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LAW·COMMISSION  
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*Report 38*

# Succession Law Homicidal Heirs

*July 1997*  
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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15 July 1997

Dear Minister

I am pleased to submit to you Report 38 of the Law Commission, *Succession Law: Homicidal Heirs*.

Earlier this year the Minister in charge of the Public Trust Office asked the Commission, as part of its project to review the law of succession, to expedite its work on the effect of homicide on rights of succession. That Minister's interest in the subject was aroused in part by problems demonstrated by the case of *Hunter's Estate: Farrell v Public Trustee* (unreported, HC, Auckland, 20 November 1996, M505/94). This report is our response.

The need for homicidal heirs legislation was identified more than 20 years ago by the former Property Law and Equity Reform Committee: *The Effect of Culpable Homicide on Rights of Succession* (1976, Report 24). The Commission agrees with the Public Trust Office's view that to preserve estates, often of only modest value, there should be statutory rules settling the terms of public policy and spelling out plainly a killer's rights and disentitlements.

The Commission recommends the enactment of the draft Succession (Homicide) Act included in this report.

Yours sincerely

*The Hon Justice Baragwanath*  
President

*The Hon Douglas Graham* MP  
Minister of Justice  
Parliament House  
Wellington



## Preface

The Law Commission is undertaking the succession project with the approval of the Minister of Justice.

The purpose of the project is to review, reform and develop

- the Wills Act 1837 (UK),
- the Law Reform (Testamentary Promises) Act 1949,
- the Family Protection Act 1955,
- the Matrimonial Property Act 1963, and
- the Administration Act 1969.

The ultimate aim is to have new succession legislation drafted in plain language which

- provides for all these succession laws in fewer statutes (these being either parts of, or instead of, the comprehensive succession statute envisaged in the original project reference),
- simplifies the law,
- enables better effect to be given to the intentions of will-makers, and
- takes account of the diversity of New Zealand families.

The project has three main aspects:

- *Wills*: Work on this aspect of the project has proceeded in parallel with the Queensland Law Reform Commission reference (from the Standing Committee of Australian Attorneys-General) to make the succession laws of Australian States and Territories more uniform. In October 1996 the Commission published a consultation paper, *Wills Reforms* (nzlc mp2, 1996). Submissions on this paper have been analysed so that the terms of recommended reforms can be settled in a forthcoming report.
- *Succession as it applies to Māori families*: The Commission engaged Professor Pat Hohepa, Dr David Williams, and Mrs Waerete Norman as consultants on this aspect of the project: *The Taking Into Account of Te Ao Māori in Relation to Reform of the Law of Succession: A Working Paper* (nzlc mp6, 1996). The Commission is continuing to consult with Māori at regional and national levels on ways that Māori decisions about succession to ancestral property can be given greater effect.
- *Testamentary claims or succession adjustment*: In August 1996 the Commission released a major discussion paper on the

legislation that provides for testamentary claims: *Succession Law: Testamentary Claims* (nzlc pp24, 1996). The present law and the changes the Commission proposed to it were summarised in a tandem plain language paper called *What Should Happen to Your Property When You Die?* (nzlc mp1, 1996). The Commission has received a large number of submissions and is considering the terms of recommendations for a forthcoming report.

Early in 1997 the Commission received a request from the Minister in charge of the Public Trust Office to expedite work on another, more general aspect of the law of succession: what happens if an estate beneficiary, say under a will, has unlawfully killed the will-maker? The answer to this general question is the subject of this report.

Our work on homicidal heirs has been especially helped by consultation with former Commissioner Professor Richard Sutton, Deputy Public Trustee Mr Brian Blacktop and the Public Trust Office's legal advisors, and Senior Law Lecturer Nicola Peart. We have also had the benefit of our work being the subject of critical review by Professor Julie Maxton. Assistance in completing the report was received from Ross Carter, a Commission researcher. The Commission acknowledges and expresses gratitude to each of these people. We emphasise, however, that the views and recommendations expressed in this report are those of the Commission, and not necessarily those of the people and bodies who have helped us. The provisions of the draft Succession (Homicide) Act 199– were prepared by the Commission's legislative counsel, Mr GC Thornton qc.



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# Introduction

## THE PRINCIPLE

1 Nobody, an ancient legal maxim proclaims, may profit from his or her wrongful conduct: *nullus commodum capere potest de injuria sua propria*.<sup>1</sup> The justice of this principle is self-evident and axiomatic. It applies in many different circumstances. In relation to succession to property on death, it disentitles a killer from benefiting economically as a result of the death of the person killed. It is well-settled law in New Zealand (and almost all legal systems) that a killer is not entitled to take any benefit under a victim's will,<sup>2</sup> or if no will disposes effectively of all of a victim's estate, on a victim's intestacy.<sup>3</sup> As an English court said in 1914, "no man shall slay his benefactor and thereby take his bounty" (*Hall v Knight & Baxter* [1914] P 1, 7). A killer is also incompetent to be granted probate<sup>4</sup> as an executor of a victim's will,<sup>5</sup> or to be appointed administrator of a victim's estate.<sup>6</sup> As part of its review of the law of succession the Commission recommends that Parliament codify New Zealand's homicidal heirs laws in one plain language statute.

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<sup>1</sup> Kersley (ed), *Broom's Legal Maxims* (10th ed, Sweet and Maxwell, London, 1939), 191–200. Related but more generally applicable maxims are *ex turpi causa non oritur actio* (no action should arise from an unworthy cause), and that a plaintiff seeking the aid of a court of equity must have *clean hands*, because the court, as the judgment in *Bridgeman v Green* notes, will require that "the hand receiving [property] be ever so chaste": (1757) Wilm 58, 65, (1757) 97 ER 22. Compare the American Law Institute's *Restatement of Restitution* (1936), ¶ 187–189.

<sup>2</sup> *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147; *Re Lentjes* [1990] 3 NZLR 193.

<sup>3</sup> *Re Cash* (1911) 30 NZLR 577; *Re Pechar* [1969] NZLR 575.

<sup>4</sup> Probate is the process of authenticating the last will of a person who has died and being granted authority by the will to gather and distribute that person's property.

<sup>5</sup> *Hall v Knight & Baxter* [1914] P 1; *Re Baker* (unreported, HC, Napier, 5 April 1991, CP 44/90).

<sup>6</sup> *Re Crippen* [1911] P 108.

## WHY LEGISLATION IS NEEDED

- 2 If the present law is well settled, why is an Act of Parliament needed? Do problems arise often enough to require a statute?
- While the general principle is well settled, precisely how it should be applied in particular circumstances is often uncertain. For example, to exactly what categories of unlawful killing should the principle apply? If a killer is debarred from receiving property, who should receive that property instead? What happens if before the killing a killer had matrimonial or de facto partners' property rights against the estate of his or her victim?
  - 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)<sup>7</sup> the considerable expense of legal proceedings. Resolving these proceedings often requires the involvement of many legal counsel. For example, in *Re Pechar* [1969] NZLR 575 (admittedly a case in which three people were killed) six different interests were separately represented. There are also the problems of delay. The judgment in *Pechar* was delivered 4 years after the killing. In *Re Lentjes* [1990] 3 NZLR 193 a similar period elapsed between the killing and the judgment.
  - Homicidal heirs cases arise more often than may at first be thought. From 1982 to 1992 the number of culpable homicides and attempted homicides almost doubled, from 53 to 103,<sup>8</sup> and about half of these occurred in a domestic setting.<sup>9</sup> Culpable

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<sup>7</sup> For a discussion of estate sizes, see *Succession Law: Testamentary Claims* (nzlc pp24, 1996), para 21.

<sup>8</sup> *Conviction and Sentencing of Offenders in New Zealand 1983–1992* (Department of Justice, Wellington, 1993), table 2.5, 28; compare the lower but still significant numbers for the comparable period *Conviction and Sentencing of Offenders in New Zealand 1986–1995* (Department of Justice, Wellington, 1996), table 2.5, 32. By contrast, total homicide offences reported to the police increased from 120 in the year ended 31 December 1987, to 141 in the year ended 31 December 1992: Wanganui Computer Crime Statistics.

<sup>9</sup> An analysis of 39 homicides in 1989 in the upper half of the North Island indicated that about half occurred in a domestic setting: Gray, *Family Violence – A Background Paper* (Gray Matter Research Ltd, Wellington, 1989). This is comparable with overseas studies, eg: Gelles, *The Violent Home: A Study of Physical Aggression between Husbands and Wives* (Sage Publications, Beverly Hills, 1974) (25% of American homicides in domestic situations involve people in a family-type relationship); Home Office, *Criminal Statistics: England and Wales 1992* (HMSO, London, Cmnd 2410, 1993) (in approximately a

homicide that was murder increased steadily in New Zealand between 1960 and 1985: from an average of six per year between 1960 and 1964, to an average of 27 per year between 1980 and 1984.<sup>10</sup> The Public Trust Office alone identified eight estates it had administered involving problems of homicidal heirs in the last 10 years or so.<sup>11</sup> Even over the brief period from November 1996 to March 1997 two current High Court proceedings involving homicidal heirs problems were made known to the Commission.<sup>12</sup>

- Legislation would remove doubts about whether judge-made rules concerning homicidal heirs can, as a matter of constitutional law, override properly the express provisions of the statute that governs distribution on intestacy (the Administration Act 1969).
- 3 For these reasons the Commission recommends that Parliament enact a code setting out, in plain language, all homicidal heirs rules. A similar conclusion was reached by the New Zealand Property Law and Equity Reform Committee (PLERC) in 1976.<sup>13</sup> Our objective is a statute that in most cases would enable administrators and trustees to carry out their functions without

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third of English and Welsh homicides the victim is the suspect's cohabitant or lover or another relative of the suspect); Easta, *Killing the Beloved* (Australian Institute of Criminology, Canberra, 1993) (25% of the sample of 629 Australian homicides between 1990–1991 were between adult sexual intimates); Wallace, *Homicide: The Social Reality* (NSW Attorney-General's Department Bureau of Crime Statistics and Research, Research Study No 5, 1986) (42.5% of NSW homicides between 1968–1981 occurred in a domestic context, 25% of this 42.5% involved one spouse or de facto partner killing another, 73% of this 25% were a husband or male de facto partner killing a wife or female de facto partner).

<sup>10</sup> Ritchie, *Violence in New Zealand* (2nd ed, Huia Publishers, Wellington, 1993), 48–49.

<sup>11</sup> In October 1976 the Public Trustee identified eight estates it had administered between 1959 and 1974 in which homicidal heirs problems had arisen, see pages 5–6 of the report mentioned in note 13.

<sup>12</sup> One was *In the estate of Hunter: Farrell v Public Trustee* (unreported, HC, Auckland, 20 November 1996, M505/94), on which see “Killer wants victim's money”, *Dominion*, 9 January 1997, 6.

<sup>13</sup> *The Effect of Culpable Homicide on Rights of Succession* (1976, Report 24). An Administration Amendment Bill 1979 included provisions based on the report, but these provisions were not proceeded with. Maxton wrote in (1988) 13 NZULR 217, 221 that “[f]or the difficulties in this area to be resolved in accordance with clear principles of law and not by public policy, legislation seems essential. That no action has been taken to date in respect of this report of the Committee is most unfortunate.”

the need for recourse to court proceedings. Fact situations of course vary infinitely, and it will be seen that in certain contexts the recommended statute can do no more than lay down the governing principles, leaving precise quantification to be determined in the particular case. Consider, for example, the calculation of the economic benefit to a remainderman who kills a prior life tenant.<sup>14</sup> But even in these more complex cases, the scope of disputes would be reduced in a useful way by the statute we recommend.

## KILLINGS AFFECTED

### *Generally*

- 4 It is the present criminal law that should define the killings that bar killers from profiting. The definition of killer<sup>15</sup> the Commission recommends is based on the Crimes Act 1961 definition of homicide.<sup>16</sup> The Commission excludes, however, negligent killings, assisted suicides (see paras 7–9), suicide pacts (see para 10), and infanticide (see para 13), and includes the killing of a child that has not become a person (see para 13).

### *Killing by a negligent act or omission*

- 5 The unhappy husband who, by his negligent<sup>17</sup> driving of the family car, kills his wife in the seat beside him should not be treated in

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<sup>14</sup> In this example, the life tenant has an interest in the property until he or she dies, and the remainderman has an interest in the same property after the death of the life tenant.

<sup>15</sup> See *section 6* of the draft Succession (Homicide) Act 199– included in this report. In this introduction and the commentary to the draft legislation, references to sections of the draft Act appear in italics.

<sup>16</sup> “Homicide is the killing of a human being by another, directly or indirectly, by any means whatsoever”: Crimes Act 1961 s 158. Homicide that is culpable is defined by s 160.

<sup>17</sup> Compare the Accident Rehabilitation and Compensation Insurance Act 1992 s 82(1)–(2): payments to a killer of compensation, grants or allowances under the Act because a victim died are barred only if the killer is (or would be, if tried in New Zealand) convicted of the murder of the victim as defined in the Crimes Act 1961 ss 167–168. Before s 82(1)–(2) of the 1992 Act (and its forebear, the proviso to s 91(2) of the Accident Compensation Act 1982), the proviso to s 138(1) of the Accident Compensation Act 1972 served the same purpose, but referred instead only to those killers who intended to cause death or serious bodily harm, or were reckless about doing so. The 1976 PLERC report recommended a definition based on the s 138(1) proviso that became the (unenacted) Administration Amendment Bill 1979 cl 68A(2).

the same way as such a cold-blooded murderer as Crippen.<sup>18</sup> The abhorrence attaching to profiting from intentional killing does not extend to accidental killing; as the adjective “negligent” suggests, the law of succession, whatever its terms, can provide no conceivable incentive for killings by negligent (rather than conscious) act or omission.

- 6 This seems to the Commission a clearer and more workable solution than the discretion conferred by the Forfeiture Act 1982 (UK),<sup>19</sup> which permits courts to modify the rule in cases of homicide other than murder, but with no guidelines beyond “the justice of the case”. There seems to be profound disagreement among English judges as to how the statute is to be applied,<sup>20</sup> in part because no clear principle dictates how “wrongful” a wrongful killing must be before the bar on profiting should apply. In *Troja v Troja* (1994) 33 NSWLR 269, 299 an attempt to confer a comparable discretion by judicial decision, led Meagher JA to observe that
- [t]here is something a trifle comic in the spectacle of Equity Judges sorting felonious killings into conscionable and unconscionable piles. 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.

### *Assisted suicides and “mercy killings”*

- 7 Sometimes sympathy can be felt for deliberate killers. One example is the “mercy killer”. One consequence of adopting the Crimes

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<sup>18</sup> See *Re Crippen* [1911] P 108.

<sup>19</sup> For discussion, see, for example, Kenny, “Forfeiture Act 1982” (1983) 46 MLR 66; Kenny, “Forfeiture Act 1982” (1982) 132 NLJ 897; Mathews, “Property, Pensions and Double Punishment: The Forfeiture Act 1982” [1983] JSWL 141; Scottish Law Commission, *Miscellaneous Topics in the Law of Succession* (1986) Consultative Memorandum No 71, paras 2.15–2.18, 14–17; Reed, “Does Crime Pay?” (1988) 132 SJ 238–240; MacDonald, “The Unworthy Heir” (1989) 1 Jur Rev 108–110; Touchstone, “Recent Developments of the Forfeiture Rule” (1991) 135 SJ 109; Cretney, “The Forfeiture Act 1982: The Private Member’s Bill as an Instrument of Law Reform” (1990) 10 OJLS 289. The 1982 UK Act is the model for the Australian Capital Territory Forfeiture Act 1991 and was also considered for adoption in Victoria: Law Reform Advisory Council, “The Forfeiture Rule: Discussion Paper” (unpublished, 1995). Compare Uniform Probate Code (1969), and (1990) revision, § 2–803.

<sup>20</sup> Compare, for example, *Re H* [1990] Fam Law 175 (Ch D) with *Jones v Roberts* [1995] Fam Law 673 (Ch D): Buckley, “Manslaughter and the Forfeiture Rule” (1995) 111 LQR 196.

Act 1961 definition of homicide is that the definition of killer that the Commission recommends does not include a person who has committed the offence (under s 179) of assisting another person to commit suicide.<sup>21</sup> There is a clear line between assisting suicide and murder: it is whether it is the killer or the victim who decides that the victim is to die.<sup>22</sup> As the Court of Appeal said in *R v Stead* (1991) 7 CRNZ 291, 295 when sentencing for manslaughter a devoted son who, in a disturbed state of mind, was influenced by his mother's wish to end her life "[i]n the end it was he, not she, who decided that she would die and she did". It may well be that the exclusion of the offence of assisting suicide from the Crimes Act definition of homicide reflects not a policy distinction but a drafting technique. Even so, in the Commission's view, the degree of abhorrence attaching to the crime of assisting suicide does not warrant the application of the bar on profiting.

- 8 We must deal with two objections to the view expressed about assisting suicide in the previous sentence.
- First is the objection that rights of succession may depend on whether the police elect to lay an assisting suicide or a murder charge. The answer is that under our draft Act a conviction on an assisting suicide charge would not preclude a discontented party from endeavouring to establish homicide in civil proceedings.
  - Second there is the problem (common to all discussions of mercy killing) that the party assisting suicide may have some motive of self-interest. The Commission considered a solution under which one who assisted suicide might, if challenged, be debarred from profiting unless the person could establish that his or her action had no economic motivation. However, the Commission rejected this approach as being unworkable in many, perhaps most, cases.<sup>23</sup> For example by precisely what means could a devoted person who assisted the suicide of a spouse in agony with terminal cancer establish that there was absolutely no element of economic benefit in his or her motivation?

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<sup>21</sup> An example is the defendant convicted of this offence who had helped his quadriplegic friend to commit suicide: *R v Ruscoe* (1992) 8 CRNZ 68; Downey [1995] NZLJ 88; Hampton [1995] NZLJ 166–167.

<sup>22</sup> The effect of this aspect of the criminal law is of course that a person who lacks the physical capacity to commit suicide can be killed only with the decisive help of another that must always amount to culpable homicide.

<sup>23</sup> The decision at first instance of Rolfe J on the distinctive facts of *Permanent Trustee Company Ltd v Freedom From Hunger Campaign* (1991) 25 NSWLR 140 (NSW Supreme Ct, Equity Division), however, is an example of the contrary view.

- 9 Finally there is the argument that, if assisting suicide attracts insufficient abhorrence for the bar on profits to apply, why do comparable considerations not apply to mercy killing that amounts to murder? Part of the answer is to be found in the very clear distinction already referred to between assisting suicide (where the decision to die is that of the deceased) and murder (where the decision is that of the killer). That the killer's motive in killing the victim was to relieve the victim's suffering is not a defence to a charge of murder or manslaughter. So the issue is whether there should be a special rule for a deliberate killer who meant well, bearing in mind that s 63 of the Crimes Act 1961 provides that no-one has the right to consent to the infliction of death upon himself or herself. The Commission has not overlooked the cases, commencing with *Re L: Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235,<sup>24</sup> in which hospitals have been told that they need not strive officiously to keep alive patients in a "living dead" state – existing only with the aid of life support systems – and that terminating such support would not be homicide. These cases seem to the Commission to have no relevance to the situation of the deliberate killer who, having decided to end the life of another human being, then seeks to benefit from the victim's estate. It should not be overlooked that the court in *Re L* emphasised that "the protection of life is, and will remain, a primary function of the criminal law" (244).
- 10 The exclusion from the bar of the defendant who assists a suicide requires as a matter of consistency the exclusion of the defendant who kills in pursuance of a suicide pact: Crimes Act 1961 s 180(3).

### *Battered women who kill*

- 11 Another example where sympathy can be felt is that of a battered woman who deliberately kills her abuser.<sup>25</sup> In *R v Oakes* [1995]

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<sup>24</sup> See, for example, *Re G* (unreported, HC, Dunedin, 13 December 1996, M126/96); compare the House of Lords' decision in *Airedale NHS v Bland* [1993] AC 789, on which see Keith, "Policy and Law: Politicians and Judges (and Poets)" in Gray and McClintock (eds), *Courts and Policy – Checking the Balance* (Legal Research Foundation and Brookers, Wellington, 1995), 117, 148–155; Rt Hon Lord Goff of Chieveley, "A Matter of Life and Death" (1995) 3 Med LR 1. More recently see the Official Solicitor's Practice Note of 26 July 1996: [1996] 4 All ER 766–768, and the decision of the Inner House of the Court of Session in *Law Hospital NHS Trust v The Lord Advocate* (1996) SLT 848; (1996) 4 Med LR 300.

<sup>25</sup> See, for example, *Evans* (1985) 2 NSWLR 188; *Re K* [1985] Ch 85, [1986] Ch 180; *Re Keitley* [1992] 1 VR 583; *Troja v Troja* (1994) 33 NSWLR 269.

2 NZLR 673 the Court of Appeal acknowledged (not for the first time)<sup>26</sup> battered women's syndrome: the unquestionably real set of effects on the mind and will of women that being the target of prolonged physical and psychological abuse can have. The court explained that

[t]he fact that a woman suffers from the syndrome is not in itself a defence; the syndrome is not in itself a justification for the commission of a crime. But where it exists – and whether it exists will be a matter for evidence in every case – the woman's actions, and her culpability for them, must be assessed in the light of contemporary knowledge of its effects on the mind and the will. It is in relation to those effects, the effects on mind and will, that the syndrome becomes relevant (675).

Under the present criminal law the syndrome may be relevant to an issue of self-defence,<sup>27</sup> provocation<sup>28</sup> or duress.<sup>29</sup> In *R v Oakes* the court stressed that the present criminal law treats as paramount protecting human life: "It hardly needs to be said that a battered woman has no more right to kill or injure than any other person, man or woman (675)". Self-defence is a complete defence to a charge of murder or manslaughter, so that if the syndrome is established as providing this defence there is no conviction, and no question of the application of the bar on profiting can arise. Under New Zealand law, duress or compulsion is not a defence to a charge of homicide. Provocation is not a complete defence but may be a ground for reducing murder to manslaughter. The question comes down to whether there is any principled basis for not applying to a battered woman the bar on profiting that applies to every other killer who establishes provocation.

### *Changes to the criminal law?*

- 12 The succession legislation this report recommends is an inappropriate vehicle for advocating reforms (which may or may

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<sup>26</sup> See, for example, *R v Gordon* (1993) 10 CRNZ 430, and more recently see *Ruka v Department of Social Welfare* [1997] 1 NZLR 154; Dawkins [1997] NZ Law Rev 50–56.

<sup>27</sup> Crimes Act 1961 s 48, provides for self-defence as a complete defence to otherwise culpable homicide, for example in *R v Lavalley* (1990) 55 CCC (3d) 97; Shaffer "The battered woman syndrome revisited: some complicating thoughts five years after *R v Lavalley*" (1997) 47 University of Toronto LJ 1.

<sup>28</sup> Crimes Act 1961 ss 169–170, provides for provocation as a partial defence that only reduces what would otherwise be a murder to a manslaughter, for example *R v Ahluwalia* [1992] 4 All ER 889. Compare *Thornton (No 2)* [1996] 1 WLR 1174 (CA); *Padfield* [1996] 55 CLJ 421–422.

<sup>29</sup> For example in the South Australian case *R v Runjanjic* (1991) 56 SASR 114.



not be desirable) to the present criminal law of homicide (to which our draft Act is ancillary). If, after a thorough review, Parliament sees fit to change the criminal law so that, in defined circumstances and with adequate protections for the sanctity of life, killings by, for example, battered women and mercy killers are more often lawful,<sup>30</sup> then the terms the draft Act uses are defined in such a way that the bar on profits would no longer apply. Ultimately, 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 (see para 6).

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<sup>30</sup> See, for example, Mendelson, "Medico-Legal Aspects of the 'Right to Die' Legislation in Australia" (1993) 19 MULR 112; Webb, "The Politics of 'Medicide' in New Zealand: A Cautious Proposal for Physician Aid-In-Dying" (1994) 5 *Canta LR* 438; Otlowski, "Active Voluntary Euthanasia: Options for Reform" (1994) 2 *Med LR* 161; Senate of Canada, *Proceedings of the Senate Special Committee on Euthanasia and Assisted Suicide* (First Session, 35th Parliament, 31 May 1995, Issue No 33, chaired by the Hon Joan Neiman) Zdenkowski, "The International Covenant on Civil and Political Rights and Euthanasia" (1997) 20 *UNSWLJ* 170; Sayers, "Euthanasia: At the Intersection of Jurisprudence and the Criminal Law" (1997) 21 *Crim LJ* 80; South African Law Commission, "Euthanasia and the Artificial Preservation of Life" (Project 86, Discussion Paper 71, 1997); Manning, "Self-Defence and Provocation: Implications for Battered Women Who Kill and for Homosexual Victims" (NSW Parliamentary Library Research Service, Briefing Paper No 33/96, December 1996); Beri, "Justice for Women Who Kill: A New Way?" (1997) 8 *Aust Fem LJ* 113.

Mercy killing would usually escape punishment by the criminal law only in cases where a killer had no directly conflicting personal pecuniary interest in the death of the person killed. For example, the Australian Northern Territory Rights of the Terminally Ill Act (1995) (now repealed by the Federal Euthanasia Laws Act (1997) Cth), required a certifying medical practitioner to have had no reason to believe that he or she, a counter-signing practitioner, or a close relative or associate of either of them, would gain a financial advantage as a result of the death of the patient. Similarly in New Zealand the proposed Death with Dignity Bill 1995 (on 16 August 1995 denied 61/29 a first reading by members of the 44th Parliament) would not have allowed the required witnesses to an incurably ill person's written request to have his or her life terminated to be relatives of the ill person or people with a pecuniary interest in the ill person's estate. The Commission considered, but rejected as precipitate and perhaps unworkable, proposed exceptions based on mercy killers showing that they had no pecuniary motive to kill their victims: see, for example, Berk (1992) 67 *Tulane LR* 485, 508; Sherman (1993) 61 *Cinn LR* 803; McLennan (1996) 113 *South African LJ* 143–146. The Commission notes PLERC's conclusion that "no attempt should be made to legislate in the special case of the mercy-killing of a victim of a painful terminal illness": (Report 24, 1976), para 15. A media statement by the Minister of Justice the Hon David Thomson on 2 March 1977, and the (unenacted) Administration Amendment Bill 1979, both took the same approach.

### *Infanticide and killing an unborn child*

- 13 The Commission recommends that the bar on profits not apply to infanticide (which, because it is part of the Crimes Act 1961 definition of culpable homicide, requires an express exclusion). Conversely the bar on profits should apply to the offence under s 182 of killing an unborn child. The death of a neonate or a foetus will, of course, affect property entitlement so as to benefit a killer only if the terms of a trust so provide. It seems to the Commission that infanticide is sufficiently analogous to an acquittal on the ground of insanity for the bar on profiting not to apply. No similar considerations apply to the s 182 offence.

### *Effect of victim's consent to killer taking*

- 14 We have not excluded killings for which the person killed, after fatal injury, but before death, forgave the killer.<sup>31</sup> The principle that the draft Act would apply is based on considerations of public policy. There will commonly in practice be a question mark over a victim's purported forgiveness, given that person's likely physical and emotional state. It is always open to the substituted beneficiaries as a matter of grace to restore to the killer property to which he or she would otherwise have been entitled. Apart from any other reason, these circumstances appear too rare to merit an exclusion provision.

## PRESERVING KILLERS' PRIOR AND INDEPENDENT RIGHTS

- 15 Care must be taken to ensure that the principle that a killer may not benefit as a result of a victim's death is not extended to deprive a killer of what was his or hers before and apart from a killing. As a result *section 10* – dealing with matrimonial property, testamentary promises, and restitution sought by a killer – and *section 11* – dealing with other interests, like those of a beneficiary under a trust – carefully preserve, but limit a killer's rights to, the killer's pre-killing entitlement. A particular source of difficulty in this context is property that is the subject of a joint tenancy (see paras 18–20).

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<sup>31</sup> For a purported example, see *Lundy v Lundy* (1895) 24 SCR 650; Simester (1992) E & TJ 217; for an example of actual forgiveness, see *Re Mona Boyd McCallum or Gilchrist* [1990] SLT (notes) 494.

## EVIDENCE

- 16 Because an objective of the proposed legislation is (where possible) to enable administrators and trustees to act without recourse to the courts, *sections 13(1) and 14* make a conviction of culpable homicide or an acquittal on the grounds of insanity conclusive evidence that the accused either is or is not a killer (defined by *section 6*). Otherwise an acquittal will not prevent interested parties re-litigating that issue in civil proceedings. The recommendations are consistent with the Commission's work in progress on an evidence code. Not all killings are the subject of criminal proceedings in New Zealand. The killer may not be brought to trial because he or she dies or is unfit to plead, or the killing may occur abroad. *Section 15* deals with these situations.

## WILLS, INTESTACIES AND NON-PROBATE ASSETS

- 17 Where homicidal heirs rules apply the killer may not be a beneficiary under the will of a victim or have an entitlement on a victim's intestacy. Consistently with the existing law, *section 7* simply disentitles the killer from taking. *Section 7* provides that the property the killer is barred from taking is to be dealt with as if the killer had predeceased the victim. This provision would avoid the results arrived at in *Davis v Worthington* [1978] WAR 144 and *Re Lentjes* [1990] 3 NZLR 193, which may be thought odd and unsatisfactory. In these cases "gifts over"<sup>32</sup> conditional on the death of the killer failed when the court interpreted the will literally, because the killer, although debarred by the rule from taking, had not in fact died. Other arrangements not covered by *section 7* could also result in a killer benefiting from the victim's death (eg, a nomination of a savings bank account or of a superannuation benefit). These are dealt with in *section 8*. One of these kinds of arrangements, the joint tenancy, needs to be discussed in more detail.

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<sup>32</sup> A "gift over" is one that operates only if a prior gift is not, at the time for decision, meant to operate. For example, if a gift in a will reads, "All to my husband, but if he dies before me, then to my child", the "gift-over" is the gift to the child which, if read literally, operates only if, when the will-maker died, the husband was in fact already dead.

## JOINT TENANCIES

- 18 The law permits property to be owned by two or more people on the basis that each party loses his or her share on death, with each survivor taking an equal part of a dead party's share, and the ultimate survivor becoming entitled to all of the property. One example, rarely encountered nowadays outside the rules of a dividing friendly society, is a tontine.<sup>33</sup> A far more common example in New Zealand is that of spouses and de facto partners owning their homes as joint tenants. Spouses may also achieve joint ownership by registering a home under the Joint Family Homes Act 1964. If one spouse murders another, who gets the home? Commonwealth courts have answered this question by treating 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 joint tenancy, or
  - treating legal title as passing to the killer, but requiring him or her to hold the undivided share previously owned by the victim for the victim's estate.

There is little practical difference between these two approaches.

- 19 The difficulty with this solution is that it takes no account of the chance that the victim had of surviving the killer and becoming (if there are only two joint tenants) the sole owner. Some North American literature suggests that to overcome this difficulty the killer should be treated as having only a life interest in the whole property, with the remainder going to the victim's estate.<sup>34</sup> This solution, so the argument runs, does not involve expropriation. The killer's only certain entitlement was enjoyment during his or her lifetime, and this is preserved. If the killer had predeceased the victim, the killer would have taken nothing and must not be permitted to enlarge his or her rights by killing the victim and so ensuring that the victim predeceases the killer. It adds nothing to the point that the killer (if he or she did not) might have insisted on severance or partition while both the killer and the victim were alive.

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<sup>33</sup> A tontine is a financial arrangement (such as an insurance policy) in which a group of participants share advantages on such terms that, upon the default or death of any participant, that participant's advantages are distributed among the remaining participants until only one remains, whereupon the whole goes to him or her; or on the expiration of an agreed period, the whole goes to those participants remaining at that time.

<sup>34</sup> Ames, *Lectures in Legal History* (Harvard University Press, Cambridge, 1913), 321; Wade, "Acquisition of Property by Killing Another – A Statutory Solution" (1936) 49 Harv LR 715; Scott and Fratcher (eds), *The Law of Trusts* (4th ed, Little Brown and Co, Boston, 1987), vol 5, para 493.2.

- 20 While there is some attraction in a solution that would allow the killer a life interest or the commuted value thereof, this seems to the Commission unnecessarily complex. It prefers the broad justice of simply treating the killer as having predeceased the victim. The killer, having ensured, by killing the victim, that the winner of the game cannot be determined fairly, cannot then be heard to complain if he or she is deprived of all rights to the prize.<sup>35</sup> This of course means that if there are one or more joint tenants other than the killer and victim, these other joint tenants benefit. But that is the nature of a joint tenancy.

## CONCLUSION

- 21 The Commission recommends that Parliament enact the Succession (Homicide) Act set out in this report.
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<sup>35</sup> We note that PLERC made the same recommendation in *The Effect of Culpable Homicide on Rights of Succession* (1976, Report 24), para 13(c), cl 68A(1)(b).



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# DRAFT SUCCESSION (HOMICIDE) ACT 199–

Public Act . . . of 199–  
Royal Assent: Day Month 199–  
Comes into force: Day Month 199–

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The Parliament of New Zealand enacts the  
Succession (Homicide) Act 199–

**1 Purpose**

The purpose of this Act is to codify the law that precludes a person (a killer) who kills unlawfully another person (a victim) from benefiting as a result of the death of the victim from the victim's estate or from some other property arrangement.

Definitions: killer, person, property, victim, s 6

**2 Commencement**

This Act comes into force one month after the date on which it receives the Royal Assent.

Definitions: month, *Acts Interpretation Act 1924* s 4



## COMMENTARY

### Section 1

- C1 *Section 1* states the purpose of the draft Act: to codify the law that precludes a person (a killer) who kills unlawfully another person (a victim), from benefiting as a result of the death, whether from the victim's estate or from other property arrangements. The (invariably linked) terms killer and victim are defined by *section 6*. The Commission recognises that the term victim can have unfortunate negative connotations, but prefers it to alternatives like the words "person killed".
- C2 The Act is based on the principle that nobody should profit from his or her own wrongdoing (*nullus commodum capere potest de injuria sua propria*). This principle has many analogues in other common and statutory law, for example:
- criminal law (see Proceeds of Crime Act 1991 ss 25–29; Crimes Act 1961 s 404);
  - contract and tort law (eg, the related maxim that no action should arise from an unworthy cause: *ex turpi causa non oritur actio*, applicable, for example, in trespass to land: see *Brown v Dunsmuir* [1994] 3 NZLR 485);
  - accident compensation law (Accident Rehabilitation and Compensation Insurance Act 1992 s 82; Accident Compensation Act 1982 s 91(2); Accident Compensation Act 1972 s 138(1));
  - social security law (Social Security Act 1964 s 76; Social Security Act 1938 s 73).

### Section 2

- C3 *Section 2* provides that the Act comes into force one month after it receives the Royal Assent. This period of delay permits executors and others responsible for the administration of estates and trusts to study the terms of the Act before it comes into force.

**3 Application**

This Act applies to interests in and claims against property resulting from the death of a victim before or after the commencement of this Act, but does not affect

- (a) a distribution made by an administrator, executor or trustee before the commencement of this Act; or
- (b) a transmission by survivorship registered before the commencement of this Act under the Land Transfer Act 1952 (or any earlier Act relating to registration and transfer of title to land); or
- (c) a grant of probate or letters of administration made before the commencement of this Act; or
- (d) any interest in or claim against property that is the subject of a proceeding commenced before the commencement of this Act, whether or not judgment has been delivered in that proceeding or an appeal against judgment was commenced before that time; or
- (e) any interest in property a person (other than a killer) acquired for value.

Definitions: **property**, **victim**, s 6; **commencement**, *Acts Interpretation Act 1924* ss 10A, 11

### Section 3

- C4 The Act codifies what is generally understood to be the present general law so that the law, more clearly stated and unified, can be applied with less delay and expense. For this reason the Act applies not only prospectively but also to interests in property, and claims against property, resulting from deaths before it commences (*section 2*).
- C5 There are, however, five exceptions to this retrospective operation. To the extent that the Act changes the scope of the bar on killers taking benefits through their wrongdoing, *section 3* provides that the Act does not affect:
- distributions made by an administrator, executor or trustee before the Act commenced;
  - transmissions by survivorship registered pursuant to the Land Transfer Act 1952 (or any predecessor to that Act) before the Act commenced;
  - grants of probate or letters of administration made before the Act commenced;
  - any interest in or claim against property that is the subject of a proceeding begun before the commencement of the Act, whether or not judgment has been delivered in that proceeding or an appeal against judgment was commenced before that time; or
  - any interest in property a person other than a killer acquired for value (*paragraph (e)* covers the faint possibility that, despite *paragraphs (a)–(e)*, an interest in property a person other than a killer acquired for value might be defeated as a consequence of the retrospective application of the Act).

**4 Act to be a code**

- (1) This Act has effect as a code in place of the rules of law, equity and public policy that preclude a killer from receiving, becoming entitled to, or claiming interests in property as a result of the death of the victim.
- (2) Notwithstanding subsection (1), this Act does not affect the entitlement of any person under a contract.

Definitions: killer, person, property, victim, s 6

**5 Act binds Crown**

This Act binds the Crown.

Note: See *Acts Interpretation Act 1924* s 5(k)

## Section 4

- C6 The Act replaces the present general law (including the Proceeds of Crime Act 1991, which *section 16* and *Schedule 1* amend so that ss 25–29 of that Act do not apply to killers). *Section 4(2)*, however, provides an exception.
- C7 *Subsection (2)* makes it clear that the exclusion of the prior rules effected by *subsection (1)* does not affect the entitlement of any person under a contract. The law of contract (including the Illegal Contracts Act 1970, already itself subject to all Acts) continues to apply to any proceeding under the law of contract for a benefit resulting from the death of a victim. The draft Act concerns the law of succession. The law of contract has its own rules for preventing profiting by wrongdoers, in particular the rules concerning contracts illegal in their purpose, or contracts legitimate in their purpose but performed illegally. It is these rules – together with the terms of the policy and the fact that a deliberate killing is not a fortuity – that prevent a killer recovering, for example, under a policy over a victim's life: see, for example, *Re S* [1996] 1 WLR 235 and *Davitt v Titcumb* [1990] Ch 110.

## Section 5

- C8 The Act will bind the Crown. It will apply, for example, if a killer makes a claim against property a victim left to the Crown in a will: see *A New Interpretation Act* (NZLC R17, 1990), chapter IV.

## 6 Definitions

In this Act

**homicide** means the killing of a person, or a child that has not become a person, by another person, directly or indirectly by any means whatever and whether done in New Zealand or elsewhere, that is, (or would be if the killing had been done in New Zealand) an offence against an Act, but does not include

- (a) a killing caused by a 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;

**killer** means a person who kills another person (a victim) in such a manner and in such circumstances that the person (the killer) is guilty, either alone or with another person or persons, of the homicide of the victim or would be so guilty if the killing had been done in New Zealand;

**person** means a human being;

**property** means everything that is capable of being owned, whether it is real or personal property, and whether it is tangible or intangible property, and includes any estate or interest in property;

**suicide pact** has the meaning given in section 180(3) of the Crimes Act 1961;

**victim** means a person, or a child that has not become a person, who is killed by a killer;

**will** includes a codicil.

Definitions: **Act**, *New Zealand, Acts Interpretation Act 1924* s 4; **property**, *A New Property Law Act* (NZLC R29, 1994), para 135, s 3

## Section 6

- C9 *Section 6* defines terms the Act uses.
- C10 **Killer** and **victim** are two (invariably related) terms used throughout the Act. A killer is a person who kills another person (a victim) in such a way that the person (the killer) is guilty, either alone or with another person or persons, of the homicide of the victim, or would be so guilty if the killing had been done in New Zealand. Any party to a homicide may therefore be a killer for the purposes of the Act (see Crimes Act 1961 s 66 on parties to offences; and for proof of homicides see *sections 13–16*).
- C11 Section 158 of the Crimes Act defines homicide as “the killing of a human being by another, whether directly or indirectly, by any means whatsoever.” Homicide that is culpable is defined by section 160 of the Crimes Act. The definition of homicide used in this Act is based on these Crimes Act provisions. Homicide is defined broadly. The killing of a **person** (a human being) and the killing of a child that has not become a person are both included (on when a child becomes a human being see Crimes Act s 159). The killing may be direct or indirect, by any means whatever, whether in New Zealand or elsewhere. The killing must have been an offence against an Act (or would have been if it had been done in New Zealand, see *section 15(2)*).
- C12 But homicide also excludes (for the reasons in paras 4–14 of this report) four sorts of killing:
- a killing caused by a negligent act or omission;
  - an infanticide under s 178 of the Crimes Act;
  - an assisted suicide (see s 179 of the Crimes Act); and
  - for consistency, a killing of a person by another in pursuance of a suicide pact (see s 180(3) of the Crimes Act).

*Disentitlements of killers to property***7 Disentitlement of killers under will or intestacy**

- (1) A killer is not entitled to any interest in property arising under a will of the victim.
- (2) A killer is not entitled to any interest in property arising on the intestacy, or partial intestacy, of the victim.
- (3) Subject to any express testamentary direction to the contrary, any interest in property that a killer is not entitled to under subsection (1) or (2) is to pass or be distributed as if the killer had died before the victim.

Definition: killer, property, victim, will, s 6



## Section 7

- C13 *Section 7(1) and (2)* bar a killer from taking any interest in property under the will or on a partial or complete intestacy of the victim.
- C14 *Section 7(3)* provides that the property a killer is barred from receiving is to be distributed instead as if the killer had died before the victim, unless the will provides (but not implies) otherwise. This provision has the advantage of simplicity and employs a mechanism to be found in other provisions: for example, the Wills Amendment Act 1977 s 2(2)(c), the Simultaneous Deaths Act 1958 s 3(1)(a), and the Accident Compensation Act 1982 s 91(3). This provision (like cl 68A(1)(a) of the Administration Amendment Bill 1979, based on the recommendations of PLERC (Report 24, 1976)) would solve the problem in *Re Lentjes* [1990] 3 NZLR 193, 194, as Heron J's decision in the case acknowledges.
- C15 *Section 7(3)* prefers the fiction of the killer predeceasing the victim over at least two other ways of identifying who, instead of the killer, will take property. The first alternative, applying only to will gifts, is to confer a discretion on the court to determine and give effect to a victim will-maker's probable wishes as demonstrated to the civil standard of proof by the *trend* of the will-maker's dispositions in wills and extrinsic evidence: see *Succession Law: Wills Reforms* (NZLC MP2, 1996), 94–97; Rowland, "The Construction or Rectification of Wills to Take Account of Unforeseen Circumstances Affecting their Operation" (1993) 1 APLJ 87–113 and 193–210; Wills Act 1968 (ACT) s 12A(2). The second alternative, applying to both wills and non-probate assets, is to *deem a killer to have disclaimed* any interest or appointment in his or her favour: compare National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code* (ULA 1996 Supplement 198–199), §2–803(c), §2–803(e).

**8 Disentitlement of killer to victim's non-probate assets**

- (1) A killer is not entitled to any property interest in any non-probate assets of the victim which, but for this subsection, would have passed to the killer on the death of the victim.
- (2) For the purposes of this section, the **non-probate assets** of a victim consist of all property passing on the death of the victim because of any of the following transactions:
  - (a) a nomination as defined in section 68A of the Administration Act 1969; and
  - (b) gifts that the victim made in contemplation of death (*donationes mortis causa*); and
  - (c) trusts settled by the victim that were revocable by the victim in his or her lifetime; and
  - (d) beneficial powers of appointment that were exercisable by the victim in his or her lifetime; and
  - (e) joint tenancies held by the deceased and any other person.
- (3) Any property interest that a killer is not entitled to under subsection (1) is to pass or be distributed as if the killer had died before the victim.

Definitions: **killer, property, victim, will**, s 6

## Section 8

- C16 *Section 8* deals with property transmitted outside the estate disposed of by the will of a victim: the Act calls this property the **non-probate assets**.
- C17 Non-probate assets are defined by *subsection (2)*. Compare *Succession Law: Testamentary Claims* (NZLC PP24, 1996), paras 338–341, draft Testamentary Claims Act 199– ss 48–51, paras C156–C170, and the Estate and Gift Duties Act 1968 s 6 definition of “dutable estate”.
- C18 *Subsection (1)* bars a killer from taking any interest in the victim’s non-probate assets that he or she would otherwise have taken as a result of the victim’s death.
- C19 *Subsection (3)* makes provision to identify who, instead of the killer, will take the property.

- 9 Disentitlement to apply under Family Protection Act 1955**  
A killer is not entitled to apply under the Family Protection Act 1955 for provision out of the estate of the victim.

Definitions: killer, victim, s 6

## Section 9

- C20 Under s 5 of the Family Protection Act 1955 courts can currently refuse to make an order in favour of a killer “whose character or conduct is or has been such as in the opinion of the court to disentitle him.” A similar “conduct of the applicant” provision can be seen in s 3(1)(g) of the Inheritance (Provision for Family and Dependants) Act 1975 (UK). We observe that under the UK Act a killer has also been held not to have satisfied either one of the statutory preconditions to claim (see ss 1–2 of the UK Act). Because, the court said, the UK family provision legislation was enacted against the common law bar on killers taking, the court would not treat a killer as inadequately provided for by the victim either “in terms of his will” or “as a result of his intestacy”. The wording of the New Zealand Act is not materially different, and therefore also seems susceptible to this argument: see *Re Royse* [1985] Ch 22; *Dickey* (1993) 67 ALJ 788; *Cretney* (1990) 10 OJLS 289, 295; Family Protection Act 1955 s 4(1); compare the result in *Homsy v Yassa and Yassa; the Public Trustee* (1993) 17 Fam LR 299 (Family Court of Australia).
- C21 The Commission acknowledges that, strictly speaking, s 5 of the Family Protection Act might make *section 9* unnecessary, but *section 9* is included in the Act for two reasons. The first is clarity. The second is that fault-based considerations have played an increasingly limited role in New Zealand family property law: see, for example, *Atkin* (1979) 10 VUWLR 93, and compare *Preble* (1995) 13 Law and Inequality 401 and *Behrens* (1993) 7 Aust J Fam L 9. If the law is amended in the way proposed in *Succession Law: Testamentary Claims* (NZLC PP24, 1996), there will be no provision comparable to the current s 5.

**10 Restriction of killer's claims as to matrimonial property, testamentary promises, and restitution**

- (1) A killer who has a valid claim against the estate of a victim under the Matrimonial Property Act 1963 or a valid claim for restitution for economic benefits conferred on the victim (whether by way of *quantum meruit*, *quantum valebat*, as beneficiary under a constructive trust, or otherwise) is entitled in respect of that claim only to a benefit calculated so that
- (a) the killer is not deprived of the benefit to which the killer is entitled for the services or other economic benefits he or she provided to the victim; but
  - (b) the killer's benefit is not made more certain, more immediate, or more valuable as a result of the death of the victim.
- (2) A killer who has a valid claim against the estate of a victim under the Law Reform (Testamentary Promises) Act 1949 is entitled in respect of that claim only to a benefit calculated so that the killer's benefit is no more certain, more immediate or more valuable than the killer would have been entitled to if the victim had continued to live for the period reasonably expected before the victim was killed.

Definitions: **killer**, **victim**, s 6

## Section 10

- C22 *Section 10* deals with three types of claims the killer may make on or after the death of the victim. Each is based on the killer having contributed something of value to the victim before the killing occurred. The basis of the claim exists independently of the killing. For this reason the Act does not remove the killer's ability to make a claim. Instead the Act ensures that the death of the victim gives the killer no more certain, immediate, or valuable benefit than that to which he or she would otherwise have been entitled.
- C23 *Section 10(1)* is one illustration. It applies to a killer's claim under s 5 of the Matrimonial Property Act 1963, which applies instead of the Matrimonial Property Act 1976 if, when the claim is made, either spouse has died. (Note that if matrimonial property division proceedings are begun under the 1976 Act and either spouse then dies, then the 1976 Act will continue to govern those proceedings.) The approach in the Australian case of *Homsy v Yassa and Yassa; the Public Trustee* (1993) 17 Fam LR 299, namely that the homicide did not deprive the killer of existing rights, is consistent with the approach of *section 10(1)*.
- C24 *Section 10(1)* also governs claims under the law of restitution for benefits conferred in anticipation of reward. The benefits may, for example, have been given by one de facto partner to another before the de facto partner killed that other partner (for an Australian example, see *Troja v Troja* (1994) 33 NSWLR 269, 298, 300). Again, the killer's pre-killing rights are preserved.
- C25 *Section 10(2)* provides a third illustration. The victim may have promised to reward the killer in return for services the killer gave to the victim. If the victim promised to reward the killer by making provision in his or her will, after the death of the victim the killer can make a claim under the Law Reform (Testamentary Promises) Act 1949. The value of the reward the victim promised will often be greater because the killer is expected to remain uncompensated until the victim reasonably expects to die, which might be many years in the future. Thus, in order for the killer not to be unjustly enriched, the real value that the killer can properly claim must be discounted to account for the killer's enjoyment of the reward earlier than promised.

**11 Disentitlement of killer to enhanced benefits generally**

- (1) This section applies only to property that is neither within the victim's estate nor a non-probate asset of the victim.
- (2) A killer whose interest in or claim to any property is affected by the death of the victim is not entitled to any more certain, more immediate or more valuable interest in the property as a result of the death of the victim than the killer would otherwise have been entitled to.
- (3) Without limiting the generality of subsection (2), a killer is not entitled to benefit as a result of the killing of the victim where
  - (a) the killing prevented the birth of the victim; or
  - (b) the killing altered the order in which it could reasonably have been expected that the killer and the victim would have died; or
  - (c) the killing prevented the victim from achieving any age or satisfying any other condition; or
  - (d) the killing reduced or closed the membership of a class of beneficiaries that included the victim; or
  - (e) the killing shortened the period during which the victim could reasonably have expected to possess an interest in property in which the killer has an interest in remainder.

Definitions: *killer*, *property*, *victim*, s 6, *non-probate assets*, s 8(2)



## Section 11

- C26 *Section 11* concerns only property that is neither
- within the estate of a victim, nor
  - a non-probate asset of a victim: *section 11(1)*.
- C27 *Section 11(2)* states the general principle: a killer must take no more certain, immediate, or valuable interest in the property as a result of the killing (this principle is consistent with the purpose of the Act: *section 1* and para C1). It will be for administrators, and others with interests, like killers, or (if ultimately needed) the courts, to settle the detailed application of this principle to the many and varied interests in property to which it can apply (perhaps by contract, see *section 4* and para C10).
- C28 *Section 11(3)*, to assist in this process, provides five common examples of ways in which the killer must not benefit as a result of killing the victim. It may be that the killer benefits but not as a result of the victim's death. For example, even though the killing may have reduced or closed the membership of a class of beneficiaries that included the killer and the victim, the killer may benefit not because of the death of the victim but because of the exercise of a discretion by a third party.

**12 Caveat against dealing with land**

- (1) If an interested person claims that an owner of an undivided estate or interest in land as a joint tenant with a deceased person is a killer of that deceased person, the interested person may lodge a caveat in accordance with section 137 of the *Land Transfer Act 1952* in respect of the estates or interests of the killer and the deceased.
- (2) So long as a caveat under this section remains in force, the District Land Registrar must not register a transmission on survivorship to the killer of any estate or interest affected by the caveat.
- (3) The provisions of the *Land Transfer Act 1952*, other than section 141(1), apply to a caveat lodged under this section.
- (4) Subsections (2) and (3) of section 141 of the *Land Transfer Act 1952* apply, subject to any necessary modifications, in respect of a caveat lodged under this section.

Definition: killer, s 6

*Evidential provisions***13 Evidential effect of conviction in New Zealand**

- (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.
- (2) A certificate issued under s 148A of the *Criminal Justice Act 1985* 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.

Definitions: homicide, person, s 6; *New Zealand, Acts Interpretation Act 1924* s 4

Note: As to when a child becomes a person (human being), see *Crimes Act 1961* s 159

## Section 12

- C29 *Section 12* allows an interested person to lodge a caveat under s 137 of the Land Transfer Act 1952 against transmission by survivorship of the estates or interests in land held as joint tenants by victim and killer.

## Section 13

- C30 The common case is where a killer is *convicted* in New Zealand of homicide of a victim. If this occurs, then under present law, in later civil proceedings the conviction is admissible but not presumptive evidence of the fact that the killer is responsible for the homicide of the victim: Evidence Amendment Act (No 2) 1980 s 23.
- C31 The Commission's proposed evidence code may recommend a general change to the law under which convictions would be admissible and *presumptive* evidence (a conviction was so treated in *Re Lentjes* [1990] 3 NZLR 193; see Law Commission, "The Rule in *Hollington v Hewthorn*", unpublished, 10 June 1997). *Section 13(1)* of the Act, for clarity and efficiency (especially important where smaller estates are in issue) goes further in making convictions *conclusive* proof in proceedings under the Act that the killer is guilty of the homicide of the victim.
- C32 If a court on or after sentencing a killer certified in writing (under the Criminal Justice Act 1985 s 148A, inserted by *section 16* of this Act) that the killing was a homicide for the purposes of the draft Act, then the certificate is conclusive evidence of that: *section 13(2)*. The present law (Evidence Amendment Act (No 2) 1980 s 27) provides for a means of proving a conviction of any person in later civil proceedings. By contrast, s 148A provides a means of proving a conviction and certifying that conviction as a homicide for proceedings under the draft Act. Section 148A may be made unnecessary by a rationalising provision of the Commission's proposed evidence code that will provide first, for a means of proving convictions in all later proceedings, and second, for the certification of convictions as relevant for the purposes of a number of particular proceedings.

**14 Evidential effect of acquittal in New Zealand**

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.

Definitions: **homicide, person**, s 6; **New Zealand**, *Acts Interpretation Act 1924* s 4

Note: As to when a child becomes a person (human being), see *Crimes Act 1961* s 159

## Section 14

- C33 *Section 14* provides that an acquittal by reason of insanity (see s 23 of the Crimes Act 1961 and, for the consequences, Part VII of the Criminal Justice Act 1985) is *conclusive* evidence in later civil proceedings under the Act that a person is not responsible for the homicide of the person killed. In these cases the person acquitted must after all have satisfied the court on the balance of probabilities that he or she was not sane (compare, where there is no prosecution in New Zealand, *section 15(4)*). To treat the acquittal as conclusive is also consistent with the likely approach of the courts under the present law of succession: *Re Pechar* [1969] NZLR 574; *Re Batten's Will Trust* (1961) 105 SJ 529; *Re Pitts* [1931] 1 Ch 564; *Re Houghton* [1915] 2 Ch 173.

**15 Evidence if no criminal prosecution in New Zealand**

- (1) This section applies where a person who is alleged to be guilty of the homicide of another person or a child that has not become a person has not been prosecuted in New Zealand in respect of that homicide, whether or not the person has been prosecuted, convicted or acquitted elsewhere.
- (2) A court 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
  - (a) would be guilty of the homicide of that person or child that has not become a person; or
  - (b) would by reason of insanity not be guilty of the homicide of that person or child that has not become a person.
- (3) A person who alleges that another person is guilty of homicide for the purposes of this Act must satisfy the court on the balance of probabilities.
- (4) 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 on the balance of probabilities.
- (5) The conviction elsewhere than in New Zealand of a person in respect of homicide is for the purposes of this Act admissible evidence concerning whether the person is guilty or not guilty of the homicide and is to be given such weight as the court may determine.

Definitions: **homicide**, **person**, s 6; **insanity**, *Crimes Act 1961* s 23; **New Zealand**, *Acts Interpretation Act 1924* s 4

Note: As to when a child becomes a person (human being), see *Crimes Act 1961* s 159

## Section 15

- C34 *Section 15* concerns cases where a person who is alleged to have killed another person, or a child that has not become a person, has not been prosecuted in New Zealand in respect of that homicide: *section 15(1)*. This may occur for a number of reasons. For example, the alleged killing may have occurred overseas (the killer may actually have been prosecuted overseas and convicted or acquitted). Alternatively if the alleged killing occurred in New Zealand the killer may later have died, or be unfit to be tried.
- C35 In these cases *section 15(2)* clarifies that courts may decide for the purposes of the Act that, if the alleged killer had been prosecuted for the homicide in New Zealand, the alleged killer
- would be guilty of the homicide of the person or child that has not become a person, or
  - would by reason of insanity not be guilty of the homicide of the person or child that has not become a person.
- C36 *Sections 15(3)* provides that a person who alleges that another person is guilty of a homicide for the purposes of the Act must satisfy the court on the balance of probabilities. In practice the standard applied in civil proceedings where a serious offence is alleged is often the “civil standard of proof on a balance or preponderance of probabilities, *but remembering more than ever the gravity of the issues involved*”: *Re Pechar* [1969] NZLR 574, 580 (emphasis added). The qualification means that this standard may vary in its requirements according to the gravity or seriousness of the offence alleged (eg, in proceedings under the Act, offences of killing will be alleged, but in other proceedings, lesser offences may be alleged, eg, a petty theft). An alternative, perhaps more predictable, third standard of proof established in America but new to New Zealand would be that of “clear and convincing evidence”: for discussions of this standard, see, for example, *McCormick on Evidence* (4th ed, West, St Pauls, 1992), 959–961; *Back v National Insurance Co of NZ Ltd* [1996] 3 NZLR 363, 370–371; compare Mahoney [1997] NZ Law Rev 62–64. The third standard would be between those that usually apply in civil and criminal proceedings. The Commission is considering whether “serious” allegations in any civil proceeding (eg, that a person is guilty of any more serious criminal offence) should be required to be proved by “clear and convincing evidence”.

(*Section 15 commentary continued on page 41*)





*(Section 15 commentary continued from page 39)*

- C37 *Section 15(4)* provides that a person who alleges that he or she is not guilty by reason of insanity of a homicide for the purposes of the Act must satisfy the court on the balance of probabilities (compare s 23 of the Crimes Act 1961, and see also *section 14*, and para C33).
- C38 *Section 15(5)* provides that a conviction outside New Zealand of a person in respect of homicide, is for the purposes of the Act admissible to show that a person is or is not guilty of the homicide and is to be given such weight as the court decides. The limited provisions of s 12A of the Evidence Act 1908 provide that convictions from the United Kingdom, Australia and Canada may (but need not) be proved for New Zealand courts by fingerprints. Section 12A(4) of the Evidence Act 1908 allows for proof by this means (fingerprints) to be extended by regulation to convictions from other countries, but to date no regulations appear to have been made for this purpose. Section 12A and provisions on related matters will be reviewed in the Commission's proposed evidence code.

*Amendments to other enactments***16 Amendments to other enactments**

The enactments specified in Schedule 1 are amended in the manner indicated in that Schedule.

SCHEDULE 1  
ENACTMENTS AMENDED

See section 16

*Administration Act 1969 (1969/52)*

after section 5

**Insert section 5A**

**"5A Killer not competent to be granted administration**

A person who is a killer of a victim for the purposes of the Succession (Homicide) Act 199– is not competent to be granted and cannot be granted

- (a) probate of the victim's will; or
- (b) letters of administration of the estate of the victim, with or without a will annexed."

## Section 16

- C39 *Section 16* provides that the three Acts in Schedule 1 are amended as Schedule 1 indicates.

## Schedule 1

- C40 First, *Schedule 1* inserts a new section 5A in the Administration Act 1969. The new section supplements and clarifies ss 6, 11(1)(c) and 53 of the Administration Act by providing that a person who is a killer of a victim for the purposes of the draft Succession (Homicide) Act is not competent to be granted and cannot be granted probate of a victim's will, or letters of administration of the estate of a victim, with or without a will annexed. For examples, see *In Re Crippen* [1911] P 108 (executor of dead husband who killed wife applied unsuccessfully for administration of wife's estate) and *Re Baker* (unreported, HC, Napier, 5 April 1991, CP 44/90) (victim's will named husband who was also killer as executor if he survived her for 30 days – it was not disputed that killer could not in these circumstances be granted probate). Compare *In the Goods of Glynn; Ireland and the Attorney-General v Kelly and Concannon* [1992] ILRM 582, [1992] 1 IR 361. In this case the defendant executor murdered the testator's sister, who under the will had a life interest in property in which the executor had an interest in remainder. The killing therefore accelerated the executor's enjoyment of his interest in remainder in the property. The court held that these facts were "special circumstances" under s 27(4) of the Succession Act 1965 (Ireland) that justified the discharge of the defendant as administrator of the testator's estate and the appointment of the Chief State Solicitor to that office instead. See also *Re Keitley* [1992] 1 VR 583, where the Supreme Court of Victoria granted to a woman probate of her violent husband's estate even though she had pleaded guilty to his manslaughter, because "her level of moral culpability was markedly diminished".

section 47

**Insert** in subsection (1) after paragraph (e)

“(ea) under the Succession (Homicide) Act 199–.”

**Insert** after subsection (4)

“(5) Subsection (4) does not apply to protect an administrator who, at the time of making a distribution, had reason to suspect

- (a) that the death of the deceased was a homicide; and
- (b) that the person to whom the distribution was made was a killer of the deceased.”

*Criminal Justice Act 1985* (1985/120)

after section 148

**Insert** section 148A

“**148A Certificate of conviction for Succession (Homicide) Act 199–**

(1) On or at any time after sentencing a person for an offence against any Act of unlawfully killing another person or child that has not become a person, a court may certify that for the purposes of the Succession (Homicide) Act 199– the person convicted is guilty of homicide of that other person or child that has not become a person.

(2) A court may issue a certificate under this section on the application of any interested person or on its own initiative.”

*Proceeds of Crime Act 1991* (1991/120)

section 24

**Number** existing section as subsection (1)

**Insert** after subsection (1)

“(2) Notwithstanding subsection (1), sections 25 to 29 of this Act do not apply to interests in or claims against property which a person who is a killer under the Succession (Homicide) Act 199– is not entitled to claim or receive because of that Act.”

- C41 Second, to protect administrators' distributions under the Act, *Schedule 1* inserts in s 47 of the Administration Act 1969 two new provisions. A new paragraph, (1)(ea), would clarify that an administrator's distributions under the draft Act would be protected, for example, in a case where a killer convicted of homicide is later granted a full pardon (eg, *Chemis* (1889), and *Thomas* (1979)) which has the effect of deeming the killer "never to have committed the offence": Crimes Act 1961 ss 406–407. However, a new subsection, 47(5), inserted in the Administration Act would also provide that administrators act at their peril if, when they make a distribution, they have reason to suspect that the death of the deceased was a homicide, and that the person to whom the distribution was made was a killer of the deceased.
- C42 Third, *Schedule 1* amends Part IX of the Criminal Justice Act 1985 by inserting a new section, 148A. The new section would allow criminal courts, on or at any time after sentencing, to certify that an offence of unlawful killing is a homicide for the purposes of the draft Succession (Homicide) Act 199–. Any certificate is conclusive evidence of that fact: section 13(2) and para C32. Section 148A makes clear that any interested person (eg, a defendant, an estate or trust beneficiary, or an administrator or trustee) may apply for a certificate, or the court may simply issue a certificate on its own initiative.
- C43 Fourth, *Schedule 1* amends s 24 of the Proceeds of Crime Act 1991 to clarify that pecuniary penalty orders under that Act do not apply to property to which the draft Succession (Homicide) Act 199– applies. In this special context profits which killers are disentitled to take should not be forfeited to the state, but distributed instead to other beneficiaries of the victim's or another's estate: *Watts* [1990] NZ Rec LR 330, 352. This is consistent with the intention of the Convicts (Forfeiture) Act 1871 (NZ), the Criminal Code Act 1893 (NZ) s 389, the Crimes Act 1908 s 413 and the Acts Interpretation Act 1924 s 20(f).



## Matters not provided for in the draft Act

- C44 The draft Act makes no provision for the following matters:
- *Protection for persons receiving property innocently and for value from killers:* The Act assumes ss 47–51 of the Administration Act 1969 would be adequate for this purpose.
  - *Time limits for applications under the draft Act:* The draft Act assumes that, if the protection offered to administrators and recipients in respect of distributions is adequate, the factors militating against any time limitations in criminal proceedings in respect of unlawful killing also apply in this context. In default of specific provision the general time limitations for civil proceedings against estates (claim within 12 years from the time the cause of action arose) should apply anyway: Limitation Act 1950 ss 7 and 22.
  - *Conflicts between the Simultaneous Deaths Act 1958 and the draft Succession (Homicide) Act 199–:* These seem likely to arise only if the order in which a homicide and a killer's suicide or accidental death occurred remains uncertain. Because both Acts often use the fiction that a killer/beneficiary predeceased a victim/benefactor, conflicts appear too rare to merit a provision indicating which regime applies in the event of conflict.
  - *Killer's competence to remain, be appointed by will, or apply to be appointed as guardian or custodian of a victim's child:* The draft Act assumes that the Guardianship Act 1968 provides adequately for cases where a killer:
    - was before a homicide a guardian of a victim's child; or
    - is appointed a guardian of a victim's child by a victim's will;
    - or
    - applies after a homicide to be appointed as guardian of a child of a victim.For an example, see *Re K* (1994) FLC 92–461 (Family Court of Australia), where a husband, awaiting trial for the murder of his wife, sought custody of a child of the marriage being cared for by the dead wife's parents.

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## Bibliography

### TEXTS

- Baker and Langan (eds), *Snell's Equity* (29th ed, Sweet and Maxwell, London, 1990), 196–197.
- Birks, *An Introduction to the Law of Restitution* (rev ed, Clarendon Press, Oxford, 1989).
- Department of Justice, *Conviction and Sentencing of Offenders in New Zealand: 1983–1992* (Department of Justice, Wellington, 1993).
- Cardozo, *The Nature of the Judicial Process – Lectures Delivered in the William L Storrs Lecture Series, 1921, Law School of Yale University* (Yale University Press, New Haven, 1921), 40–43.
- Clark and Ross Martyn (eds), *Theobald on Wills* (15th ed, Sweet and Maxwell, London, 1993), 146–149.
- Cleary (ed), *McCormick on Evidence* (4th ed, West, St Pauls, 1992), 959–961.
- Dworkin, *Law's Empire* (Fontana Press, London, 1986), 15–20.
- Dworkin, *Taking Rights Seriously* (Harvard University Press, Cambridge, 1977), 23–45.
- Estead, *Killing the Beloved* (Australian Institute of Criminology, Canberra, 1993).
- Fisher (ed), *Fisher on Matrimonial Property* (3rd ed, Butterworths, Wellington, 1996).
- Garrow and Alston, *Garrow's Law of Wills and Trusts* (5th ed, Butterworths, Wellington, 1984).
- Garrow and Caldwell, *Criminal Law in New Zealand* (6th ed, Butterworths, Wellington, 1981).
- Gelles, *The Violent Home: A Study of Physical Aggression between Husbands and Wives* (Sage Publications, Beverly Hills, 1974).
- Glanville Williams (ed), *Criminal Law* (2nd ed, Stevens and Sons Ltd, London, 1961).
- Goff and Jones (eds), *The Law of Restitution* (4th ed, Sweet and Maxwell, London, 1993).
- Gray, *Family Violence: A Background Paper* (Gray Matter Research Ltd, Wellington, 1989).
- Graycar and Morgan, *The Hidden Gender of Law* (rev ed, Federation Press, Annandale, NSW, 1992), 405–409.
- Hall (ed), *Hall's Sentencing* (looseleaf ed, Butterworths, Wellington, 1997).
- Halsbury's Laws of England* (4th ed, Butterworths, London, 1984), vol 50, paras 241–242.
- Hardingham, Neave and Ford (eds), *Wills and Intestacy in Australia and New Zealand* (Law Book Co, Sydney, 1983).
- Hart, *The Concept of Law* (Clarendon Law Series, Oxford University Press, London, 1961).
- Hart and Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Tentative ed, Harvard University, Cambridge, 1958), 85–110.
- Hinde, McMorland and Sim, *Land Law* (Butterworths, Wellington, 1978), vol 1, para 1.011.
- Home Office, *Criminal Statistics: England and Wales 1986* (HMSO, London, Cmnd 233, 1987).
- Home Office, *Criminal Statistics: England and Wales 1992* (HMSO, London, Cmnd 2410, 1993).
- Kersley (ed), *Broom's Legal Maxims* (10th ed, Sweet and Maxwell, London, 1939).



- Mathieson (ed), *Cross on Evidence* (NZ looseleaf ed, Butterworths, Wellington, 1997).
- Maxton, *Nevill's Laws of Trusts, Wills and Administrations* (8th ed, Butterworths, Wellington, 1985).
- Oakley, *Constructive Trusts* (2nd ed, Sweet and Maxwell, London, 1987), 23–30.
- Palmer, *The Law of Restitution* (Little, Brown and Co, Boston, 1978), ¶ 20.8–20.17, 233–289 and (1992 supplement), 442–458.
- Palmer, *Unbridled Power* (2nd ed, OUP, Auckland, 1987), 151–153.
- Ritchie, *Violence in New Zealand* (2nd ed, Huia Publishers, Wellington, 1993).
- Robertson (ed), *Adams on Criminal Law* (looseleaf ed, Brooker's, Wellington, 1997).
- Scott and Fratcher (eds), *The Law of Trusts* (4th ed, Little, Brown and Co, Boston, 1987), vol 5, para 493.2.
- Smith and Hogan (eds), *Criminal Law* (7th ed, Butterworths, London, 1992).
- Strong (ed), *McCormick on Evidence* (4th ed, West, St Pauls, 1992), 959–961.
- Turkington (ed), *Garrow and Turkington's Criminal Law in New Zealand* (looseleaf ed, Butterworths, Wellington, 1997).
- Wallace, *Homicide: The Social Reality* (NSW Attorney-General's Department, Bureau of Crime Statistics and Research, Research Study No 5, 1986).
- Beehler, "Legal Positivism, Social Rules, and *Riggs v Palmer*" (1990) 9 Law and Philosophy 285.
- Behrens, "Domestic Violence and Property Adjustment: A Critique of 'No-Fault' Discourse" (1993) 7 Aust J Fam Law 9.
- Bennett, "*Spencer v Floyd*: Distribution of Life Insurance Proceeds When the Primary Beneficiary is Disqualified" [1992] 45 Arkansas LR 213.
- Beri, "Justice for Women Who Kill: A New Way?" (1997) 8 Aust Fem LJ 113.
- Berk, "Mercy Killing and the Slayer Rule: Should the Legislatures Change Something?" (1992) 67 Tulane LR 485.
- Bix, "Physician-Assisted Suicide and the United States Constitution" (1995) 58 MLR 404.
- Bott, "North Dakota Probate Code: Prior and Revised Article II" (1996) 72 North Dakota LR 1.
- Buckley, "Manslaughter and the Forfeiture Rule" (1995) 111 LQR 196.
- Butt, "The Forfeiture Rule" (1993) 67 ALJ 923.
- Butt, "Forfeiture Rule Confirmed" (1995) 69 ALJ 682.
- Chadwick, "A Testator's Bounty to His Slayer" (1914) 68 LQR 211.
- Corcoran, "Homicide and Succession – Is there a Need for a Statutory Regime?" (unpublished seminar paper, University of Canterbury Law School, 1994).
- Clark, "Civil and Criminal Penalties and Forfeitures – A Framework for Constitutional Analysis" (1976) Minn LR 379.
- Clark, "Autonomy and Death" (1996) 71 Tulane LR 45.
- Cretney, "The Forfeiture Act 1982: The Private Member's Bill as an Instrument of Law Reform" (1990) 10 OJLS 289.
- D'Amato, "Elmer's Rule: A Jurisprudential Dialogue" (1975) 65 Iowa LR 1129.
- Downey, "Euthanasia: Life, Death and the Law" [1995] NZLJ 88.

## ARTICLES, ESSAYS AND PAPERS

- Ames, "Can a Murderer Acquire Title by his Crime and Keep it?" in *Lectures in Legal History* (Harvard University Press, Cambridge, 1913), 321.
- Atkin, "The Survival of Fault in Contemporary Family Law in New Zealand" (1979) 10 VUWLR 93.
- Bakshi, "The Killer as Heir" (1990) 26 Banaras LJ 61.

- Dewey, "Civil Murder Trials: Macabre Reflections of Our Violent Society" (1990) Capital Univ LR 897.
- Dickey, "The Forfeiture Rule and the Right to an Order for Family Provision" (1993) 67 ALJ 788.
- Dugdale, "*Procul este Bonanzas* – A Note on the Illegal Contracts Act 1970" [1971] NZLJ 209.
- Dworkin, "The Model of Rules" (1967) 35 Univ Chicago LR 14.
- Earnshaw and Pace, "Let the hand receiving it be ever so chaste . . ." (1974) 37 MLR 481.
- Ehrlich and Posner, "An Economic Analysis of Legal Rulemaking" (1974) 3 J Legal Stud 257.
- Epp, "The Supreme Court of Canada Restricts *Ex Turpi Causa*" (1994) 110 LQR 357.
- Fellows, "The Slayer Rule – Not Simply a Matter of Equity" (1986) 71 Iowa LR 489.
- Rt Hon Lord Goff of Chieveley, "A Matter of Life and Death" (1995) 3 Med LR 1.
- Graycar, "Telling Tales: Legal Stories about Violence Against Women" (1996) 7 Aust Fem LJ 79.
- Graycar and Morgan, "Legal Categories, Women's Lives and the Law Curriculum" [1996] 18 Sydney LR 431.
- Griffiths, "Assisted Suicide in the Netherlands: The *Chabot* case" (1995) 58 MLR 232.
- Griffiths, "Assisted Suicide in the Netherlands: Postscript to *Chabot*" (1995) 58 MLR 895.
- Haig, "*Re Lentjes*" (1988) 5 BCB 35–36.
- Hallen, "Forfeiture Rule" (1993) 67 ALJ 386.
- Hampton, "Re: Euthanasia: Life, Death and the Law" [1995] NZLJ 166–167.
- Innes, "The Profits of Crime" (1992) 17 Alt LJ 193–194.
- Keith, "Policy and Law: Politicians and Judges (and Poets)" in Gray and McClintock (eds), *Courts and Policy – Checking the Balance* (Legal Research Foundation and Brooker's, Wellington, 1995), 117, 148–155.
- Kenny, "Forfeiture Act 1982" (1983) 46 MLR 66.
- Kenny, "Forfeiture Act 1982" (1982) 132 NLJ 897.
- Lanham and Fehlberg, "Living Wills and the Right to Die with Dignity" (1991) 18 MULR 329.
- Leach, "Northern Territory Proposes Euthanasia Law" (1995) 6(1) HIV/AIDS Legal Link 6–7.
- Leach and McLean, "Euthanasia Law Passed in the Northern Territory" (1995) 6(2) HIV/AIDS Legal Link 1, 6–7.
- McCouch, "Will Substitutes under the Revised Uniform Probate Code" (1993) 58 Brooklyn LR 1123.
- MacDonald, "The Unworthy Heir" (1989) 1 Jur Rev 108.
- McGovern, "Homicide and Succession to Property" (1970) Michigan LR 65.
- McLennan, "Unworthiness to Inherit, the 'Bloedige Hand' Rule and Euthanasia, What to Say in Your Will" (1996) 113 South African LJ 143.
- McMorland, "Succession" [1989] NZ Rec LR 265, 270.
- Mackie, "Manslaughter and Succession" (1988) 62 ALJ 616.
- Mahoney, "Evidence: A Third Standard of Proof?" [1997] NZ Law Rev 62–64.
- Maki and Kaplan, "*Elmer's Case* Revisited: The Problem of the Murdering Heir" (1980) 41 Ohio St LJ 905.
- Manning, "Self-Defence and Provocation: Implications for Battered Women Who Kill and for Homosexual Victims" (NSW Parliamentary Library Research Service, Briefing Paper No 33/96, 1996).
- Mathews, "Property, Pensions and Double Punishment: The Forfeiture Act 1982" [1983] JSWL 141.
- Maxton, "The Property Law and Equity Reform Committee" (1988) 13 NZULR 217.

- Mendelson, "Medico-Legal Aspects of the 'Right to Die' Legislation in Australia" (1993) 19 MULR 112.
- Note, "Commonwealth Parliament Enacts Legislation to Override State Euthanasia Laws" (1997) 8(2) PLR 1002.
- Otlowski, "Active Voluntary Euthanasia: Options for Reform" (1994) 2 Med LR 161.
- Otto, "A Barren Future: Equity's Conscience and Women's Inequality" (1992) 18 MULR 808.
- Padfield, "Why Does Provocation Diminish Culpability?" [1996] 55 CLJ 421.
- Park, "Death by Beneficiary – The Effect on Inheritance" (1994) Law Institute Journal Jan–Feb, 42–43.
- Preble, "Family Violence and Family Property: A Proposal for Reform" (1995) 13 Law and Inequality 401.
- Price, "Assisted Suicide and Refusing Medical Treatment: Linguistics, Morals and Legal Contortions" (1996) 4 Med LR 270.
- Reed, "Does Crime Pay?" (1988) 132 SJ 238–240.
- Reppy, "The Slayer's Bounty – The History of the Problem in Anglo-American Law" (1942) NYULQR 229.
- Rowland, "The Construction or Rectification of Wills to Take Account of Unforeseen Circumstances Affecting their Operation" (1993) 1 APLJ 87–113 (Part I), 193–210; (Part II).
- Rowland, "The Construction or Rectification of Wills to Take Account of Unforeseen Circumstances Affecting their Operation" (unpublished paper delivered to the Law Faculty of the University of Oregon, January 1996).
- Sherman, "Mercy Killing and the Right to Inherit" (1993) 61 Cinn LR 803.
- Silver, "*Elmer's Case*: A Legal Positivist replies to Dworkin" (1987) 6 Law and Philosophy 381.
- Simester, "Unworthy but forgiven heirs" (1992) E & TJ 217.
- Stuckley-Clarke, "The Forfeiture Rule" (1995) 67 ALJ 923.
- Tarnow, "Unworthy Heirs: The Application of the Public Policy Rule in the Administration of Estates" (1980) 58 Can Bar Rev 582.
- Tay, "The Russian Law of Inheritance" (1968) 17 ICLQ 472.
- Thomas, "Public Policy as Affecting Property Rights Accruing to a Party as a Result of Wrongful Acts" (1913) 1 California LR 397.
- Toohy, "Killing the Goose that Lays the Golden Eggs" (1958) 32 ALJ 14.
- Touchstone, "Recent Developments of the Forfeiture Rule" (1991) 135 SJ 109.
- Vines, "Succession" in Baxt and Moore (eds), *An Annual Survey of Australian Law 1994* (Adelaide LR Association, Adelaide, 1995), 463.
- Vines, "Succession: Work and Violence" (unpublished module for DEET, University of NSW, Sydney, 1995).
- Wade, "Acquisition of Property by Killing Another – A Statutory Solution" (1936) 49 Harvard LR 715.
- Watts, "Restitution: Enrichment Derived from Crime" [1990] NZ Rec Law Rev 350–352.
- Webb, "The Politics of 'Medicide' in New Zealand: A Cautious Proposal for Physician Aid-In-Dying" (1994) 5 Canta LR 438.
- Willbanks, "Does it Pay to Kill your Mother? The Effect of Criminal Acquittal in a Subsequent Civil Proceeding to Disqualify the Slayer" (1983) 16 Conn LR 29.
- Young, "Forfeiture Rule" (1994) 68 ALJ 461.

## REFORM PAPERS AND REPORTS

- California Law Revision Commission, *Tentative Recommendation relating to Wills and Intestate Succession* (1982), 16 California Law Revision Commission Reports 2346–2347, §200–§206, 2382–2385.

- Crimes Consultative Committee, *Report on the Crimes Bill 1989* (Department of Justice, Wellington, 1991).
- Criminal Law Reform Committee, *Report on Culpable Homicide* (Department of Justice, Wellington, 1976).
- Law Commission (NZ), *A New Interpretation Act* (nzlc r17, 1990).
- Law Commission (NZ), *A New Property Law Act* (nzlc r29, 1994).
- Law Commission (NZ), "Burden and Standard of Proof – Policy Paper" (unpublished paper, March 1997).
- Law Commission (NZ), *Succession Law: Testamentary Claims* (nzlc pp24, 1996).
- Law Commission (NZ), *Succession Law: Wills Reforms* (nzlc mp2, 1996).
- Law Commission (NZ), "The Rule in *Hollington v Hewthorn*" (unpublished paper, August 1996).
- Law Reform Advisory Council (Vict, Aust), "'The Forfeiture Rule': Discussion Paper" (unpublished, 1995).
- Law Reform Commission of Hong Kong, *Report on the Law of Wills, Intestate Succession and Provision for Deceased Persons' Families and Dependents* (1984), Topic 15, 79.
- Property Law and Equity Reform Committee (NZ), *The Effect of Culpable Homicide on Rights of Succession* (1976, Report 24).
- Scottish Law Commission, *Some Miscellaneous Topics in the Law of Succession* (1986), Consultative Memorandum No 71.
- Scottish Law Commission *Report on Succession* (1990) No 124, paras 7.1–7.27.
- South African Law Commission, "Euthanasia and the Artificial Preservation of Life" (Project 86, Discussion Paper 71, 1997).
- South African Law Commission, *Review of the Law of Succession: Disqualification from Inheriting, Substitution and Succession Rights of Adopted Children* (1987), Working Paper No 19.
- Torts and General Law Reform Committee (New Zealand), *The Rule in Hollington v Hewthorn* (1972, Report No 6).
- Senate of Canada, *Proceedings of the Senate Special Committee on Euthanasia and Assisted Suicide* (First Session, 35th Parliament, 31 May 1995, Issue No 33, chaired by The Hon Joan Neiman).

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# Table of Legislation

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- Lavallee, R v* (1990) 55 CCC (3d) 97 f27
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