendation 34

SALRI recommends that, as a result of the proposed *Forfeiture Act*, consequential and consistent amendments should be made to the *Wills Act 1936* (SA), the *Trustee Act 1936* (SA), the *Real Property Act 1886* (SA) and to Part 3 of the *Administration and Probate Act 1919* (SA).

7.2 Executors, Administrators and Trustees

Current Position in South Australia

7.2.1 An executor is a person appointed by the will of a testator to administer the property of the testator and to carry into effect the provisions of the will. Usually an executor is appointed expressly, by clear words in the will.¹²⁹⁵ Sometimes there is implied appointment where a person, not appointed expressly as an executor, is nevertheless appointed as the person whom the testator intends

¹²⁹⁵ The testator may appoint whomsoever he or she wishes, including a company, and may appoint as many as he or she likes. Generally an executor can be appointed only by the testator in his or her will, but there are some exceptions: the testator may nominate some other person to make the appointment in an instrument executed as a will, where a sole or surviving executor dies then in certain circumstances his or her executorship is transmitted to another person, called an executor by representation or an “executor *de son tort*” — a person who intermeddles with the property of the testator or does any of the acts characteristic of the office of executor.

to carry out the executorial functions.¹²⁹⁶ The testator's property vests in the executor on death, personalty by common law, realty by the *Administration and Probate Act 1919* (SA).¹²⁹⁷

7.2.2 Where there is no will, or there is a will but no executor is appointed, or the appointed executor is unable or unwilling to act, the duties of the personal representative are carried out by an administrator appointed by the court. The Supreme Court of South Australia *Probate Rules* lay down an order of priority for the appointee.¹²⁹⁸ An administrator's title, unlike that of an executor, dates from the grant of letters of administration — until then the deceased's estate is vested in the Public Trustee.¹²⁹⁹

7.2.3 Personal representatives must apply for a grant of probate or letters of administration as the case may be. The grant is official recognition of the right of the personal representative named in the grant to administer the deceased's estate and of the vesting in them of the title to those assets passing to them.

7.2.4 It is unclear whether the murder or manslaughter of a testator results in an automatic disqualification of the killer from the office of executor of that testator's estate. In cases concerning the granting of probate to the killer of the deceased victim, courts have relied on statutory powers to pass over an executor. The leading authority is the English case of *Re Crippen*.¹³⁰⁰ This famous case involved a husband who murdered his wife and then fled to the United States with his mistress. Crippen was arrested and returned to England and was convicted of murder and executed. Mrs Crippen had died intestate and Crippen's executor applied for a grant of administration, claiming that the husband's estate would be entitled to the wife's property. The court, passed over the husband's executor 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.

7.2.5 The court relied on a statutory power that enabled it to pass over the applicant in 'special circumstances'.¹³⁰¹ However, in the absence of such a statutory power, there is little guidance from the case law as to what the position would be, given that the appointment of the killer as an executor or administrator does not give them a beneficial interest in the deceased's estate. Holland J in *Re Pedersen*¹³⁰² considered this possibility:

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

¹²⁹⁶ See, for example, where a person is directed to pay the deceased's debts or is directed to distribute the estate — such a person is known as an executor according to the tenor of the will and is in the same position as an executor appointed expressly. This is a question of the construction of the will as a whole. It arose in *Re Estate of Ryan* (1987) 139 LSJS 42.

¹²⁹⁷ *Administration and Probate Act 1919* (SA) s46.

¹²⁹⁸ *Supreme Court of South Australia Probate Rules 2015* (SA) r 33, 34. See also *Public Trustee Act 1995* (SA) s9(1).

¹²⁹⁹ *Administration and Probate Act 1919* (SA) s45.

¹³⁰⁰ [1911] P 108.

¹³⁰¹ The court subsequently relied on an equivalent statutory power in *Re J* [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.

¹³⁰² Supreme Court of New South Wales, Holland J, 17 June 1977.

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.¹³⁰³

7.2.6 Where the deceased victim has appointed the killer as their executor, the most likely scenario is that the killer will either renounce probate of the will of which he or she is appointed executor or decline to take out a grant but at the same time fail to renounce his or her right to do so. In this situation, the court has the power to compel the killer to renounce their executorship by a procedure known as citation.¹³⁰⁴ If the court renounces the killer's executorship, the right of such person or executor in respect of the executorship shall wholly cease, and the representation of the testator and the administration of their estate shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor.

Position in Other Jurisdictions

7.2.7 The New Zealand Act expressly states that a person who is a killer of a victim for the purposes of the New Zealand Act or who is awaiting trial for an offence of homicide within the meaning of that Act is not competent to be granted, and must not be granted, probate of the victim's will, or letters of administration of the estate of the victim.¹³⁰⁵

7.2.8 The NSW, ACT, Victoria and UK laws do not expressly prevent a person from acting as an executor or administrator of an estate even though the forfeiture rule has, or might, disentitle them from taking a benefit from that estate.

Issues

7.2.9 The VLRC recognised that, while there is no express statutory rule preventing a person subject to the forfeiture rule acting as an executor or administrator, this does not appear to have stopped the court from declining to grant such a person probate or administration, or removing them from office using its inherent jurisdiction and the common law.¹³⁰⁶ However, the VLRC recognised that, in the absence of an express provision which clarifies that such a person is disentitled from obtaining a grant of representation, the processes are indirect and the grounds uncertain for innocent beneficiaries or other interested persons who wish to bring the matter before the court.¹³⁰⁷ Similarly, as there may be a substantial period of time between the death of a person and determining who is responsible for their death, the VLRC considered that it might be sensible to expressly confer a discretionary power upon the court to refuse a grant to a person if there are reasonable grounds for concluding that that person is implicated in causing the death.¹³⁰⁸

7.2.10 The Law Reform Commission of Ireland considered that a rule that prohibits a person charged with a homicide offence from being an executor or administrator would be inconsistent with the presumption of innocence, and did not favour such an approach.¹³⁰⁹ However, the Commission

¹³⁰³ *Re Pedersen* (Supreme Court of New South Wales, Holland J, 17 June 1977) 2–3.

¹³⁰⁴ *Administration and Probate Act 1919* (SA) s 36.

¹³⁰⁵ *Administration Act 1969* (NZ) s 5A.

¹³⁰⁶ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 62 [5.22].

¹³⁰⁷ *Ibid* 62 [5.23]–[5.24].

¹³⁰⁸ *Ibid* 62 [5.26].

¹³⁰⁹ Law Reform Commission of Ireland, *Report on Prevention of Benefit from Homicide* (Report No 114, July 2015) 66.

was of the view that, once a person is convicted, there should be a rebuttable presumption that the killer is unsuitable to administer the estate of the deceased. The presumption would be rebuttable, for example, in cases where the court has modified the application of the forfeiture rule, were the court provided this discretion.¹³¹⁰

7.2.11 The issue was not considered by the law reform bodies in the UK, ACT, NSW, Tasmania or New Zealand.

7.2.12 Another issue concerning the role of an executor or administrator of the deceased person's estate is the timing of the distribution of a benefit in accordance with the application of the forfeiture rule.

7.2.13 On the topic of distribution, SALRI considers that there are two primary models which could be implemented. Under the first approach, anyone who wants to apply the forfeiture rule to distribute a benefit to someone other than the killer would need to make an application to the court before doing so. Upon receiving an application, the court would provide advice and directions as to how the benefit should be distributed. This approach increases the workload of the court and creates unnecessary delay and expense as not all situations will require the court's guidance in relation to how the forfeiture rule should be applied. On the other hand, this approach provides certainty for administrators and trustees as they will know that they cannot distribute the benefit until after an order of the court.

7.2.14 Under the second approach, an administrator or trustee could apply the forfeiture rule and distribute property to benefit someone other than the killer without obtaining an order, advice or directions from the court. However, the benefit could not be distributed until either after the killer had been found guilty of an unlawful killing in an Australian court, or where there is no finding of guilt in criminal proceedings, after it had been established in civil proceedings in an Australian court that the killer had unlawfully killed the victim.

7.2.15 This approach also provides certainty for administrators and trustees as to when they can distribute a benefit to someone other than the killer. Further, for straightforward applications of the forfeiture rule, this approach does not require an administrator or trustee to obtain guidance from the court. This makes it cheaper and less time consuming than the first approach. However, where an administrator or trustee requires guidance from the court, this approach would include a provision allowing them to make an application for such guidance.

Consultation Data Overview: Who Should be Responsible for Administering the Estate of the Victim in Forfeiture Cases?

7.2.16 At the Adelaide Roundtables, it was noted that in many situations, the killer as the spouse or defacto partner of the victim would be appointed as the executor of the deceased victim's estate. In these cases, the general view was that where the forfeiture rule applies, the Public Trustee should be appointed to manage the administration of the estate and that this has happened in the past, in cases where there are protracted proceedings or when the estate has to be preserved.

7.2.17 There was concern that sometimes the Public Trustee is not able to be swiftly instructed or does not have legal staff available. There was discussion as to whether in these cases, the Attorney-

¹³¹⁰ Ibid 72.

General would be better placed to act. It was considered that generally the Attorney-General would not want to assume these responsibilities and does not have the means or knowledge necessary. Another alternative considered was to use private trustees. It was also noted to SALRI that the DPP has counselling services and perhaps the DPP is better placed and equipped to assume this role.

7.2.18 It was agreed that the court should be given the power to appoint a new executor and that this should be clarified in the law and that the appointed executor should be someone that the court considers has the best interests of all parties in mind. Attendees thought that it would be useful for the court to develop guidelines or rules to guide practitioners.

7.2.19 The Commissioner for Victims' Rights submitted that the costs involved to become an executor of the victim's estate can be prohibitive. The Commissioner provided a case study of a 65 year old man who was found dead. His 35 year old son was charged with murder.¹³¹¹ The nephew of the deceased accepted responsibility for organising the estate of the deceased and accused (son). The nephew sought legal advice and was advised that there would be protracted and costly delays to become the executor of the estate. In the meantime, there would be ongoing costs such as home and contents insurance that the nephew must cover as well as funding the legal advice/action.

7.2.20 With respect to when the executor or administrator should be able to administer all of the estate of the deceased victim, the Law Society of South Australia and the Legal Services Commission submitted that the property subject to the forfeiture rule should be distributed in accordance with the court's discretion once all criminal legal proceedings have concluded.

7.2.21 The Hon Geoffrey Muecke noted that, in cases where the killer is not the appointed executor, the executor or administrator should apply to the Supreme Court immediately upon a killing to make an order for their appointment in order to protect the estate of the deceased victim.

SALRI's Observations and Conclusions

7.2.22 SALRI considers that the proposed *Forfeiture Act* should provide that the killer of the deceased person should be disqualified from the office of executor or administrator of that deceased person's estate. Further, in order for the estate to be administered expediently following the death of the victim, the court should be given a discretion to refuse to make a grant of representation if there are reasonable grounds to suspect the person has unlawfully killed the deceased and where the court considers it just and reasonable in all the circumstances.

7.2.23 SALRI is of the view that the proposed *Forfeiture Act* should provide that disqualification from acting as a personal representative would not be able to be modified by a forfeiture rule modification order.

7.2.24 On the topic of distribution, SALRI is of the view that an administrator or trustee should be able to apply the forfeiture rule and distribute property to benefit someone other than the killer without obtaining an order, advice or directions from the court. However, the benefit could not be

¹³¹¹ It should be noted that the charge in this matter was subsequently dropped. See Jordanna Schriever, 'Murder Charge Dropped Against Joel Russo, Accused of Killing Father Frank, Who May Have Died of Natural Causes', *The Advertiser* (online at 25 September 2019) <adelaidenow.com.au/truecrimeaustralia/police-courts/_/murder-charge-dropped-against-joel-russo-accused-of-killing-father-frank-who-died-of-natural-causes/news-story/8b5afaef29961d3ac68783a0ff16dd5e>.

distributed until either after the killer had been found guilty of an unlawful killing in an Australian court, or where there is no finding of guilt in criminal proceedings, after it had been established in civil proceedings in an Australian court that the killer had unlawfully killed the victim.

7.2.25 SALRI prefers this approach as it provides certainty for administrators and trustees as to when they can distribute a benefit to someone other than the killer. Further, for straightforward applications of the forfeiture rule, this approach does not require an administrator or trustee to obtain guidance from the court. This makes it cheaper and less time consuming than going through the court. However, where an administrator or trustee requires guidance from the court, this approach would include a provision allowing them to make an application for such guidance.

7.2.26 Recommendations

Recommendation 35

SALRI recommends that the proposed *Forfeiture Act* should provide that the killer of the deceased person shall be disqualified from acting as a personal representative of that deceased person's estate.

Recommendation 36

SALRI recommends that the proposed *Forfeiture Act* should provide that a court should be given a discretion to disqualify a person who applies for a grant of representation if there are reasonable grounds to suspect the person has unlawfully killed the deceased and where the court considers it just and reasonable in all the circumstances.

Recommendation 37

SALRI recommends that the proposed *Forfeiture Act* should provide that disqualification from acting as a personal representative would not be able to be modified by a forfeiture rule modification order.

Recommendation 38

SALRI recommends that the proposed *Forfeiture Act* should provide that an executor, administrator or trustee should be able to apply the forfeiture rule and distribute property to benefit someone other than the killer without obtaining an order, advice or directions from the court. However, the benefit could not be distributed until either after the killer had been found guilty of an unlawful killing in an Australian court, or where there is no finding of guilt in criminal proceedings, after it had been established in civil proceedings in an Australian court that the killer had unlawfully killed the victim.

Recommendation 39

SALRI recommends that the proposed *Forfeiture Act* should provide that where an executor, administrator or trustee requires guidance from the court, that they are able to make an application for such guidance.

7.3 The Deceased Victim Dies With a Will

Current South Australian Law

7.3.1 The forfeiture rule is protective of testators whose wills have been drafted upon assumptions that a beneficial interest will be invalidated by a homicide. The current formulation also gives effect to a presumption of testamentary will that an individual would not allow their killer to benefit. The presumption is that if a testator is slain, ‘the claimant is then unworthy to take as beneficiary ... [and that] the testator would have revoked the bequest to his slayer’.¹³¹² Accordingly, the gift to the killer does not operate or alternatively operates so that, at law, the killer would be entitled to be paid the money by the executor or administrator of the estate, but, in equity, the killer would hold it on trust for the person next entitled.

7.3.2 The forfeiture rule can impact on the rights of others who are named in the will of the testator. This is particularly so when a will includes a ‘gift-over’ clause which stipulates that if the killer (the primary beneficiary) of the will has predeceased the testator (or dies shortly afterwards), that their estate will pass to other named beneficiaries (usually the killer’s children) who are innocent of the offence. These clauses are drafted to avoid the doctrine of lapse,¹³¹³ but do not address the issue of possible forfeiture.¹³¹⁴ There is no clear position as to how the testator’s will should be constructed in this situation. Four different approaches emerge in the case law.

First Approach – Jones v Westcomb

7.3.3 The first approach has been followed in earlier cases and involves the courts taking into account the intention of the testator and disqualifying the killer but giving effect to the gift-over. Some commentators have noted that, whilst as a basic principle of construction of wills, a court cannot give effect to an intention that is neither expressed nor implied in the testamentary words, this principle is not without exception.¹³¹⁵ The leading authority is *Jones v Westcomb*¹³¹⁶ which involved a testator who believing his wife was pregnant, made a will leaving a life interest to his wife with the remainder to the child. If the child died before reaching age 21, the wife was to take one-third of the benefit. The wife was not in fact pregnant, but the court held that the testator must have intended that the wife should have the interest in those circumstances and she was nevertheless held entitled to the benefit.

7.3.4 The principle in *Jones v Westcomb* forms the notion that in certain circumstances a beneficiary can receive a gift-over even though the precise contingency (in the forfeiture context, the

¹³¹² J Chadwick, ‘Testator’s Bounty to His Slayer’ (1914) 30(2) *Law Quarterly Review* 211, 211.

¹³¹³ As to the doctrine of lapse, see Gino Dal Pont and Ken Mackie, *Law of Succession* (LexisNexis, 1st ed, 2013) [7.13]–[7.22].

¹³¹⁴ If the will is worded to indicate that, if the initial gift fails for any reason, the gift-over is effective. Most wills however, only provide for substitutional gifts in the event of the initial beneficiary predeceasing the testator, or at least not surviving him or her for a short period.

¹³¹⁵ Charles Rowland, ‘The Construction or Rectification of Wills to Take Account of Unforeseen Circumstances Affecting Their Operation (Pt 1)’ (1993) 1 *Australian Property Law Journal* 87, 99–110; Ken Mackie, ‘The Forfeiture Rule: The Destination of Property Interest on Homicide’ (1997) 2(2) *Newcastle Law Review* 230.

¹³¹⁶ (1711) Prec Ch 316; 24 ER 149.

primary beneficiary (killer) predeceasing the victim) does not occur where the court determines that the testator's intention was that the gift-over take effect.¹³¹⁷

7.3.5 Application of the *Jones v Westcomb* rule in forfeiture cases involving a gift-over has occurred in a number of cases, albeit cautiously. In *Re Keid*,¹³¹⁸ the testator was murdered by her son who had been left the estate and in the event of the son predeceasing his mother, the testator's sisters. The dispute was between the sisters and the testator's mother, who would have been entitled on intestacy. Wanstall CJ, in ruling that the gift-over should have effect, reasoned that 'the contingency against which the testator really had to guard was the failure of the gift to her son so that she would be left intestate' and, that being so, 'the court should look to that contingency and give effect to the will if it should happen'.¹³¹⁹

7.3.6 In *Re Barrowcliff*,¹³²⁰ a wife executed a will, leaving her entire estate to her husband in the event of him surviving her, but otherwise on a gift-over to trustees for named beneficiaries. The husband murdered the wife. It was argued that, as the gift-over was expressed to rest on the husband predeceasing the testator, but the husband in fact survived the wife, and intestacy resulted. Napier J rejected this argument, reasoning that, as the testator had made manifest her intention to dispose of the property, the will should be construed to read as if the gift-over took effect subject to the interest previously given. Napier J reasoned:

It could never have occurred to anyone concerned in the making of this will that there was any hiatus between these dispositions, or that this event might happen, to preclude the husband from taking, and yet leave the condition of the gift-over unfulfilled.¹³²¹

7.3.7 There is English authority aligning with this view,¹³²² as well as support at first instance in *Troja v Troja*.¹³²³

Second Approach – Public Trustee v Hayles

7.3.8 Under the second approach, which has been broadly adopted in more recent cases, the interest that would otherwise pass to the killer is held by the killer on constructive trust for the person considered appropriate by the court and if there is insufficient evidence for that, then the next of kin as on intestacy.

7.3.9 In *Public Trustee v Hayles*,¹³²⁴ the deceased person gifted his estate to a friend and, in the event that the friend predeceased him, to the friend's mother, a Mrs Hayles. The friend murdered the testator and the forfeiture rule applied to deny him any entitlement to the estate. The executor sought

¹³¹⁷ See, for example, *Union Trustee Co of Australia Ltd v Church of England Property Trust Diocese of Sydney* (1946) 46 SR (NSW) 298, 306 (Nicholas CJ in Eq) following the decision of *Re Fox* [1937] 4 All ER 664. *Re Jolley (dec'd)* (1984) 36 SASR 204, 206 (Jacobs J). See, for example, *Re Tredwell* [1891] 2 Ch 640, 650 (Bowen LJ); *Re Fox* [1937] 4 All ER 664, 666 (Lord Greene MR), 669 (Romer LJ); *Union Trustee Co of Australia Ltd v Church of England Property Trust, Diocese of Sydney* (1946) 46 SR (NSW) 298, 306 (Nicholas CJ).

¹³¹⁸ [1980] Qd R 610.

¹³¹⁹ *Ibid* 614.

¹³²⁰ [1927] SASR 147.

¹³²¹ *Ibid* 151.

¹³²² See, for example, *Re Callaway* [1956] Ch 599; *Macintyre v Oliver* [2018] EWHC 3094 (Ch).

¹³²³ (Supreme Court of New South Wales, Waddell CJ in Eq, 15 February 1993) 36 (affd *Troja v Troja* (1994) 33 NSWLR 269 but without specifically addressing this issue).

¹³²⁴ (1993) 33 NSWLR 154.

directions as to whether the estate should go to Mrs Hayles under the gift-over, or should be distributed to the testator's next of kin under the intestacy rules. Young J considered that, where the will is 'quite plain' in making a gift to the murderer, the court can address the policy underscoring the forfeiture rule, whilst avoiding fictional enquiries into intention, by making the killer 'hold the estate on trust for the person it thinks appropriate'.¹³²⁵ Young J took the view that the mere fact that there was in the will an alternate gift to take effect if the primary beneficiary predeceased the testator was insufficient of itself to bring in the rule in *Jones v Westcomb*. He said, however, that if there was admissible evidence to demonstrate that the testator's intention was that the gift-over would operate in a wider set of situations than that specifically stated then the court would order that the primary beneficiary hold the estate on that trust. A memorandum prepared by the testator requesting that the relatives of the testator were not to be notified of their death, did not, according to Young J, necessarily mean that the testator preferred his killer's mother, Mrs Hayles to his next of kin. This inclined the court to impose a trust in favour of the next of kin, reflecting the intestacy rules.¹³²⁶

7.3.10 In *Egan v O'Brien*,¹³²⁷ Young CJ affirmed his approach in *Hayles*. This case involved a testator whose will left their estate to a friend with a gift-over to charity if the friend predeceased the testator. The friend was convicted of the manslaughter of the testator. Young CJ held that the *Jones v Westcomb* rule could not apply as there was no evidence of the intention of the testator and that it was not clear whether testator intended 'predecease' to cover other eventualities. The gift passed to the friend who held that gift on a constructive trust to be distributed under the laws of intestacy, to the testator's next of kin. Young CJ referred to the cases of *Re Robertson*,¹³²⁸ *Re Lentjes*¹³²⁹ and *Davis v Worthington*,¹³³⁰ all cases involving similar circumstances, where whilst the judges acknowledged the usefulness of the *Jones v Westcomb* rule in this context, nonetheless declined to apply it. These cases all involved gift-over provisions, where the courts held that the testator could hardly have thought of the contingency that a beneficiary in their will might murder them and that the courts would not be justified in treating the words in the gift-over as applying generally, resulting in the gift-over failing. In each of these cases, the court could not accommodate the testator's intent as it was not encompassed in the structure of the will.¹³³¹ As the question was one of construction of the will, it was wrong to notionally

¹³²⁵ *Public Trustee v Hayles* (1993) 33 NSWLR 154, 171.

¹³²⁶ Young J held, however, that as no evidence was put forward otherwise than by the Public Trustee of the relationships and intentions which may affect the result on the constructive trust, D should be given an opportunity to re-open the case, and so directed a stay of the formal order. As D did not take up that opportunity, formal orders were entered.

¹³²⁷ [2006] NSWSC 1398.

¹³²⁸ (1963) 107 Sol Jo 318.

¹³²⁹ [1990] 3 NZLR 193.

¹³³⁰ [1978] WAR 144.

¹³³¹ *Re Lentjes* [1990] 3 NZLR 193, 197. Cf Charles Rowland, 'The Construction or Rectification of Wills to Take Account of Unforeseen Circumstances Affecting Their Operation' (Pt 1) (1993) 1 *Australian Property Law Journal* 87, 106–110 (who cogently argues that this is an unwarranted and unnecessary restrictive interpretation of the *Jones v Westcomb* rule). There have been decisions in Queensland that have taken this approach such as *Re Rowney* (1992) (Supreme Court of Queensland, Cooper J, 19 March 1992); *Re Nicholson* [2004] QSC 480, a decision of Atkinson J and *Verrall v Jackson* [2006] QSC 309, a decision of Wilson J. For an English case on point, see *Re DWS (dec'd)* [2001] Ch 568.

regard the killer as predeceasing the testator or to simply ‘strike out’ his name. This ‘literal’ approach can also be found in English cases.¹³³²

Third Approach – Ekert v Mereider

7.3.11 The third approach is where the property passes, as on intestacy. This approach was taken by Windeyer J in *Ekert v Mereider*.¹³³³ A testator was murdered by his wife, who was also the principal beneficiary named in his will, there being provision for a gift-over in the event of the beneficiary predeceasing the testator (to a child and a step child of the testator). Windeyer J held that the words of the will should be interpreted in an ordinary way having regard to the fact that the principal beneficiary as a killer could not take, so that where the events upon which the operation of the gift-over were predicated did not occur there was no testamentary disposition of the estate which must therefore be held in trust for the next of kin other than the killer. In *Ekert*, Windeyer J said that the *Jones v Westcomb* rule could not be applied in order to bring about a result the court considers fair, and that ‘in many cases it would be dangerous for a court to interpret a will based on presumed intentions’.¹³³⁴

Fourth Approach – Re Stone

7.3.12 Under the final approach, the estate is distributed on the basis of lapse as if the killer died immediately before the testator. In *Re Stone*,¹³³⁵ Mrs Stone was unlawfully killed by her husband and they had owned property as joint tenants. McPherson J held that Mrs Stone’s interest in the property was held on a constructive trust for the benefit of the beneficiaries of her estate under her will. Her will had a gift-over clause leaving her estate to her husband, provided that he survived her for the space of one month and, in the event of his not doing so to her trustee in trust for her children in equal shares as tenants in common upon their attaining the age of twenty-one years. McPherson J held that, since the husband may not benefit from his criminal act, he is not entitled to claim the disposition under Mrs Stone’s will, and the disposition is to be considered as passing as if he had died immediately before the testator.

7.3.13 In *Egan v O'Brien*, Young CJ questioned the approach taken by the McPherson J in *Re Stone* arguing that this approach cannot be supported by the authorities and has little judicial support.¹³³⁶

Position in Other Jurisdictions

7.3.14 New Zealand and the UK have introduced laws, so that if a person is entitled to an interest under a will and forfeits it under the forfeiture rule, that person is treated as having died immediately before the intestate. As such, the person who is the subject of a gift-over is able to inherit.¹³³⁷

¹³³² See, for example, *Re Robertson* (1963) 107 Sol Jo 318; *Re Kyd* [1992] SLT 1141; *Jones v Midland Bank Trust Co Ltd* [1998] 1 FLR 264.

¹³³³ [1993] 32 NSWLR 729.

¹³³⁴ *Ekert v Mereider* (1993) 32 NSWLR 729 at 732–733.

¹³³⁵ [1989] 1 Qd R 351

¹³³⁶ See, for example, the criticisms in *Re Stone* [1989] 1 Qd R 351; *Ekert v Mereider* (1993) 32 NSWLR 729, 731–732 (Windeyer J); *Public Trustee v Hayles* (1993) 33 NSWLR 154, 170 (Young J).

¹³³⁷ See s 7 of the New Zealand Act, in particular, s 7(3) which states that any interest in property that a killer is not entitled to pass or be distributed as if the killer had died before the killer’s victim; *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). In the UK, this reform was also extended to the circumstance in which a person disclaims an interest.

7.3.15 By contrast, while the relevant laws in New South Wales and Tasmania provide 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, it is silent on the position when interpreting a will.¹³³⁸

Issues

7.3.16 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.

7.3.17 With respect to the most accepted approach, the defensibility of such an approach awaits further analysis and authority.¹³³⁹ Aside from, as a result, having little in the way of clear parameters informing the exercise of the court's discretion as to the imposition and terms of the trust, the challenge to the trust approach is that it is premised on the killer taking legal title to the gift in question. This sits uneasily with the core public policy underscoring the forfeiture rule, which by definition assumes that the killer takes nothing (forfeits) under the testator's will.

7.3.18 The Law Reform Commission of Ireland recognised that s 120(5) of the *Succession Act 1965* gives effect to a 'pre-decease' rule, whereby the inheritance lost by the offender will go to other beneficiaries, if any, named in the deceased's will or to the next person listed to inherit under Part 6 of that Act if the deceased died intestate. It was noted that '[t]his ensures that the offender's descendants, such as his or her children and grandchildren, are not disinherited by the criminal acts of the offender and are entitled to inherit from the deceased's estate.'¹³⁴⁰

7.3.19 The Law Commission of the United Kingdom recognised three possible approaches where forfeiture has occurred in such circumstances. First, the inheritance could go to the killer's children, being the deceased's grandchildren, as though the killer had died before the deceased. Secondly, the inheritance could go to other relatives, such as the brothers or sisters of the deceased. Thirdly, the inheritance could go to the State. The Law Commission noted that the second solution is problematic, in that 'the grandchildren should not be punished for the sins of their parent'. Further, the deceased would likely have wished to benefit their grandchildren over other relatives, and, as a matter of policy, intestacy law generally prefers descendants to siblings and other relatives.¹³⁴¹

7.3.20 The VLRC recognised that a court cannot give effect to an intention that is not expressed or implied within a will, when read with the circumstances in which the will was made.¹³⁴² The court is likely to interpret the will literally, if it provides for a gift over in the circumstance that the principal beneficiary predeceases the will-maker. This is problematic, because it means that a gift over which is contingent on the principal beneficiary predeceasing the will-maker is likely to fail when the forfeiture

¹³³⁸ *Succession Act 2006* (NSW) s 239(b); *Intestacy Act 2010* (Tas) s 40(b).

¹³³⁹ In *Egan v O'Brien* [2006] NSWSC 1398; in a brief judgment, Young CJ in Eq reaffirmed the position he originally took in *Public Trustee v Hayles*, and in *Stevens v Baxter* [2009] VSC 257, [26]. Forrest J simply assumed that a constructive trust could be imposed.

¹³⁴⁰ Law Reform Commission of Ireland, *Report on Prevention of Benefit from Homicide* (Report No 114, July 2015) 13–14.

¹³⁴¹ Law Commission, *The Forfeiture Rule and the Law of Succession* (Report No 95, 4 July 2005) 2 [1.7]–[1.8].

¹³⁴² Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 64 [5.30].

rule prevents the offender from taking the gift.¹³⁴³ The property is instead likely to be distributed to the residuary beneficiaries on intestacy.¹³⁴⁴

7.3.21 The VLRC discussed two possible reforms for this issue. First, it was considered that the offender could be deemed to have died before the deceased person. Under this reform, an alternative named beneficiary could benefit from a gift over under a will. Secondly, it was considered that legislation could broaden the court's power to rectify a will, by enabling it to ascertain the hypothetical intention of the will-maker in unforeseen circumstances and construe the will accordingly.¹³⁴⁵

7.3.22 The issue was not discussed in the reports of the ACT, NSW, Tasmania or NZ law reform bodies.

Consultation Data Overview: What Should be the Effect of the Rule When There are Gift-Overs in the Victim's Will?

7.3.23 The practical uncertainty caused by this aspect of the forfeiture rule was highlighted in SALRI's consultation. A strong theme to emerge in consultation was unease over the notion that under the present forfeiture rule the 'sins of the unlawful killer may be visited upon the blameless children'.¹³⁴⁶ This unease echoed concerns expressed by the Law Commission of the United Kingdom.¹³⁴⁷

7.3.24 At the Adelaide Roundtables, attendees noted the issues concerning the administration of the estate of the victim and, in particular, the lack of clarity with respect to the effect of the forfeiture rule where there are gift-overs in the deceased victim's will. One of the major concerns expressed was with respect to the implications for the children of the killer in the gift-over situation. Attendees agreed that children should not be unfairly dealt with under this rule where they have had no involvement in the killing. In many cases the child of the perpetrator is a child or grandchild of the victim as discussed below and so may be the person whom the victim would wish to benefit.

7.3.25 The unanimous view at the Roundtables was that children should not be punished for the actions of their parents and that the rule's current operation comes from a place no longer part of society. 'We don't blame children for sins of their parents'. It was noted that accessorial liability of the child, if involved, would be disqualified in any event. The exclusion of the children was not considered to be a matter of high principle, but rather 'just a consequence', particularly in the gift-over situation.

7.3.26 In order to work around the current position, it was agreed that any *Forfeiture Act* should include a presumption that the killer predeceased the victim. In the general gift-over situation, this would then allow the children of the killer to inherit the killer's share of the victim's estate under the terms of a will.

7.3.27 STEP submitted to SALRI that in order to clarify the law, coupled with the need for the law to be applied consistently, a formulation in which the perpetrator is considered to have predeceased

¹³⁴³ Ibid 64 [5.31].

¹³⁴⁴ Ibid.

¹³⁴⁵ Ibid 66 [5.45].

¹³⁴⁶ See, for example, *R v DWS (dec'd)* [2001] Ch 568. See further Law Commission of England and Wales, *The Forfeiture Rule and the Law of Succession* (Report No 295, 4 July 2005); Roger Kerridge, 'Visiting the Sins of the Fathers on their Children' (2001) 117(July) *Law Quarterly Review* 371.

¹³⁴⁷ Law Commission of England and Wales, *The Forfeiture Rule and the Law of Succession* (Report No 295, 4 July 2005) 2 [1.7]–[1.8].

the victim would generally be considered appropriate in a society that no longer holds the child to have any responsibility for the acts of the parent.

7.3.28 Ken Mackie, Professor Gino Dal Pont, Professor Prue Vines, the South Australian Victim Support Service, the Commissioner for Victims' Rights, the Legal Services Commission, Michael O'Connell and Dr Hemming made separate submissions recommending that the law should be codified to clarify the position and crucially that children should not be impacted by their killer parent's actions. The primary concern raised in these submissions was that the common law rule is too inflexible, and that in certain limited circumstances is inequitable and unjust in the sense of having unintended consequences, by depriving benefits to either the perpetrator or children of the perpetrator that the victim(s) would not have wished to occur (assuming it is possible to reasonably identify those wishes). The favoured approach in each of these submissions is that which treats the killer as having died immediately before the deceased. This was considered to be an efficient way to proceed and has the advantage of clarity as well as not treating children as responsible for the wrongs of their parents.

SALRI's Observations and Conclusions

7.3.29 The notion that under the present forfeiture rule the 'sins of the unlawful killer may be visited upon the blameless children' is unsatisfactory. Legislative reform of this aspect of the forfeiture rule, as in the UK,¹³⁴⁸ is necessary.

7.3.30 SALRI is of the view that the proposed *Forfeiture Act* needs to address the current issues that arise with respect of gift-overs when the forfeiture rule interrelates with succession laws. It is clear from the cases that this is a matter of construction of the language of the gift rather than a matter of the application of the principle behind the forfeiture rule.

7.3.31 The simplest solution which is likely to achieve a just outcome in the majority of cases is to treat the killer as having predeceased the deceased victim when the forfeiture rule applies. Given that in a gift-over situation that a testator is unlikely to have contemplated that their principal beneficiary would kill them, the children of the deceased victim may be disenfranchised. The deceased victim's intention would be undermined if that gift-over fails. If the killer is deemed to have predeceased the deceased, then the gift-over will take effect as intended.

7.3.32 Recommendation

Recommendation 40

SALRI recommends that the proposed *Forfeiture Act* should provide that where the deceased victim's will contains a bequest to a person who has been precluded by the forfeiture rule from acquiring it or who disclaims it, then, unless a contrary intention appears by the will, or a forfeiture modification order has been made in favour of the person, the person is deemed to have predeceased the deceased victim.

¹³⁴⁸ See *The Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011* (UK) which received Royal Assent on 12 July 2011, and came into force on 1 February 2012.

7.4 The Deceased Victim Dies Intestate

Current South Australian Law

7.4.1 An intestacy does not only arise where the victim has no will or, in the case of a partial intestacy, where the victim has failed to bequest part of her estate. An intestacy could arise on a technicality. For example, if a killer is prevented by the forfeiture rule from benefiting under the victim's will and there is no substitute beneficiary named in the will for the property interests bequeathed to the killer, this will result in an intestacy. Many of the cases involving gift-overs in a testator's will where the forfeiture rule has applied have resulted in the estate of the testator being dealt with under the laws of intestacy.

7.4.2 In circumstances where the forfeiture rule applies and the victim dies intestate (or partially intestate), a killer is also disqualified from benefiting under an intestacy. The case law takes a public policy approach, overriding the ordinary distributions of the deceased's estate under the laws of intestacy and operates as if the killer had never existed.¹³⁴⁹ This means that the children and remoter descendants of the killer are also disqualified from inheriting any of the deceased's estate. So, for example, if a son murdered his mother, his children would be disqualified from sharing in their grandmother's estate, even though they had nothing to do with the murder.

7.4.3 In *Re DWS (dec'd)*,¹³⁵⁰ for example, a son was convicted of the murder of his parents, neither of whom left a will. At the time of the murders, the offender had a two-year old son who subsequently claimed to be entitled to his grandparents' estates under s 47(1)(i) of the *Administration of Estates Act 1925* (UK). To succeed under this provision, the court would have been required to treat the son as having predeceased the deceased parent. This, in giving the section its plain meaning, the court declined to do.¹³⁵¹

Position in Other Jurisdictions

7.4.4 The position in New Zealand, the UK, NSW and Tasmania is that, where the forfeiture rule prevents a person from sharing in an intestate estate, that person is deemed to have died before the intestate.¹³⁵²

Issues

7.4.5 The principle criticism of this rule's effect is that it 'disadvantages the children or other descendants of the killer, although they were not responsible in any way for the killing',¹³⁵³ as lineal

¹³⁴⁹ See, for example, *Re Tucker* (1920) 21 SR (NSW) 175 (where the husband killed his wife, but was excluded from taking on intestacy, the wife's property instead passing entirely to the deceased's son); *Re Sangal (dec'd)* [1921] VLR 355 (similar factual situation and outcome as *Re Tucker*); *Public Trustee v Fraser* (1987) 9 NSWLR 433 (Kearney J remarked that the killer was to be treated as being 'no longer a member of the class constituted by the next of kin entitled to take on intestacy': at 444); *Re Estate of Soukup* (1997) 97 A Crim R 103. Similar developments have occurred in the United Kingdom; see, for example, *Re Sigworth* [1935] Ch 89.

¹³⁵⁰ [2001] Ch 568.

¹³⁵¹ Roger Kerridge, 'Visiting the Sins of the Fathers on their Children' (2001) 117(July) *Law Quarterly Review* 371, 374–375.

¹³⁵² New Zealand Act s 7(2)–(3); *Administration of Estates Act 1925* (UK) s 46A; *Succession Act 2006* (NSW) s 139(b); *Intestacy Act 2010* (Tas) s 40(b).

¹³⁵³ South Australian Law Reform Institute, *Cutting the Cake: South Australian Rules of Intestacy* (Issues Paper No 7, December 2015) 109.

descendants can no longer inherit through the killer.¹³⁵⁴ This effect has been criticised for creating inconsistent results with the presumption that lineal descendants are favoured over more distant relatives.¹³⁵⁵

7.4.6 The English Law Commission considered the outcome in *Re DWS (dec'd)* to be unsatisfactory because it was unjust to penalise the blameless grandson for the crime of his parent. It was more likely that the deceased would have wished to benefit their grandchild than the other relatives, and the result contradicted the general policy of the intestacy legislation which is to prefer descendants to siblings and other relatives.¹³⁵⁶ This outcome may also be contrary to public policy as in Australia as there is a 'rise in the number of grandparents raising their grandchildren.'¹³⁵⁷

7.4.7 Other law reform bodies have largely favoured treating the offender as having predeceased the victim. For instance, the VLRC recognised the possibility of addressing this issue through deeming the killer to have died before the victim.¹³⁵⁸ This option was recognised as having the potential to avoid unjust outcomes for innocent persons entitled to claim through the killer.¹³⁵⁹ While the possibility that an offender could benefit indirectly from other beneficiaries was recognised, it was considered excessively harsh that descendants of a killer be automatically disinherited based on the actions of another.¹³⁶⁰ Treating the offender as having predeceased the victim was considered by the VLRC to be a solution which is sufficiently simple, while providing certainty.¹³⁶¹

7.4.8 The NSW Law Reform Commission Report acknowledged the same problematic features of intestacy law, and ultimately concluded for reasons of consistency, certainty and simplicity that a killer be deemed to have died before the intestate where the forfeiture rule prevents him or her from sharing in the intestate estate, or where he or she has disclaimed the share to which he or she is otherwise entitled.¹³⁶²

7.4.9 The English Law Commission proposed the solution that in situations where a person forfeits the right to inherit by killing an intestate, the rules of intestate succession should be applied as if the killer had died immediately before the intestate.¹³⁶³ The National Committee for Uniform

¹³⁵⁴ South Australian Law Reform Institute, *'Cutting the Cake: South Australian Rules of Intestacy'* (Issues Paper No 7, December 2015) 110; Dianne Caldwell, 'Criminal Law and Estates: The Forfeiture Rule' (2004–2005) 24(3) *Estates, Trusts and Pensions Journal* 269, 276.

¹³⁵⁵ South Australian Law Reform Institute, *'Cutting the Cake: South Australian Rules of Intestacy'* (Issues Paper No 7, December 2015) 110. This presumption is also enshrined in legislation, where a deceased dies intestate: *Administration and Probate Act 1919* (SA) s 72G.

¹³⁵⁶ Law Commission of England and Wales, *The Forfeiture Rule and the Law of Succession* (Report No 295, 4 July 2005) [1.8].

¹³⁵⁷ COTA National Seniors, Department of Social Services, *'Grandparents Raising Grandchildren'* (Final Report, July 2003) 13.

¹³⁵⁸ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 67 [5.48].

¹³⁵⁹ *Ibid* 67 [5.50].

¹³⁶⁰ *Ibid* 67 [5.53]. See also Law Commission of England and Wales, *The Forfeiture Rule and the Law of Succession* (Consultation Paper No 172, 30 September 2003) [5.19]–[5.22].

¹³⁶¹ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 69 [5.63].

¹³⁶² NSW Law Reform Commission, *Uniform Succession Laws: Intestacy* (Report No 116, April 2007) 207–208 [12.41]–[12.45].

¹³⁶³ Law Commission of England and Wales, *The Forfeiture Rule and the Law of Succession* (Report No 295, 4 July 2005) 4 [1.14].

Succession Laws with all States and Territories also endorsed this position.¹³⁶⁴ The National Committee, having noted that the English position was consistent with recommendations made by the New Zealand Law Commission in 1997, went on to conclude that ‘the option of extending constructive trusts to these situations would not be productive of certainty, which is one of the aims of the proposed intestacy rules’.¹³⁶⁵

Consultation Data Overview: What Should be the Effect of the Rule When the Victim Dies Intestate?

7.4.10 A strong theme to again emerge in consultation was unease over the notion that under the present forfeiture rule the ‘sins of the unlawful killer may be visited upon the blameless children’.

7.4.11 At the Adelaide Roundtables, attendees noted the issues concerning the administration of the estate of victim and, in particular, the lack of clarity with respect to the effect of the forfeiture rule where the deceased victim dies intestate. One of the major concerns expressed was with respect to the implications for the children of the killer when the victim dies intestate. Attendees agreed that the children should not be unfairly dealt with under the forfeiture rule where they have had no involvement in the unlawful killing.

7.4.12 One of the attendees highlighted the inconsistency between collateral relatives inheriting to the exclusion of lineal descendants when the policy of the law is to prefer descendants over collateral relatives. Further, it was noted that it is likely the victim would have been distressed if lineal descendants had missed out.

7.4.13 In order to address the current position, it was agreed that any *Forfeiture Act* should include a presumption that the killer predeceased the victim. Under South Australian intestacy laws, this would also result in the children (and grandchildren) of the killer becoming entitled to their killer parent’s share of the estate of the victim.

SALRI’s Observations and Conclusions

7.4.14 The notion that under the present forfeiture rule the ‘sins of the unlawful killer may be visited upon the blameless children’ is unsatisfactory. Legislative reform of this aspect of the forfeiture rule, as in the UK,¹³⁶⁶ is necessary.

7.4.15 SALRI’s view is that the proposed *Forfeiture Act* should address the current issues that arise with respect of intestacy when the forfeiture rule interrelates with succession laws. The simplest solution which is likely to achieve a just outcome in the majority of cases is to treat the killer as having predeceased the deceased victim when the forfeiture rule applies. When the deceased victim dies intestate, a deeming provision would ensure that the lineal descendants receive the benefit which would otherwise have passed to the killer. This solution is likely to reflect the intention of the deceased victim and protect the interests of the children of the killer who are innocent parties in need of support.

¹³⁶⁴ Law Reform Commission of New South Wales, *Uniform Succession Laws: Intestacy* (Report No 116, April 2007) [12.46].

¹³⁶⁵ Ibid [12.45].

¹³⁶⁶ See *The Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011* (UK) which received Royal Assent on 12 July 2011, and came into force on 1 February 2012.

7.4.16 In line with SALRI's recommendation in its previous Intestacy Report,¹³⁶⁷ SALRI reiterates its position that, when a relative disclaims his or her interest, the estate should be distributed as if the disclaiming relative had died immediately before the intestate. The killer will then be able to disclaim their interest in the deceased victim's estate prior to litigation and disclaiming their interest will not impact on the benefits under a will or on intestacy passing to the descendants of the killer. This would promote the voluntary resolution of the matter prior to any litigation.

7.4.17 The VLRC noted that there is a concern that a deeming provision may result in offenders obtaining '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'.¹³⁶⁸ However, SALRI considers that the preferable view taken by the VLRC is that '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'.¹³⁶⁹

7.4.18 Recommendation

Recommendation 41

SALRI recommends that the proposed *Forfeiture Act* should provide that where the deceased victim dies intestate and a share of their estate is to pass to a person who is precluded by the forfeiture rule from acquiring it or who disclaims it, unless a forfeiture modification order has been made in favour of the person, that person is deemed to have predeceased the deceased victim.

7.5 Rectification of the Victim's Will by the Courts

Current Position in South Australia

7.5.1 The Supreme Court of South Australia has a specific power to rectify the will of a deceased.¹³⁷⁰ Under that power, if the court is satisfied that will does not accurately reflect the testamentary intentions of a deceased person, the court may order that the will be rectified so as to give proper expression to those intentions.¹³⁷¹ Such an application must not be made more than six months after the grant of probate or letters of administration without the consent of the court.¹³⁷²

7.5.2 The rectification power in 25AA(1) of the *Wills Act 1936* (SA) is not broad enough to enable the court to ascertain the hypothetical intention of the will-maker in unforeseen circumstances,

¹³⁶⁷ South Australian Law Reform Institute, *South Australian Rules of Intestacy* (Report No 7, July 2017) 52 [7.3].

¹³⁶⁸ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 67 [5.51].

¹³⁶⁹ *Ibid* 68 [5.55].

¹³⁷⁰ *Wills Act 1936* (SA) s 25AA(1).

¹³⁷¹ *Ibid*. See also *Wesley v Wesley* (1998) 71 SASR 1; *Re Estate of Miller* (2002) 223 LSJS 133.

¹³⁷² *Wills Act 1936* (SA) s 25AA(2).

including when a beneficiary kills the will-maker, and construe the will accordingly.¹³⁷³ Accordingly, the court does not have the power to rectify the will of the deceased victim to give effect to a gift-over.

Position in Other Jurisdictions

7.5.3 In every State and Territory other than the ACT, the court has the power to rectify a will to carry out the intentions of the testator, if the court is satisfied that the will does not carry out the testator's intentions because a clerical error was made or the will does not give effect to the testator's instructions.¹³⁷⁴ The UK Act provides for rectification of wills in similar terms to the NSW legislation.¹³⁷⁵

7.5.4 By contrast, the Supreme Court of the ACT has a broader statutory power to rectify a will.¹³⁷⁶ Under this power, the court may order that a will be rectified to carry out the testator's intentions if satisfied that the probate copy of the will is so expressed that it fails to carry out his or her intentions. The court may order that the will be rectified to give effect to the testator's probable intention if satisfied that, for example, that circumstances or events were not known to, or anticipated by, the testator; and because of the circumstances or events, the application of the provisions of the will according to their tenor would fail to give effect to the probable intention of the testator if the testator had known of their effects.

Issues

7.5.5 The primary issue is whether broadening the rectification power within the *Wills Act 1936* (SA) provides a preferable solution than a deeming provision, in cases where the forfeiture rule applies and there is a gift-over in the will of a deceased victim.

7.5.6 The VLRC noted that a broad statutory power to rectify a will could be considered desirable, as it could enable the court to ascertain the hypothetical intention of the deceased in unforeseen circumstances, such as when a beneficiary kills the will-maker, and construe the will accordingly.¹³⁷⁷ For example, the VLRC noted that 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'.¹³⁷⁸

7.5.7 However, potential issues arise with a power of rectification that is too broad, in that it may have the potential to destabilise the accepted rules for construing a will.¹³⁷⁹ Further, the VLRC noted that a broad power of rectification may not provide the same certainty for executors that a

¹³⁷³ *Mortensen v State of New South Wales* (1991) (New South Wales Court of Appeal, Needham AJ, 12 December 1991) 'rectification is available for mistakes, not for lack of vision or perception of knowledge. See also *Re Estate of Miller* (2002) 223 LSJS 133.

¹³⁷⁴ *Succession Act 2005* (NSW) s 27(1); *Wills Act 2000* (NT) s 27(1); *Succession Act 1981* (QLD) s 33(1); *Wills Act 2008* (TAS) s 42(1); *Wills Act 1997* (Vic) s 31(1); *Wills Act 1970* (WA) s 50(1).

¹³⁷⁵ *Administration of Justice Act 1982* (UK) 30 Eliz 2, c 53, s 20.

¹³⁷⁶ *Wills Act 1968* (ACT) s 12A.

¹³⁷⁷ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 68 [5.57].

¹³⁷⁸ *Ibid* 68 [5.58].

¹³⁷⁹ See, for example, National Committee for Uniform Succession Laws, 'Uniform Succession Laws for Australian States and Territories: First Issues Paper: The Law of Wills' (Working Paper No 46, Queensland Law Reform Commission, 1994) 44–45.

deeming provision would, and would increase legal costs to the estate and delay distribution of the assets.¹³⁸⁰

7.5.8 The NZLC preferred the fiction of the killer predeceasing the victim to the rectification of wills.¹³⁸¹ The VLRC also preferred this solution, and noted that it provides an appropriate balance between respecting the expressed intention of the will-maker and a general policy that gives preference to lineal descendants, and ensuring that innocent descendants are not deprived of entitlements because of the actions of another.¹³⁸² While noting the support expressed in submissions, the VLRC:

‘[Did] 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.’

7.5.9 The issue was not considered in the reports of the UK, ACT, NSW, NZ or Ireland law reform bodies.

SALRI’s Observations and Conclusions

7.5.10 SALRI considers that the rectification power in s 25AA(1) of the *Wills Act 1936* (SA) should not be broadened to give the courts powers 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.

7.5.11 SALRI notes that a deeming provision in the proposed *Forfeiture Act* which deems the killer to have predeceased the victim will resolve the gift-over issue, leading to just and appropriate outcomes in the majority of cases. This solution will also allow the matter to be dealt with without the need for a court’s involvement.

7.5.12 Recommendation

Recommendation 42

SALRI recommends that the rectification power in s 25AA(1) of the *Wills Act 1936* (SA) should not be broadened to give a court the power to ascertain the hypothetical intention of the will-maker in unforeseen circumstances.

7.6 Family Provision Legislation

Current Position in South Australia

7.6.1 The *Inheritance (Family Provision) Act 1972* (SA) provides a discretion to the Supreme Court to allow certain specified members of a deceased’s family who establish they have been left without

¹³⁸⁰ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 69 [5.61].

¹³⁸¹ New Zealand Law Commission, *Homicidal Heirs* (Report No 38, 15 July 1997) 25 [C15].

¹³⁸² Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 67 [5.53].

adequate provision for their proper maintenance, education or advancement in life, to order such provision as the court thinks fit to be made out of the deceased's estate for the proper maintenance, education or advancement in life of the applicant. Similar laws exist in all States and Territories.

7.6.2 Persons entitled to claim under this Act include a spouse and domestic partner,¹³⁸³ a person who has been divorced from the deceased,¹³⁸⁴ a child of the deceased person,¹³⁸⁵ a child of a spouse or domestic partner of the deceased person,¹³⁸⁶ a grandchild of the deceased,¹³⁸⁷ a parent¹³⁸⁸ and a brother or sister of the deceased.¹³⁸⁹

7.6.3 The adjudication involves a 'two-stage' process explained by the High Court in *Singer v Bergbouse*.¹³⁹⁰ First, whether the applicant has been left without adequate provision for proper maintenance and second, to decide what provision ought to be made.¹³⁹¹

7.6.4 There is no provision in the Act which precludes an unlawful killer from claiming family provision from the estate of the deceased victim, however the court may refuse to make an order on the ground of disentitling conduct by the applicant.¹³⁹² This has been interpreted to mean character or conduct relevant to the purposes which the legislation is intended to serve, such as misconduct towards the deceased or character or conduct which shows that any need which an applicant may have for maintenance is due to his or her own fault.¹³⁹³

7.6.5 The burden of proving disentitling conduct is on those who resist the application (the beneficiaries under the will or on intestacy). The court may not reduce the award by reason of the applicant's conduct or character (s7(3) authorises the court only to 'refuse' to make an order) — but of course character or conduct falling short of what the court considers disentitling may still affect the

¹³⁸³ *Inheritance (Family Provision) Act 1972* (SA) subsections 6(a) and 6(ba).

¹³⁸⁴ *Inheritance (Family Provision) Act 1972* (SA) subsection 6(b); this is almost a dead letter since the introduction in the *Family Law Act 1975* (Cth) of the 'clean-break' policy of divorce whereby property is split once and for all — however *Burke v Public Trustee* (1997) 69 SASR 557 shows that in exceptional circumstances a divorced spouse can still succeed.

¹³⁸⁵ *Inheritance (Family Provision) Act 1972* (SA) subsection 6(c); includes by s4 a person who is recognised as a child by virtue of the *Family Relationships Act 1975* (Cth).

¹³⁸⁶ *Inheritance (Family Provision) Act 1972* (SA) subsection 6(g); being a child who was maintained wholly or partly or who was legally entitled to be maintained wholly or partly (under the *Family Law Act* an order can be made in exceptional circumstances for a spouse to maintain step-children) by the deceased person immediately before his death.

¹³⁸⁷ *Inheritance (Family Provision) Act 1972* (SA) subsection 6(h); *Re Sinodinos* (1994) 63 SASR 42.

¹³⁸⁸ *Inheritance (Family Provision) Act 1972* (SA) subsection 6(i); (defined in *Inheritance (Family Provision) Act 1972* (SA) s4) of the deceased who satisfies the court that he cared for, or contributed to the maintenance of, the deceased person during his lifetime; *Parente v Parente & Porter* (1982) 29 SASR 310.

¹³⁸⁹ *Inheritance (Family Provision) Act 1972* (SA) subsection 6(j); who satisfies the court that he cared for, or contributed to the maintenance of the deceased during his lifetime.

¹³⁹⁰ (1994) 181 CLR 201.

¹³⁹¹ (1994) 181 CLR 201, 209–210. See also *Kozłowski v Kozłowski* [2013] SASCFC 112, [36]–[38]; *Parker v Australian Trustees Executors Ltd* [2016] SASC 64, [18]–[21]. Though in practice 'there is in most cases a very large degree of overlap between the two stages': *Ilott v Mitson* [2017] 2 WLR 979, [23]. See further SALRI, 'Distinguishing between the Deserving and the Undeserving': *Family Provision Laws in South Australia* (Report No 9, December 2017) 70–73 [5.3.1]–[5.3.10].

¹³⁹² *Inheritance (Family Provision) Act 1972* (SA) s 7(3).

¹³⁹³ *Will of Gilbert* (1946) 46 SR (NSW) 318.

amount awarded on the merits (the court placing itself in the position of a wise and just testator¹³⁹⁴ or intestate) under s7(1). The relevant date is the death of the deceased taking into account matters which the deceased either knew or could reasonably have foreseen.

7.6.6 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. In the English case of *Re Royse (dec'd)*,¹³⁹⁵ 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. Ackner LJ stated:

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.

7.6.7 The decision of the English Court of Appeal in *Re Royse (deceased)* was endorsed by the NSW Supreme Court in *Troja v Troja (No 2)*¹³⁹⁶ following the earlier proceedings where the majority had held that a wife who had been convicted of the manslaughter of her abusive husband on the ground of diminished responsibility forfeited any bequests in his will in her favour.¹³⁹⁷ In the later proceedings, *Troja v Troja (No 2)*,¹³⁹⁸ it was held that she was also disentitled from bringing a claim under the family provision legislation as to allow this would be inconsistent with the earlier decision holding she was disentitled under his will, 'inconsistent with public policy and indeed, an affront to the public attitude, which is the basis for the forfeiture rule'.¹³⁹⁹

Position in Other Jurisdictions

7.6.8 The New Zealand Act expressly disentitles a killer from applying under the *Family Protection Act 1955* (NZ) for provision out of the estate of the killer's victim.¹⁴⁰⁰

7.6.9 The NSW Act expressly includes the entitlement to family provision in its definition of benefits to which the Act applies.¹⁴⁰¹

7.6.10 The UK Act allows the killer to apply for financial provision under the family provision laws and under family law/divorce legislation.¹⁴⁰²

7.6.11 The ACT does not expressly address the killer's entitlement to financial provision under other statutes — the only criterion is the definition of property.

¹³⁹⁴ *Allen v Manchester* (1922) NZLR 218, 220–221; *Bosch v Perpetual Trustee Co* [1938] AC 463, 478–479.

¹³⁹⁵ [1985] 1 Ch 22.

¹³⁹⁶ (1994) 35 NSWLR 182.

¹³⁹⁷ *Troja v Troja* (1994) 33 NSWLR 269.

¹³⁹⁸ (1994) 35 NSWLR 182.

¹³⁹⁹ *Ibid* 186 (Master McLaughlin).

¹⁴⁰⁰ New Zealand Act s 9.

¹⁴⁰¹ See NSW Act ss 3, 5.

¹⁴⁰² UK Act s 3.

Issues

7.6.12 The primary issue is whether the forfeiture rule should disentitle a person from claiming family provision, as the policy of the forfeiture rule may be seen to equally apply to such applications.

7.6.13 The VLRC noted that, while it appears that the common law forfeiture rule does prevent an offender from making a family provision application, this may not be clear to personal representatives of deceased estates, beneficiaries and other interested parties.¹⁴⁰³ As such, for clarity it may be beneficial to specify the effect of the forfeiture rule in relation to family provision claims.¹⁴⁰⁴

7.6.14 The VLRC was of the view that, where the forfeiture rule disentitles a person from receiving a benefit from a deceased estate, that person should also be precluded from claiming family provision. However, the VLRC considered that the effect of the rule should be able to be modified by a forfeiture rule modification order.¹⁴⁰⁵

7.6.15 The Law Reform Commission of Ireland noted that s 120(1) of the Irish *Succession Act 1965* prevents an unlawful killer from making an application for ‘just provision’. The Commission consequently noted that it was important to consider, ‘in the event that the courts are granted the discretion to modify the effect of the [forfeiture] rule, [whether] this discretion should extend to permitting an offender who has killed his or her parent to make an application under s 117 for a share in the estate of that parent.’¹⁴⁰⁶ Ultimately, it was recommended that the discretion extend to family provision legislation.¹⁴⁰⁷

7.6.16 This issue was not discussed in the reports of the UK, ACT, NSW, Tasmania or New Zealand law reform agencies.

Consultation Data Overview

7.6.17 There were differing views expressed during SALRI’s consultation as to whether a killer should be prohibited from making a claim under family provision legislation. At one of the Adelaide Roundtables, the general consensus was that the law may already be equipped to deal with most situations. In that regard, if a court is making a decision to award family provision, they will take into account the conduct of the applicant.

7.6.18 The general view expressed at another Adelaide Roundtable was that the killer should be entitled to make a claim under family provision law which will allow the justice of the case to prevail in cases where it is fair for a claim to be made. Of course, the requisite tests under the family provision law will need to be met before any order can be made. The Hon Geoffrey Muecke was also of the view that an unlawful killer should still be able to make a claim for provision but as long as it’s within the spirit of the forfeiture rule and that they must be granted leave to apply.

7.6.19 The Law Society of South Australia, the Victim Support Service and Dr Andrew Hemming took an opposing view and submitted that the killer should not be able to make a claim

¹⁴⁰³ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 73 [5.81].

¹⁴⁰⁴ *Ibid* 73 [5.82].

¹⁴⁰⁵ *Ibid* 73 [5.80].

¹⁴⁰⁶ Law Reform Commission of Ireland, *Report on Prevention of Benefit from Homicide* (Report No 114, July 2015) 52.

¹⁴⁰⁷ *Ibid*.

under family provision law, otherwise the rule is circumvented. The Victim Support Service also felt that ‘the idea of a killer being in prison and then coming for their victim’s estate does not sit well’.

SALRI’s Observations and Conclusions

7.6.20 The current position is that it is unlikely in practice that, in those cases where the forfeiture rule applies, a killer would be awarded provision under the family provision law. However, the law does not preclude the killer from making such a claim.

7.6.21 SALRI’s recent report into Family Provision noted that a particular problem in recent years, is that family provision laws have given rise to what has been described as a culture of expectation, even entitlement, and prompted greedy, vexatious or opportunistic claims. Less than meritorious claims are also likely to be settled early to avoid costs pressures and/or the uncertain outcome at trial, but even where these claims are not successful, they can greatly diminish the value of the testator’s estate and cause considerable distress and expense to all the parties involved.¹⁴⁰⁸

7.6.22 SALRI’s view is that the new law would apply to all property interests including financial provisions available to the killer under other South Australian Acts, such as family provision entitlements. When the forfeiture rule applies, that person should also be precluded from making a claim under family provision legislation.

7.6.23 Where the rule is modified by a forfeiture rule modification order under the proposed *Forfeiture Act*, the person can make a claim under the family provision legislation provided they are an eligible claimant under the family provision legislation. However, consistent with SALRI’s earlier position,¹⁴⁰⁹ the rationale of the forfeiture rule should not be undermined or diminished. SALRI notes the cogent view of the Victim Support Service that ‘the idea of a killer being in prison and then coming for their victim’s estate does not sit well’. An unlawful killer to whom the rule applies should only be able to make a successful claim under the family provision legislation in ‘exceptional circumstances’.

7.6.24 Recommendations

Recommendation 43

SALRI recommends that the proposed *Forfeiture Act* should apply to all property interests including financial provisions available to the killer under other South Australian Acts, such as the *Inheritance (Family Provision) Act 1972* (SA).

Recommendation 44

SALRI recommends that where the operation of the forfeiture rule is modified by a forfeiture rule modification order under the proposed *Forfeiture Act*, the killer would be able to make a claim under the *Inheritance (Family Provision) Act 1972* (SA).

¹⁴⁰⁸ South Australian Law Reform Institute, ‘*Distinguishing between the Deserving and the Undeserving: Family Provision Laws in South Australia*’ (Report No 9, December 2017) 17.

¹⁴⁰⁹ See above Rec 1.

7.7 Property Division Proceedings

Current Position in South Australia

7.7.1 The Family Court has no jurisdiction in a situation involving the forfeiture rule if proceedings have not yet been issued in the Family Court as at the date of the deceased victim's death. It is considered that, upon death, the deceased is no longer a party to a marriage (or de facto relationship) and the right to bring an action to sever the financial relationship is null and void. The death will, in effect, sever the financial relationship by survivorship laws, the laws of succession and family maintenance.

7.7.2 The Family Court only has jurisdiction in those cases where an application for a property settlement has been made and one party kills the other prior to the final hearing. In these cases, the first step involves the court giving leave for the continuation of the proceedings pursuant to s 79(8) of the *Family Law Act 1975* (Cth). If leave is granted, the deceased partner's legal personal representative will be permitted to continue the property proceedings commenced by the deceased partner prior to their death.

7.7.3 In *Cornell & Stokes*,¹⁴¹⁰ Wilson FM summarised the approach to proceedings involving s 79(8) of the *Family Law Act 1975* (Cth) in the following terms:

From the above authorities, I conclude that the appropriate way in which to deal with a case where one of the parties has died since the commencement of proceedings is as follows:

- (a) The party representing the deceased party to the marriage must demonstrate that, at the time of the death of the party so represented, the court would have made an order in favour of that party. In so doing, the party is not limited to the state of evidence at the date of death;
- (b) In reaching an opinion about that first prerequisite imposed by s 79(8)(b)(i) of the Act, the Court is not required to determine precisely what orders would have been made in that deceased party's favour, just that an order would have been made in that party's favour;
- (c) To reach that opinion, the Court must embark upon the exercise in s 79(4) of the Act;
- (d) Having determined that it would have made an order in the deceased party's favour had he or she survived, the Court must then consider whether it is still appropriate to make an order;
- (e) In that regard, the Court's discretion should not be exercised lightly, and should only be exercised in limited circumstances, so as to satisfy moral obligations that remain unsatisfied;
- (f) The deceased party to the marriage has a prima facie moral entitlement to his or her contributions based entitlements to matrimonial property;
- (g) The size of the pool and the needs of the surviving spouse, including s 75(2) factors must be taken into account in formulating any orders.¹⁴¹¹

¹⁴¹⁰ [2008] FamCA 774.

¹⁴¹¹ Wilson FM reviewed relevant authorities, including the Full Court in *Bourke v Bourke* [1998] FamCA 69.

7.7.4 In this process, the onus of establishing the appropriateness of making a property order *post mortem* rests on the representative of the deceased party.¹⁴¹²

7.7.5 There are a number of cases which have considered the impact of death of a spouse on the stage of the exercise involving consideration of other factors, including the remaining matters to be taken into consideration in relation to spousal maintenances under s 75(2) of the *Family Law Act 1975* (Cth).¹⁴¹³ The underlying principle in all of these cases is that the death of a spouse is likely to have a significant impact on the application of s 75(2) factors. This is neatly summarised by Brereton J in *Grace v Grace*¹⁴¹⁴ where he stated:

... Secondly, a deceased spouse has no future needs, and thus no s 75(2) factors operating in her or his favour [*Tasmanian Trustees Limited v Gleeson* (1990) FLC 92, 156]; thus the death of a party *can* have a profound effect on the balance of the s 75(2) factors [*Parrott v Public Trustee of NSW* (1994) FLC 92, 473], although that will depend on the means and needs of the surviving spouse and the adequacy of his or her contribution-based entitlement to provide for them.¹⁴¹⁵

7.7.6 As the deceased victim does not have s75(2) circumstances, then generally this will result in the bulk of the property going to the surviving party. However, in forfeiture cases, the courts have modified their approach so that the killer is unable to obtain any alteration in their favour pursuant to section 75(2) factors. As Coleman J stated in *Homsy v Yassa and Yassa; the Public Trustee*:¹⁴¹⁶

In determining what order should now be made, Section 75 needs to be considered. It is artificial to have regard to Section 75(2) operating in favour as of the deceased. It is rather in this case, the operation of Section 75(2) as raised by the applicant to increase his entitlement which must be considered. In essence, though not put this way by his counsel, the applicant maintains that he has needs for accommodation, that he has health problems, that he has limited or no capacity to be employed for a variety of reasons relating to health and his criminal record, and that, in all the circumstances, Section 75(2) should operate to increase his entitlement beyond that which he achieves by contribution. I do not accept that this is so. In my view, the applicant having terminated the life of the deceased, and thereby rendering inappropriate Section 75(2) factors which previously significantly favoured the deceased, cannot himself have the benefit of those factors. To do so would be offensive to justice and equity, whether that is considered in the context of Section 79(2) and Section 75(2)(o) of the Act.¹⁴¹⁷

7.7.7 Coleman J went further and in the context of the husband seeking a delayed sale of the house, a primary asset of the parties, observed:

¹⁴¹² *Tasmanian Trustees Ltd v Gleeson* (1990) FLC 92, 156, applied by Carmody J in *Rutter* [2004] FamCA 424; and by Boland J in *Ford & Marchant* [2001] Fam CA 1585.

¹⁴¹³ *Lawrie v Lawrie* [1981] FamCA 73; (1981) FLC 91–102 (Asche, Fogarty and Gee JJ); *Menzies v Evans* [1988] FamCA 35; (1988) FLC 91–969 (Smithers J); *Tasmanian Trustees Limited v Gleeson* (1990) FLC 92–156 (Strauss, Baker and Nygh JJ); *Parrott v Public Trustee of NSW* (1994) FLC 92–473 (Nicholson CJ, Lindenmayer and McGovern JJ); *Homsy v Yassa; Public Trustee* (1994) FLC 92–442 (Coleman J); *Mason v Mason & Mason-King* (1994) FLC 92–446 (Baker, Lindenmayer and Bell JJ); *W & W* [1999] FamCA 1765 (Jordan J); *G v The Public Trustee of the Australian Capital Territory (as Legal Representative of N)* [2002] FamCA 751 (Finn J); and *K & P* [2003] FamCA 1491 (Collier J).

¹⁴¹⁴ [2012] NSWSC 976.

¹⁴¹⁵ *Ibid* [290] (Brereton J). See also *Van der Linden & Kordell* [2010] FamCAFC 157.

¹⁴¹⁶ (1994) FLC 92–442.

¹⁴¹⁷ *Ibid* 442.

It is evident from the above that I reject the submission on behalf of the applicant that the sale of Concord be postponed until April 1997. To grant such an indulgence to the applicant would in my view be unconscionable as it would represent a benefit which could only be seen as applicable to Section 75(2) of the Act, and in turn sustainable on the basis that, as the deceased will not in any way benefit from any order made in these proceedings, whether it be effective immediately or postponed indefinitely, to grant this indulgence would be to permit the applicant to profit from his unlawful killing of the deceased. Having regard to the matters set out above, I will not make orders which, directly or indirectly confer upon the applicant a benefit for that unlawful killing.¹⁴¹⁸

Position in Other Jurisdictions

7.7.8 In New Zealand, the killer will not be deprived of existing rights in family property proceedings. Under the New Zealand Act, the benefit of a killer who has a valid claim against the estate of their victim under the *Matrimonial Property Act 1963* or the *Property (Relationships) Act 1976* must be calculated to ensure that the killer is not deprived of the benefit to which they are entitled for the services or other economic benefits they provided to the victim. However, the killer's benefit must not be calculated such that it is made more certain or more valuable as a result of the victim's death.¹⁴¹⁹

7.7.9 The legislation in NSW, the ACT and the UK does not expressly address the killer's entitlements in family property proceedings.

Issues

7.7.10 The New Zealand Law Commission discussed that the basis of a claim in family property proceedings exists independently of the killing, and as such, it is arguable that any proposed legislation should not remove the killer's ability to make such a claim. Equally, one might think it appropriate that the death of the victim gives the killer no more certain, immediate or valuable benefit than that to which he or she would have otherwise been entitled.¹⁴²⁰

7.7.11 The issue was not discussed in the UK, ACT, NSW, Tasmania, Victoria or Ireland law reform reports.

Consultation Data Overview: What Role Should the Family Court Play in Cases Where the Forfeiture Rule Applies?

7.7.12 Berman J of the Family Court told SALRI that the Family Court is a suitable venue to deal with forfeiture applications and the issues arising but accepted the formidable jurisdictional and constitutional problems with vesting the Family Court with this role. Berman J considered that the Family Court to be well placed given that it is well equipped to deal with situations involving children and because of its ability to deal concurrently with bankruptcy and family law proceedings and that these competing claim scenarios are commonly encountered in the forfeiture context.

7.7.13 The Hon Geoffrey Muecke submitted that where there is an order of the Family Court that the unlawful killing should prevent the order being executed further except by further instruction

¹⁴¹⁸ The court in *Neubert (Dec'd) & Neubert and Anor (No 2)* [2017] FamCA 829 reiterated at [182] the statement of Coleman J in *Homsy & Yassa and Yassa; the Public Trustee* (1994) FLC 92-442 that 'the husband, having murdered the late wife, cannot have the benefit of the s75(2) factors' and that '[t]o do so would be offensive to justice and equity'.

¹⁴¹⁹ New Zealand Act s 10(1)-(2).

¹⁴²⁰ New Zealand Law Commission, *Homicidal Heirs* (Report No 38, 15 July 1997) [C22], 31.

by the family court. If there are orders concerning children, they may be carried out provided they do not affect the operation of the forfeiture rule.

7.7.14 The Legal Services Commission did not see any merit in giving the Family Court the power to concurrently deal with the forfeiture issue. The Commission was of the view that involvement in Family Court proceedings would further complicate the administration of the estate. The Commission argued that Family Court orders concern the redistribution of assets under principles in the *Family Law Act 1975* (Cth) and should not be considered under inheritance laws.

SALRI's Observations and Conclusions

7.7.15 SALRI notes that Berman J raised a willingness for the Family Court to play a role in cases where the forfeiture rule applies, and where property division proceedings in the Family Court were on foot at the time of the killing. While this suggestion is not untenable, SALRI notes that there are formidable constitutional and other issues associated with approach, and that such an approach might be thought to be unnecessary in any event.

7.7.16 Recommendation

Recommendation 45

SALRI recommends that the Family Court should play no additional role in cases where the forfeiture rule applies, and where property division proceedings in the Family Court were on foot at the time of the killing.

7.8 Defending a Homicide Charge

Current Position in South Australia

7.8.1 An alleged killer is not entitled to payment of legal expenses from the victim's estate to defend the homicide charge even if he or she is the sole beneficiary under his victim's will.¹⁴²¹

7.8.2 In the case of *Gonzales v Claridades*¹⁴²² the alleged killer had been charged with the murder of his parents and his sister. Under his parents' joint will, he was to receive their entire estate. However, the forfeiture rule would preclude him from receiving the estate if it could be established that he murdered his parents. The alleged killer pleaded not guilty to murder and sought an order that the executrix of his parents' will provide him with a sufficient amount from their estate to pay for his defence and instruct suitable lawyers in the committal proceedings and to allow him to make a No Bill application if he was committed to trial. The court refused to make the order sought both at first instance and on appeal. The NSW Court of Appeal dismissed the appeal since the administration of the estate was incomplete and therefore the alleged killer had no present right in law or equity to the

¹⁴²¹ See *Gonzales v Claridades* (2003) 58 NSWLR 211.

¹⁴²² Ibid.

property which it comprised.¹⁴²³ Mason P held that nothing in the *Forfeiture Act* ‘presently applies’.¹⁴²⁴ The appeal judgment contains the following pertinent remarks:

In my view, the forfeiture rule is firmly embedded in the Australian common law, certainly as regards murder. It is strict and unbending (*Helton v Allen*, *Troja v Troja*, *Rivers v Rivers*). Legislation like the *Forfeiture Act* was considered necessary to modify the rule, and nothing in that legislation presently applies. The rule is therefore not qualified by reference to any exceptional or discretionary principle permitting a trustee or court to advance money for legal expenses to the person charged with the relevant homicide for the purpose of testing the issue of guilt in criminal or civil proceedings. Nor do the appellant’s legitimate interests in the effective defence of his criminal proceedings create any basis for the relief claimed stemming from nothing more than his present need for money to protect his interests.¹⁴²⁵

Position in Other Jurisdictions

7.8.3 The NSW, ACT, UK and New Zealand laws do not specifically refer to the use of funds from the victim’s estate to defend a homicide charge.

Issues

7.8.4 The VLRC recognised that on one view, it is arguable that a defendant, who is presumed innocent until found guilty, should be allowed access to their potential inheritance or any joint assets to fund their defence.¹⁴²⁶ However, the VLRC recognised it as problematic that there would be little prospect of recovering the value of that interest if the forfeiture rule was found to apply.¹⁴²⁷

7.8.5 Further, the VLRC noted that applying the forfeiture rule after assets have been put towards funding a defence would seem to be contrary to public policy, as the offender will have benefitted from the death of the deceased.¹⁴²⁸ It would also be contrary to the interests of innocent third parties who would have otherwise been entitled to the realised assets.¹⁴²⁹

7.8.6 This issue was not discussed in the reports of the UK, ACT, NSW, Tasmania, NZ and Ireland law reform bodies.

Consultation Data Overview: Prior to Conviction, Should a Court be Empowered to Appropriate Any Part of the Deceased’s Estate for the Use of the Unlawful Killer?

7.8.7 SALRI’s consultation raised that a defendant, who is presumed innocent until found guilty, should in theory be allowed access to their potential inheritance or any joint assets to fund their defence.¹⁴³⁰ However, it was widely recognised this is highly problematic as there would be little prospect of recovering the value of that interest if the forfeiture rule was found to apply. It was noted

¹⁴²³ *Gonzales v Claridades* (2003) 58 NSWLR 211, [19]. Mason P gave the leading judgment (with whom Beazley JA and Foster AJA agreed) and relied on *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694.

¹⁴²⁴ *Gonzales v Claridades* (2003) 58 NSWLR 211, 220 [46] (Mason P).

¹⁴²⁵ *Ibid* 220 [46].

¹⁴²⁶ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 77 [5.111].

¹⁴²⁷ *Ibid* 78 [5.112].

¹⁴²⁸ *Ibid* 78 [5.114].

¹⁴²⁹ *Ibid* 78 [5.114].

¹⁴³⁰ *Ibid* 77 [5.111].

that the killer may have instructed the most highly paid lawyers available and the estate may have been wholly dissipated in their defence in the criminal proceedings. The objectionable nature of a killer using their ‘inheritance’ from the deceased they had killed in order to fund their defence in the criminal proceedings and before any conviction or application of the forfeiture rule was highlighted.

7.8.8 At the Adelaide Roundtables there was discussion about how an accused person who wishes to mount a defence would find the resources to do so in cases where an injunction or order has been granted preventing them from accessing their assets. It was thought that in appropriate cases the accused could access their ‘share’ of the assets but that it would be up to the court to assess that. For example, if the judge is satisfied that there is a genuinely held joint account, there is no reason why half of the account balance should not be available for the conduct of the defence.

7.8.9 A concern raised was that in family violence situations the abused partner will not have access to any money as it is likely being controlled by their abuser. The view expressed was that the system is already equipped to deal with this through legal aid, where the aid is provided subject to a charge being applied over the accused’s share of property. At the Mount Gambier Roundtable similar concerns were raised, but the general view was that the accused would have legal aid to fall back on.

7.8.10 Mr O’Connell raised to SALRI the concern that if the accused applies for legal aid, then the legal aid authority will seek a caveat over the property. He was concerned that the law may impact on the accused’s access to fair legal representation, particularly in cases involving family violence or Aboriginal defendants.

7.8.11 The Legal Services Commission considered that the preferable option would be to allow the accused to apply to the executor or court for an order that a partial distribution of the deceased victim’s estate be made and that funding should be provided if the court determines that the defence case has merit.

7.8.12 Dr Andrew Hemming submitted that under no circumstances should the victim’s estate be able to be used by the killer to pay for their defence to an unlawful homicide charge. He was of the view that the killer will have their own resources to draw on or would be able to rely on Legal Aid.

SALRI’s Observations and Conclusions

7.8.13 It is obviously inappropriate and against public policy for an alleged killer to use their ‘inheritance’ from the deceased they had killed in order to fund their defence in the criminal proceedings and before any criminal conviction or application of the forfeiture rule. SALRI considers that, until a formal finding of guilt is made and any application made by or on behalf of the killer for relief from the rule has been finalised, the court should not be empowered to appropriate any part of the deceased’s estate for the use of the killer.

7.8.14 SALRI is of the view that the court should have power to grant the killer access to the killer’s pre-existing share of property jointly owned by the killer with the deceased, but no more.

7.8.15 Recommendations

Recommendation 46

SALRI recommends that the proposed *Forfeiture Act* should provide that until criminal proceedings are finalised, a court should not be empowered to appropriate any part of the deceased’s estate for the use of the unlawful killer.

Recommendation 47

SALRI recommends that the proposed *Forfeiture Act* should provide that a court should have the power to grant the killer access to the killer's pre-existing share of property jointly owned by the killer with the deceased, but no more.

Part 8 - Effect on the Killer's Entitlement to the Victim's Other Assets

8.1 Jointly Owned Property or Assets

Current Position in South Australia

8.1.1 The effect of the forfeiture rule also raises implications where the killer and victim are joint tenants.¹⁴³¹ Property held jointly with another person may be held in a 'joint tenancy' form of ownership or a 'tenancy in common' form of ownership. Each are treated differently. Co-owned assets held as joint tenants do not form part of a person's estate, whilst interests held jointly as tenants in common do form part of an estate.

8.1.2 In ordinary circumstances, a person's interest in jointly owned property does not become part of his or her estate upon death. Instead, that person's interest is extinguished and the interests of the other joint tenants are correspondingly enlarged.¹⁴³² This is known as the right of survivorship.

8.1.3 This situation is in contrast to a tenancy in common form of ownership where one co-owner's share does not automatically vest in a surviving co-owner upon death. Each co-owner holds a distinct share that then forms part of their estate upon their death.

8.1.4 Example 1:

Thivanka and Alice have a joint bank account. On Alice's death, Thivanka will automatically receive the cash in the joint bank account as the surviving joint tenant and it will not form part of Alice's estate. The cash in the joint account also cannot be challenged under the *Inheritance (Family Provision) Act 1972* (SA). A jointly held property would be treated in the same manner.

8.1.5 The application of the forfeiture rule in relation to property jointly owned by the killer and a victim at the time of the victim's death is problematic. By survivorship, the victim's legal interest in the property is extinguished upon his or her death and the entitlement of the remaining joint tenants is enlarged.¹⁴³³ Where the victim's property is jointly owned with the killer, this would enlarge the killer's entitlement. Such enlargement would be contrary to the forfeiture rule, which seeks to prevent the killer from benefiting from the killing. However, where property is jointly owned by the killer and the victim at the time of the victim's death, the forfeiture rule prevents the right of survivorship from operating in its normal way. The courts have adopted two different approaches which both result in

¹⁴³¹ Under the constructive trust approach, the property the killer would have otherwise been entitled to is held on trust for an appropriate beneficiary: *Re Keid* [1980] Qd R 610; *Rasmanis v Jurewitsch* [1968] 2 NSWLR 166; Ken Mackie, *Principles of Australian Succession Law* (LexisNexis, 3rd ed, 2017) 242.

¹⁴³² *Wright v Gibbons* (1949) 78 CLR 313, 323 (Latham CJ): 'The interests of each joint tenant in the land held are always the same in respect of possession, interest, title and time. No distinction can be drawn between the interest of any one tenant and that of any other tenant. If one joint tenant dies his interest is extinguished. He falls out, and the interest of the surviving joint tenant or joint tenants is correspondingly enlarged.'

¹⁴³³ *Wright v Gibbons* (1949) 78 CLR 313, 323.

the killer keeping an equivalent of his or her interest in the jointly owned property immediately before the death but no more.

8.1.6 One approach holds that the killing severs the joint tenancy so that the beneficial interest passes as if the killer and the victim were tenants in common.¹⁴³⁴ This change causes the killer to lose his or her right of survivorship, which is a complication where the property is jointly owned not only by the killer and victim but also by a third party.

8.1.7 The second approach holds that the killing does not sever the joint tenancy but that the killer takes the legal interest of the victim by right of survivorship but holds that legal estate on a constructive trust for both him or herself and the victim's legal representatives as equitable tenants in common in equal shares.¹⁴³⁵ This position has been consistently followed in New South Wales,¹⁴³⁶ New Zealand,¹⁴³⁷ Canada¹⁴³⁸ and the United Kingdom.¹⁴³⁹

8.1.8 The situation becomes more complex in those cases involving joint owners other than the killer and the victim. In the ensuing discussion, the example is of a three-person joint tenancy, including the killer and victim, with the third tenant having nothing to do with the unlawful killing. The principles discussed would apply equally to a joint tenancy involving more than one other innocent third tenant.

8.1.9 The first approach that has been taken by Australian courts in applying the forfeiture rule in such circumstances is to find that the unlawful killing causes a severance in equity of the joint tenancy, so that the two surviving joint tenants continue as the only joint tenants at law but the interest of each one is enlarged by one-sixth.¹⁴⁴⁰ There is no further severance or constructive trust. Hence:

- a. The killer gains by getting half of the victim's interest (one-sixth of the entirety) and the killer is entitled to the entire estate, by survivorship, should the innocent third tenant predecease him or her. This approach is clearly contrary to the fundamental premise of the forfeiture rule because it allows the killer to benefit from the victim's death.
- b. The victim's estate receives nothing. Although the rule does not set out to compensate the victim's estate for the unlawful killing, but rather to prevent the killer benefiting from it, and notwithstanding that upon death the victim would in any event relinquish any share

¹⁴³⁴ *Re Barroncliff* [1927] SASR 147. This approach was adopted in *Kemp v Public Curator of Queensland* [1969] Qd R 145, 149. However, subsequent Queensland cases have adopted the alternative approach, see below n 1434.

¹⁴³⁵ *Rasmanis v Jurewitsch* (1968) 88 WN (Pt 1) (NSW) 59 and, on appeal, *Rasmanis v Jurewitsch* [1970] 1 NSW 650 (*Rasmanis (No 2)*). In taking this approach, the court noted the disapproval of *Re Barroncliff* in *Re Thorp* [1962] NSW 889, and considered a range of subsequent cases and academic commentary. This approach was subsequently adopted in Queensland in *Re Stone* [1989] 1 Qd R 351, 353–355 and *Re Nicholson* [2004] QSC 480, [10], in New South Wales in *Public Trustee v Evans* (1985) 2 NSWLR 188, 193, *Ekert v Mereider* (1993) 32 NSWLR 729, 731, *Neubacher v Good* [2003] NSWSC 379, [10], *Public Trustee of New South Wales v Fitter* [2005] NSWSC 1188, [64], *Nay v Iskov* [2012] NSWSC 598 (2 May 2012), [12]–[13], *Josifovski v Velenski* [2013] NSWSC 1103, [33], in New Zealand in *Re Pechar (dec'd)* [1969] NZLR 574, 587–588, in Ireland in *Cawley & Ors v Lillis* [2011] IEHC 515, and in Canada in *Schobelt v Barber* (1966) 60 DLR (2d) 519, 524, 526, *Re Dreger* (1976) 69 DLR (3d) 47, 60, *Merkley v Proctor* (1989) 33 ETR 175, [28] and *Singh Estate v Bajrangie-Singh* (1999) 29 ETR 302, [19], [33].

¹⁴³⁶ *Public Trustee v Evans* (1985) 2 NSWLR 188.

¹⁴³⁷ *Re Pechar (dec'd)* [1969] NZLR 574.

¹⁴³⁸ *Schobelt v Barber* (1966) 60 DLR (2d) 519.

¹⁴³⁹ *Re K (dec'd)* [1985] Ch 85.

¹⁴⁴⁰ *Rasmanis v Jurewitsch* [1970] 1 NSW 650 (Jacobs JA).

in the jointly-owned property by survivorship and that therefore the concept of a victim's 'surviving' share is notional, the fact that the victim died at the hands of one of the other tenants makes the result seem unfair and inappropriate.

8.1.10 The second approach taken by Australian courts is to find that the unlawful killing causes a severance in equity of the joint tenancy so that it becomes an equitable tenants in common in the share of one third to the killer and two thirds to the third party joint tenant.¹⁴⁴¹ This means that the killer's interest remains the same, but the victim's interest passes by survivorship to the other surviving tenant. Therefore, the killer and the surviving other tenant hold, respectively, 1/3 and 2/3 interests on trust for themselves as equitable tenants in common. The victim's estate receives nothing. By this approach, the innocent third tenant gains an additional one-sixth, and, hence, would appear to be gaining from another's unlawful act. However, the innocent third tenant also loses his or her entitlement to the entire property by survivorship. The killer does not gain anything under this model, but also loses his entitlement to the entire property by survivorship.

Position in Other Jurisdictions

8.1.11 In New South Wales, where the killer and the victim jointly owned property at the time of the victim's death, a court is permitted to exclude the operation of the forfeiture rule in relation to any or all of the interests.¹⁴⁴² The ACT contains a provision with similar effect.¹⁴⁴³ The UK Act also contains a similar provision. However, where there is more than one interest in property, such as in a joint tenancy, the UK Act does not permit exclusion of the forfeiture rule in respect of all of the interests.¹⁴⁴⁴

8.1.12 These Acts do not purport to determine how the forfeiture rule applies. Their purpose is to permit a court to modify its effect when it would otherwise apply strictly. Hence none of them specifically says how the rule should apply to jointly-owned property.¹⁴⁴⁵

8.1.13 In New Zealand, that property that is owned in joint tenancy by the victim, the victim's killer, and any other person (if any) devolves at the death of the victim as if the property were owned by each of them as tenants in common in equal shares.¹⁴⁴⁶

Issues

8.1.14 SALRI has considered the question of how the forfeiture rule should apply, both to property jointly owned by the killer and the victim, and to property also jointly owned by a third party uninvolved in the killing.

¹⁴⁴¹ *Rasmanis v Jurevitsch* (1968) 88 WN (Pt 1) (NSW) 59 (Street J).

¹⁴⁴² NSW Act s 6.

¹⁴⁴³ ACT s 3.

¹⁴⁴⁴ UK Act s 2(5).

¹⁴⁴⁵ By contrast, the New Zealand Act, the purpose of which is to codify the common law rule and to prevent modification, provides that 'property owned in joint tenancy by the victim, the victim's killer, and any other person (if any) devolves at the death of the victim as if the property were owned by each of them as tenants in common in equal shares': New Zealand Act s 8(3).

¹⁴⁴⁶ New Zealand Act s 7 (property under a will or intestacy) and s 8(3) (non-probate assets) combined prevent the survivorship rule applying to a joint tenancy, and therefore if there was a third innocent party who jointly owned the property then he or she would be unaffected.

8.1.15 Commonwealth courts have typically treated the property as owned by the parties as tenants in common in equal shares, either by treating the killing as an election to sever the tenancy or treating the legal title as passing to the killer, but requiring the killer to hold the undivided share for the victim's estate.¹⁴⁴⁷ While this is one option for reform, this solution is arguably problematic, in that it does not recognise the chance that the deceased had of surviving the killer and becoming the sole owner of the property.¹⁴⁴⁸

8.1.16 It is also important to consider the application of the forfeiture rule to the scenario where there are multiple joint tenants, if only to illustrate an area of law where legislative clarification is justified. This necessity arises both from the need to make the application of the forfeiture rule clear, and to make it fair and consistent with other laws.

8.1.17 The survivorship approach has been applied in two different ways in circumstances where there are joint owners other than the killer and the victim. The rationales for the forfeiture rule and the principle of survivorship are difficult to reconcile, and neither approach appears to produce a sound result.

8.1.18 The appropriate way to resolve the application of the forfeiture rule to a joint tenancy has been discussed by various law reform bodies and commentators.¹⁴⁴⁹

8.1.19 The VLRC recognised issues with the current law, in that a beneficial interest in a constructive trust cannot be reflected in the lands title register.¹⁴⁵⁰ This means that either the deceased person's estate or the innocent joint tenant would have to lodge a caveat to protect their interest, which may be complex for executors and administrators of estates.¹⁴⁵¹

8.1.20 The VLRC supported an approach where an offender's interest in a joint tenancy is severed from the other joint tenants, resulting in the offender and the deceased's person's estate taking the property as tenants in common in equal shares.¹⁴⁵² This approach was favoured because it results in neither a gain nor a loss for any party; the offender is prevented from enlarging their share, but is not stripped of their existing interest.¹⁴⁵³ Likewise, the rights of innocent joint tenants to take the deceased person's interest by survivorship and to retain rights of survivorship among themselves would be untouched.¹⁴⁵⁴

8.1.21 Conversely, the New Zealand Law Commission was of the view that it is more just to treat the killer as having predeceased the victim. The NZLC was of this view, and considered that it is not unfair to deprive the killer of all rights to the property, given the killer has ensured that 'the winner of the game cannot be determined fairly'.¹⁴⁵⁵ The Tasmania Law Reform Commission also supported

¹⁴⁴⁷ New Zealand Law Commission, *Homicidal Heirs* (Report No 38, 15 July 1997) 12 [18].

¹⁴⁴⁸ *Ibid* 12–13.

¹⁴⁴⁹ See, for example, Dianne Caldwell, 'Criminal Law and Estates: The Forfeiture Rule' (2004–2005) 24(3) *Estates, Trusts and Pensions Journal* 269; Nicola Peart, 'Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia' (2002) 31(1) *Common Law World Review* 1.

¹⁴⁵⁰ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 74 [5.90].

¹⁴⁵¹ *Ibid*.

¹⁴⁵² *Ibid* 76 [5.100].

¹⁴⁵³ *Ibid* 76 [5.101].

¹⁴⁵⁴ *Ibid*.

¹⁴⁵⁵ New Zealand Law Commission, *Homicidal Heirs* (Report No 38, 15 July 1997) 13 [20].

this view, with provision for an interested person to apply for an order that the estate be distributed in some other manner, for reasons of clarity and ease for the legal personal representative.¹⁴⁵⁶

8.1.22 The Law Reform Commission of Ireland discussed case authority which identified the need for legislative reform to deal with joint tenancies.¹⁴⁵⁷ It was recognised by Laffoy J in *Cawley v Lillis*¹⁴⁵⁸ that ‘ideally, there should be legislation in place which prescribes the destination of co-owned property in the event of the unlawful killing of one of the co-owners by another co-owner.’¹⁴⁵⁹

8.1.23 The Irish Law Reform Commission ultimately suggested that, in the case where the offender and the victim hold property under a joint tenancy, the offender should be ‘precluded from obtaining the benefit of the right of survivorship, and the legal and beneficial interests in the property held under the joint tenancy between the victim and the offender shall stand severed from the date when the offence was committed.’¹⁴⁶⁰ The Commission further suggested that, without prejudice to the presumption that the victim holds at least half of the interest, the amount and value of the interest to be held by the offender will be determined by the court, having regard to prescribed circumstances.¹⁴⁶¹

8.1.24 Regarding multiple joint tenants, the Irish Law Reform Commission recommended that where there are more than two joint tenants, the joint tenancy is to remain between joint tenants other than the victim and the offender. Those innocent joint tenants will take the deceased person’s interest by survivorship, and the interest of the offender would be severed. However, the Irish Commission also recommended that the offender’s remaining interest be subject to a power of the court to alter that interest, having regard to prescribed circumstances.¹⁴⁶²

8.1.25 The issue was not discussed in the reports of the UK, ACT or NSW law reform bodies.

Consultation Data Overview: What Should the Effect of the Forfeiture Rule be on Jointly Owned Property?

8.1.26 The general view at the first Adelaide Roundtable was that, where the deceased victim and the killer hold property jointly, the joint tenancy should be severed and that the parties then hold their property as tenants in common. There were a number of concerns raised with the constructive trust option. The general view was that courts still cannot define the role of the constructive trust. There was also unease at the device of the unlawful killer holding the property on a constructive trust. This suggestion, especially in a family violence context, was viewed as flawed.

8.1.27 At the second Adelaide Roundtable, the preferred option was also to sever the joint tenancy. Attendees again expressed concern with the constructive trust approach leaving the killer to hold the property of person they have killed and that there would need to be a caveat or other protection in place to prevent any dissipation of the assets. A small number of attendees preferred that the rule operate on the presumption that the killer predeceased the victim so that the killer loses their

¹⁴⁵⁶ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 21–22.

¹⁴⁵⁷ Law Reform Commission of Ireland, *Report on Prevention of Benefit from Homicide* (Report No 114, July 2015) 23.

¹⁴⁵⁸ [2012] 1 IR 281.

¹⁴⁵⁹ Ibid 303. See also Law Reform Commission of Ireland, *Report on Prevention of Benefit from Homicide* (Report No 114, July 2015) 23.

¹⁴⁶⁰ Law Reform Commission of Ireland, *Report on Prevention of Benefit from Homicide* (Report No 114, July 2015) 36.

¹⁴⁶¹ Ibid 36–37.

¹⁴⁶² Ibid 39.

entitlement to their ownership interest in the jointly owned property and that the entire property passes to the victim's estate. The concern expressed by some attendees at taking this approach is that this outcome goes beyond forfeiture and then becomes confiscation.

8.1.28 At the third Adelaide Roundtable, the preferred option was also to sever the joint tenancy. The general consensus was that the constructive trust approach is unworkable. The equitable idea of a constructive trust as once raised by the learned Ken Mackie at the University of Tasmania¹⁴⁶³ and adopted on occasion by the courts¹⁴⁶⁴ was discussed. There was wide unease with this idea. The notion of the killer holding the estate on trust for the deceased was dismissed as an 'offensive fiction'.

8.1.29 It was noted to SALRI that the family home is often held jointly between spouses. There was concern regarding young children and the impact on the children's health and welfare if they are forced to leave their home. It was thought that, on an interim basis, it is important to keep the children at home but it was noted that the 'unfortunate reality' is that, regardless of the murder/manslaughter, as a family law matter the children may have to leave the family home for reasons beyond the court's control. Grandparents may not want to live in the house because it may be where the crime occurred. Whilst noting these problems, there was still general agreement that, during the often lengthy period a criminal case is unresolved, a court should have the power to control the use of the property.

8.1.30 The Commissioner for Victims' Rights, Ken Mackie and Professor Gino Dal Pont submitted that severing the joint tenancy is the preferable option.

8.1.31 Attendees at the Mount Gambier Roundtable formed the view that, in cases where property is jointly owned, a presumption should arise that the killer died first, resulting in the victim's estate receiving the property. The Victim Support Service also preferred introducing a presumption that the killer died first. An interesting point raised by the Victim Support Service was that if the killer is deliberating as to whether they would be financially better off in the Family Court or under the forfeiture rule, they could be driven to kill their spouse if they think the 50% under the forfeiture rule will be higher than the lower percentage likely to be received in the Family Court.

8.1.32 With respect to those situations involving third party joint ownership, the preferred view at the first Adelaide roundtable was to sever the joint tenancy altogether. This option received support as it was viewed that then 'no one receives a windfall' and that it also removes the complexity of establishing a constructive trust.

8.1.33 The preferred option at the second Adelaide Roundtable was also to sever the joint tenancy. Attendees did not like the idea that the third party should get a windfall benefit under the rule. The better approach was to deal with the property on the basis that behind the joint tenancy there was an understanding as to natural death, and that understanding has been frustrated by the event of the killing, and so severing the joint tenancy by splitting the property into thirds is a logical outcome. The contrary argument was that the third party should not be penalised under the joint tenancy arrangement and that a joint tenancy arrangement is a 'lottery' with each party taking a risk that they may die before the other joint owners of the property.

¹⁴⁶³ Ken Mackie, 'The Forfeiture Rule: The Destination of Property Interests on Homicide' (1997) 2(2) *Newcastle Law Review* 30, 45. Mr Mackie told SALRI that he no longer supports the constructive trust device.

¹⁴⁶⁴ *Re Keid* [1980] Qd R 610; *Rasmanis v Jurewitsch* [1968] 2 NSWLR 166.

8.1.34 The preferred option at the third Adelaide Roundtable was also to sever the joint tenancy. This was considered to be simpler and also results in a fairer distribution of the jointly owned property, rather than relying upon survivorship — the last party standing approach.

8.1.35 If there are three joint owners, Mr Mackie and Professor Dal Pont considered that the preferable option is to sever the part that belongs to the killer and that the third party should receive the remaining two thirds of the property. The basis for this argument is that the third party has not been involved and that is what could have happened in the ordinary course of events anyway depending on timing of deaths. Mr Mackie explained to SALRI that he no longer supports the constructive trust notion. This was also the approach supported by the four practitioners who attended the follow-up consultation held at the Adelaide Law School.

8.1.36 The Hon Geoffrey Muecke was of the opinion that, when there is a third party involved, the joint tenancy should not be severed and a constructive trust should be set up for the estate of the deceased for the one sixth ownership of that property.

8.1.37 Professor Prue Vines of the University of New South Wales was also of the view that the preferable way to proceed is to deem that the killer predeceased the victim. 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 and in any event, this was the outcome in *Rasmani*¹⁴⁶⁵ although by other means. Professor Vines submitted that the advantage of deeming that the killer predeceased the victim lies mainly in its simplicity.

8.1.38 The Legal Services Commission submitted that non-estate assets including assets owned as joint tenants, trust assets, superannuation, life insurance and social security do not form part of the deceased's estate and should not be impacted by the forfeiture rule. The Commission submitted that these are complex areas of the law each with their own rules, in some cases regarding entitlement and unlawful killing, and they are governed by separate legislation and therefore the forfeiture rule has no role to play.

SALRI's Observations and Conclusions

8.1.39 The rationale of the forfeiture rule is that a killer should not be allowed to profit from his or her crime. The rule is not intended to punish the killer. That is the role of the criminal law. The rationale for the rule is more akin to equity's doctrine of unjust enrichment than to the criminal law's concept of retribution and punishment.

8.1.40 SALRI considers that, in light of the uncertainty of the present law in this respect, legislative clarification of the application of the forfeiture rule to a joint tenancy is appropriate. The proposed *Forfeiture Act* should apply to all property interests including property held as joint tenants between the victim and the killer and third parties. SALRI is of the view that the proposed *Forfeiture Act* should provide that, where the forfeiture rule applies and a joint proprietor has been unlawfully killed by another joint proprietor, the property shall devolve at the death of the victim as if the property were owned by each of them as tenants in common in equal shares.

8.1.41 SALRI considers that in those cases where there are more than two proprietors, the property shall devolve at the death of the victim as if the unlawful killer holds their interest as a tenant

¹⁴⁶⁵ Tasmania Law Reform Institute, *The Forfeiture Rule* (Report No 6, December 2004) 26.

in common with the other proprietors. The joint tenancy will continue to exist between the innocent joint proprietors. The surviving innocent joint proprietors will take the victim's interest by survivorship. This approach recognises that the third party has not been involved in the killing and whilst they receive a 'windfall gain' of one-sixth of the property, they will also forgo the opportunity to inherit the killers one-third share due to the severance of the joint tenancy with respect to the killer's share.

8.1.42 Recommendations

Recommendation 48

SALRI recommends that the proposed *Forfeiture Act* should apply to all property interests including property held as joint tenants between the victim and the killer and third parties.

Recommendation 49

SALRI recommends that the proposed *Forfeiture Act* should provide that, where the forfeiture rule applies and a joint proprietor has been unlawfully killed by another joint proprietor, the property shall devolve at the death of the victim as if the property were owned by each of them as tenants in common in equal shares.

Recommendation 50

SALRI recommends that the proposed *Forfeiture Act* should provide that, where there are more than two proprietors, the property shall devolve at the death of the victim as if the unlawful killer holds their interest as a tenant in common with the other proprietors. The joint tenancy will continue to exist between the innocent joint proprietors. The surviving innocent joint proprietors will take the victim's interest by survivorship.

Recommendation 51

SALRI recommends that the proposed *Forfeiture Act* should provide that, if the effect of the forfeiture rule is modified by the court, the survivorship rules will apply in the usual manner to the killer and third parties.

8.2 Trust Assets

Current Position in South Australia

8.2.1 A trust describes a legal relationship or structure in which one person (the *settlor*) transfers legal ownership over specific property to another person (the *trustee*) with instructions that the property is to be administered for the benefit of another person or entity (the *beneficiary*), or for a particular purpose. The essence of a trust is dual ownership over the same property: the trustee is vested with *legal* ownership and the beneficiary or beneficiaries enjoy *equitable* — or *beneficial* — ownership.

8.2.2 Trusts can be classified in a number of ways, one being by virtue of how the income and/or capital of the trust property is distributed. In a *fixed trust*, the beneficiaries have a fixed entitlement to the trust income and/or capital, which the trustee is bound to distribute. Alternatively, in a *discretionary* trust, the trustee is vested with the discretion to determine which beneficiaries receive

a benefit and in what amount. Either way, the arrangement is detailed within and facilitated by the relevant trust deed.

8.2.3 A family trust is typically a discretionary trust established for the purpose of holding a family's assets or conducting a family business.¹⁴⁶⁶ It is one of the most popular business and asset holding structures in Australia and is widely employed.

8.2.4 There are several components to a family trust. The parties invariably include: an appointor, a settlor, a trustee, and one or more beneficiaries. The appointor is the party with power to appoint and remove the trustee(s). By virtue of this power, the appointor effectively owns and controls the trust. There may be more than one appointor. In a family trust, the appointor is normally one or both of the parents of the respective family.¹⁴⁶⁷

8.2.5 A trustee holds legal title to trust property and any associated income. They may be a natural person or a corporation. Indeed, there is a growing trend to designate a corporate entity as a trustee.¹⁴⁶⁸ The trustee's general role is to hold and control the trust property for the benefit of the beneficiaries.¹⁴⁶⁹ The trustee's most significant power in a discretionary family trust is to make distributions to the relevant class of beneficiaries.

8.2.6 As was mentioned earlier, in trust arrangements, the trustee is vested with *legal* ownership while the beneficiary or beneficiaries enjoy *equitable* or *beneficial* ownership. As such, the term 'beneficiary' describes a person with equitable or beneficial ownership of trust property and for whose benefit the legal title to that same property is held by the trustee.¹⁴⁷⁰ As with most family trusts, the beneficiaries are normally the children or other family relatives of the parent trustees, along with the trustees themselves.

8.2.7 Assets held in discretionary trusts (commonly known as family trusts), do not form part of a deceased person's estate and therefore cannot be transferred under the deceased person's will (with the exception of any beneficiary loan account the deceased has within the trust).¹⁴⁷¹

8.2.8 With respect to trust assets, the controller of the trust (usually referred to as the appointor of the trust) does not 'own' the property held in the trust. The controller is simply controlling the trust for the benefit of the beneficiaries. Further, no beneficiary to a discretionary trust is entitled to the

¹⁴⁶⁶ See generally: Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Family Businesses in Australia: Different and Significant: Why they Shouldn't be Overlooked* (Final Report, 20 March 2013) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2010-13/fam_bus/report/c06#c06f23>.

¹⁴⁶⁷ The appointor typically draws their power to appoint and remove trustees from the trust deed itself, though the Trustees Acts in each state and territory stipulate alternative persons who can appoint trustees, as well as the circumstances in which such appointments can be made. *Trustee Act 1925* (ACT) s 6; *Trustee Act 1925* (NSW) s 6; *Trustee Act 1893* (NT) s 11; *Trusts Act 1973* (Qld) s 12; *Trustee Act 1936* (SA) s 14; *Trustee Act 1898* (Tas) s 13; *Trustee Act 1958* (Vic) s 41; *Trustees Act 1962* (WA) s 7.

¹⁴⁶⁸ While the common law also vests trustees with a number of other important duties and powers, these are largely codified through the trustee's legislation and invariably incorporated into the relevant trust deed.

¹⁴⁶⁹ 'One obligation of a trustee which exists by virtue of the very office is the obligation to get the trust property in, protect it, and vindicate the rights attaching to it. That obligation exists even if no provision of any statute or trust instrument creates it. It exists unless it is negated by a provision of any statute or trust instrument': *CGU Insurance Limited v One.Tel Limited (In Liq)* (2010) 242 CLR 174, 182.

¹⁴⁷⁰ The old phrase from Law French used to describe beneficiaries was *cestui que trust* ('the person for whose use the trust was made').

¹⁴⁷¹ Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death: Text and cases* (LexisNexis, 2013).

trust assets as all they have is a right to be considered for a distribution of income or capital from the trust by the trustee.

8.2.9 The trust deed of a trust will set out how a change of control is to occur on the death of the controller of the trust. Usually this can occur through the appointment of a successor appointor in the will of the appointor.

8.2.10 In the forfeiture context, the victim may be an appointor of their family trust or the killer and victim may both be appointors of their family trust.

Position in Other Jurisdictions

8.2.11 The UK, ACT and NSW Acts are silent as to the application of the forfeiture rule to trust assets.

8.2.12 While the New Zealand Act does not expressly mention trust assets, it provides that a killer is not entitled to any property interest in any non-probate assets of the killer's victim which would have passed to the killer on the death of the victim, which presumably includes trust assets.¹⁴⁷²

Issues

8.2.13 In the forfeiture context, in those cases where the victim is the appointor of their family trust, the victim may have appointed the killer as their successor appointor under their will or under the terms of the trust deed. This will then place the killer in the position of the controller of the trust and therefore provide the killer access to the assets held in the trust. This outcome is inappropriate and contrary to the policy underlying the forfeiture rule.

8.2.14 Example 2:

Thivanka is the sole appointor and trustee of the Morris Family Trust. The trust has in excess of \$1 million net assets.

The Trust Deed sets out how Thivanka can pass control of the trust to successors in the event of his death. Before his death, Thivanka exercised this power by including a clause in his will which nominated his wife Alice.

Alice kills Thivanka. On his death, Alice will become the successor appointor of the Morris Family Trust. In that role she has the power to add or remove the trustee of the Morris Family Trust and therefore control the distribution of income and capital out of the trust to beneficiaries of the Morris Family Trust.

8.2.15 Another common scenario involving family trusts is for the killer and victim to be the joint appointors of their family trust. If one of them were to die, the general position would be that the survivor then becomes the sole appointor of the family trust. In cases where the forfeiture rule applies, the killer may become the sole appointor if the victim and killers were both acting as appointors

¹⁴⁷² New Zealand Act s 8(1).

at the date of the deceased victim's death. This outcome is also clearly contrary to the policy underlying the forfeiture rule.

8.2.16 Example 3:

Thivanka and Alice are both appointors of the Morris Family Trust. The trust has in excess of \$1 million net assets.

The Trust Deed provides that if one of the appointors dies, the other will then act as the sole appointor of the family trust.

Alice kills Thivanka. On his death, Alice will become the sole appointor of the Morris Family Trust. In that role she has the power to add or remove the trustee of the Morris Family Trust and therefore control the distribution of income and capital out of the trust to beneficiaries of the Morris Family Trust.

Consultation Data Overview: What Should the Effect of the Forfeiture Rule be on Property Held in Trusts?

8.2.17 At one Adelaide Roundtable it was noted that where there is a family trust which holds a considerable amount of the family's wealth, the killer may be in full control of the trust (as the appointor and trustee of the trust), yet half of the assets belong to the victim. One proposal was to establish a constructive trust in relation to the victim's share of the family trust assets. Whilst it was acknowledged that this is a very complex area, it was noted that the Family Court regularly deals with this issue and that this may be an area where the court will have to step in and exercise its discretion as to how the trust will be administered once it is determined that the forfeiture rule applies.

8.2.18 It was noted that assets held in family trusts should be dealt with by reference to the trust deed as well as taking into account other factors such as the children of the deceased victim and the beneficiaries of the trust. Leaving it to the court's discretion would allow for a range of different matters to be considered.

8.2.19 The additional complexity of carrying on a family business through a trust structure was also considered. The view expressed was that once you have a qualified independent person, that person can be instructed by the court as to how to administer that trust. Up until that point, it is the responsibility of the trustees to ensure that the killer does not receive any inappropriate benefit out of the trust. The discussion regarding protecting the assets of the victim from dissipation prior to conviction apply equally to non-estate assets including family trusts. In those cases where the killer is in control of the trust, orders should be made to appoint someone else to assume that role until a determination as to the killer's guilt, whether in a criminal or civil trial, has been made. If the forfeiture rule applies, then the courts can exercise discretion to determine how trust assets will be dealt with.

8.2.20 At another Adelaide Roundtable, one solution was to provide a court with the power to direct the trustee that a percentage or part of the assets held in the trust are not available for distribution. The order may involve the making of consequential changes to the trust deed, removal of the directors and shareholders of any corporate trustee and any consequential matters. Whilst this was supported, it did raise questions as to the adverse tax and stamp duty liability that can result upon the resettlement of a trust which can occur if changes of this nature are made to the trust. This could then disadvantage a range of people who are beneficiaries under the trust but who have nothing to do with

the killing. There were also concerns as to how trusts holding assets located in multiple jurisdictions would be dealt with. The general view expressed was that any costs associated with separating out the trust assets under the forfeiture rule should be borne by the killer. It was also noted that action must be taken quickly to avoid dissipation of trust assets prior to the conviction of the killer.

8.2.21 At the final Adelaide Roundtable, the Family Court was raised as a suitable court to deal with trust assets, superannuation and insurance policies which are subject to the operation of the forfeiture rule, but the 'formidable' constitutional and other problems in this were explained.¹⁴⁷³

8.2.22 Mr Mackie and Professor Dal Pont referred to the law of equity where a trust can be split based on contributions.

8.2.23 Mr Muecke submitted that the law should provide that the killer must be removed from the trust and that there should be judicial discretion taking into account policy and the interests of all the potential beneficiaries of the trust when determining who is to benefit from the trust.

8.2.24 Professor Dal Pont and Mr Mackie also supported a judicial discretion which should provide a category of directions to include that an unlawful killer is not to benefit from anything other than their pre-existing property rights prior to the unlawful killing. It was noted that the court can also make directions on trust distributions of income and capital.

8.2.25 STEP submitted that, for clarity and certainty, any new law to apply a form of forfeiture in relation to roles in a trust structure, should be specifically drafted to state that it is intended to override provisions of a trust instrument. There would also be a need to specifically define the nature of each trust role to which such the codified forfeiture rule might apply. Some suggested roles include the role of trustee, a role with power to remove or appoint a trustee, a role with power to approve or prohibit a decision of a trustee, a role which gives a power to appoint property, any interest in property or any income derived therefrom and a role which gives a right to appropriate a specific asset to a specific beneficiary. STEP submitted that where a killer is named to hold or become a successor in a defined role such as those described above, he or she would be considered as if deceased and so unable to fill that role. The person to take that role in the 'absence' of the perpetrator would be determined under the deed of the particular trust, or if no provision was made under the *Trustee Act 1936* (SA) conversely, if neither provided for the eventuality of that person's absence, by order of the Supreme Court.

8.2.26 At a follow-up consultation attended by four Adelaide practitioners, the preferred position was that there should be a removal of the right of the unlawful killer to act in any role under a deed which gives him or her any control over distribution as possibly a more workable restriction in practice. The practitioners considered the alternative of giving a court the power to give directions to the trustee of the trust necessary to ensure that that portion of the trust income and capital that would have been likely to be appointed to the deceased if he or she had survived is not available to the unlawful killer. All practitioners in attendance were of the view that this approach would be likely to cause considerable issues. In these practitioner's experience, in most situations, a trustee of a discretionary 'family' trust distributes different percentage amounts to different people each year as income and circumstances alter. Determination of 'that portion of the trust income and capital that

¹⁴⁷³ Justice Berman of the Family Court noted to SALRI the potential interaction of the Family Court and the forfeiture rule but also highlighted the major constitutional and other implications that would arise.

would have been likely to be appointed to the deceased' may be almost impossible and could lead to excessive litigation.

SALRI's Observations and Conclusions

8.2.27 SALRI view is that the proposed *Forfeiture Act* should apply to all property interests including assets held in trusts.

8.2.28 SALRI recommends that the proposed *Forfeiture Act* should provide that, in the case of a trust where the beneficial interests are fixed, a court should have the power to give directions to the trustee of the trust necessary to ensure that the beneficial interest held by the deceased is not available to the unlawful killer.

8.2.29 Many people routinely hold family assets in family trusts in which there are no vested interests and instead the trustee has a discretionary power to appoint trust property and income among a class of potential beneficiaries.¹⁴⁷⁴ SALRI recommends that the proposed *Forfeiture Act* should provide that in the case of a discretionary trust, where the deceased was, at the date of death:

- b) an identified beneficiary under the trust; or
- c) a person who takes capital of the trust property in default,

a court should have the power to prohibit the unlawful killer from acting in any role under the trust deed which gives him or her any control over the distribution of income or capital of that trust.

8.2.30 SALRI recommends that the proposed *Forfeiture Act* should provide that, if the effect of the forfeiture rule is modified by a court, the unlawful killer should be entitled to take on any role under the trust deed and receive distributions of some or all of the trust fund, in the manner they would have had the forfeiture rule not applied.

8.2.31 Recommendations

Recommendation 52

SALRI recommends that the proposed *Forfeiture Act* should apply to all property interests including assets held in trusts.

Recommendation 53

SALRI recommends that the proposed *Forfeiture Act* should provide that, in the case of a trust where the beneficial interests are fixed, a court should have the power to give directions to the trustee of the trust necessary to ensure that the beneficial interest held by the deceased is not available to the unlawful killer.

¹⁴⁷⁴ Strictly called 'objects'.

Recommendation 54

SALRI recommends that the proposed *Forfeiture Act* should provide that where the deceased was, at the date of death:

- a) an identified object under a trust; or
- b) a person who takes capital of the trust property in default,

a court should have the power to make orders prohibiting the unlawful killer from acting in any role under the trust deed which gives him or her any control over the distribution of income or capital of that trust.

Recommendation 55

SALRI recommends that the proposed *Forfeiture Act* should provide that, if the effect of the forfeiture rule is modified by a court, the unlawful killer should be entitled to take on any role under the trust deed and receive distributions of some or all of the trust fund, in the manner they would have, had the forfeiture rule not applied.

8.3 Superannuation

Current Position in South Australia

8.3.1 Some trusts are purely established to operate as superannuation schemes. A superannuation trust works by allowing its ‘members’ — the beneficiaries — to make contributions to the trust so as to provide for their retirement. Any trust operating as a superannuation fund must comply with the requirements of the *Superannuation Industry (Supervision) Act 1993* (Cth).

8.3.2 Superannuation can be a substantial asset of an individual. The Australian Prudential Regulation Authority (‘APRA’) reports that there were \$2.7 trillion in superannuation assets in Australia at 30 June 2018.¹⁴⁷⁵ The average account balance was \$69,807.¹⁴⁷⁶ An individual may also hold life insurance within superannuation, with it being estimated that 13.5 million Australians have a life insurance policy within super,¹⁴⁷⁷ comprising more than 70% of the life insurance policies in Australia.¹⁴⁷⁸ Hence, the value of a member balance in superannuation is not considered indicative of the amounts expected to be paid on the death of a Member.

8.3.3 The treatment of a person’s superannuation upon their death depends on several factors including the rules of the fund in which the person’s superannuation is held and any binding

¹⁴⁷⁵ Australian Prudential Regulation Authority, *Statistics: Annual Superannuation Bulletin* (June 2018, Reissued 22 January 2019) 6.

¹⁴⁷⁶ Ibid 8.

¹⁴⁷⁷ Metlife Insurance Limited, *Insurance Inside Super: A Detailed Report into Members’ Awareness, Attitude and Engagement with Insurance Inside Super* (Report, 2018); Michael Easson, ‘Super Changes Could Leave Thousands Without Enough Superannuation’, *Sydney Morning Herald* (Sydney, 2 September 2018).

¹⁴⁷⁸ Metlife Insurance Limited, *Insurance Inside Super: A Detailed Report into Members’ Awareness, Attitude and Engagement with Insurance Inside Super* (Report, 2018).

nominations made by the member effective upon their death. Depending on these factors, a person's superannuation death benefits may or may not form part of their estate.

8.3.4 It is only superannuation death benefits that are paid to a deceased's legal personal representative that form part of the deceased person's estate. Superannuation death benefits that a fund pays directly to beneficiaries fall outside of the deceased's estate. Superannuation death benefits will not form part of a person's estate if, for example:

- a. in a self-managed superannuation fund, the member of the superannuation fund, subject to the amending power in the trust deed, amends the trust deed so that on his or her death the trustee is compelled to pay his death benefit to his or her surviving spouse or other dependant(s) under the SISA;¹⁴⁷⁹ or
- b. the member of the superannuation fund makes a valid and effective¹⁴⁸⁰ binding death benefit nomination that directs all of their death benefits to a beneficiary, for example to a spouse or other dependant(s) under the SISA.

8.3.5 In the forfeiture context, in each of these situations, the killer may be the beneficiary of the superannuation death benefit, however the killer is unlikely to be paid any benefit from the victim's superannuation fund, not only because of the application of the forfeiture rule, but as appears more often the case, by an exercise of the discretion of the fund trustees.¹⁴⁸¹

8.3.6 The basis of the SISA is that a complying superannuation fund must be a 'trust' under the general law. The duties of trustees are specified and extended in SISA¹⁴⁸² but the courts have indicated that these do not replace the general law duties of trustees.¹⁴⁸³

8.3.7 The Superannuation Complaints Tribunal (SCT) is an independent tribunal established by the Commonwealth to deal with certain complaints regarding superannuation funds, annuities and retirement savings accounts.¹⁴⁸⁴ A complaint generally cannot be made where the proposed decision

¹⁴⁷⁹ The SISA generally limits beneficiaries to one or more of the following: a dependant of the member, as defined in the SISA, the member's legal personal representative (LPR) — that is, the executor or administrator of the member's estate. The SISA defines a dependant as including: the spouse of the member; any child of the member; or any person with whom the member has an interdependency relationship. SISA s 10. Most, but certainly by no means all, superannuation fund trust deeds define "dependant" according to the definition in the SISA.

¹⁴⁸⁰ Where the nomination complies with the rules of the particular fund and superannuation legislation.

¹⁴⁸¹ *Public Trustee of New South Wales v Fitter* [2005] NSWSC 1188 [62], [66]. In this case, the court ordered that the killers must hold any benefit they received from the victim's superannuation fund on trust for her estate, should they receive such a benefit. The court did not have to decide whether the forfeiture rule barred payment of the superannuation benefit to the killers.

¹⁴⁸² SISA ss 52–53.

¹⁴⁸³ *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd* [2011] NSWCA 204, [118]–[122] (Giles JA); *Karger v Paul* [1984] VicRp 13. The nature and the extent of the general law duties attaching to the role of a trustee appear to have been integral in the decision to predicate the SISA upon complying superannuation entities being required to be trust structures. Indeed, the general law formulation applicable to determination of whether trustees are correctly exercising a discretion; See, for example, *Re Marsella*; *Marsella v Wareham (No 2)* [2019] VSC 65; *Ainsworth v Davern* [2018] VSC 8.

¹⁴⁸⁴ The SCT was established as an alternative to the Supreme Court for dispute resolution. Part 7 of the *Superannuation (Resolution of Complaints) Act 1993* (Cth) deals with appeals made to the Federal Court regarding determinations made by the SCT. A beneficiary or potential beneficiary may apply to the SCT for a review of the trustee's decision if they feel that they have unfairly missed out on receiving a superannuation death benefit or that the proportion of the death benefit they are to receive should be greater.

was made pursuant to a direction in the fund's trust deed, or as the result of a BDBN. There have been several SCT decisions which have considered the operation of the forfeiture rule. In these cases, the killer has been precluded from receiving the superannuation death benefit, not because of the application of the forfeiture rule, but by an exercise of the discretion of the fund trustees.

8.3.8 In *Trustee and the Deceased's father, as administrator of the Deceased's estate*,¹⁴⁸⁵ the SCT noted that it cannot affirm the Trustee's decision to pay the death benefit to the estate of the deceased or to another dependant (other than the killer), even if it is of the opinion that the decision was fair and reasonable, if to do so would be contrary to the law or the terms of the Trust Deed. The SCT noted that it is not able to rely on the common law to affirm a decision if it would be contrary to the terms of the Trust Deed. Nor can the Tribunal reach a decision which is consistent with the Trust Deed if it results in a decision which is contrary to law. In this case, the SCT held that the decision of the trustee to refuse payment to the killer was not contrary to the trust deed and payment to the killer would be in breach of the law, and therefore contrary to s 37(5) of the *Complaints Act*.

8.3.9 *The Complainant (Husband of the Deceased Member) and The Trustee*¹⁴⁸⁶ is a similar case heard by the SCT. The tribunal held the Trustee's decision not to pay any of the death benefit to the complainant was fair and reasonable in its operation in relation to the killer in the circumstances. In making this determination, the SCT noted the complex and unclear state of the law regarding the forfeiture rule.

8.3.10 Binding death benefit nominations are not subject to a challenge to the SCT, however they may be overridden where the trustee is subject to a court order, or aware that the member is subject to a court order, restraining or prohibiting payment in accordance with the notice.¹⁴⁸⁷ Presumably, in the forfeiture context a court is able to order the trustee to prohibit the payment of the death benefit to the killer which would then 'unbind' the trustee, rendering the binding death benefit nomination invalid in which case the trustee would exercise their discretion as to the payment of the death benefit in the usual manner. There is no case law or commentary on this point.

Position in Other Jurisdictions

8.3.11 The UK, ACT and NSW Acts are silent on the topic of superannuation.

8.3.12 While the New Zealand law does not expressly mention superannuation, it does state that a killer is not entitled to any property interest in any non-probate assets of the killer's victim which would have passed to the killer on the death of the victim, which presumably includes superannuation.¹⁴⁸⁸

Issues

8.3.13 The VLRC considered whether it would be useful to deem that a person who is responsible for unlawfully killing a superannuation fund member died before the fund member in legislation. It was ultimately concluded that such a provision would be beneficial, as it would clarify the effect of the rule without adding to the obligations already existing at common law.¹⁴⁸⁹

¹⁴⁸⁵ (1997) D97/111.

¹⁴⁸⁶ (2003) D02-03\256.

¹⁴⁸⁷ *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A(4A).

¹⁴⁸⁸ New Zealand Act s 8(1).

¹⁴⁸⁹ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 81 [5.132]–[5.133].

8.3.14 The reports of the UK, ACT, NSW, Tasmania, NZ and Ireland law reform bodies did not consider the issue of superannuation.

Consultation Data Overview: What Should the Effect of the Forfeiture Rule be on the Victim's Superannuation Death Benefit?

8.3.15 The interaction of the forfeiture rule with superannuation death benefit proceeds was discussed at the Adelaide Roundtables. It was noted that the superannuation death benefit of a deceased member of a superannuation fund may not pass through the estate of the deceased member. For example, if the deceased member made a binding death benefit nomination in favour of a dependant under the SISA. In this situation, the superannuation death benefit will not pass through the estate, so will not be dealt with under the will of the deceased victim, or under the laws of intestacy.

8.3.16 It was noted that it is unlikely that a superannuation trust deed would specify that if the beneficiary killed the member that they are excluded from receiving their death benefit. Attendees noted that as superannuation law is governed by the Commonwealth, any reforms to South Australian law cannot operate to direct the superannuation fund trustee as to how they deal with the death benefit of the victim. It was agreed that this is a complex area and that one way in which to deal with this conflict of laws is to introduce another rule giving the courts a power to make an order which provides that the superannuation death benefit is held on a constructive trust when it arrives in South Australia.

8.3.17 STEP submitted that one solution could be to include a provision in the *Trustee Act 1936* (SA) preventing a perpetrator from acting as trustee of a trust in the place of the deceased which would have equal application to a superannuation fund where the situs is South Australia. If the fund is operated from another jurisdiction South Australian law will not apply. STEP also submitted that many superannuation fund deeds limit the persons to whom a death benefit may be paid to a smaller class within the list of those permitted by legislation and that there is no reason why state law in South Australia may not prevent payment of a death benefit to a person against whom the forfeiture rule is applied by a trustee in South Australia.

SALRI's Observations and Conclusions

8.3.18 The payment of superannuation death benefits is regulated by the Commonwealth and States have only a limited role in this area. SALRI suggests that courts exercising federal jurisdiction should apply the common law forfeiture rule, including modifications to the forfeiture rule under the proposed *Forfeiture Act*, where it is not inconsistent with Commonwealth laws.

8.3.19 To the extent that the deceased has superannuation entitlements that are governed by State law, they should be subject to the forfeiture rule and, in the absence of a binding direction of the deceased that they should go to someone other than the killer, they should pass to the deceased's legal personal representative.

8.3.20 If the effect of the forfeiture rule is modified by the court, the killer would be entitled to receive a payment from the victim's superannuation fund.

Recommendation 56

SALRI recommends that the proposed *Forfeiture Act* should apply, as far as State law allows, to all property interests including the superannuation death benefits of the deceased person.

Recommendation 57

SALRI recommends that the proposed *Forfeiture Act* should provide, to the extent that the deceased has superannuation entitlements that are governed by State law, such entitlements should be subject to the forfeiture rule and, in the absence of a binding direction of the deceased that they should go to someone other than the unlawful killer, they should pass to the deceased's legal personal representative.

Recommendation 58

SALRI recommends that the proposed *Forfeiture Act* should provide that, if the effect of the forfeiture rule is modified by a court, the trustee of the deceased's superannuation fund should pay out the superannuation death benefit of the deceased to the beneficiaries, including the killer, in the manner they would have, had the forfeiture rule not applied.

8.4 Life Insurance

Current Position in South Australia

8.4.1 Life insurance is regulated by the *Life Insurance Act 1995* (Cth). The way that the proceeds of a life insurance policy are treated is similar to the position in relation to superannuation death benefits. In summary, the proceeds of a life insurance policy are paid according to the details of the policy, who the account holder is and any beneficiaries nominated.

8.4.2 Proceeds of a life insurance policy paid to the deceased person's legal personal representative form part of the deceased's estate. Proceeds of a life insurance policy that are paid directly to a nominated beneficiary fall outside of the deceased person's estate.

8.4.3 The killer is not entitled to the proceeds of the victim's life insurance policy and cannot, after the killing, assign his or her entitlement to the proceeds.¹⁴⁹⁰ The insurer holds the proceeds on trust for the victim's estate.¹⁴⁹¹

8.4.4 If there is a reasonable potential that the party who claims the proceeds of a policy will be disqualified from the benefit under the forfeiture rule, the process outlined in s 215 of the *Life Insurance*

¹⁴⁹⁰ *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147.

¹⁴⁹¹ Ibid. The US authority for this is *Estate of Draper v Commissioner* 536 F 2d 944 (1st Cir, 1976). Useful discussion of the public policy rationale for the disposition of insurance proceeds when the forfeiture rule is applied may be found in FF Thomas Jr. 'Public Policy as Affecting Property Rights Accruing to a Party as a Result of Wrongful Acts' (1913) 1 *California Law Review* 513; Comment, 'Disposition of Life Insurance Proceeds when Owner Beneficiary Murders the Insured: Estate of Draper v Commissioner' (1977) 2(1) 29 *Maine Law Review* 126.

Act may be invoked.¹⁴⁹² By s 215(1) of the *Life Insurance Act 1995* (Cth), subject to the Rules of the Court, a life insurance company may pay into the court any money payable by it in respect of a policy for which, in its opinion, no sufficient discharge can otherwise be obtained. Under s 215(2), such payment of the money into the court will discharge the insurer from any liability under the policy in relation to it and, under s 215(3), any money so paid into the court will be dealt with according to a court order.

Position in Other Jurisdictions

8.4.5 The UK, ACT, NZ and NSW Acts do not specifically refer to life insurance. However, the New Zealand Act states that a killer is not entitled to any property interest in any non-probate assets of the killer's victim which would have passed to the killer on the death of the victim.¹⁴⁹³ This includes any interest of the deceased under a life insurance policy.

Issues

8.4.6 On the topic of life insurance, the Law Commission of Ireland recommended that the scope of the rule be confirmed in legislation, to extend to all forms of property interest including life insurance.¹⁴⁹⁴ The Irish Law Commission noted a series of decisions from various jurisdictions disallowing killers the benefit of a life insurance policy,¹⁴⁹⁵ in which the courts 'applied the public policy principles that a person should not be able to benefit from his or her wrongful conduct.'¹⁴⁹⁶

8.4.7 The New Zealand Law Commission recommended that the forfeiture rule should apply to non-probate property.¹⁴⁹⁷

8.4.8 The VLRC did not discuss life insurance in any great detail, but noted that life insurance is regulated by the Commonwealth. Modifications made to the common law through statute would impact the disposition of life insurance, and courts exercising federal jurisdiction would apply the modified common law where it is not inconsistent with Commonwealth legislation.¹⁴⁹⁸

8.4.9 The reports of the UK, ACT, NSW and Tasmania law reform bodies did not discuss the issue.

Consultation Data Overview: What Should the Effect of the Forfeiture Rule be on the Victim's Life Insurance Proceeds?

8.4.10 Attendees at the Adelaide Roundtables considered that the similar issues to those raised with respect to superannuation proceeds are likely to arise with the payment of the victim's life insurance policy. Unlike superannuation however, it was noted that life insurance contracts are likely to have a clause in them which prevents the killer from receiving the proceeds under the policy. If the policy does not expressly provide for the forfeiture situation, the view was that a court should have the

¹⁴⁹² *Edwards v State Trustees Limited* (2016) 257 A Crim R 529.

¹⁴⁹³ New Zealand Act s 8(1).

¹⁴⁹⁴ Law Reform Commission of Ireland, *Report on Prevention of Benefit from Homicide* (Report No 114, July 2015), 42–43.

¹⁴⁹⁵ See, for example, *New York Mutual Life Insurance Co v Armstrong* 117 US 591 (1886); *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147; *Cawley & Ors v Littis* [2011] IEHC 515.

¹⁴⁹⁶ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 41.

¹⁴⁹⁷ New Zealand Law Commission, *Succession Law: Homicidal Heirs* (Report No 38, 15 July 1997).

¹⁴⁹⁸ Victorian Law Reform Commission, *The Forfeiture Rule* (Report No 20, September 2014) 79 [5.122].

power to make an order precluding the payment of the proceeds to the killer. However, this will depend on someone making an application. It was noted that swift justice in these cases is required and that that mechanisms need to be put in place to confiscate the proceeds if they are paid out to the killer.

SALRI's Observations and Conclusions

8.4.11 SALRI is of the view that the payment of life insurance proceeds is regulated by the Commonwealth. Courts exercising federal jurisdiction should apply the common law forfeiture rule, including modifications to the forfeiture rule under the proposed *Forfeiture Act* where it is not inconsistent with Commonwealth legislation.

8.4.12 Recommendations

Recommendation 59

SALRI recommends that the proposed *Forfeiture Act* should apply, as far as State law allows, to all property interests, including proceeds from a life insurance policy.

Recommendation 60

SALRI recommends that the proposed *Forfeiture Act* should provide that, as far as State law allows, if the effect of the forfeiture rule is modified by a court, the unlawful killer should be entitled to receive the life insurance proceeds of the deceased in the manner they would have, had the forfeiture rule not applied.

8.5 Social Security and Other Public Benefits

Current Position in South Australia

8.5.1 The killer is unlikely to be paid social security benefits that arise from the killer's relationship with the victim and his or her death¹⁴⁹⁹ (for example the various kinds of bereavement payments and allowances, and the widow's allowance).¹⁵⁰⁰

¹⁴⁹⁹ *R v National Insurance Commissioner, Ex parte Connor* [1981] 1 QB 758. There are no Australian cases or academic commentary specifically on the application of the forfeiture rule to claims for social security benefits in Australia. For its application to widows' claims for bereavement benefits in the United Kingdom, see Philip Larkin, 'The Rule of Forfeiture and Bereavement Benefits' (2004) 11(2) *Journal of Social Security Law* 59–82.

¹⁵⁰⁰ The *Social Security Act 1991* (Cth) does not contemplate situations where an applicant for benefits arising from their relationship with another person has killed that person. See, for example, *Social Security Act 1991* (Cth) s 408BA (Qualification widow's allowances). But, as the Victorian Full Court said in *Church of The New Faith v Commissioner for Pay Roll Tax* [1983] 1 VR 97 (Brooking J): 'General words in a statute which might include cases obnoxious to the principle of public policy must be read down (*Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, 157 (Fry LJ) and the provisions of the statute must bend before it (*Re Sangal* [1921] VLR 355, 359) even though the result may appear to be an extraordinary instance of judge-made law (*Re Tucker* (1920) 21 SR (NSW) 175, 181).

Position in Other Jurisdictions

8.5.2 The UK Act gives the Social Security Commissioner¹⁵⁰¹ a power to determine whether a killer is entitled to social security benefits, including a pension and other similar benefits.¹⁵⁰²

8.5.3 The effect of s 8(1) of the New Zealand Act is to disentitle a killer from any property interest in any non-probate property assets of the victim, which would otherwise have passed to the offender on the death of the victim. This includes any interest of the deceased under a pension.

8.5.4 The ACT and NSW Acts do not expressly address social security benefits.

Issues

8.5.5 On the topic of social security benefits, the Law Commission of Ireland recommended that the scope of the rule be confirmed in legislation, to extend to all forms of property interest including a pension.¹⁵⁰³ As was discussed above, the Irish Law Commission noted a series of decisions from various jurisdictions disallowing killers the benefit of a life insurance policy,¹⁵⁰⁴ in which the courts ‘applied the public policy principles that a person should not be able to benefit from his or her wrongful conduct.’¹⁵⁰⁵ The Irish Commission considered that a similar approach would likely be, and should be, applied where a killer sought to obtain the benefit of the deceased’s pension.¹⁵⁰⁶

8.5.6 The New Zealand Law Commission similarly recommended that the forfeiture rule apply to non-probate property.¹⁵⁰⁷

8.5.7 The Tasmania Law Reform Institute noted that State-based forfeiture laws would be unable to override a person’s eligibility to a welfare benefit under Commonwealth legislation.¹⁵⁰⁸

8.5.8 The law reform bodies of other jurisdictions did not otherwise give consideration to the issue, and it was not mentioned in the reports of the UK, ACT, NSW and Victoria law reform bodies.

Consultation Data Overview: What Should the Effect of the Forfeiture Rule be on Social Security Benefits and Other Benefits?

8.5.9 The general consensus during SALRI’s consultation with respect to the issue of social security benefits was that, if there are other persons who are able to receive a benefit which would have passed to the deceased victim, they should take that benefit and the killer should be precluded from receiving that benefit.

¹⁵⁰¹ *Social Security Act 1998* (UK) s 39; *Forfeiture Act 1982* (UK) s 4(5).

¹⁵⁰² See *Forfeiture Act 1982* (UK) s 4.

¹⁵⁰³ Law Reform Commission of Ireland, *Report on Prevention of Benefit from Homicide* (Report No 114, July 2015) 42–43.

¹⁵⁰⁴ See, for example, *New York Mutual Life Insurance Co v Armstrong* 117 US 591 (1886); *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147; *Cawley v Littis* [2011] IEHC 515.

¹⁵⁰⁵ Law Reform Commission of Ireland, *Report on Prevention of Benefit from Homicide* (Report No 114, July 2015) 41.

¹⁵⁰⁶ *Ibid* 42.

¹⁵⁰⁷ New Zealand Law Commission, *Succession Law: Homicidal Heirs* (Report No 38, 15 July 1997).

¹⁵⁰⁸ Tasmania Law Reform Institute, *The Forfeiture Rule*, (Report No 6, December 2004) 26.

SALRI's Observations and Conclusions

8.5.10 SALRI notes that the payment of social security benefits is regulated by the *Social Security Act 1991* (Cth). Courts exercising federal jurisdiction should apply the common law forfeiture rule, including modifications to the forfeiture rule under the proposed *Forfeiture Act* where it is not inconsistent with Commonwealth legislation.

8.5.11 Recommendations

Recommendation 61

SALRI recommends that the proposed *Forfeiture Act* should apply, as far as State law allows, to all property interests including social security and any other public benefits.

Recommendation 62

SALRI recommends that the proposed *Forfeiture Act* should provide that, as far as State law allows, if the effect of the forfeiture rule is modified by a court, the unlawful killer should be entitled to receive social security benefits and any other public benefit, in the manner they would have, had the forfeiture rule not applied.

Part 9 – Other Issues

9.1 Extending the Forfeiture Rule to Financial Benefits Derived Indirectly by the Killer

Current Position in South Australia

9.1.1 Another way in which the scope of the forfeiture rule is unclear is the uncertainty as to whether the forfeiture rule extends to cases where an offender who has forfeited inheritance of the deceased's property may ultimately still inherit the property through a third-party beneficiary.

Position in Other Jurisdictions

9.1.2 This issue is not directly addressed under the UK, ACT, NSW or New Zealand laws.

9.1.3 The issue arose in a recent Western Australian decision. In *Public Trustee (WA) v Mack*,¹⁵⁰⁹ Master Sanderson of the Supreme Court of Western Australia extended the forfeiture rule in a previously unknown manner. A son, Brent Mack, had murdered his mother. His inheritance of her intestate estate was forfeited, meaning her sole beneficiary was her other son, Gary. Gary died soon after. The mother's estate had not distributed at the time of Gary's death. The sole beneficiary of Gary's estate was his brother, Brent Mack. Because the mother's estate had not been distributed, Brent Mack's inheritance was to include the part of the mother's estate which had been forfeited through his unlawful act of homicide. The administrator of Gary's estate brought the matter to the Supreme Court for determination of the beneficiaries of that estate.

9.1.4 Sanderson M noted that there 'appears to be no Australian authority directly on point' but referred to three American decisions. In the first decision,¹⁵¹⁰ two grandsons intentionally and unjustifiably caused their grandmother's death. Their mother died after the grandmother was murdered. An Illinois appellate court held that the grandsons could not indirectly inherit the grandmother's estate through their mother.

9.1.5 In the second decision,¹⁵¹¹ the deceased died intestate survived only by eight nieces and nephews. One nephew had murdered his father, the deceased's brother, and then stood to inherit by reason of the deceased's brother's death. The New York court held that the nephew's conviction disqualified him as an eligible intestate distributee.

9.1.6 In the third US decision,¹⁵¹² *Matter of Edwards*, the deceased's daughter's husband caused the death of his mother-in-law in circumstances which lead to his conviction for manslaughter. Less than 14 months after the mother's death, her daughter died intestate leaving her husband as her sole beneficiary. The court denied the husband an inheritance of his wife's estate but admitted that:

a consistent application of the approach adopted herein could prove to be problematic were there a greater temporal proximity between the wrongful act and the wrongdoer's succession to the

¹⁵⁰⁹ [2017] WASC 325. See also Mikaylie Page, 'Public Trustee (WA) v Mack: An Uncertain Future for the Forfeiture Rule in Elder Abuse Cases?' (2018) 18 *Macquarie Law Journal* 137.

¹⁵¹⁰ *Re Estate of Vallerius* 259 IllApp (3d) 350 (1994).

¹⁵¹¹ *Re Estate of Macaro* 182 Misc (2d) 625 (1999).

¹⁵¹² *Matter of Edwards* (Sur Ct, Suffolk County, No 36 Misc 3d 486, 28 March 2012) slip op 22102.

funds received by the original heir(s) of the victim. The court is well aware that the tracing of such funds may well prove to be impossible in certain cases due to their conversion, expenditure, depletion, or any other number of reasons.

9.1.7 According to these authorities there is an indirect inheritance where:

- (1) upon the exclusion of the murdering offender the deceased's estate and other interest arising by reason of the deceased's death (such as proceeds of life insurance and survivorship) is distributed to another person, and
- (2) upon death of the other person, the murdering offender inherits the deceased's estate and other interest which had been forfeited.

9.1.8 In *Public Trustee (WA) v Mack*,¹⁵¹³ Sanderson M observed that there may be doubt whether the principle would hold good where there was a long period of time between the commission of the offence and the passing of an asset to the wrongdoer. In *Mack*, there was no significant modification to the inheriting beneficiary's estate, by the flux of time or otherwise, which caused difficulty with identification of the asset held by the inheriting beneficiary consequent upon his mother's death. Unlike *Matter of Edwards*, the mother's estate had not vested in the inheriting beneficiary. Master Sanderson held that the forfeiture rule, previously used only to preclude those convicted of an unlawful killing from inheriting directly from their victims, should be extended to prevent Brent Mack from inheriting that part of his brother's estate that was made up of the mother's estate. Accordingly, the court made directions that on distribution of the inheriting beneficiary's estate the administrator should not pay Brent Mack any part of the estate which derived from the mother's estate.

9.1.9 The potential problem with delayed and remote indirect benefits was alluded to by the US Court of Appeals for the Seventh Circuit where Kevin Spann was murdered at the instigation of his wife. She was sentenced to life imprisonment plus five years. His death triggered the payment of two life insurance policies. After excluding the murdering wife as beneficiary, the contingent beneficiaries were the wife's sister for one policy and her son for the other. Their benefit was challenged by Kevin Spann's daughter. The court imagined the following 'subtler cases of indirect benefit':

Suppose that ...the murderess's son...promised that he would use the life insurance proceeds to pay for his mother's lawyer or to buy her books or other goods that the prison would allow her to receive. Or suppose that [the son] needed an expensive operation that Kevin could not or would not pay for and [his wife] killed Kevin so that the proceeds of his life insurance could be used to pay for the operation; or that [the wife] had been given a short prison sentence and [the son] had promised to support her in style out of the life insurance proceeds when she was released.¹⁵¹⁴

9.1.10 The court did not resolve these questions. It concluded that it was 'exceedingly unlikely that [the wife] will ever benefit significantly from the proceeds of her husband's life insurance policies in the hands of her son and her sister'.

9.1.11 They were not deprived of the benefit because of the remote prospect of the offender benefitting. But remoteness, as well as temporal proximity, looms as a restraint on how far the decision of the Western Australian Supreme Court in *Mack* extends the forfeiture rule.

¹⁵¹³ [2017] WASC 325.

¹⁵¹⁴ *Prudential Insurance Company of America and Boston Mutuallife Insurance Company v Athmer* (1999) 178 F 3d 473.

Issues

9.1.12 As recognised by the English Law Commission, if a person who has been excluded from inheriting under the forfeiture rule is able to inherit due to an indirect connection to the forfeited assets, the forfeiture rule is rendered largely ineffective and its deterrent effect is undermined.¹⁵¹⁵

9.1.13 While this may be perceived as problematic, the problem is likely to only arise very rarely in practice. The issue has been largely unconsidered by other law reform bodies. The reports of the UK, ACT, New South Wales, Tasmania, New Zealand, Victoria and Ireland law reform bodies did not address this issue.

Consultation Data Overview: Should the Forfeiture Rule be Extended to Financial Benefits Derived Indirectly by the Killer?

9.1.14 At the Adelaide Roundtables, the general view expressed with respect to the forfeiture rule's application to the killer benefiting indirectly from their killing was that this was a dramatic extension of the rule that would have to be codified given there is no clear common law position. There was unease in extending the forfeiture rule so that it can apply twice. It was agreed that if the rule were to be extended in this manner, that the second death must have occurred shortly after the death of the deceased victim and that the assets of the deceased victim must be easily traceable.

9.1.15 The South Australian Commissioner for Victim's Rights agreed with the general view expressed in the Adelaide Roundtables and would only recommend an extension of the forfeiture rule in those cases where the time frame is immediate and where the assets can be traced. The Commissioner considered that a five year look back period was appropriate.

9.1.16 The Law Society of NSW submitted that if the law were to be codified, legislation could assist by prescribing the extent to which remoteness or temporal proximity could be relied on to defend the forfeiture of an indirect inheritance.

9.1.17 David Browne, a legal practitioner, submitted to SALRI that 'these issues loom as further bases for uncertainty in the metes and bounds of the forfeiture rule which could be addressed through legislation'. He submitted that the codifying legislation should extend the forfeiture rule to include loss of an indirect inheritance (where an Act could prescribe the extent to which remoteness or temporal proximity could be relied on to defend the forfeiture of an indirect inheritance).

SALRI's Observations and Conclusions

9.1.18 SALRI recognises that if a person who has been excluded from inheriting under the forfeiture rule is able to inherit due to an indirect connection to the forfeited assets, the forfeiture rule is rendered largely ineffective. However, there is nothing preventing an innocent beneficiary of the deceased victim's estate (who has inherited that share of the victim's estate as a result of the operation of the forfeiture rule), passing on some or all of their inheritance to the killer during their lifetime, rendering the forfeiture rule ineffective. Once the innocent beneficiary receives a share of the deceased victim's estate under the forfeiture rule, SALRI's view is that that beneficiary should **be free to do** whatever they wish with that inheritance, including passing some or all of that inheritance to the killer

¹⁵¹⁵ See, for example, Law Commission of England and Wales, *The Forfeiture Rule and the Law of Succession* (Consultation Paper No 172, 30 September 2003) 24 [5.20]. The Law Commission, in this section of the paper, discusses the concept of an indirect benefit in another context, but the issue is nonetheless the same in this context.

under the terms of their will or through the operation of the laws of intestacy. SALRI's view is that extending the forfeiture rule to financial benefits derived indirectly by the killer, as in *Mack*, is taking the forfeiture rule a step too far.

9.1.19 An additional problem with extending the forfeiture rule in this manner is the problem of tracing which may well prove to be impossible in certain cases due to their conversion, expenditure, depletion, or any other number of reasons. While SALRI is of the view that no provision for tracing should be made, if such a provision were adopted for an indirect connection, the tracing provision described in the circumstance of an overturned conviction is recommended as an appropriate mechanism.

9.1.20 Recommendations

Recommendation 63

SALRI recommends that the forfeiture rule should not be extended to financial benefits derived indirectly by the killer.

Recommendation 64

SALRI recommends that if the forfeiture rule was extended to financial benefits derived indirectly by the killer, the tracing provision described in the circumstance of an overturned conviction should be adopted as the appropriate mechanism to determine which assets the forfeiture rule applies to.

9.2 Extending the Forfeiture Rule to Elder Abuse

South Australian Position

9.2.1 The issue of elder abuse has occasioned considerable recent concern in Australia.¹⁵¹⁶ The common law forfeiture rule presently does not extend to elder abuse, which involves improper dealings via an enduring power of attorney,¹⁵¹⁷ misusing electronic PIN access to bank accounts,¹⁵¹⁸ coercion in relation to will making¹⁵¹⁹ and improper dealings with real estate,¹⁵²⁰ among other actions.

9.2.2 Very few elder financial abuse cases result in criminal prosecution. Civil redress in the equity division of the Supreme Court is more common,¹⁵²¹ but major difficulties still arise where, as

¹⁵¹⁶ Rae Kaspiew, Rachel Carson and Helen Rhoades, Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, February 2016); Melanie Joosten, Freda Vratsidis and Briony Dow, *Understanding Elder Abuse: A Scoping Study* (National Ageing Research Institute, Melbourne Social Equity Institute, 2017); Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, June 2017); Phil Mercer, 'Australia's Elder Abuse Scandal "Beyond Belief"', *BBC News* (online at 17 September 2018) <<https://www.bbc.com/news/world-australia-45543804>>.

¹⁵¹⁷ See *Smith v Smith* [2017] NSWSC 408; *McFee v Reilly* [2018] NSWCA 322.

¹⁵¹⁸ See *Lindsay v Amison* [2017] NSWSC 41.

¹⁵¹⁹ See *Petrovski v Nasev, The Estate of Janakievska* [2011] NSWSC 1275; *Dickman v Holley; Estate of Simpson* [2013] NSWSC 18.

¹⁵²⁰ *Cohen v Cohen* [2016] NSWSC 336.

¹⁵²¹ See, for example, *Smith v Smith* [2017] NSWSC 408.

often arises, the victim lacks the mental capacity to provide evidence of the abuse or rebut a presumption of advancement.

9.2.3 SALRI received suggestions from the NSW Law Society and Mr Browne that the forfeiture rule should be extended to cases of elder abuse such as financial abuse and the misuse by a beneficiary of the estate of a power of attorney.

9.2.4 Professor Gino Dal Pont was intrigued at such suggestions to SALRI to extend the application of the forfeiture rule to elder abuse such as the misuse by a beneficiary of the estate of a power of attorney. Professor Dal Pont highlighted that there are few effective civil or criminal law remedies to address elder abuse, especially in a financial context (such as the misuse of powers of attorney), and it is usually a case of anything happening after the event. Professor Dal Pont noted the suggestion to extend the forfeiture rule to elder abuse is ‘interesting’ but requires ‘very careful examination as it raises many issues and implications’. He suggested it would be preferable to look at this question as part of a specific project and not as part of SALRI’s current forfeiture rule reference.

Position in Other Jurisdictions

9.2.5 The NSW, ACT, New Zealand and UK laws do not specifically refer to elder abuse.

9.2.6 In the United States, eight states have expanded the forfeiture rule (known as ‘slayer laws’) to disqualify persons from inheriting if they have been involved in physical abuse or financial exploitation of the deceased, in order to reduce elder abuse.¹⁵²² It has been recognised that the abuse is often committed by beneficiaries in wills or those who will inherit on intestacy, that is, close family members.¹⁵²³

Issues

9.2.7 While this legislative approach does not currently exist in Australia, the application in Australia of an extended forfeiture rule of this type can be demonstrated by considering the facts of cases where a statutory will has been made or denied, and similar circumstances. Australian courts have demonstrated a willingness to deprive the unworthy of inheriting when the court has an opportunity to authorise a person’s statutory will.¹⁵²⁴

9.2.8 In *State Trustees Ltd v Hayden*,¹⁵²⁵ the court re-wrote a will to remove a person who had engaged in ‘reprehensible and disgraceful’¹⁵²⁶ behaviour, namely elder financial abuse. The court’s

¹⁵²² See Lisa Kisabeth, ‘Opinion of the Connecticut Probate Court: Article: Slayer Statutes and Elder Abuse: Good Intentions, Right Results? Does Michigan’s Amended Slayer Statute Do Enough to Protect the Elderly?’ (2013) 26 *Quinn Probate Law Journal* 373; Travis Hunt, ‘Comment, Disincentivizing Elder Abuse Through Disinheritance: Revamping California Probate Code §259 and Using It as a Model’ (2014) 2 *Brigham Young University Law Review* 445; Jennifer Piel, ‘Expanding Slayer Statutes to Elder Abuse’ (2015) 43(3) *Journal of the American Academy of Psychiatry and the Law* 369; Natasa Gilisic, ‘Expanding the Slayer Rule in Florida: Why Elder Abuse Should Trigger Disinheritance’ (2016) 22 *Barry Law Review* 111.

¹⁵²³ See Jennifer Piel, ‘Expanding Slayer Statutes to Elder Abuse’ (2015) 43(3) *Journal of the American Academy of Psychiatry and the Law* 369. The US statutes provide not only for forfeiture of estate assets but also “non probate assets” or “will substitute assets”. An example of the application of this law in the context of elder financial abuse is *Re Estate of Haviland*, 301 P3d 32 (Wash, 2013).

¹⁵²⁴ *De Gois v Korp* [2005] VSC 326; *Wills Act 1992* (Tas) s 27; *Wills Act 1936* (SA) s 73; *Wills Act 1997* (Vic) s 26; *Wills Act 2000* (NT), s 21; *Succession Act 1981* (Qld) s 24; *Succession Act 2006* (NSW) s 22; *Wills Act 1970* (WA) s 42.

¹⁵²⁵ (2002) 4 VR 229.

¹⁵²⁶ *Ibid* [46].

abhorrence of reprehensible behaviour is most obvious where the court authorises a will starting with a blank canvass.¹⁵²⁷

9.2.9 In *Re Fennick*,¹⁵²⁸ the court made a statutory will for ‘Charles’, the pseudonym given to an eleven year old severely incapacitated child who had suffered irreversible brain injury at the age of four months. The injuries were consistent with Shaken Baby syndrome. He received a victim’s compensation award of \$50,000. He was placed under the care of the Minister for Community Services. The Minister sought a statutory will for Charles so as to avoid Charles’ estate passing on intestacy to his parents.

9.2.10 The surrounding circumstances undeniably raised a suspicion that the parents had caused Charles’ injuries. The court authorised a will in favour of Charles’ only other family member, his elder sister. The will contained a gift-over provision in favour of two charities committed to caring for children with Charles’ disabilities.

9.2.11 Similarly, courts have ensured that a perpetrator of family violence does not inherit under the laws of intestacy;¹⁵²⁹ removing a wife from her husband’s will after she fraudulently transferred over \$3,000,000 from her husband’s account to her own;¹⁵³⁰ and omitted a husband from his wife’s will after being charged with her attempted murder.¹⁵³¹

9.2.12 As courts have remarked when authorising the statutory will, it is inconceivable that the abused person would want their estate to pass to the perpetrator. Yet in each of these instances, and others, the perpetrator would have inherited if the abused person had died before the statutory will had been made.¹⁵³² As the law currently stands, an abuser’s inheritance depends on happenstance. If Charles had died before the court authorised a statutory will for him, his parents would have inherited the victim’s compensation paid to Charles by reason of their conduct.

9.2.13 In its Discussion Paper, the ALRC suggested that the other strategies identified for preventing and responding to elder abuse should be considered and evaluated, before consideration is given to amending the forfeiture rule in the way noted above. The ALRC noted two major constraints in introducing the US model. The first is that the US forfeiture provisions are linked to specific elder abuse offence provisions and the ALRC has concluded against recommending specific alteration to criminal laws in this way. Secondly, any consideration of the introduction in Australia of amendments

¹⁵²⁷ This is a person who has never had testamentary capacity. They have been commonly called ‘nil capacity’ cases in Australia since *Re Fennick* (2009) 76 NSWLR 22 but were called *tabula rasa* in *Re C, (A Patient)* [1991] 3 All ER 866, 870.

¹⁵²⁸ (2009) 76 NSWLR 22.

¹⁵²⁹ *Application by Kelso* [2010] NSWSC 357.

¹⁵³⁰ *Lawrie v Hwang* [2013] QSC 289.

¹⁵³¹ An example of similar conduct which produced a statutory will for the abused child is *Secretary, Department of Human Services v Nancarrow* [2004] VSC 450.

¹⁵³² In the case of *Cohen v Cohen* [2016] NSWSC 336, a son transferred his elderly mother’s property to himself under a power of attorney which the NSW Supreme Court held was a breach of fiduciary obligations of attorney to principal. The son remains Mrs Cohen’s sole testamentary beneficiary — which outcome, given the mother’s mental capacity, is only likely to change by the making of a statutory will — upon the mother’s death, he will inherit her whole estate. If a statutory will is not made for Avivia Cohen, her son will inherit her whole estate.

to State and Territory probate laws, in the form of disinheritance provisions similar to those in the US, would need to be undertaken in the context of a wider consideration of succession law in Australia.¹⁵³³

9.2.14 Mikaylie Page, in a recent insightful article, discussed the interaction of the forfeiture rule with elder abuse in light of *Mack*. Ms Page observed:

There is an increasing recognition of the need for the law to protect elderly individuals from abuse where that abuse occurs as a result of their vulnerability. One of the difficulties in conceiving a framework for the dignified protection of the elderly, compared to those frameworks designed to protect other vulnerable groups such as children, is that the consequences of ageing are unpredictable and widely inconsistent... Extending the forfeiture rule to disinherit those who have subjected elderly people to abuse could help protect those who are vulnerable in the community. However, adopting a paternalistic approach that interferes with testamentary capacity may disregard the need to uphold the dignity and autonomy of the elderly. This is a difficult balance for the law, particularly when there continues to be no clear legal definition about what constitutes an act of elder abuse. The ruling in this case [*Mack*] represents an interesting opportunity to examine how existing laws can impact elderly Australians. Further, it presents an opportunity for the law to expand in ways that could better protect elderly people in society. However, the definitional issues relating to the concept of elder abuse, and continuing tension between protection and autonomy, present significant challenges for this area of the law.¹⁵³⁴

SALRI's Observations and Conclusions

9.2.15 Societal changes mean that older people are at greater risk of abuse and exploitation, especially financial abuse and exploitation.¹⁵³⁵ In particular, the last few decades have seen major changes to the way wealth is distributed among the Australian population. There is a growing concentration of wealth and assets among seniors, particularly through home ownership.¹⁵³⁶ At the same time, there is an increasing emphasis on user charges for services such as aged care, which may conflict with the expectations of younger generations about inheritance. There are reports of an increasing number of 'inheritance impatience' cases where adult children take inappropriate advantage of their parents to access inheritance money prematurely.¹⁵³⁷ A strong aspect of this is

¹⁵³³ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, June 2017) 280. The ALRC commented that the initiative could be a matter for, and led by, a State law reform agency, such as the specific project undertaken by the VLRC with respect to the forfeiture rule.

¹⁵³⁴ Mikaylie Page, 'Public Trustee (WA) v Mack: An Uncertain Future for the Forfeiture Rule in Elder Abuse Cases?' (2018) 18 *Macquarie Law Journal* 137, 141.

¹⁵³⁵ In the South Australian context of ageing population and elder abuse; see further Wendy Lacey et al, University of South Australia, *Ageing in South Australia 2016: Insights from the Aged Care Sector* (Report, September 2016); Wendy Lacey et al, University of South Australia, *Prevalence of Elder Abuse in South Australia* (Report, 2016); Wendy Lacey et al, Australian Research Network on Law and Ageing, *Single Ageing Women and Housing Security: A Pilot Study of Women Living in the Cities of Unley and Salisbury* (Report, May 2016); Wendy Lacey and Susannah Sage-Jacobson, Australian Research Network on Law and Ageing, *A South Australian Framework for Using International Human Rights Norms as the Basis for Ageing Strategies* (Report, 2015).

¹⁵³⁶ Grattan Institute, *The Wealth of Generations* (Report, December 2014)

¹⁵³⁷ Kirsty Needham, 'Inheritance Impatience Causing Families to Rob Granny for School Fees, Renovations', *Sydney Morning Herald* (online at 21 November 2015) <<https://www.smh.com.au/national/nsw/inheritance-impatience-causing-families-to-rob-granny-for-school-fees-renovations-20151121-gl4im7.html>>; Christine Long, 'How to Stop Elder Financial Abuse at the Hands of Loved Ones', *Sydney Morning Herald* (online at 18 February 2016) <<https://www.smh.com.au/money/planning-and-budgeting/how-to-stop-elder-financial-abuse-at-the-hands-of-loved-ones-20160217-gmwwhz.html>>; Caroline Baum, 'Inheritance Impatience: "Our Family has been Wrecked by this Experience"', *The Guardian* (online at 13 September 2018)

the misuse of powers of attorney.¹⁵³⁸ The potential for abuse and exploitation of these instruments was widely raised to SALRI in its recent reference on Family Provision and accords with recent research and media concern.¹⁵³⁹

9.2.16 While SALRI agrees that it is crucial that suitable protections should be put in place to prevent the financial exploitation of elderly persons, SALRI considers that extending the common law forfeiture rule at this stage to cases of elder abuse is a step too far. SALRI agrees with the comments of Ms Page that this suggestion has merit but raises complex issues and requires careful examination. SALRI also notes the ALRC's major constraints in extending the forfeiture rule to cases involving elder abuse and is also of the view that there are other strategies for preventing and responding to elder abuse that should be considered and evaluated before any extension to the rule is made.

9.2.17 SALRI's next major reference to be undertaken in 2020 is to comprehensively review and provide recommendations on the role and operation of the current law in South Australia with respect to powers of attorney. SALRI agrees with Professor Dal Pont that it is preferable to look at the role and operation of the forfeiture rule to elder abuse as part of a specific project and not as part of SALRI's current forfeiture rule reference. As part of its reference on powers of attorney, SALRI will consider and evaluate a number of options and strategies designed at preventing and responding to the misuse of powers of attorney and other forms of financial elder abuse and make any suitable recommendations for law reform.

9.2.18 Recommendation

Recommendation 65

SALRI recommends that the forfeiture rule should not be extended to cases involving elder abuse.

9.3 Implications for Aboriginal Communities

South Australian Position

9.3.1 The current position under the common law does not provide any special provision for Aboriginal people under the forfeiture rule.

<<https://www.theguardian.com/lifeandstyle/2018/sep/12/inheritance-impatience-our-family-has-been-wrecked-by-this-experience>>.

¹⁵³⁸ Rhonda Parker, 'Inheritance Impatience' Sparking Abuse of Seniors', *The West Australian* (online at 20 June 2018) <<https://thewest.com.au/business/your-money/inheritance-impatience-a-family-affair-in-elder-abuse-ng-b88860823z>>; Sarah Keoghan, 'Banks in Fresh Push to Block Inheritance Greed', *Sydney Morning Herald* (online at 7 August 2019) <<https://www.smh.com.au/business/consumer-affairs/banks-in-fresh-push-to-block-inheritance-greed-20190806-p52eef.html>>; Matthew Doran, 'Age Discrimination Commissioner Calls for Uniform Power of Attorney Laws across Australia to Help Stop Elder Abuse', ABC News (online at 27 November 2019) <<https://www.abc.net.au/news/2019-11-28/power-of-attorney-changes-needed-to-help-stop-elder-abuse/11743540>>.

¹⁵³⁹ SALRI, 'Distinguishing between the Deserving and the Undeserving': *Family Provision Laws in South Australia* (Report No 9, December 2017) 127.

Position in Other Jurisdictions

9.3.2 The ACT and NSW Acts do not specifically refer to Aboriginal people or Aboriginal customary laws.

Issues

9.3.3 One issue concerning the effect and operation of the forfeiture rule in cases involving Aboriginal communities is whether consideration should be given to developing specific legislative provisions for Aboriginal deceased estates in the proposed *Forfeiture Act*. The Aboriginal Legal Rights Movement identified to SALRI a concern that aspects of the forfeiture rule may apply particularly inappropriately to Aboriginal communities.

9.3.4 SALRI in its Intestacy Report noted that, while there are many Aboriginal people who have little estate, comprising items such as a motor vehicle, perhaps a firearm and a few personal items, some Aboriginal people leave estates of considerable monetary value, particularly if they have been employed or in business and accumulated superannuation and death benefit entitlements or have been successful artists.¹⁵⁴⁰

9.3.5 The tension between many of the concepts in present English based succession laws in Australia and Aboriginal kinship and customary law and practice has been raised to SALRI in its previous succession law references. For example, the definition of ‘family’ for many Aboriginal people is much broader than immediate blood relatives and founded on kinship rather than familial relationships.¹⁵⁴¹

9.3.6 When an Aboriginal killer and/or victim is involved, difficult questions may arise about who has standing to apply for a forfeiture modification order, whether there should be any additional factors that courts should take into account when determining whether to grant a modification order and what the effect of the rule should be on certain assets, such as sacred objects or property held by an Aboriginal person linked to a native title claim.

9.3.7 As all the Australian statutory succession regimes (including South Australia) are based on a non-Aboriginal view of family and kinship, it has been suggested that this creates a serious mismatch between the various legislative schemes and Aboriginal cultural practice and expectations.¹⁵⁴²

9.3.8 The forfeiture reports of the ACT, New South Wales, Tasmania and Victoria and law reform bodies did not address this issue.

Consultation: Should There be Special Rules in the Proposed *Forfeiture Act* Addressing Issues Particular to the Forfeiture Rule and Aboriginal offenders?

9.3.9 There was some discussion during SALRI’s consultation concerning some of the issues that may arise for Aboriginal offenders under the forfeiture rule. The general consensus during consultation is that there is that where Aboriginal offenders are involved, there is a particular need for flexibility in such cases in manslaughter and at least some types of murder. The example of an

¹⁵⁴⁰ SALRI, ‘*Distinguishing between the Deserving and the Undeserving*’: *Family Provision Laws in South Australia* (Report No 9, December 2017) 119.

¹⁵⁴¹ Ibid 63.

¹⁵⁴² Ibid 120.

Aboriginal offender with a severe cognitive impairment just short of a defence of mental impairment (or insanity) was given as a situation where modification of the forfeiture rule may be appropriate.

9.3.10 The practical implications for ‘property’ held by an Aboriginal person that is linked to a native title claim, on behalf of the whole community were also noted. The concepts of property and ownership are not clear cut in an Aboriginal context and it was felt that the effect of the forfeiture rule where Aboriginal offenders are involved may need to be modified in these situations.

SALRI’s Observations and Conclusions

9.3.11 SALRI accepts that the issues raised concerning the effect and operation of the forfeiture rule on Aboriginal people and communities is an important area but considers that this raises complex issues and requires further research and consultation, notably with Aboriginal communities.

9.3.12 SALRI remains of the view that any examination of law reform proposals relating to Aboriginal communities and succession law (including the interaction in cases where the forfeiture rule applies) should only be undertaken as a wider project with wide, inclusive and culturally appropriate consultation. Any such reference requires the close involvement of Aboriginal communities.¹⁵⁴³

9.3.13 SALRI is proposing to examine succession law issues for Aboriginal people as part of a future law reform project and to include in this project issues as to the law relating to funeral instructions, the disposal of human remains and the resolution of disputes that may arise. Given that the forfeiture rule is closely connected with succession law, SALRI’s preferred view is that any examination of the forfeiture rule and its particular application to Aboriginal communities should only be undertaken by SALRI as part of any wider future law reform project relating to succession law and Aboriginal communities.

9.3.14 Recommendation

Recommendation 66

SALRI recommends that, subject to funding, research ethics approval, the necessary consultation (especially with Aboriginal communities) and the input of Aboriginal communities, it undertake a future law reform project to examine the various areas where there is tension between current succession laws in South Australia and Aboriginal kinship and customary law and practice (this project to include funeral instructions in a will, the disposal of a deceased’s remains and the resolution of disputes that may arise, and the operation and effect of the forfeiture rule) and to make appropriate recommendations.

¹⁵⁴³ SALRI, ‘*Distinguishing between the Deserving and the Undeserving*’: *Family Provision Laws in South Australia* (Report No 9, December 2017) Rec 28. See also at: 118–125; SALRI, *South Australian Rules of Intestacy* (Report No 7, July 2017) 59.

9.4 Need for Court's Approval

9.4.1 One issue that arose towards the end of the writing of this Report¹⁵⁴⁴ concerned the potential for the relevant parties to seek to 'contract out' or make a 'consent order' as to the application or not of the forfeiture rule. It was raised this could give rise to concern and undermine the public policy rationale of the rule. It was noted this could be due to the prospect of the stress and high legal costs associated with civil litigation and encourage the relevant parties to come to an agreement outside court to modify the rule in a manner that was contrary to the underlying public policy and allow an undeserving unlawful killer to profit from their crime. It was also noted that, despite clear evidence of the killer's guilt and culpability, the relevant family member may take an accommodating approach to the killer and support the modification of the forfeiture rule to the killer and allow them to benefit from the crime. This would also be contrary to public policy.

9.4.2 SALRI is of the view that it should not be possible to 'contract out' or make a 'consent order' as to the application or not of the forfeiture rule and any proposed agreement between the relevant parties to modify the application of the rule must be subject to the approval of the Court. The Court would need to be independently satisfied that there are exceptional circumstances and any agreement between the parties to modify the forfeiture rule does not undermine the sound underlying public policy that an unlawful killer should ordinarily not benefit or profit from their crime.

9.4.3 Recommendation

Recommendation 67

SALRI recommends that it should not be possible to 'contract out' or make a 'consent order' as to the application or not of the forfeiture rule and any proposed agreement between the relevant parties to modify the application of the rule must be subject to the approval of the Court.

¹⁵⁴⁴ Another issue that arose was the suggestion that the *Forfeiture Act* could include a provision to the effect that it is intended that the Act should apply in any case where the relevant offence, the offender, or the property in question has a sufficient connection with South Australia. To the extent that this might create overlap with statute law in force in other States, it is anticipated that any apparent conflict would be resolved in accordance with the usual common law choice of law rules. SALRI considers that a specific recommendation to this effect is unnecessary.

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Appendix A: Law Reform Recommendations and Forfeiture Provisions

Jurisdiction	Law Reform Proposal	Legislation
<p>Tasmania: Tasmania Law Reform Institute, <i>The Forfeiture Rule</i>, Report No 6 (2004).</p>	<p><u>Recommendation 5</u> If a person has unlawfully killed another person and is thereby precluded by the forfeiture rule from obtaining a benefit, any interested person may make an application to the Supreme Court for an order modifying the effect of the rule. And that such an order may be made in such terms and subject to such conditions as the Court thinks fit.</p> <p><u>Recommendation 6</u> Upon application the Court may make an order modifying the effect of the forfeiture rule if it is satisfied that justice requires the effect of the rule to be modified. In determining whether justice requires the effect of the rule to be modified, the Court is to have regard to the following matters: (a) the conduct of the killer, (b) the conduct of the deceased person, (c) the effect of the application of the rule on the killer or any other person, (d) any findings of fact by the sentencing judge, (e) the mental state of the killer, (f) such other matters as appear to the Court to be material.</p>	<p>None implemented</p>

<p>Victoria: Victorian Law Reform Commission, <i>The Forfeiture Rule</i>, Report (2014).</p>	<p>Recommendations:</p> <p>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</p> <p>...</p> <p>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:</p> <p>(a) dangerous driving causing death</p> <p>(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.</p> <p>...</p> <p>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.</p> <p>7. In determining the moral culpability of the offender, the Supreme Court should have regard to:</p> <p>(a) findings of fact by the sentencing judge</p> <p>(b) findings by the Coroner</p> <p>(c) victim impact statements presented at criminal proceedings for the offence</p> <p>(d) submissions on interests of victims</p> <p>(e) the mental state of the offender at the time of the offence, and</p> <p>(f) such other matters that in the Court's opinion appear to be material to the offender's moral culpability</p>	<p>None implemented</p>
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<p>United Kingdom: <i>Forfeiture Act 1982 (UK).</i></p>	<p>None created — instead a Private Members Bill</p>	<p><u>s 2: Power to modify the rule.</u> (1) Where a court determines that the forfeiture rule has precluded a person who has unlawfully killed another from acquiring any interest in property mentioned in subsection (4) below, the court may make an order under this section modifying the effect of that rule. (2) The court shall not make an order under this section modifying the effect of the forfeiture rule in any case unless it is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified in that case. (3) In any case where a person stands convicted of an offence of which unlawful killing is an element, the court shall not make an order under this section modifying the effect of the forfeiture rule in that case unless proceedings for the purpose are brought before the expiry of the period of three months beginning with his conviction.</p>
<p>New South Wales: <i>Forfeiture Act 1995 (NSW).</i></p>	<p>None created- legislative response to <i>Troja v Troja</i></p>	<p><u>s 5 Power of Supreme Court to modify effect of forfeiture rule</u> (1) If a person has unlawfully killed another person and is thereby precluded by the forfeiture rule from obtaining a benefit, any interested person may make an application to the Supreme Court for an order modifying the effect of the rule. (2) On any such application, the Court may make an order modifying the effect of the forfeiture rule if it is satisfied that justice requires the effect of the rule to be modified. (3) In determining whether justice requires the effect of the rule to be modified, the Court is to have regard to the following matters: (a) the conduct of the offender, (b) the conduct of the deceased person,</p>

		<p>(c) the effect of the application of the rule on the offender or any other person,</p> <p>(d) such other matters as appear to the Court to be material.</p> <p><u>s 6 Forfeiture modification orders may be moulded to suit circumstances</u></p> <p>(1) The Supreme Court may make a forfeiture modification order in such terms and subject to such conditions as the Court thinks fit.</p> <p>(2) For example, the Court may modify the effect of the forfeiture rule in relation to property:</p> <p>(a) in the case of more than one interest in the same property (for instance, a joint tenancy) affected by the rule-by excluding the operation of the rule in relation to any or all of the interests, and</p> <p>(b) in the case of an offender who has an interest in real property (such as a family home) and personal property affected by the rule-by excluding the application of the rule in relation to all the property or some of the property.</p> <p>(3) If the Court makes a forfeiture modification order, the forfeiture rule is to have effect for all purposes (including purposes relating to anything done before the order was made) subject to modifications made by the order.</p>
<p>Australian Capital Territory: <i>Forfeiture Act 1991</i> (ACT)</p>	<p>None created — legislative response</p>	<p><u>s 3 Power of Supreme Court to modify forfeiture rule</u></p> <p>(1) Where a person (the <i>offender</i>) has unlawfully killed another and is thereby precluded by the forfeiture rule from obtaining an interest in any property, application may be made to the Supreme Court for an order modifying the effect of the rule.</p> <p>(2) On an application under subsection (1), the Supreme Court may make an order modifying the effect of the forfeiture rule</p>

		if satisfied that, having regard to the conduct of the offender and of the deceased and to any other circumstances that appear to the court to be material, the justice of the case requires the effect of the rule to be modified.
New Zealand: New Zealand Law Commission, <i>Succession law: Homicidal Heirs</i> , Report No 38 (1997) and <i>Succession (Homicide) Act 2007</i> (NZ).	Contents page of the draft provisions (almost identical to the provision implemented) 1 Purpose 2 Commencement 3 Application 4 Act to be a code 5 Act binds Crown 6 Definitions Disentitlements of killers to property 7 Disentitlement of killers under will or intestacy 8 Disentitlement of killer to victim's non-probate asset 9 Disentitlement to apply under Family Protection Act 1955 10 Restriction of killer's claims as to matrimonial property, testamentary promises, and restitution 11 Disentitlement of killer to enhanced benefits generally 12 Caveat against dealing with land Evidential provisions 13 Evidential effect of conviction in New Zealand 14 Evidential effect of acquittal in New Zealand 15 Evidence if no prosecution in New Zealand	<u>s 4 Interpretation</u> <i>assisted suicide</i> — (a) means the killing of a person by another person directly or indirectly if, immediately before death, the deceased asked the other person to help them to commit suicide; but (b) does not include a killing where the deceased formed the wish to commit suicide, or resolved to commit suicide, or acted on that wish or resolve, as a consequence of any form of persuasion by the other person <i>homicide</i> means the killing of a person or a child who has not become a person, by another person, intentionally or recklessly by any means that would be an offence under New Zealand law, whether done in New Zealand or elsewhere, but does not include— (a) a killing caused by negligent act or omission; or (b) infanticide under section 178 of the Crimes Act 1961; or (c) a killing of a person by another in pursuance of a suicide pact; or (d) an assisted suicide <u>s 7 Disentitlement of killers under will or intestacy</u> (1) A killer is not entitled to any interest in property arising under a will of the killer's victim. (2) A killer is not entitled to any interest in property arising on the intestacy, or partial intestacy, of the killer's victim. (3) Subject to any express testamentary direction to the contrary, any interest in property that a killer is not entitled to

		<p>under subsection (1) or subsection (2) is to pass or be distributed as if the killer had died before the killer's victim.</p> <p><u>s 14 Evidential effect of conviction in New Zealand</u></p> <p>(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.</p> <p>(2) A certificate issued under section 146A of the Sentencing Act 2002 is conclusive evidence that a person convicted of an offence of unlawfully killing another person or a child that has not become a person is for the purposes of this Act guilty of the homicide of that other person or child that has not become a person.</p> <p><u>s 15 Evidential effect of acquittal in New Zealand</u></p> <p>The acquittal in New Zealand of a person on the grounds of that person's insanity in respect of 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 not guilty of that homicide.</p> <p><u>s 16 Evidence if no criminal prosecution or unsuccessful prosecution in New Zealand</u></p> <p>(1) This section applies if,—</p> <p>(a) in any proceedings in which the application of this Act is in issue, any party alleges that another person is guilty of the homicide of a person or a child that has not become a person; and</p> <p>(b) the person who is alleged to be guilty of the homicide of another person or child that has not become a person has—</p>
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		<p>(i) not been prosecuted in New Zealand in respect of that homicide, whether or not the person has been prosecuted, convicted, or acquitted elsewhere; or</p> <p>(ii) been prosecuted in New Zealand in respect of that homicide but has been acquitted other than on the grounds of insanity or the prosecution has been stayed or withdrawn, whether or not the person has been prosecuted, convicted, or acquitted elsewhere.</p> <p>(2) If this section applies,—</p> <p>(a) the court hearing the proceedings may decide for the purposes of this Act whether the killing of a person or a child that has not become a person has taken place and, if so, whether, if the alleged killer had been prosecuted in New Zealand, he or she—</p> <p>(i) would be guilty of the homicide of that person or child that has not become a person; or</p> <p>(ii) would by reason of insanity not be guilty of the homicide of that person or child that has not become a person:</p> <p>(b) a person who alleges that another person is guilty of homicide for the purposes of this Act must satisfy the court of that fact on the balance of probabilities:</p> <p>(c) a person who alleges that he or she is not guilty of the homicide for the purposes of this Act by reason of insanity must satisfy the court of that fact on the balance of probabilities:</p> <p>(d) the conviction elsewhere than in New Zealand of a person in respect of homicide is, for the purposes of this Act, admissible evidence as to whether the person is guilty or not guilty of the homicide and is to be given any weight that the court determines.</p>
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Appendix B: Potential Application of the Common Law Forfeiture Rule in South Australian Homicide Cases

Case	Type	Facts	Sentence	Common Law Forfeiture Rule
<i>R v Adrian Keith Stone</i> (2007)	Manslaughter	Out of frustration, the Defendant threw his eight-month old son into his cot. This fractured the child's skull and caused his death.	4 years 6 months; Non Parole period 2 years and 6 months	Yes
<i>R v Angela Puhle</i> (2013)	Manslaughter	The Defendant's severely disabled adult daughter died as a result of the Defendant's negligence in the last six months of the deceased's life. Sulan J was satisfied that the Defendant had been a loving and devoted mother, who had done her best to give the deceased a happy life, and who had suffered greatly in her own right.	5 years; Non Parole period 2 years and 6 months (wholly suspended)	Yes
<i>R v Quinton Lambadgee</i> (2006)	Manslaughter	The Defendant fatally stabbed his father at a party, after his father had spoken disparagingly of the Defendant's homosexuality. Both men were intoxicated.	8 years 5 months; Non Parole Period 5 years and 6 months	Yes
<i>R v Ronald Robert Ironside</i> (2008)	Manslaughter	The Defendant caused the death of his wife of 40 years by inflicting head injuries upon her. This act was not an isolated incident of violence, but part of a wider pattern of abusive behaviour.	6 years 3 months; Non Parole Period 5 years	Yes
<i>R v Karim George Derbali</i> (2010)	Manslaughter	The Defendant had the primary care of the deceased, who was the father of his <i>de facto</i> wife, and was in poor health.	6 years; Non Parole Period of 3	Yes

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Application of the Common Law Forfeiture Rule in South Australian Homicide Cases

		<p>The house in which they were living was not suitable for caring for a man with the disabilities of the deceased, and the Defendant was not equipped to provide the full-time and expert care required.</p> <p>The Defendant fatally punched and kicked the deceased, acting under the influence of alcohol and accumulated frustration.</p>	years and 6 months	
<i>R v Bi Qing Lin</i> (2006)	Manslaughter	<p>The Defendant gave her three-year old son a bath after he had fallen over and become distressed. She left, and returned to find him lying with his head in the water, not breathing.</p> <p>The child had a number of injuries which had been inflicted by his mother at the time of death, and had been subjected to ongoing violence and neglect throughout his life.</p>	5 years; Non Parole Period of 18 months	Yes
<i>R v Sophie Louise Christensen</i> (2007)	Manslaughter	The Defendant inflicted a number of injuries upon her five-month old daughter, including bruises, bite marks and bone fractures. The child died as a result of these injuries.	8 years 2 months; Non parole period of 5 years	Yes
<i>R v Sarah Michelle Peters</i> (2008)	Manslaughter	The Defendant was unable to settle her infant daughter. She shook and threw the child out of panic, which caused the child's death.	5 years 7 months; Non Parole of 4 years and 3 months	Yes
<i>R v David Richard Fraser</i> (2007)	Manslaughter	The Defendant and the deceased were in an intimate relationship. At the request of the deceased, the Defendant reluctantly held a shoelace around the deceased's neck during consensual sexual activity. The deceased died in the process.	4 years 9 months; Non Parole Period of 3 years	Yes
<i>R v Cassandra Lee Dodd</i> (2011)	Manslaughter	The Defendant stabbed the deceased, her partner, in the course of an altercation in the flat that they shared with their children. The relationship was volatile and dysfunctional, punctuated by arguments and physical violence by both partners.	5 years; Non parole Period of 2 years	Yes

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Application of the Common Law Forfeiture Rule in South Australian Homicide Cases

<i>R v Leon Curtis</i> (2009)	Manslaughter	The Defendant bludgeoned his <i>de facto</i> partner to death. Her death was a part of a cycle of violence, and she had previously been the subject of domestic abuse at his hands. Gray J described the Defendant's conduct as 'cowardly and despicable'.	17 years 6 months; Non Parole Period of 14 years	Yes
<i>R v Catherine Therese Collyer</i> (2009)	Manslaughter	The Defendant stabbed her partner during a physically abusive fight at their family home. She was sentenced on the basis that her actions were in self-defence, but excessive in the circumstances. The relationship between the Defendant and the deceased was intense and destructive, characterised by turbulence and occasionally physical violence.	3 years and 9 months; Non Parole Period of 9 months	Yes
<i>R v Richard James Webb</i> (2013)	Murder	The Defendant murdered his <i>de facto</i> wife in a fit of rage, resulting from his possessiveness and desire to control his partner's actions.	Life; Non Parole Period of 22 years	Yes
<i>R v Danny Ferguson</i> (2016)	Manslaughter	The Defendant caused the death of his partner, who died of blood loss from blunt trauma. The victim had 54 separate injuries. Her death followed a prolonged pattern of violence and degradation in the relationship. Vanstone J noted it as 'a very serious example of the offence of manslaughter. There is really nothing to mitigate it.'	15 years; Non Parole Period 12 years	Yes
<i>R v Rajini Narayan</i> (2011)	Manslaughter	The Defendant poured petrol on her husband and set him alight following years of psychological and physical abuse from the deceased.	6 years; Non Parole period of 3 years (wholly suspended)	Yes
<i>R v Wei Li</i> (2016)	Manslaughter	The Defendant killed his mother, who was verbally, emotionally and sometimes physically abusive towards him. The killing arose out of a long history of intense pressure to succeed from his mother, in circumstances which amounted to provocation.	9 years; Non Parole period of 7 years and 2 months	Yes
<i>R v Noreen Jessamine Weetra</i> (2009)	Manslaughter	The Defendant had been in a relationship with the deceased for five years. Their relationship was violent, and police often had to intervene. On the night of the incident, the deceased was physically and verbally aggressive,	5 years; Non Parole Period of 2 years	Yes

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Application of the Common Law Forfeiture Rule in South Australian Homicide Cases

		and grabbed the Defendant by the throat. In spontaneous response, the Defendant stabbed and killed the deceased in excessive self-defence. The court described the case as ‘somewhat unique’ and noted the ‘many’ mitigating features, including local community support.	(wholly suspended)	
<i>R v John Phillip Anzac Newchurch</i> (2008)	Manslaughter	The Defendant attacked and killed his partner of several years with a piece of timber. This ‘vicious and severe’ act followed a history of family violence and substance abuse. Gray J noted that the victim ‘was weak and vulnerable; you were a violent oppressor. Your crime, in these circumstances, must be viewed very seriously.’	12 years; Non Parole period of 9 years and 7 months	Yes
<i>R v Benjamin Robert McPartland and Ashlee Jean Polkinghorne</i>	Manslaughter	The Defendants were the mother of the deceased and her partner. The Defendants had bought the four-year old deceased a dirt bike, which was too big for her. The child was seriously injured when the pair caused her to use the motorbike, and died after the Defendants failed to call an ambulance. It was classified as a ‘grave’ crime of manslaughter by gross neglect.	Polkinghorne: 8 years; Non Parole Period of 4 years and 9 months McPartland: 7 years; Non Parole Period of 4 years and 2 months	Yes
<i>R v Ziaollah Abrahamzadeh</i> (2012)	Murder	The Defendant stabbed his wife, from whom he was separated, at the Adelaide Convention Centre on New Year’s Eve at a public event. The Defendant had been persistently violent towards the deceased and their children, and was particularly angry about the prospect of a property settlement upon separation. Sulan J noted the crime was planned and premeditated and of particular seriousness.	Life with Non parole period of 26 years	Yes
<i>R v Richard David Clifford Edward & Debra Marlene Edward</i> (2013)	Death by Criminal Neglect (s 14 CLCA)	The Defendants’ 14-year old daughter died from common and easily avoidable complications of Type 1 Diabetes, as a result of their neglect and failure to seek medical assistance.	Richard Edward: 4 years and 6 months; Non	Yes

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Application of the Common Law Forfeiture Rule in South Australian Homicide Cases

		Managing their family life was ‘extremely difficult’ for the Defendants because of the developmental, intellectual, social and financial problems which plagued their large family unit. Nicholson J noted that he regarded Ms Edward’s ‘level of intellectual impairment as very significant. I also regard as significant the controlling and dominating influence your husband exercised.’	Parole Period of 3 years and 7 months Debra Edward: 4 years and 6 months; Non Parole Period 3 years and 7 months	
<i>R v Lisa Anne Collard</i> (2012)	Manslaughter	The Defendant’s five-year old son died after she administered methadone to him for illness. She had been warned of the dangers of doing so.	3 years 9 months; Non Parole Period of 18 months	Yes
<i>R v Kane Rodney Jonathon Allen</i> (2010)	Murder	The Defendant murdered his wife, towards whom he had previously been erratic and violent. The deceased was in a much better financial position than the Defendant, who did not have ongoing employment.	Life; Non Parole Period of 22 years and 6 months	Yes
<i>R v Daniel Troy Ames</i> (2011)	Murder	The Defendant murdered his uncle because of a disagreement over methylamphetamine.	Life; Non Parole Period of 24 years	Yes
<i>R v Neil Anthony Archer</i> (2017)	Murder	The Defendant murdered his partner by strangling her with a cord from a hoodie jumper. The Defendant was described as a controlling and abusive man throughout the course of their relationship. Significantly, after he murdered his partner, he went to the bank with her mother and withdrew money from the deceased’s account.	Life; Non Parole Period of 22 years	Yes

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<i>R v Edward Christopher Yost</i> (2009)	Murder	The Defendant bashed his partner to death. From the beginning of their relationship to her death, he had subjected his partner to continuous and ‘obscene’ family violence, which he often filmed.	Life; Non Parole Period of 30 years	Yes
<i>R v Tracey Lee Smith</i> (2007)	Murder	The Defendant beat her 18-month-old daughter to death.	Life; Non Parole Period of 14 years	Yes
<i>R v Stephen Vadjunec</i> (2017)	Murder	The Defendant repeatedly struck his father on the head with a 10kg dumbbell. It was a planned crime. The act appeared to be the culmination of his concerns about his father’s controlling, if not abusive, behaviour towards the rest of the family.	Life; Non Parole Period of 20 years and 6 months	Yes
<i>R v Michael Suve McDonald</i> (2014)	Murder	The Defendant became violent towards his partner during a quarrel over finances. The relationship was punctuated with episodes of family violence inflicted on her and she died from this ‘savagely and protracted beating’.	Life; Non Parole Period of 23 years	Yes
<i>R v Benjamin Andrew Brown</i> (2011)	Aggravated causing death by dangerous driving	The Defendant, following an alcohol-fuelled argument with a man at a party, got into his father’s motor vehicle. His father and the other man were standing in the middle of the road, and the Defendant collided into both men. His father took most of the force and died. Vanstone J heard that the Defendant had regarded his father as his best friend, and that the event would haunt him forever.	2 years 4 months; Non Parole Period of 12 months	Yes
<i>R v Minh Ly Tran</i> (2009)	Murder	The Defendant murdered his former wife with a knife and a young child of her and her new partner. He had been violent during their marriage, and they had had heated arguments about money. After separation, Ms Nguyen received a considerable proportion of the proceeds from a sale of property in Family Court proceedings. The Defendant became obsessed by the break-up, and particularly the division of assets.	Life; Non Parole Period of 27 years	Yes
<i>R v Matthew Reginald Wills Heyward</i>	Murder	The Defendant, Heyward, was found guilty of the murder of his mother, after assisting his father to bring about her death. His parents had separated, and his father was anxious as to the economic consequences of the separation.	Life, Non Parole Period of 23 years	Yes

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<i>(Jeremy Adam Minter was an employee) (2010)</i>		The Defendant's father was a 'brutal and evil man' who had great influence over the Defendant. The father had treated the deceased with 'great brutality' throughout their relationship. The father committed suicide before trial.		
<i>R v Christopher Robert Mieglich (2014)</i>	Murder	The Defendant shot his father in the face twice. He also attempted to murder a second man. 'Both offences are at the very serious end of the scale. They were premeditated.'	Life, Non Parole period of 26 years	Yes
<i>R v Lazaros Hajistassi (2009)</i>	Murder	The Defendant stabbed and killed the deceased, who was his mother's partner, after discovering that he had been violent towards his mother on several occasions.	Life; Non Parole period of 18 years and 10 months	Yes
<i>R v Daniel Phillip Hall (2009)</i>	Murder	The Defendant repeatedly stabbed his partner of two years multiple times with a kitchen knife, after she left him for another man.	Life, Non Parole Period of 17 years	Yes
<i>R v Mark Scott Bampton (2010)</i>	Murder	The Defendant shot his partner after hearing her make comments of a sexual nature on the phone to another man. The relationship was characterised by the abuse of amphetamines and both were under the influence of drugs at the time of her death.	Life; Non Parole period of 18 years	Yes
<i>R v Vicki Yvonne Brooks (2008)</i>	Murder	The Defendant and a male accomplice lured her former partner and set him alight in a hotel carpark. The relationship had ended years earlier but had been violent in nature.	Life; Non Parole period of 24 years	Yes
<i>R v Jane Busson (2007)</i>	Murder	The Defendant murdered her husband with a co-offender, with whom she was in an 'intense romantic relationship'. Her marriage had become unhappy, due to her husband's poor health, alcoholism and verbal abuse. She wanted to sever the relationship with her husband, and had made various proposals for a division of property. Her husband rejected these proposals, and obstructed her ability to continue living in the home they owned together.	Life; Non Parole Period of 17 years	Yes

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Application of the Common Law Forfeiture Rule in South Australian Homicide Cases

		The Defendant and the co-accused violently attacked the deceased while he was asleep. Soon after the murder, they moved into the house and slept in the bed in which he had been murdered.		
<i>R v Craig Aaron Cocks</i> (2011)	Murder	The Defendant stabbed and strangled his wife, with whom he was experiencing marital problems. She had been planning to leave him.	Life; Non Parole Period of 24 years	Yes
<i>R v Melissa Joanne Field</i> (2007)	Criminal neglect (s 14 CLCA)	The Defendant's three-year old son died from injuries which had been inflicted by the Defendant's partner. She was aware that her partner was habitually abusing the child and failed to take steps to protect her child from harm. She was both in fear of her partner and pregnant with his child at the time.	6 years; Non Parole Period of 4 years and 6 months	Yes
<i>R v Jason Lee Gardiner</i> (2014)	Murder	The Defendant murdered his girlfriend on a camping trip. The two had a toxic relationship which was punctuated by episodes of violence, particularly when drinking.	Life, Non parole period of 23 years	Yes
<i>R v Julie Michelle Dunn</i> (2007)	Murder	The Defendant had been living with the deceased for about six months, and wanted to move out to resume cohabitating with a former boyfriend. The Defendant drugged the deceased with a sedative and attacked him.	Life; Non Parole Period of 18 years	Yes

Appendix C: Application of the Common Law Forfeiture Rule in South Australian Mental Impairment Cases

Case	Type	Facts	Common Law Forfeiture Rule
<i>R v Cawte</i> (2018)	Murder	The defendant was charged with the murder of his twin brother. He admitted to having shot his brother, and stated that he had been planning to shoot him 'for weeks...to save him...from God'. Nicholson J found the defendant not guilty by reason of mental incompetence, as he was suffering from schizophrenia at the time of the offence.	No
<i>R v Eliby</i> (2016)	Murder	The defendant killed his wife of 28 years. The deceased was found on the floor of the couple's <i>en suite</i> bathroom, with head and facial injuries so severe that she was unrecognisable. She died at the scene. The defendant told police that he had wanted to set the deceased 'free from earthly problems'. He was found incompetent to commit the offence, as he was suffering from psychotic depression as a result of bipolar disorder.	No
<i>R v Colella</i> (2016)	Murder	The 75 year old defendant was charged with the murder of her 76 year old husband, whom she stabbed and bludgeoned to death in their bedroom. The defendant had a reported history of mental illness, and was suffering with major depressive disorder with psychosis and late onset paranoid schizophrenia at the time of the offence. She was found not guilty by reason of mental impairment.	No
<i>R v Eitzen</i> (2011)	Murder	The defendant was charged with the murder of her 16 year old son. He was born with a severe intellectual and cognitive disability, and became violent as he grew older and stronger. His mother was his primary caregiver, and she had become both increasingly depressed and increasingly desperate about her	No

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		son's future. On the day of his death, she had intended to take both her son's life and her own life. She was found not guilty by Sulan J, who found that she was suffering from a severe mental illness, namely a major depressive episode, at the time of the offending.	
<i>R v Wagner</i> (2019)	Murder	The defendant was charged with the murder of her mother, after stabbing and slashing the deceased over 140 times. The defendant was found not guilty by reason of mental impairment. She had suffered from schizoaffective disorder for over a decade, often with 'bizarre' psychotic and depressive symptoms. At times, her hallucinations were so intense that they were experienced 24 hours a day, and included hearing the voice of her dead infant son.	No
<i>R v Crabbe</i> (2018)	Murder	The defendant was charged with the murder of his mother, and was found not guilty by reason of mental impairment. The defendant suffered from schizophrenia, an antisocial personality, and a long history of substance abuse and addiction. Leading up to the incident, the defendant had developed a 'bizarre and persecutory delusion' that his mother was a witch who posed a threat to his life. These delusions culminated in the defendant killing his mother in a 'stabbing frenzy'.	No
<i>R v Walsh</i> (2016)	Murder	The defendant was charged with the murder of his well-known father, Adelaide Crows coach Phillip Walsh, who died after being stabbed by the defendant 20 times. He was found not guilty by reason of mental incompetence. The defendant was suffering from schizophrenia and, at the time of the described conduct, was 'acutely psychotic'.	No
<i>R v Caldwell</i> (2019)	Murder	The defendant was charged with the murder of his stepfather, and was found not guilty by reason of mental impairment. He had stabbed his stepfather upwards of 80 times, because he was convinced that the deceased was spying on him and was working as an informant. The defendant was psychotic at the time, and had a history of mental health issues stemming back almost a decade. These issues had at times required hospitalisation, including in	No

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		psychiatric units, and had involved ‘bizarre conduct [with] serious acts of violence’.	
<i>R v Pallin</i> (2015)	Murder	The defendant was charged with the murder of her two year old daughter, whom she had drowned in a dam. The defendant had explained that it ‘was the best thing she could do to stop [her daughter’s] pain’. She stated she that ‘had to do it’ to protect her daughter, and ‘felt a huge amount of love’ towards her. The defendant was found not guilty by reason of mental impairment. Sulan J was satisfied that the defendant ‘was clearly psychotic at the time she drowned her daughter’.	No
<i>R v Zilic</i> (2010)	Murder	The defendant was charged with the murder of his son, and was found not guilty on the basis that he was suffering from schizophrenia and acute psychotic symptoms. The defendant’s delusions had included being convinced he was Jesus, thinking his own mother was a witch, believing his son was being abused, and believing his ex-wife was working for the Devil. Neighbours reported that the defendant was often screaming and loudly banging on the walls in the weeks leading up to the event.	No
<i>R v Janzow</i> (2015)	Murder	The defendant stabbed his young son to death inside his car, and told paramedics, ‘no one deserves me. I’m a psychopath’ while they attempted to revive the deceased. He was found not guilty, because he was suffering from a psychosis due to the effects of bipolar disorder at the time of his conduct. The defendant’s wife told the Court of her love for her family, her lack of bitterness towards the defendant, and her deep sadness at the events that had transpired that day.	No