



# Review of the common law forfeiture rule

## Background Information & Consultation Questions

### About SALRI

SALRI is an independent, non-partisan, law reform body based at the Adelaide Law School. 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. SALRI conducts inquiries, also known as references, into areas of law. The areas of law are selected by the expert SALRI Advisory Board and are often at the request of the State Attorney-General. SALRI looks at how the law works in other places, any research available and speaks widely to the community, experts and interested parties. Based on its research and consultation throughout an inquiry, SALRI then makes recommendations to the State Government so that the Government and Parliament can make informed decisions about any changes to law and practice. SALRI's recommendations do not automatically become law, but they may be acted upon and accepted by the Government and Parliament. Any decision on accepting a SALRI recommendation is for the Government and Parliament.

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

### The Forfeiture Rule<sup>1</sup>

The common law forfeiture rule stems from a broad and powerful maxim of public policy – that no person should benefit from his or her wrongdoing.

The rule was first stated in the 1891 decision of the English Court of Appeal in *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 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'. Lord Justice Fry 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.*

---

<sup>1</sup> For further information about the operation of the forfeiture rule and the various issues arising, see Victorian Law Reform Commission, *The Forfeiture Rule: Report* (September 2014), [http://www.lawreform.vic.gov.au/sites/default/files/VLRC\\_Forfeiture\\_Rule\\_Report.pdf](http://www.lawreform.vic.gov.au/sites/default/files/VLRC_Forfeiture_Rule_Report.pdf).

---

The forfeiture rule was extended to both murder and manslaughter in *Re: Hall* [1914] P 1. This principle was approved and the forfeiture rule effectively endorsed by the joint judgment of the High Court of Australia in *Helton v Allen* (1940) 63 CLR 691, 709 (Dixon, Evatt and McTiernan JJ) (though the status and effect of this decision is still debated).

The forfeiture rule has apparent absolute operation in South Australia (see *Troja v Troja* (1994) 33 NSWLR 269 (though note Kirby P's dissent); *Rivers v Rivers* [2002] SASC 437; *Re: Luxton* [2006] SASC 371). The rule has been held to apply to any example of murder and manslaughter. The rule 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 a statutory pension. The killer is also barred from making a claim under family provision laws.

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 scope and operation of the rule are contentious and uncertain (see *Re: Edwards* [2014] VSC 392; *Edwards v State Trustees Ltd* [2016] VSCA 28). In particular, the application of the forfeiture rule to unlawful killings in various situations where a lesser degree of moral culpability is 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, manslaughter by gross negligence (as opposed to an act of violence), euthanasia or a 'mercy killing', where the offender has a relevant 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' and 'injudicious and incongruous' with its public policy rationale.

The problematic operation of the rule in an assisted suicide context has arisen recently in the UK; see the 2019 English case of *In the Matter of Alexander Shedden Ninian (Deceased) and in the Matter of the Forfeiture Act 1982*, <https://www.bailii.org/ew/cases/EWHC/Ch/2019/297.html>.

The technical application of the forfeiture rule in various property, succession and inheritance situations is also unclear and problematic. SALRI is keen to look at these aspects. In particular, in various property, succession and inheritance situations the rule may result in the 'sins of the unlawful killer been visited upon their blameless children'. These are discussed by the English Law Commission in its 2005 Report: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/272162/6625.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/272162/6625.pdf).

The forfeiture rule presently does not apply to an individual found not guilty of homicide by reason of mental impairment (previously termed insanity). The Victorian Law Reform Commission opposed any such extension. Noting the NSW statutory model which allows a court to apply the rule where a person is found not guilty of murder on the basis of insanity, SALRI will examine whether the forfeiture rule should be capable of applying to an individual found either unfit to plead or especially not guilty by reason of mental impairment/insanity. The recent judgment of Lindsay J in *Re: Settree Estates* [2018] NSWSC 1413 provides a very helpful summary.

---

## Potential Models for Reform

The forfeiture rule has been modified by statute in the UK, NSW, ACT, and New Zealand. The Victorian Law Reform Commission (VLRC) supported a hybrid model combining aspects of the UK/NSW and New Zealand models.

The United Kingdom, ACT and New South Wales have laws that modify the rule and provide discretion to a court to modify the effect of the forfeiture rule. In both models, unlawful killing is broadly defined. The UK and NSW laws do not codify the rule, but rather allow a court to exempt an individual in an appropriate case of unlawful killing (though not amounting to murder) from its application. The UK and NSW models contain some limited guidance with regard to the circumstances in which a court should exercise the discretion, but it is not comprehensive.

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 model states the assets to which an unlawful killer is disentitled.

The Tasmanian Law Reform Institute in its report, [http://www.utas.edu.au/\\_data/assets/pdf\\_file/0008/1009808/Forfeiture-Rule-Final-Report-.pdf](http://www.utas.edu.au/_data/assets/pdf_file/0008/1009808/Forfeiture-Rule-Final-Report-.pdf), 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 supported 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 Tasmanian Law Reform Institute also favoured greater clarity with regard to the burden of proof and the disposal of disinherited assets.

The Victorian Law Reform Commission (VLRC) in its 2014 report, supported a 'hybrid' legislative model. The VLRC proposal would define the scope and effect of the rule, with specific forms of homicide such as infanticide or dangerous driving totally excluded from the rule. However, the VLRC proposal would also provide a discretion to a court to more broadly modify the rule in an appropriate case, whilst setting out the factors for a court to have regard in deciding whether or not to exercise its discretion to avoid applying the rule.

In its review, SALRI will draw on the academic, judicial and law reform work in this area to date, notably the 2004 Report of the Tasmanian Law Reform Institute, the 2005 Report of the English Law Commission, and especially the recent Report by the VLRC. SALRI is interested to hear any comments on the ACT/NSW/English or New Zealand models and their operation.

This reference will allow SALRI to identify the problems with the forfeiture rule (both broad areas and its technical implications); look at other models; gather the views of the community, interested parties and experts and on the basis of its research and consultation suggest ways in which the law in South Australia can be best improved. SALRI is due to provide a Report with recommendations for the Government about any potential law reforms by the end of August 2019.

---

## Your help is needed

SALRI will be progressing its consultation for this reference in the first half of 2019. SALRI is committed to an active and inclusive consultation process and we want to hear your views concerning the forfeiture rule and on how the law in South Australia can be best improved. There will be ample opportunities for interested parties to provide comments to SALRI or speak to us. SALRI is especially committed to seeking rural and regional input.

Our **consultation period ends at 5pm on Friday 3 May 2019**, so please get in quick with your feedback!

Your experiences of the present law and views on potential changes are very important.

There are three main ways that you can be involved:

1. Participate in one of SALRI's community roundtables;
2. Send us a written submission or letter via email to [salri@adelaide.edu.au](mailto:salri@adelaide.edu.au); or
3. Arrange to speak to us over the phone or meet us in person.

The list of consultation questions is set out on the following pages. Please do not feel obliged to answer every question. It may be that a particular area is of interest. We would welcome comments on any question or issue relating to this reference.

Please also feel free to circulate this to your networks and contacts.

If you are interested in finding out more information about SALRI generally, please visit our webpage at: <https://law.adelaide.edu.au/research/south-australian-law-reform-institute/> .

Yours sincerely

**Professor John Williams**

Director

South Australian Law Reform Institute

5 March 2019

*SALRI acknowledges the assistance of the SA Attorney-General's Department in providing funding for this project.*



---

## CONSULTATION QUESTIONS

### Scope of the Forfeiture Rule

#### The current rule

1. Should the common law forfeiture rule remain in South Australia?
2. What are the primary concerns with respect to the application of the common law forfeiture rule in South Australia?

#### Codification of the rule

3. Should the forfeiture rule apply to all cases of murder, and if not, which should be excluded and on what basis? What of situations such as a 'mercy killing' or euthanasia or where the killer has a major relevant cognitive impairment (often called 'diminished responsibility').
4. Should the forfeiture rule apply to all cases of manslaughter, and if not, which should be excluded and on what basis? Should such cases include those where the killer is convicted of manslaughter, but the court has acknowledged that his or her responsibility for the killing may be reduced, such as:
  - a. Manslaughter by gross negligence and/or dangerous driving causing death;
  - b. Manslaughter pursuant to a suicide pact with the deceased person or assisting the deceased to commit suicide;
  - c. Infanticide;
  - d. Manslaughter where the killer has a major relevant cognitive impairment (often called 'diminished responsibility');
  - e. Any other case?
5. Should the presence of domestic violence affect the operation of the forfeiture rule and if so, how and in what circumstances?
6. In determining whether the forfeiture rule should apply, should the courts be able to consider moral culpability? What other factors should be taken into account? Is there benefit in a statutory list of relevant considerations?
7. How should the forfeiture rule be applied to a person who has not been prosecuted?
8. Should the forfeiture rule continue to apply to cases where the unlawfulness of the killing is only in civil proceedings on the civil standard of proof?
9. Should any property or any other interest which may be affected by the operation of the forfeiture rule be protected until civil or criminal proceedings have ascertained whether the alleged killer unlawfully killed the victim? If so, by what means should it be protected?
10. How should the forfeiture rule accommodate changes in circumstances, such as where a crime is resolved many years after the event, or a person's conviction is overturned?
11. Who should decide how the forfeiture rule is to apply under a new law? Should it be:
  - a. the judge who tried the criminal charges arising from the killing (determining this question as a separate civil application)?
  - b. a different judge determining the question as a separate civil application after the determination of all relevant criminal charges?
12. Are there any other matters that should be addressed in a codified rule (and how)?

---

## Modification of the Forfeiture Rule

### The current rule

13. Should South Australia introduce legislation, like that in the United Kingdom, Australian Capital Territory, New South Wales and as recommended by the Victorian Law Reform Commission, that empowers a court to modify the effect of the forfeiture rule?

### Modifying the effect of the Forfeiture Rule

14. Who should be able to make an application seeking an order to modify the effects of the forfeiture rule?
15. What should be the time limit for making an application?
16. Should modification only be allowed for certain types of unlawful killings? If so, which types of unlawful killings?
17. Should the court have to take certain factors into account when exercising its discretion?
18. What principles, if any, governing the court's discretion should be stated in the legislation?
19. Which property and other interests should be able to be affected by the order?
20. Where a killer is found not guilty of a killing on the ground of mental impairment, the forfeiture rule would not normally apply to that killer. Should a court be able to make an order that the forfeiture rule is to apply as if that killer had been found guilty of murder?
  - a. In what circumstances should the exception not apply?
  - b. What considerations do you consider important to the application of the forfeiture rule to a killer who has been found not guilty of killing by reason of mental impairment?
  - c. Should the court have a discretion to apply the rule in the circumstances of the case?
  - d. How should the forfeiture rule apply or not in the case of an alleged offender who is found unfit to plead?
21. Are there any incidental or other changes you would propose in relation to any law which modifies the effect of the forfeiture rule?

### Options for Reform

22. Which of the Proposed Models should we adopt in South Australia?

Option A - the common law forfeiture rule remains as it is in South Australia with no legislative scope for the modification of the rule.

Option B - the common law forfeiture rule remains as it is in South Australia but introduce legislation that empowers a court to modify the effect of the rule.

Option C – introduce legislation codifying the forfeiture rule as it is to apply in South Australia with no scope for the modification of the rule.

Option D - introduce legislation codifying the forfeiture rule as it is to apply in South Australia which also empowers a court to modify the effect of the rule.

---

## Effect of the Forfeiture Rule

### The effect on the killer's entitlement to the victim's estate

23. How should the forfeiture rule affect the killer's entitlement to assets or property he or she would otherwise have inherited from or through the victim?
24. How should any new law address the situation where the killer is a principal beneficiary of the victim's will and there are gift overs contingent on the killer predeceasing the victim?
25. Should the courts have a discretion to rectify a will to fulfil the will-maker's probable intent?
26. Should South Australia's intestacy laws permit an unlawful killer's descendants to inherit from the victim, as representatives of the killer? If so, are there any circumstances in which an unlawful killer's descendants should be prevented from inheriting from the victim?
27. In circumstances where the forfeiture rule applies, when should an administrator or trustee be able to distribute a benefit to the appropriate beneficiary in accordance with the application of the rule?
28. Should the forfeiture rule prohibit an unlawful killer from applying for a share of the victim's estate under family provision legislation?
29. How should the forfeiture rule apply to family property that was the subject of property division proceedings between the killer and the victim in the Family Court at the time the victim died?
30. In which circumstances, if any, should the victim's estate's interest in these assets or property be able to be used by the killer to pay for his or her defence to an unlawful homicide charge?

### The effect on the killer's entitlement to the victim's other assets

31. How should the forfeiture rule apply to:
  - a. Assets or property the killer jointly owned with the victim at the time the victim died? What if that property was also jointly owned by someone else too (who had nothing to do with the killing)?
  - b. Trust assets where the victim or the killer is an appointor of the trust?
  - c. The victim's superannuation benefits?
  - d. The victim's life insurance payout?
  - e. Social security or other public benefits deriving from the killer's association with the victim?
32. Are there any incidental or other changes you would propose that impact on the effect of the forfeiture rule?
33. Should the effect of the forfeiture rule on the matters concerned in questions 23-31 be introduced into legislation to clarify how the law operates in these areas?