

OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS

13 January, 2004

Professor Kate Warner Tasmania Law Reform Institute Faculty of Law
Private Bag 89
HOBART Tasmania 7001

Dear Professor

THE FORFEITURE RULE - ISSUES PAPER NO.5

Thank you for your letter inviting responses to the Issues Paper concerning the forfeiture rule. This is mine.

I believe the forfeiture rule should remain as it is. If there have been judicial encroachments "modifying" it ("*hard cases make bad law*") then there is a basis to legislate to restore it to a strict rule. I cannot think of any form of culpable homicide (and I include "involuntary" manslaughter - a quite misleading term) for which a jury would return a conviction which does not involve sufficient moral culpability on the part of the offender that it would not be offensive to see the offender benefit financially by the crime by inheriting all or part of the deceased's estate. Although in some ways an intuitive value-judgment, this position is capable of rational justification - particularly by reference to the need for the law to be coherent and not have regard to the "worthiness", "unworthiness", "innocence" or "deservedness" of the victim of a culpable killing.

No rational or philosophical discussion justifying the Issues Paper's position appears to have been attempted. Instead, it proceeds from an already assumed position to conclude the rule needs modification and "*the domestic violence cases are of particular concern*". That "*concern*" is then apparently justified by a survey demonstrating that women are victims of domestic violence (alarmingly broadly defined) and that some then kill their husbands. So an outcome which deprives them of one of the economic benefits of that killing is "*unjust*". Indeed, without a skerrick of supporting evidence it is asserted that (p 21) "*killings resulting in the application of the forfeiture rule are often a desperate reaction to domestic violence*" so an "*absolute*" rule produces a "*grossly unjust*" result.

If forfeiture is a "*grossly unjust*" result, it is unclear to me why prosecution, conviction and sentence following a culpable homicide should not also be an "*unjust*" result.

If your Institute articulated a philosophical basis against which these results could be tested the answer might be clearer. Unfortunately it seems to be content to proceed on an assumption that killing in response to "*domestic violence*" (the offered definition of which does not stop at "*violence*" as commonly understood but includes "*financial abuse*" and "*social abuse*" and "*psychological abuse*") is, if not positively laudable, at least undeserving of adverse consequences. Indeed, it seems unable to appreciate that it is the

enrichment of the killer from the estate of the deceased which is involved; the killer's own estate is undiminished by the application of the forfeiture rule.

Tasmania has led the way in abolishing provocation as a partial defence to murder. To do so was enlightened, and reflected that a civilised society does not endorse that the losing of self-control should not excuse murder. Although not strictly required to make out the defence, the notion that the victim "deserved it" hovered over trials in which provocation was an issue. Your Institute's view, if adopted, would bring back a focus on the victim's character, behaviour and deservedness of death, and is retrograde rather than progressive.

The paper is even more disappointing for its lack of the slightest discussion or even appreciation of either how the rule operates in the real world or how it would operate if modified as recommended.

Litigation concerning the application of the forfeiture rule is civil litigation. The loser is almost always the estate, obliged to defend what might be an unmeritorious action with no practical prospect of recovery of costs. Making the application of the rule discretionary is simply an encouragement to such litigation.

Further, it is no doubt distressing for the relatives of the deceased - that is, the ones who haven't killed him - to have to endure at their cost a further trial.

Then there is the question of proof. Who is going to contradict the killer's evidence that the deceased - behind closed doors - subjected her to "*psychological abuse*" which was unseen by others but nevertheless present? The case which I believe is the one coyly footnoted at fn. 138 is a good one in point. A woman has been convicted of murder. A jury found she had deliberately stabbed her husband three times while he was in bed. It rejected (beyond reasonable doubt) her account of him rolling onto a knife used to peel fruit twice then stabbing himself again when he clutched it from her. Provocation was left to the jury (and rejected) but if him saying he was leaving her for another and didn't love her qualifies as "psychological abuse" (and why wouldn't it qualify?) then those circumstances can be revisited. The murderer is claiming there was no murder. The lawful beneficiaries of the husband's estate, on the law as presently understood (I expect a ruling will be sought to see if the Evidence Act 2001 allows evidence of her conviction for murder to prove the obvious - that she committed murder) to resist this claim have to, in effect, re-run a difficult and complex murder case in which they will have to prove their loved one's death wasn't the bizarre series of accidents claimed. This wasteful, unmeritorious and duplicitous litigation is exactly the type we can expect to see much more of if the proposals in the Issues Paper are accepted. It is a pity the author or authors haven't dealt with any of that.

Yours sincerely

T J Ellis SC
DIRECTOR OF PUBLIC PROSECUTIONS