



Victorian
Law Reform
Commission

Succession Laws

REPORT | AUGUST 2013



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Preface

The Attorney-General has asked the Commission to review various aspects of Victoria's laws on succession after death, to ensure that they operate fairly and in accordance with community expectations.

Victoria's succession laws have a long heritage and convey enduring values about the transfer of wealth from one generation to the next. These values shape community expectations but do not determine them. Community expectations are more responsive to changes in the world around us.

The change that has most affected community expectations about succession laws is the increase in life expectancy. Over the past 100 years, the average life expectancy has increased by 25 years. If parents live until children are well into middle age, an inheritance can be transformed from financial assistance that helps the children establish themselves in life into the guarantee of a financially secure retirement. More people are living to a frail age, dependent on others to assist them with their daily decisions and activities and vulnerable to pressure to leave property to those who care for them. They are leaving many more descendants, possibly from two or more relationships, who may feel entitled to a share of their property.

This reference has been a timely opportunity to consider how well succession laws protect will-makers from undue influence, recognise their significant relationships, safeguard the rights of beneficiaries and creditors and ensure that the estate is not depleted by unnecessary or unreasonable costs.

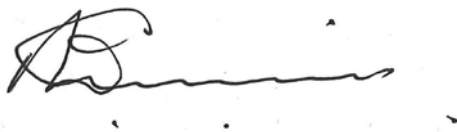
The Commissioner who led the reference, Dr Ian Hardingham QC, brought to the task his extensive experience in teaching, advising and writing about succession laws, as well as the benefit of many years of legal practice. I extend to him my thanks for his perceptive and practical insights into the operation of the law.

I wish to thank the many people who gave their time and expertise to assist the Commission during the reference. I thank in particular the members of the advisory committee: Richard Boaden, Associate Professor Matthew Groves, Michael Halpin, Justin Hartnett, Mark Maier, Stewart McNab, Richard Phillips, Carol Stuart, Michael Tsotsos, Professor Prue Vines and Kathy Wilson.

I would also like to thank my fellow Commissioners who, with Dr Hardingham and me, comprised the Division of the Commission with responsibility for this reference: the Hon. David Jones AM and Eamonn Moran PSM QC. They contributed significantly to the recommendations made in this report.

I extend my warm thanks to the Succession Laws team, most ably led by Lindy Smith and comprising Mia Hollick, Natalie Lilford and Joanna O'Donohue. The work of the team was carried out with much application and skill.

I commend the report to you.



The Hon. P. D. Cummins

Chair
August 2013

Terms of reference

The Victorian Law Reform Commission is asked to review and report on the desirability of legislative or other reform in relation to the succession law matters set out in these terms of reference. The purpose of this reference is to:

- (a) ensure that Victorian law operates justly, fairly and in accordance with community expectations in relation to the way property is dealt with after a person dies
- (b) ensure that the processes to resolve disputes about the distribution of such property are efficient, effective and accessible
- (c) identify practical solutions to problems that may still be outstanding in Victorian law and practice following the recommendations of the National Committee for Uniform Succession Laws established by the Standing Committee of Attorneys-General (SCAG).

In particular, the Commission is asked to review and report on the following matters:

Wills

- 1 whether the current requirements for witnessing wills should be revised to better protect older and vulnerable will-makers from undue influence by potential beneficiaries or others
- 2 whether the current provisions that allow the Supreme Court to authorise wills for persons who do not have testamentary capacity should be revised
- 3 the need to clarify when testamentary property disposed of during the will-maker's lifetime will be adeemed and when it will be protected from ademption

Family provision

- 4 whether Part IV of the *Administration and Probate Act 1958* concerning family provision applications is operating justly and effectively, having regard to its objective of providing for the proper maintenance and support of persons for whom a deceased had a responsibility to make provision

Intestacy

- 5 whether Division 6 of Part I of the *Administration and Probate Act 1958* concerning the distribution of an estate on an intestacy is operating effectively to achieve just and equitable outcomes

Legal practitioner executors

- 6 whether there should be special rules for legal practitioners who act as executors and also carry out legal work on behalf of the estate, including rules for the charging of costs and commission

Administration of estates

- 7 how assets are designated to pay the debts of an estate and the effect that this has on the estate available for distribution to beneficiaries or to meet a successful family provision claim
- 8 whether a court should have the power to review and vary costs and commission charged by executors

Operation of the jurisdiction

- 9 whether there are more efficient ways of dealing with small estates
- 10 the costs rules and principles applied in succession proceedings, taking into account any developments in rules or practice notes made or proposed by the Supreme Court
- 11 any other means of improving efficiency and reducing costs in succession law matters.

In undertaking this reference, the Commission should have regard to, and conduct specific consultation on, any relevant recommendations made by the National Committee for Uniform Succession Laws established by SCAG. The National Committee has released reports and model legislation on wills (1997 and 2006), family provision (1997 and 2004), intestacy (2007) and the administration of deceased estates (2009). State and Territory Ministers have agreed to adopt the National Committee's recommendations as the basis for reforming succession laws in their respective jurisdictions with the aim of maximising national consistency.

The reference does not include consideration of the remaining recommendations of the National Committee, unless relevant to the above referred matters.

The Commission should also consider any legislative developments in both Victoria and other Australian jurisdictions since the National Committee released its reports.

The Commission is to report by 1 September 2013.

Glossary

Ademption	The rule of ademption specifies that, when the subject matter of a specific gift to someone is no longer in the will-maker's estate at the date of death (because it has been sold or given away, for example), the beneficiary will receive nothing. In this case, the gift is said to have adeemed.
Administrator	A person appointed by the court under letters of administration to administer a deceased estate that has no executor . This may be because there is no will, the will does not appoint an executor, or a named executor is unwilling or unable to act.
<i>Bona vacantia</i>	Property that has no owner. If a person dies intestate (leaving property that is not disposed of by a will) and is not survived by any next of kin, the intestate estate belongs to the Crown as <i>bona vacantia</i> .
Chattels	Personal property, as distinct from real property. Money, securities and property used for business purposes are excluded from the definition of chattels.
Collateral relatives	Blood relatives who are related by common ancestry but not through a direct line of descent. For example, the relationship between siblings is collateral.
Disbursement	An expense paid by a solicitor on behalf of a client, for which reimbursement will be sought. Disbursements are distinct from solicitors' professional fees and might include, for example, the cost of medical reports or a barrister's fees.
Executor	The person appointed by the will to administer the estate.
Grant of letters of administration	A grant made where there is no will, or where there is a will but no executor is available for some reason. It confers upon a court-appointed administrator the authority to administer the estate.
Grant of probate	A grant made when there is a will. A grant of probate certifies that the will is the last and valid will of the deceased person and confirms the authority of the executor named in the will to administer the estate.
Grant of representation	A grant, by the Supreme Court, of probate or of letters of administration .
Hotchpot	The requirement for certain benefits received by a deceased person's child during the deceased person's lifetime to be taken into account when determining that child's share on intestacy .

Informal administration	Administration of estate assets without a grant of representation .
<i>Inter vivos</i>	Refers to something that occurs during life. In the succession law context, it is most often used to distinguish between gifts or transactions during a person's life and those that occur in accordance with their will.
Intestacy	Occurs when a person dies without having made a valid will, or where their will fails to effectively dispose of all of their property. Intestacy can be partial, where only some of the deceased person's property is effectively disposed of by will, or total, where none of the deceased person's property is effectively disposed of by will.
Issue	A person's children, grandchildren, great-grandchildren and other direct descendants down this line.
Joint tenancy	Common ownership of property when all co-owners (or co-tenants) together own the whole piece of property, each having an undivided share. Property that is owned jointly passes to the surviving co-owner or co-owners on the death of one of the co-owners and does not become part of the deceased person's estate. See also survivorship and tenancy in common .
Lineal relatives	Blood relatives who are related by a direct line of ancestry, either ancestors or descendants. For example, the parent to child relationship is lineal.
Next of kin	A person's closest blood relatives. A deceased person's estate is distributed to their surviving partner(s) and next of kin on intestacy .
Personal representative	The common term that refers to either an executor appointed by a will, or an administrator appointed by the Supreme Court, to administer the deceased person's estate.
Real property	Land and interests in land, otherwise known as real estate.
Registrar of Probates	An officer of the Supreme Court appointed under the <i>Supreme Court Act 1986</i> (Vic) to exercise the power of the Court in making grants of representation .
Residuary estate	The remainder of the estate after debts and liabilities are paid, and specific gifts and legacies are distributed.
Statutory will	A will authorised by the court for a person who is alive but lacks the testamentary capacity required to make a valid will for themselves.
Survivorship	A right in relation to property held by two or more people as joint tenants. Where a co-owner (or co-tenant) dies, their share in the property passes to the surviving co-owner(s). It cannot be given by will. See also joint tenancy .
Tenancy in common	A type of co-ownership where multiple parties own distinct interests in the same piece of property. The share owned by a tenant in common forms part of their estate. See also joint tenancy .
Testamentary capacity	The mental capacity required to make a valid will. To have testamentary capacity, a person must be of sound mind, memory and understanding, and must understand the nature and effect of making a will.

Executive summary

Need for reform

- 1 This report contains 78 recommendations to reform the law and related practices that affect what happens to the assets of Victorians after they die. The need for reform has long been recognised. More than 20 years ago, the Standing Committee of Attorneys-General initiated a project to develop uniform succession law and practice across Australia. The project was led by a National Committee for Uniform Succession Laws. By 2009, the project had produced a series of reports and model legislation.
- 2 Victoria's legislation on wills was reviewed shortly before the national project began and the *Wills Act 1997* (Vic) closely aligns with the national model. The *Administration and Probate Act 1958* (Vic), which regulates the administration and distribution of estates, has never been comprehensively reviewed.
- 3 Of course, a law that has not been reviewed does not necessarily need reform, and there may be good reason not to adopt a provision contained in the model legislation. Although requiring the Commission to have regard to the national uniform succession laws project, the terms of reference for this review make clear that any reforms should have a sound policy basis:

The purpose of this reference is to:

- (a) ensure that Victorian law operates justly, fairly and in accordance with community expectations in relation to the way property is dealt with after a person dies
 - (b) ensure that the processes to resolve disputes about the distribution of such property are efficient, effective and accessible
 - (c) identify practical solutions to problems that may still be outstanding in Victorian law and practice following the recommendations of the National Committee for Uniform Succession Laws established by the Standing Committee of Attorneys-General.
- 4 In conducting the review, the Commission has been mindful of changes in community expectations arising from increasingly complex family structures, longer life spans and a more accessible legal system. These changes have affected the operation of succession laws and influenced the Commission's recommendations.

Terms of reference

- 5 The Attorney-General asked the Commission to review a number of disparate topics, which are listed in the terms of reference under six headings: wills, family provision, intestacy, legal practitioner executors, administration of estates and operation of the jurisdiction.
- 6 This report broadly follows the order and categorisation of topics as set out in the terms of reference. The Commission's findings and recommendations are summarised below in the order in which they are discussed in the report.
- 7 Most of the law under review is contained in the Administration and Probate Act and the Commission's recommendations, if implemented, would require substantial amendments to that legislation. In considering the provisions of the Administration and Probate Act that fall within the terms of reference, the Commission noticed that other parts of the Act require revision to correct errors and ambiguities. Ideally, the whole Act should be revised and re-enacted.

Wills

- 8 The terms of reference set out three topics under the heading 'wills'. They concern witnessing requirements, statutory wills, and ademption.

Witnessing requirements and undue influence

- 9 The first topic is whether the current requirements for witnessing wills should be revised to better protect older and vulnerable will-makers. While the Commission found widespread concern about potential beneficiaries improperly prevailing upon vulnerable will-makers to make wills that do not reflect their wishes, there was little support for the view that changing the witnessing requirements would deal with this problem.
- 10 Proving undue influence in probate matters has traditionally been difficult. Fortunately, recent developments in the common law test applied by the court suggest that it is becoming easier to prove. However, the Canadian province of British Columbia has recently passed legislation that introduces the more flexible equitable doctrine of undue influence into the probate context. The Commission recommends that the Attorney-General cause a report to be prepared on the operation of the new legislation after it has been in force for four years. It also recommends that the Law Institute of Victoria develop best practice guidelines on detecting and preventing undue influence when preparing a will.

Statutory wills

- 11 The second topic on wills concerns the Supreme Court's power under the Wills Act to authorise a will for a person lacking testamentary capacity, known as a statutory will. Similar schemes exist in all other jurisdictions and the model uniform legislation. The Commission's consultations on this topic revealed that no major changes to Victoria's scheme are necessary. However, there was support for reinforcing the Court's ability to take into account the incapacitated person's views, where they can be expressed, and for streamlining the application procedures. The Commission agrees and has recommended accordingly.

Ademption

- 12 The third topic on wills is about what happens when something that was left as a gift in a will is no longer owned by the will-maker when they die. If the subject of the gift does not exist in the same form within the estate, the gift is said to have been adeemed and the beneficiary receives nothing in its place. This is a particularly significant issue when a person acting under an enduring power of attorney (financial) sells an asset during the will-maker's lifetime and the will-maker is unaware of the sale or no longer has the mental capacity to change their will. A common example is when the family home, which may be gifted under the will, is sold to fund the will-maker's aged care.
- 13 Section 53 of the *Guardianship and Administration Act 1986* (Vic) provides an exception to the ademption rule if the subject of the gift is sold by an administrator appointed by the Victorian Civil and Administration Tribunal (VCAT). In this case, the beneficiary who would have received nothing under the rule may instead receive the remaining proceeds of the sale.
- 14 The Commission recommends a similar statutory exception for a person acting under an enduring power of attorney (financial), and a similar right to apply to VCAT for access to some or all of the person's will. However, as the administrator or attorney should aim to deploy all assets in the best interests of the person they represent during that person's lifetime, the Commission recommends against requiring that separate accounts and records of sale proceeds be kept, or that the proceeds be quarantined from other assets.
- 15 Clearly, it is difficult to produce rules that accommodate all possible scenarios. Redistributing some of the estate's assets to a beneficiary who otherwise would receive nothing may unfairly deplete a gift to someone else. Therefore, the Commission recommends that a beneficiary should be able to challenge an outcome that would result in a beneficiary gaining an unjust and disproportionate advantage, or suffering an unjust and disproportionate disadvantage, of a kind not contemplated in the will. They would be able to challenge the outcome whether or not the exception to the ademption rule applies.

Intestacy

- 16 In 2012, 36,328 deaths were registered in Victoria.¹ Many of those who died did not leave a valid will setting out how they wanted their property to be distributed. Property that is not disposed of by a valid will is distributed under a statutory intestacy scheme contained in the Administration and Probate Act.
- 17 In some areas, Victoria's intestacy laws are unnecessarily complex and out of step with the laws in other jurisdictions. Recommendations by the National Committee for Uniform Succession Laws regarding intestacy have largely been implemented in New South Wales and Tasmania. Adoption of these recommendations in Victoria would promote national consistency, modernise and clarify the law and simplify the administration of intestate estates.
- 18 The Commission found general support for the recommendations and has recommended that Victoria adopt most of them as well. The basic framework of the intestacy scheme in Victoria would remain the same but there would be many refinements. In particular, the changes would strengthen the position and entitlements of the deceased person's partner and allow for a more tailored distribution to multiple partners.
- 19 However, simply grafting the changes onto the existing provisions in the Administration and Probate Act would make Victoria's law unnecessarily complex and confusing. For this reason, the Commission considers that all of the provisions concerning the intestacy scheme should be rewritten, incorporating the recommendations in this report.

-
- 20 The Commission's recommendations depart significantly from those of the National Committee for Uniform Succession laws in two respects: how an intestate estate is shared among multiple partners and children, and how the law provides for an alternative system of distributing the intestate estate of an Indigenous person.
 - 21 The National Committee's recommendation concerning distribution of the estate where multiple partners and children are entitled to a share of the estate could unfairly favour the partners at the expense of the children. The Commission prefers the approach taken in New South Wales and recommends accordingly.
 - 22 Noting that the current law on intestacy reflects English law and society and may be inappropriate for the distribution of some Indigenous people's estates, the National Committee recommended an alternative scheme, based on Northern Territory law. The Northern Territory law is rarely used. The Commission's consultations identified concerns that, compared to the existing scheme in Victoria, the National Committee's alternative is not necessarily more accessible or able to accommodate traditional law. The Commission concluded that adopting the National Committee's recommendation would not greatly assist Indigenous communities in Victoria and recommends that the Attorney-General have the Department of Justice prepare a report about the distribution of the intestate estates of Indigenous people in Victoria, building on the work of the National Committee and the Commission, and based on further community consultation.

Family provision

Eligibility to apply

- 23 Victoria's family provision law, set out in Part IV of the Administration and Probate Act, allows any person who believes that a deceased person had a responsibility to provide for them, and did not do so, to apply for a court order to redistribute the estate in their favour. Each case is determined on its merits, which ensures that no worthy claim is ever excluded.
- 24 However, this open-ended approach to eligibility has had the unintended effect of making it difficult for legal practitioners to advise their clients about whether or not they have a claim. Almost all family provision claims settle at mediation, including those that might not have succeeded at trial, commonly in order to contain the legal costs that are often borne by the estate. There is widespread concern that the current law allows opportunistic and non-genuine claims.
- 25 The Victorian approach to eligibility is unique in Australia and effectively aligns with that recommended by the National Committee for Uniform Succession Laws. It is unlikely that any other jurisdiction will adopt this approach. In all other Australian states and territories, family provision legislation specifies categories of people who are eligible to apply. Following extensive consultations, the Commission recommends adopting the approach taken in New South Wales.

Costs

- 26 The Commission also makes several recommendations in response to concerns about estates being depleted by the costs of family provision claims. Costs rules operate differently in family provision proceedings compared to other civil proceedings, where the unsuccessful party pays their own costs and some of the costs of the other side. In family provision proceedings, the estate commonly bears its own costs regardless of the outcome. On occasion, the estate may even be required to pay the costs of an unsuccessful family provision applicant. A provision at section 97(7) of the Administration and Probate Act, empowering the court to make a costs order against the applicant if the application is made frivolously, vexatiously or with no reasonable prospect of success, has not deterred applicants from making unmeritorious claims and should be repealed.

- 27 Although most family provision claims settle, an applicant could be deterred from bringing or pursuing a weak claim if the Administration and Probate Act set out the costs orders that the court could make if the claim proceeds to trial. The Act should specify that the court may make any order as to costs in family provision proceedings that it considers just, and then set out a non-exhaustive list of the types of costs orders that the court may make. These would include orders that each party bear their own costs, the estate pay the applicant's costs, or that the applicant pay the personal representative's costs. The Commission also considers that the court's power under the *Civil Procedure Act 2010* (Vic) to cap costs should be specified in the Administration and Probate Act.
- 28 These measures are intended to deter opportunistic family provision applications being made, and to strengthen the position of the personal representative when determining how to respond to such claims.

Procedure

- 29 As the actual costs of proceedings largely depend on court practices and procedures, the Commission examined current and proposed initiatives in Victoria and other jurisdictions that expedite family provision applications and refine the evidence that the courts rely upon. The courts are best placed to determine how a case should proceed and the Commission puts forward a series of recommendations for their consideration. They include proposals to standardise and reduce the size of documents that the parties produce, to require disclosure of costs based on the relevant court scale, and to determine applications concerning smaller estates summarily.
- 30 Although both the County Court and Supreme Court have jurisdiction in family provision matters, only one in four proceedings is initiated in the County Court. In consultations, many people said that the County Court hears and determines family provision applications well and expeditiously. Some said that costs are often less in the County Court than in the Supreme Court. The Commission can see no reason why, in normal circumstances, a family provision claim concerning a smaller estate would need to be initiated in the higher court. The Commission recommends that the County Court have exclusive jurisdiction in family provision claims where the net value of the estate does not exceed \$500,000.

Other reform

- 31 Finally, the Commission considered particular difficulties that arise when dealing with farm property under succession laws, as the property provides a livelihood as well as a residence and may not be easily divided among family members. To reduce the risk of disputation after the will-maker's death and to encourage the making of mutually satisfactory arrangements before death, the Commission recommends introducing a provision that allows the recipients of gifts during the will-maker's lifetime to sign, with the court's approval, a binding release of their rights to make a family provision claim after the will-maker dies. Such a provision exists in New South Wales.
- 32 The Commission considered two other recommendations of the National Committee for Uniform Succession Laws concerning family provision applications but does not recommend that they be adopted in Victoria.
- 33 The first recommendation was to introduce notional estate provisions, as in New South Wales legislation. Notional estate provisions allow certain property that is not part of the deceased person's estate to be used to satisfy a successful family provision claim or pay the costs of family provision proceedings. The National Committee recommended them to discourage will-makers from disposing of their property during their lifetime in order to frustrate the operation of family provision laws. However, in the absence of any evidence that notional estate provisions achieve this purpose in New South Wales, or that they are needed in Victoria, the Commission does not recommend their introduction.

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- 34 The second National Committee recommendation that the Commission does not support is that an application for family provision should be able to be made up to 12 months after the date of the deceased person's death. The time limit within Victoria is six months from the date of the grant of representation. Some submissions supported extending the time limit; others argued that it is already too long. On balance, the Commission considers that the current time limit strikes an appropriate balance between providing notice to interested persons and efficiency in distributing the estate.

Executors' costs and commission

Special rules for legal practitioner executors

- 35 There are cogent reasons why legal practitioners are appointed as executors, and it is in the community's interest that they continue to provide executorial services. Most act in the best interests of will-makers and beneficiaries, as is their duty, but there is persistent concern that legal practitioner executors who also provide legal services to the estate are charging twice for some of the same services. The terms of reference ask the Commission to review whether there should be special rules for these executors.
- 36 Although a will-maker may select a legal practitioner as executor because of their legal skills and knowledge, the provision of executorial services is not regulated under the *Legal Profession Act 2004* (Vic), which regulates the provision of legal services by legal practitioners to their clients. An executor has a duty to act in the interests of the beneficiaries, but a beneficiary is not the executor's client. Most of the safeguards, rights and avenues for dispute resolution that are available to clients under the Legal Profession Act are not available to beneficiaries.
- 37 New uniform law for regulating the legal profession in New South Wales and Victoria is expected to be introduced in 2013. The Commission has not seen the new legislation but understands that the treatment of executorial services will be unchanged. The Commission makes a series of recommendations that would:
- require legal practitioner executors to disclose to beneficiaries an estimate of what they will charge the estate for executorial and legal services
 - extend the jurisdiction of the Legal Services Commissioner to resolve disputes about services provided by legal practitioner executors and charges of \$25,000 or less for executorial services
 - allow a beneficiary to apply to the Costs Court for review of legal costs.
- 38 Some legal practitioner executors who are authorised by a will to be paid commission choose instead to charge a fee for their executorial services, which may be a smaller amount. The Commission has concluded that it would be useful for legal practitioners and beneficiaries alike if there were a statutory provision that clearly permitted them to do this, and has recommended accordingly.
- 39 The legal profession makes professional rules of conduct and associated guidelines. A failure to comply with the rules may amount to unsatisfactory professional conduct or professional misconduct. The current rules do not adequately address the need to obtain the informed consent of the will-maker or the beneficiaries in order to be paid commission, or to otherwise seek court authorisation. In any event, legal practitioners are not always referring to the rules when administering estates. The Commission recommends new provisions in the Administration and Probate Act to alert any professional executor (who may be a legal practitioner, accountant, or financial adviser or other professional) to this requirement.

- 40 The Commission also recommends that the legal profession revise the professional rules that apply when a legal practitioner drafts a will that appoints the legal practitioner as executor and authorises the payment of commission, or allows the legal practitioner to charge the estate for legal services. In addition, the Commission recommends that new professional rules, supported by guidelines, should clarify the duties of legal practitioners in providing executorial services and charging for those services.

Court review of costs and commission

- 41 The National Committee for Uniform Succession Laws recommended that the model legislation should include a provision like section 86A of the *Probate and Administration Act 1898* (NSW). Section 86A allows the court to review and reduce commission, or an amount charged or proposed to be charged, in respect of any estate, even if the amount charged is authorised by the will. The review can be requested by an interested person or initiated by the court. The provision is rarely used in New South Wales but has served as an effective deterrent to the abuse of charging or commission clauses.
- 42 The Commission recommends that Victoria adopt a provision such as section 86A, except that there would be a time limit within which an interested person could apply for review. The time limit would be three months after the time that the interested person knew, or ought to have known, of all commission, charges and disbursements charged or proposed to be charged out of the estate. This additional requirement was proposed by the Law Institute of Victoria and was widely supported in submissions.

Community education for non-professional executors and beneficiaries

- 43 In response to submissions that drew attention to gaps in publicly available information on what happens to a person's assets after they die, the Commission recommends that the Victorian Law Foundation should publish a guide, or series of guides, on making wills and the role of the executor.

Payment of debts

- 44 While not causing significant difficulties, Victoria's current law in relation to the payment of debts is overly complex. In some areas, the relative simplicity of the law is obscured by inaccessible drafting.
- 45 The National Committee for Uniform Succession Laws made recommendations that, if adopted in Victoria, would modernise and clarify the law and simplify the administration of estates. Submissions to the Commission conveyed strong support for adopting these recommendations in Victoria, and the Commission recommends that they be adopted. The reforms would give primacy to the will-maker's intentions when the estate is solvent, and clarify the application of the *Bankruptcy Act 1966* (Cth) when the estate is insolvent.

Small estates

- 46 Victorian law and practice provide a number of measures that assist personal representatives of small estates to obtain a grant of probate or letters of administration at less than the usual cost, or to administer the estate without obtaining a grant. Some measures support non-professional personal representatives who administer small estates themselves, and others encourage trustee companies to obtain grants of representation for small estates. Each of these measures works without significant difficulty but could be more effective.
- 47 The Supreme Court's Probate Office will prepare and file documents for a person applying for a grant of representation, if the value of the estate is \$25,000 or less. If the only beneficiaries are the partner, children or sole surviving parent of the deceased person, assistance is available for an estate that is valued at \$50,000 or less. In addition, there are two expedited processes for trustee companies that obtain grants of representation for estates valued at \$50,000 or less.
- 48 These dollar figures have remained unchanged since 1995 and represent a dwindling proportion of deceased estates. Only 48 estates were assisted by the Probate Office's small estates service in 2011–12, and one of the expedited processes for obtaining a grant of representation has been used only twice since 2006. The upper limit of \$50,000 is lower than in other jurisdictions, and there was clear support in submissions and consultations for increasing it.
- 49 The Commission recommends that the assistance provided by the Probate Office, and expedited grants of representation, should be available in respect of estates valued at up to \$100,000. The dual eligibility criteria for assistance from the Probate Office's small estates service would be removed, and the upper value limit would be adjusted in accordance with movements in the Consumer Price Index.
- 50 The Commission also recommends combining the two expedited processes for obtaining a grant of representation into a single process to be availed of by State Trustees. Private trustee companies do not administer small estates for commercial reasons, whereas State Trustees receives a government subsidy to administer small estates. As noted above, one of the current processes is rarely used. The second process is simpler, cheaper and favoured by State Trustees but does not create searchable records that could ensure that only one grant is made in relation to each estate.
- 51 The Commission's recommendations enable State Trustees to continue to use a streamlined process to obtain a grant of representation but improve the degree of transparency. The will would be filed with the Supreme Court and a notice of intention to administer the estate would be advertised on the Supreme Court's website rather than in a daily newspaper.
- 52 While a grant of representation is always required when transferring certain types of property, for example land and shares, it is possible to transfer other assets without one. Gifted goods, for example, can simply be handed to the beneficiary; instead of a grant, a bank may accept a death certificate or other documentation as authority to release money in an account. In this way, many estates are fully or partially administered informally.
- 53 However, a person administering an estate informally is liable to be sued by a rightful personal representative, creditors or beneficiaries if they make payments that would not have been legitimate if they had obtained a grant of representation. This may occur where a more recent will is discovered after the estate has been informally administered according to an older will, or when the debts of the estate were not fully paid before the estate was distributed. In addition, a bank or other third party that transfers assets of the estate to a person without requiring a grant of representation is exposed to liability where payments are made incorrectly or a grant of representation is later taken out by another person.

- 54 The Commission makes recommendations to clarify and strengthen existing protections to people who administer estates informally, and to protect third parties transferring up to \$25,000 without a grant of representation. This amount would be adjusted to reflect changes in the Consumer Price Index.
- 55 Although the Commission recognises that it is useful to be able to administer an estate informally, this course of action should not be taken simply because seeking a grant of representation seems too complex or costly. The valuable assistance provided by the Probate Office to small estates should be supplemented by more and better information to the public on the administration of estates. The Commission recommends that the Supreme Court produce a compilation of simply expressed and comprehensive information for potential applicants for a grant of representation, and make it available on its website.

Costs rules in succession proceedings

- 56 The Commission considered cost rules at a general level, as well as in the context of reviewing applications for statutory wills and family provision. It has concluded that, at the general level, the rules are working satisfactorily and do not require legislative amendment. No submissions expressed a contrary view.

Recommendations

Chapter 2 Witnessing wills and undue influence

Prevention of undue influence through other changes to the will-making process

- 1 The Law Institute of Victoria should prepare best practice guidelines for legal practitioners on the detection and prevention of undue influence when preparing a will. These guidelines should cover such matters as:
 - (a) the importance of taking detailed instructions from the will-maker alone
 - (b) common risk factors associated with undue influence
 - (c) the need to keep detailed file notes and make inquiries regarding previous wills.

Doctrine of undue influence

- 2 Four years after the legislation comes into effect, the Attorney-General should cause a report to be prepared on:
 - (a) the operation of new legislation in British Columbia that imports the equitable doctrine of undue influence into the probate context, and
 - (b) whether a similar provision should be adopted in Victoria.

Chapter 3 Statutory wills

Involvement of the incapacitated person in the decision

- 3 The *Wills Act 1997* (Vic) should expressly provide that the Court may order separate representation for the person on whose behalf an application for a statutory will is made.

Accessibility of the statutory wills process

- 4 An application for a statutory will should be made in one stage rather than two. The requirement at section 21(2) of the *Wills Act 1997* (Vic) to seek leave to make an application for a statutory will should be repealed and consequential amendments made to sections 26–29.

Chapter 4 Ademption

Acts by administrators appointed by the Victorian Civil and Administrative Tribunal

- 5 Section 53 of the *Guardianship and Administration Act 1986* (Vic), which modifies the common law of ademption where an administrator sells or otherwise disposes of a represented person's property, should be amended to allow a beneficiary under a will to apply to the Supreme Court for an order where:
 - (a) the exception would result in a beneficiary under the will gaining an unjust and disproportionate advantage or suffering an unjust and disproportionate disadvantage of a kind not contemplated in the will
 - (b) notwithstanding the exception to ademption, the outcome would result in a beneficiary under the will gaining an unjust and disproportionate advantage or suffering an unjust and disproportionate disadvantage of a kind not contemplated in the will.

The Court would make such orders and direct such conveyances, deeds and things to be executed and done as it thinks fit.

- 6 Section 53 of the *Guardianship and Administration Act 1986* (Vic) should be amended to provide that a beneficiary under a will to whom the section applies because an administrator has sold or otherwise disposed of the will-maker's property is entitled to any traceable income generated by any sale proceeds.
- 7 Section 53 of the *Guardianship and Administration Act 1986* (Vic) should be amended to:
 - (a) no longer require an administrator to keep a separate account and record of the money or other property received upon the sale or other disposition of the represented person's property
 - (b) expressly state that an administrator is not required to keep any proceeds of the sale or other disposition of property separate from the represented person's other assets.
- 8 Section 53 of the *Guardianship and Administration Act 1986* (Vic) should be amended to clarify that it applies whether or not the represented person had testamentary capacity at the time of the sale or other disposition of relevant property.

Acts by persons acting under an enduring power of attorney

- 9 *The Instruments Act 1958* (Vic) should be amended to provide an exception to ademption when property is sold or otherwise disposed of by a person acting under an enduring power of attorney (financial). The exception should align with the exception that will apply to administrators under section 53 of the *Guardianship and Administration Act 1986* (Vic) as amended in accordance with recommendations 5–8, including:
 - (a) a right of beneficiaries under a will to apply to the court if the result is unjust
 - (b) no requirement that the attorney keep a separate account and record of the proceeds of the sale or other disposition
 - (c) no requirement that the attorney keep the proceeds of sale or other disposition separate from other assets owned by the donor of the power
 - (d) no requirement that the donor of the power be without will-making capacity at the time of the sale or other disposition.

Access to a person's will to prevent ademption

- 10 Guardianship legislation should provide for a person acting under an enduring power of attorney (financial) to apply to the Victorian Civil and Administrative Tribunal for a full or redacted copy of a will made by the donor of the power. The Tribunal would be able to grant access only where the donor does not have testamentary capacity.

Chapter 5 Intestacy

Setting a limit on next of kin

- 11 The entitlements of all next of kin on intestacy should be clearly set out in the *Administration and Probate Act 1958* (Vic).
- 12 Next of kin who are entitled to inherit on intestacy should be limited to children of the deceased person's parents' siblings (the deceased person's first cousins).
- 13 Persons entitled to inherit on intestacy in more than one capacity should be entitled to take in each capacity.

Survivorship

- 14 Next of kin should be required to survive the deceased person for 30 days in order to inherit on intestacy, unless the survivorship requirement would result in *bona vacantia*.
- 15 Children who are conceived but not yet born at the date of the deceased person's death should be required to survive for at least 30 days after birth in order to inherit on intestacy, unless the survivorship requirement would result in *bona vacantia*.

The partner's share

- 16 The definition of partner in the *Administration and Probate Act 1958* (Vic) should be amended to include registered caring partners, as defined in the *Administration and Probate Act 1958* (Vic) by reference to the *Relationships Act 2008* (Vic).
- 17 Registered caring partners should be entitled to inherit on intestacy in the same circumstances as spouses, registered domestic partners and unregistered domestic partners.
- 18 Where the deceased person is survived by a partner and children or other issue who are entitled to a share on intestacy, the deceased person's partner's statutory legacy should be increased to \$350,000 and adjusted to reflect changes in the All Groups Consumer Price Index number according to the following formula:
$$A = \$350,000 \times B/C, \text{ where}$$
 - A represents the Consumer Price Index adjusted legacy
 - B represents the All Groups Consumer Price Index number for the last quarter for which such a number was published before the date of the deceased person's death
 - C represents the All Groups Consumer Price Index number for the December 2005 quarter.
- 19 The Supreme Court of Victoria should publish the quarterly Consumer Price Index adjusted statutory legacies on its website.
- 20 The deceased person's partner should be entitled to interest on the statutory legacy to which they are entitled on intestacy, or any part thereof, that is not paid within one year after the deceased person's death.

- 21 Interest on a statutory legacy to which a deceased person's partner is entitled on intestacy should be calculated between the first anniversary of the deceased person's death and the date of payment of the legacy in full, in accordance with a rate that is two per cent above the cash rate last published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.
- 22 Where the deceased person is survived by a partner and children or other issue who are entitled to a share on intestacy, the partner's share of the remainder of the intestate estate should be increased to one half.

The partner's right to elect to acquire an interest in certain property

- 23 The deceased person's partner should have a right to elect to acquire an interest in any property in the intestate estate on intestacy.
- 24 If the deceased person's partner elects to acquire an interest in property from the intestate estate, they should satisfy the price of this interest:
 - (a) first from money to which the partner is entitled from the intestate estate and, if that is insufficient,
 - (b) from money paid by the partner to the estate on or before the date of the transfer.
- 25 If the partner of the deceased person wishes to elect to acquire property from the intestate estate, they should be required to apply to the Supreme Court for authorisation of the election if:
 - (a) the property forms part of a larger aggregate, and
 - (b) the acquisition could substantially diminish the value of the remainder of the property or make the administration of the estate substantially more difficult.
- 26 When authorising an election by the deceased person's partner to acquire property from the intestate estate, the Supreme Court should:
 - (a) be able to impose such conditions as it considers just and equitable, including a condition that the partner pay compensation to the estate in addition to consideration to be given for the property
 - (b) be required to refuse authorisation of an election if it considers that the diminution of the value of the remainder of the estate, or difficulties in administration, cannot be adequately addressed by granting an authorisation subject to conditions.
- 27 A personal representative should not be permitted to dispose of property from an intestate estate, except to a partner who has elected to acquire it, unless any of the following applies:
 - (a) the personal representative is the partner entitled to make the election
 - (b) time for exercising the election has elapsed and no election has been made
 - (c) the election requires the Court's authorisation but the necessary authorisation has been refused or the application for authorisation has been withdrawn
 - (d) the partner has notified the personal representative, in writing, that he or she does not propose to exercise the right to acquire property from the estate
 - (e) sale of the property is required to meet funeral and administration expenses, debts and other liabilities of the estate
 - (f) the property is perishable or likely to decrease rapidly in value.
- 28 Details of the expanded right of the deceased person's partner to elect to acquire property from the intestate estate, including in relation to notice requirements, time limits and valuation of property, should be based on the recommendations of the National Committee for Uniform Succession Laws, as reflected in sections 114–121 of the *Succession Act 2006* (NSW).

Multiple partners

- 29 Where the deceased person is survived by multiple partners, but no children or other issue who are entitled to a share on intestacy, the *Administration and Probate Act 1958* (Vic) should provide for the intestate estate to be distributed:
- (a) in accordance with a distribution agreement, or
 - (b) in accordance with a distribution order, or
 - (c) equally between the partners.
- 30 Where the deceased person is survived by multiple partners and children or other issue who are entitled to a share on intestacy, the deceased person's personal chattels, adjusted statutory legacy, interest on the adjusted statutory legacy (if any) and one half of the remainder of the intestate estate should be shared between the partners:
- (a) in accordance with a distribution agreement, or
 - (b) in accordance with a distribution order, or
 - (c) equally between the partners.
- 31 Where the deceased person is survived by multiple partners, there should be no right to elect to acquire an interest in particular estate property.

Entitlements of the deceased person's children or issue

- 32 Children or other issue of a deceased person should not be entitled to a share on intestacy if:
- (a) they are children or issue of a surviving partner of the deceased person who is entitled to a share on intestacy, and
 - (b) all surviving children or issue of the deceased person are also children or issue of that surviving partner or another partner of the deceased person who is entitled to a share on intestacy.
- 33 If any of the children of a deceased person are not children of a surviving partner of the deceased person who is entitled to a share on intestacy, then all children of the deceased person should be entitled to an equal share on intestacy.

Per stirpes or *per capita* distribution

- 34 Where next of kin take by representation, *per capita* distribution on intestacy should be abolished and *per stirpes* distribution should be applied in all cases.

Taking benefits into account

- 35 The *Administration and Probate Act 1958* (Vic) should be amended to provide that the distribution of an intestate estate is not affected by dispositions made by the deceased person:
- (a) during the deceased person's lifetime, or
 - (b) in the case of a partial intestacy, by will.

Intestate estates of Indigenous people

- 36 The Attorney-General should have the Department of Justice prepare a report about the distribution of the intestate estates of Indigenous people in Victoria, including the need for any legislative reform. This report should build on the work of the National Committee for Uniform Succession Laws and the findings of the Commission, and be based on further community consultation.

Chapter 6 Family provision

Court jurisdiction

37 The *Administration and Probate Act 1958* (Vic) should be amended to:

- (a) grant the County Court exclusive jurisdiction over family provision claims where the value of the net estate does not exceed \$500,000
- (b) specify that the County Court and Supreme Court have concurrent jurisdiction in relation to all other family provision proceedings
- (c) remove reference to the County Court's jurisdictional limit.

Eligibility to make a family provision claim

38 Victoria should replace its 'responsibility' test for eligibility to make a family provision claim with a test based on the New South Wales test for eligibility, but extended to include stepchildren. To this end, section 91(1) of the *Administration and Probate Act 1958* (Vic) should be repealed and replaced with provisions in the following terms:

The following are eligible persons who may apply to the court for a family provision order in respect of the estate of a deceased person:

- (a) a person who was the wife or husband of the deceased person at the time of the deceased person's death
- (b) a person with whom the deceased person was living in a registrable domestic relationship or registered domestic relationship at the time of the deceased person's death
- (c) a child of the deceased person
- (d) a former wife or husband of the deceased person
- (e) a person:
 - (i) who was, at any particular time, wholly or partly dependent on the deceased person, and
 - (ii) who is a grandchild of the deceased person or was, at that particular time or any other particular time, a member of the household of which the deceased person was a member
- (f) a person with whom the deceased person was living in a registrable caring relationship or registered caring relationship
- (g) a stepchild of the deceased person.

39 The *Administration and Probate Act 1958* (Vic) should provide that the court may, on application under the relevant provisions, make a family provision order in relation to the estate of a deceased person, if it is satisfied that:

- (a) the person in whose favour the order is to be made is an eligible person, and
- (b) in the case of a person who is an eligible person by reason only of paragraph (d), (e), (f) or (g), in recommendation 38 above—having regard to all the circumstances of the case (whether past or present) there are factors which warrant the making of the application, and
- (c) at the time when the court is considering the application, adequate provision for the proper maintenance and support of the person in whose favour the order is to be made has not been made by the will of the deceased person, or by the operation of the intestacy provisions, or both.

40 The court should:

- (a) be permitted to consider the criteria set out in sections 91(4)(e)–(p) of the *Administration and Probate Act 1958* (Vic) when determining whether the applicant is an eligible person and, where relevant, whether there are factors which warrant the making of the application
- (b) be required to consider the criteria set out in sections 91(4)(e)–(p) of the *Administration and Probate Act 1958* (Vic) when determining:
 - (i) whether adequate provision was made for the applicant’s proper maintenance and support
 - (ii) the amount of further provision that should be made, if any.

Costs rules

41 Sections 97(6) and 97(7) of the *Administration and Probate Act 1958* (Vic) should be repealed and replaced by provisions that:

- (a) specify that the court may make any order as to the costs of a family provision application that is, in the court’s opinion, just
- (b) set out a non-exhaustive list of the types of costs orders that the court may make, including:
 - (i) an order that each party bear their own costs
 - (ii) an order that the estate pay the costs of an applicant, whether successful or unsuccessful, on any basis and to any extent
 - (iii) an order that an applicant pay the costs of a personal representative, on any basis and to any extent.

42 The family provision costs provisions in the *Administration and Probate Act 1958* (Vic) should specify that the court has the power to cap costs.

43 The family provision costs provisions in the *Administration and Probate Act 1958* (Vic) should specify that they do not otherwise limit:

- (a) the Supreme Court’s existing jurisdiction
- (b) the County Court’s existing jurisdiction
- (c) any other powers of a court arising or derived from the common law or under any other Act (including any Commonwealth Act), rule of court, practice note or practice direction.

Procedure

44 The County Court and Supreme Court should consider including in equivalent practice notes or rules of court:

- (a) reference to position statements and direction as to the length, form and content of position statements for use in family provision proceedings
- (b) provision concerning pro forma affidavits in family provision proceedings, similar to those referred to in Practice Note SC Eq 7 of the Supreme Court of New South Wales
- (c) guidelines in relation to when a family provision matter will be referred to judicial mediation

- (d) a requirement that parties to family provision proceedings bring to mediation an estimate of their costs to date, based on the relevant court scale
 - (e) reference to the courts' powers to order affidavits as to costs at any stage of a family provision proceeding
 - (f) reference to the courts' powers to cap costs and make other orders as to costs in family provision proceedings.
- 45 The County Court should consider including in its *County Court Civil Procedure Rules 2008* (Vic) a rule permitting it to determine a family provision application summarily when:
- (a) there are reasonable grounds on which to conclude that the net estate of the deceased person that will be available for distribution will be less than \$500,000, and
 - (b) it is in the interests of justice to do so.
- 46 The County Court should consider whether its *County Court Civil Procedure Rules 2008* (Vic) should provide that summary determination of a family provision application:
- (a) is to proceed in accordance with such directions as are given by the Court
 - (b) may be on the basis of evidence that does not conform with the rules of evidence
 - (c) is to have as a primary object the minimisation of costs and an expeditious but just resolution of the action.
- 47 The County Court should consider including in its *County Court Civil Procedure Rules 2008* (Vic) a rule that permits the Court to order a party to pay any costs that might have been avoided if a family provision application had been determined summarily if:
- (a) because of the party's actions, the family provision application was not determined summarily and proceeded to trial, and
 - (b) at trial the Court finds that the family provision application should have been determined summarily.

The summary determination costs rule should specify that it does not limit any other power of the Court in relation to costs.

Other areas for reform raised in the Commission's consultation paper

- 48 The *Administration and Probate Act 1958* (Vic) should permit any person to apply to the court for approval of a release of their rights to make a family provision application, as provided by sections 95 and 96 of the *Succession Act 2006* (NSW).
- 49 Section 99A of the *Administration and Probate Act 1958* (Vic) should be amended to clarify that:
- (a) it relates only to protection of personal representatives, and
 - (b) it does not affect the time within which a family provision application must be made under section 99 of the *Administration and Probate Act 1958* (Vic).
- 50 The second proviso to section 99 of the *Administration and Probate Act 1958* (Vic), which refers to Part V of that Act, should be removed.

Chapter 7 Executors' costs and commission

Special rules for legal practitioner executors

- 51 The Law Institute of Victoria or other relevant body should revise the conduct and practice rules that apply to legal practitioners who prepare a will or other instrument under which they receive a benefit to expressly require the practitioner to obtain the client's informed consent to the payment of the benefit.
- 52 A new provision should be inserted into the *Administration and Probate Act 1958* (Vic) to the effect that a professional executor is unable to rely on a remuneration or commission clause in a will unless the will-maker gave their informed written consent to the inclusion of the clause, before the will was executed.
- 53 A new provision should be inserted into the *Administration and Probate Act 1958* (Vic) to the effect that an executor may receive commission from the assets of an estate provided that the executor obtains the fully informed consent of all interested beneficiaries.
- 54 Legal practitioner executors should be required to disclose to beneficiaries details about their charges to the estate for executorial and legal services, and associated information, along the lines currently required by section 3.4.9 of the *Legal Profession Act 2004* (Vic) in respect of costs disclosure to clients. In particular:
 - (a) Costs disclosure to beneficiaries should be required:
 - (i) as soon as practicable after the law practice or legal practitioner commences in the position of executor
 - (ii) as soon as practicable after the law practice or legal practitioner executor becomes aware of any substantial change to anything included in a disclosure already made to the beneficiary
 - (iii) in plain language, which may be in a language other than English if the beneficiary is more familiar with that language
 - (iv) by spoken word to a beneficiary of legal capacity who is unable to read.
 - (b) Costs disclosure to beneficiaries should not be required:
 - (i) if disclosure in accordance with the obligations currently set out at sections 3.4.9–3.4.18 is made to a co-executor who is not a legal practitioner
 - (ii) to a beneficiary who is not legally competent
 - (iii) to a beneficiary whose entitlement under the will is unaffected by payment from the estate for legal and executorial services.
 - (c) A failure by a law practice to comply with the disclosure requirements should be capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any legal practitioner involved in the failure, as currently applies in respect of disclosure to clients.
- 55 Costs disclosure to beneficiaries about their rights to receive information, seek costs review and make a complaint should be possible by providing a written statement. As is currently permitted in respect of cost disclosure to clients, the written statement should be prepared in accordance with the regulations, and supplemented by fact sheets and documents prepared by the Legal Services Commissioner in consultation with the profession.

- 56 A new provision should be inserted into the *Administration and Probate Act 1958* (Vic) to the effect that, where a will contains a provision authorising a professional executor to charge commission, the professional executor may elect to charge fees for executorial work rather than relying on the provision in the will. The ability to make an election would be subject to conditions, including that the fees:
- (a) do not exceed in total the amount to which the executor would have been entitled if the executor had not made the election
 - (b) are calculated at a rate applicable for work that does not require the executor to use their specialist professional skills
 - (c) are distinguished from any fees charged by the professional executor for professional services
 - (d) where the professional executor is a legal practitioner, are treated as legal costs for the purposes of the rights of the beneficiaries to apply for costs review by the Costs Court and make a civil complaint to the Legal Services Commissioner.

Court review of costs and commission

- 57 The Supreme Court should have the power to review and vary commission, charges and disbursements claimed by executors and administrators out of estates. A new provision of the *Administration and Probate Act 1958* (Vic), based on section 86A of the *Probate and Administration Act 1898* (NSW), should provide that:
- (a) the court may review all or part of a commission or amount charged or proposed to be charged in respect of any estate
 - (b) if it finds it is excessive, the court may reduce it even if it was authorised by a provision in the will
 - (c) subject to any extension of time granted by the court, an application granted by this provision should be brought within three months after the time that the applicant beneficiary first knew, or ought to have known, of all commission, charges and disbursements charged or proposed to be charged out of the estate.

Other regulatory reform

- 58 The Legal Services Commissioner should be given jurisdiction to resolve a dispute between a legal practitioner and a beneficiary under a will about an amount charged to an estate for executorial services, where the disputed amount does not exceed \$25,000. The procedures for resolving such a dispute would be essentially the same as those that currently apply to civil disputes under Part 4.2 of the *Legal Profession Act 2004* (Vic) and would specify that:
- (a) a complaint that involves a dispute about an amount charged for executorial services must be made within 60 days after the time that the applicant beneficiary first knew, or ought to have known, of the amount charged or proposed to be charged
 - (b) the Legal Services Commissioner has discretion to provide more time as currently permitted by section 4.2.7(4) of the *Legal Profession Act 2004* (Vic) for complaints that involve a dispute about legal costs
 - (c) a beneficiary who makes a complaint to the Legal Services Commissioner that involves a dispute about an amount charged for executorial services may not apply for review by the court.

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- 59 The Legal Services Commissioner should be given jurisdiction to resolve a civil dispute between a legal practitioner and a beneficiary under a will or trust where the dispute relates to services provided by the legal practitioner to the estate in the capacity of executor or trustee. The procedures for resolving such a dispute would be the same as those which currently apply to civil disputes under Part 4.2 of the *Legal Profession Act 2004* (Vic).
- 60 Review of legal costs by the Costs Court, as currently made available to clients and third party payers by section 3.4.38 of the *Legal Profession Act 2004* (Vic), should once again be made available to a person interested in any property out of which a legal practitioner executor, administrator or trustee may recover legal costs.
- 61 The Law Institute of Victoria or other relevant body should make:
- (a) uniform rules under the new uniform law that clarify the duties of legal practitioners in providing executorial services and charging for those services
 - (b) in support of these rules, guidelines for legal practitioner executors on meeting their fiduciary responsibilities.
- 62 The Victoria Law Foundation should publish a guide, or series of guides, on making wills and the role of the executor. The information should encompass the following topics and be made available in community languages:
- (a) questions and issues to consider when making a will, focusing on helping will-makers avoid problems commonly identified in wills made without legal advice and providing guidance about selecting an executor
 - (b) practical information for non-professional executors about what they need to do in that position, focusing on resources that can help them in meeting their responsibilities and identifying where they may obtain professional assistance
 - (c) practical information for bereaved family and friends about what happens to the assets of a person after they die, focusing on what the executor needs to do before the estate can be distributed and the basis on which the estate might be charged for their services.

Chapter 8 Payment of debts

Solvent estates

- 63 The *Administration and Probate Act 1958* (Vic) should be amended to:
- (a) repeal Part II of the Second Schedule (order of application of assets where the estate is solvent)
 - (b) provide in section 39(2) of the Act the following order of application, as recommended by the National Committee for Uniform Succession Laws:
 1. Property specifically appropriated or given by will (either by a specific or general description) for the payment of debts; and property charged by will with, or given by will (either by a specific or general description) subject to a charge for, the payment of debts.
 2. Property comprising the residuary estate of the deceased person and property in relation to which a disposition in the deceased person's will operates as the exercise of a general power of appointment.
 3. Property specifically given by will, including property specifically appointed under a general power of appointment, and any legacy charged on property given or appointed.
 - (c) provide that the provisions in (b) should be subject to the manifestation of any contrary intention contained in the will.

- 64 A provision should be inserted into the *Administration and Probate Act 1958* (Vic) that stipulates that the payment of pecuniary legacies is to be made from the residuary estate.
- 65 Section 40(1) of the *Administration and Probate Act 1958* (Vic) should be amended to provide that an expression of contrary intention may only be shown by will.

Insolvent estates

- 66 The *Administration and Probate Act 1958* (Vic) should be amended to:
- (a) repeal Part I of the Second Schedule (rules as to payment of debts where the estate is not solvent)
 - (b) provide in section 39(1) that the provisions of the *Administration and Probate Act 1958* (Vic) will only apply where an insolvent estate is not being administered under the provisions of the *Bankruptcy Act 1966* (Cth)
 - (c) provide in section 39(1) that the relevant rules of bankruptcy are those in force at the time of death
 - (d) provide in section 39(1) a list of the provisions of the *Bankruptcy Act 1966* (Cth) that will apply when estates are being administered under the *Administration and Probate Act 1958* (Vic).

Chapter 9 Small estates

Assistance in seeking a grant of representation

- 67 Section 71(1) of the *Administration and Probate Act 1958* (Vic) should be replaced with a provision that:
- (a) permits a person entitled to probate of the will or letters of administration in respect of an estate not exceeding \$100,000 in value to apply to the registrar of probates or, where appropriate, a registrar of the Magistrates' Court, for aid in obtaining a grant of representation
 - (b) provides for the maximum value of the estate in respect of which the aid may be provided to be adjusted quarterly to reflect changes in the All Groups Consumer Price Index.
- 68 The Supreme Court of Victoria should publish on its website the quarterly Consumer Price Index adjusted maximum values of estates in respect of which the Probate Office may provide assistance in applying for a grant of representation.
- 69 The Supreme Court of Victoria, in consultation with Victoria Legal Aid, the Law Institute of Victoria and the Federation of Community Legal Centres, should develop and make available on its website in community languages a package of information for those wishing to seek a grant of representation without professional assistance.

Informal administration

- 70 Section 33(1) of the *Administration and Probate Act 1958* (Vic) should be redrafted in the simpler form reflected in the National Committee's model provision dealing with persons acting informally.
- 71 Drawing on model legislation proposed by the National Committee for Uniform Succession Laws, section 32 of the *Administration and Probate Act 1958* (Vic) should be amended to:
- (a) provide a discharge of liability in respect of payments of \$25,000 or less
 - (b) provide that the \$25,000 limit will be adjusted quarterly to reflect changes in the All Groups Consumer Price Index
 - (c) provide that payments made in accordance with the section will serve as a complete discharge of liability
 - (d) remove the requirement that the party releasing the assets be satisfied that the value of the estate does not exceed a particular limit.
- 72 The Supreme Court of Victoria should publish on its website the quarterly Consumer Price Index adjusted limit for the purposes of section 32 of the *Administration and Probate Act 1958* (Vic).

Removing costs barriers to formal administration

- 73 The applicable fee for obtaining a grant of probate or letters of administration in the Supreme Court Probate Office should be based on the estate's value, in a sliding scale, with estates valued at no more than \$100,000 attracting a nil fee.

Expedited grants

- 74 Section 11A of the *Trustee Companies Act 1984* (Vic) should be repealed.
- 75 Section 79 of the *Administration and Probate Act 1958* (Vic) should be amended to provide that, if in the course of administering a small estate under that section, State Trustees ascertains that the value of the estate exceeds 120 per cent of the adjusted upper value for small estates as set out in section 71(1), it must as soon as practicable apply in the same manner as any other person for a grant of representation.
- 76 Section 79(2) of the *Administration and Probate Act 1958* (Vic) should be amended to require that notices of intention to administer an estate under this section should be advertised on the Supreme Court's website rather than in a daily newspaper.
- 77 Section 79 of the *Administration and Probate Act 1958* (Vic) should be amended to require that the will be filed with the Supreme Court Probate Office.

Other amendments to Part II of the Administration and Probate Act

- 78 The following corrections of errors in the *Administration and Probate Act 1958* (Vic) should be made:
- (a) Section 71(2): 'registrar of the Supreme Court' should read 'registrar of the Magistrates' Court'.
 - (b) Section 72: the reference in the heading to the County Court registrar should be removed.



Introduction

- 2** Terms of reference
- 3** The Commission's process
- 4** The Commission's approach to the issues
- 4** Structure of this report

1. Introduction

Terms of reference

- 1.1 On 1 March 2012, the Attorney-General asked the Victorian Law Reform Commission to report on a number of succession law matters by 1 September 2013. The terms of reference are on page x.
- 1.2 Succession laws regulate how property is administered and distributed on the owner's death. Most of Victoria's succession laws are found in:
 - the *Wills Act 1997* (Vic) and associated case law on the construction and validity of wills
 - the *Administration and Probate Act 1958* (Vic) and associated case law dealing with the administration and distribution of assets.
- 1.3 The Wills Act is the product of extensive and detailed reviews in Victoria over a period of 10 years, first by a government working party¹ and later by the Victorian Parliament Law Reform Committee.² The Commission was asked to report on only three issues concerning wills:
 - witnessing wills and undue influence
 - statutory wills
 - ademption.
- 1.4 Unlike the Wills Act, the Administration and Probate Act has never been comprehensively reviewed. While not requiring the whole Act to be examined, the Commission's terms of reference extend to many of the key provisions, including those that address the following issues:
 - executor's commission for their time and trouble
 - applying assets to the payment of debts
 - the intestacy scheme for distributing the assets of someone who has died without making a will
 - special procedures for administering small estates
 - family provision.

¹ In 1984, the Attorney-General established a working party to review the *Wills Act 1958* (Vic). It comprised representatives of the Law Department, the Probate Office, the Law Faculty of the University of Melbourne, the Law Institute of Victoria and the Victorian Bar. Its report was presented to the Attorney-General in 1986 but not published. Work then began on drafting a Wills Act. The eighth draft was referred to the Parliamentary Law Reform Committee in 1991.

² Law Reform Committee, Parliament of Victoria, *Reforming the Law of Wills* (1994).

The National Uniform Succession Laws project

- 1.5 In conducting the review, the Commission is required by the terms of reference to take account of recommendations made by the National Committee for Uniform Succession Laws. The National Committee guided the National Uniform Succession Laws project, which was an initiative of the former Standing Committee of Attorneys-General (SCAG).³ The aim of the project was to develop uniform succession law and practice across Australia.
- 1.6 The National Committee conducted extensive research in conjunction with a number of law reform bodies over a period of 14 years and published reports on the law of wills (1997), family provision (1997 and 2004), intestacy (2007) and the administration of deceased estates (2009).

The Commission's process

- 1.7 The Commission's review was led by Dr Ian Hardingham QC and guided by a Division chaired by the Hon. Philip Cummins. The other Division members were the Hon. David Jones AM and Eamonn Moran PSM QC.
- 1.8 Shortly after Dr Hardingham's appointment, the Commission formed an advisory committee of experts to provide insights into how the law works in practice and discuss issues and options for reform. The members were asked to bring their expertise to the issues discussed and not necessarily represent the views of any organisation with which they work or are affiliated. The advisory committee met four times and its members are listed at **Appendix A**.
- 1.9 When conducting a review, the Commission usually publishes a consultation paper addressing all of the issues arising from the terms of reference and seeking written submissions on possible reforms. Because the terms of reference in this case covered a range of disparate subjects, the Commission instead released six short consultation papers. Each focussed on one or more key topics as follows:
 - Wills—whether there is a need to revise the law on witnessing wills to better protect elderly and vulnerable will-makers from undue influence; statutory wills; and ademption.
 - Family provision—whether the law is achieving its objective of ensuring that provision is made for people for whom the deceased person had a responsibility to provide.
 - Intestacy—whether the law is operating effectively to achieve just and equitable outcomes.
 - Executors—whether there should be special rules for legal practitioner executors and whether a court should be able to review executors' costs and commissions.
 - Debts—whether the law governing how a deceased estate's assets are ordered to pay its debts can be simplified.
 - Small estates—whether there are more efficient ways of dealing with small estates.
- 1.10 Submissions were invited by 28 March 2013, though the Commission accepted contributions after that date. Most of the submissions are public and can be seen on the Commission's website.⁴ They are listed at **Appendix B**.
- 1.11 Throughout the reference, and particularly after the consultation papers were released, the Commission consulted widely. Meetings with legal practitioners were held in Colac, Shepparton and Wodonga as well as in Melbourne. An open day was held to provide an opportunity for members of the public to meet with Commission staff to discuss

³ Now known, since September 2011, as the Standing Council on Law and Justice. It comprises Commonwealth, State and Territory Attorneys-General and the New Zealand Minister for Justice.

⁴ Victorian Law Reform Commission, *Succession Laws* (15 July 2013) <<http://www.lawreform.vic.gov.au/inquiries/succession-laws>>.

their response to the questions raised in the consultation papers. The Commission held a roundtable on wills, which was attended by representatives of community groups, legal practitioners, academics, State Trustees and the Victorian Civil and Administrative Tribunal. Meetings were held with members of the Law Institute of Victoria, judges and associate judges of the Supreme Court, judges of the County Court, and representatives of private trustee companies.

- 1.12 As a number of the law reform options being considered by the Commission drew on New South Wales legislation and practice, Dr Hardingham held discussions in Sydney with members and staff of the New South Wales Supreme Court and other individuals and organisations with expertise in this area of the law. The consultations held after the consultation papers were released are listed at **Appendix C**.
- 1.13 In addition to the planned consultations, the Commission received many comments and further information informally from interested members of the public as well as from individuals with specialist knowledge and expertise.

The Commission's approach to the issues

- 1.14 In considering the issues arising from the terms of reference the Commission was mindful of the stated objectives of the review. It noted in particular that state and territory ministers have agreed to adopt the National Committee's recommendations as the basis for reforming succession laws, with the aim of maximising national consistency.
- 1.15 The Commission's guiding principle was that national consistency is to be preferred where Victorian law or processes are not demonstrably fairer or more efficient. However, national consistency is not always advanced by adopting the recommendations of the National Committee for Uniform Succession Laws. For example, Victoria's family provision law already largely aligns with the National Committee's proposed model legislation but no other states or territories have adopted it.
- 1.16 Other features of the National Committee's proposed model legislation are not controversial and the Commission has found no policy reason to depart from them. For example, the Commission's recommendations for reform of the intestacy scheme follow the model closely.

Structure of this report

- 1.17 The structure of this report broadly follows the terms of reference. The first three topics in the terms of reference concern wills, and they are discussed in Chapters 2–4.
- 1.18 The focus of the report then turns to two schemes established by the Administration and Probate Act that affect how the assets of a person are distributed after they die. Chapter 5 concerns the distribution of assets on intestacy, when a person dies without making a valid will or their will does not dispose of all of their property. Chapter 6 reviews the family provision law under which someone for whom the deceased person had a responsibility to provide, but who was not adequately provided for, may apply to have the assets redistributed in their favour.
- 1.19 Chapter 7 discusses two of the topics in the terms of reference together because they both concern executors: whether there should be special rules for legal practitioner executors, and whether a court should have the power to review and vary costs and commission that executors charge.
- 1.20 In Chapter 8, the question of how assets are designated to pay the debts of an estate is explored. Chapter 9 considers the way in which Victorian law and practice assists in the administration of small estates. Chapter 10 sets out in general terms the costs rules and principles that are applied in succession proceedings. The costs rules that apply when the court authorises statutory wills, and in family provision proceedings, are discussed in Chapters 3 and 6 respectively.

Witnessing wills and undue influence

- 6** Introduction
- 6** Requirements for witnessing a will
- 13** Prevention of undue influence through other changes to the will-making process
- 15** Doctrine of undue influence
- 20** Other common law rules related to undue influence

2. Witnessing wills and undue influence

Introduction

- 2.1 The Commission has been asked to review and report on ‘whether the current requirements for witnessing wills should be revised to better protect older and vulnerable will-makers from undue influence by potential beneficiaries or others’.
- 2.2 The Commission’s consultation paper on wills set out various ways in which the requirements for witnessing a will could be changed in order to protect vulnerable will-makers from undue influence. However, although widespread concern was expressed in submissions and consultations about potential beneficiaries improperly prevailing upon vulnerable will-makers to make wills that do not reflect their wishes, there was little support for the view that changing the witnessing requirements would deal with this problem.
- 2.3 The Commission has concluded that no changes to the witnessing requirements for wills are necessary. This is because changing the witnessing requirements is unlikely to prevent undue influence, and some changes may have other negative consequences. Instead, the Commission sees a need to give legal practitioners more guidance on detecting and preventing undue influence when preparing a will, and to monitor the application of the doctrine of undue influence to probate matters in Canada.
- 2.4 The next section outlines the requirements for witnessing a will, the reform ideas canvassed in the consultation paper, comments made about those ideas, and the Commission’s conclusions in relation to each possible change.

Requirements for witnessing a will

- 2.5 In order to make a valid will, the document must be in writing and signed by the will-maker in the presence of two witnesses. Both witnesses must witness the will-maker signing the will, in each other’s presence. They must then sign the will in the presence of the will-maker, but not necessarily in each other’s presence.¹
- 2.6 The witness must be able to see the will-maker sign the document, but does not need to know that the document is a will.² A witness can be any competent adult capable of sight, including a beneficiary under the will, and no particular qualifications are required.³
- 2.7 Even if the will-maker does not follow these formalities, the will may still be admitted to probate where the Supreme Court is satisfied that the person ‘intended the document to be his or her will’.⁴ This is referred to as a dispensing power, as the Court may dispense with the formal requirements which otherwise apply in the making of a will.

1 *Wills Act 1997* (Vic) s 7.
2 *Ibid* ss 8, 10.
3 *Ibid* ss 10–11.
4 *Ibid* s 9.

- 2.8 Witnessing requirements in Victorian law are consistent with the National Committee for Uniform Succession Law's recommendations,⁵ as well as the requirements in other states and territories.⁶ The requirements in all Australian jurisdictions have been relaxed in recent years to make it easier for people to make a valid will.⁷

Additional qualifications or requirements for witnesses

- 2.9 In the consultation paper on wills, the Commission raised various ways that witnessing requirements could be made stricter in order to prevent undue influence, including:
- requiring one of the witnesses to be a person who is authorised to witness a statutory declaration
 - requiring the witness to certify that the will-maker signed the will freely and voluntarily and appeared to have the mental capacity necessary to make a will
 - requiring one of the witnesses to be a medical practitioner who provides an assessment of the will-maker's capacity and freedom of will
 - requiring the witness to be aware that they are signing a will.⁸
- 2.10 The comments received about each of these proposals are detailed below. In general, they conveyed the view that none of these potential changes would be effective in preventing undue influence.⁹ In addition to this key concern, submissions identified other negative consequences of changing the witnessing requirements:
- It would undermine national consistency in one of the few areas where laws are currently consistent.¹⁰
 - It would, subject to any application of the dispensing power, lead to an increasing number of wills being found invalid and the will-maker's intentions therefore not being upheld.¹¹
 - It may increase the cost of making a will or make it more difficult to make a will without the assistance of a legal practitioner.¹²
 - It would undermine the important civil right to make a will.¹³
- 2.11 Comments were also sought on whether special witnessing requirements should be introduced only for will-makers over a certain age. The majority did not support the idea.¹⁴ Most felt it would be arbitrary and discriminatory, as well as ineffective in preventing undue influence.¹⁵
- 2.12 In balancing the risk of abuse with the ability of persons to make their own will easily, most felt that the law should facilitate will-making rather than add additional obstacles to the process.¹⁶

5 National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills*, Queensland Law Reform Commission Miscellaneous Paper No 29 (1997) 10–12. Victorian law is not consistent with the National Committee's recommendation on the witness-beneficiary rule: see [2.30]–[2.44].

6 *Succession Act 2006* (NSW) s 6; *Succession Act 1981* (Qld) s 10; *Wills Act 1970* (WA) s 8; *Wills Act 1936* (SA) s 8; *Wills Act 1968* (ACT) s 9; *Wills Act* (NT) ss 8–9; *Wills Act 2008* (Tas) ss 8–9.

7 The dispensing power mentioned in [2.7] is one example. Another is the abolition of the requirement that the will be signed at the 'foot or end' by the will-maker: *Wills Act 1997* (Vic) s 7(1)(b). Law Reform Committee, Parliament of Victoria, *Reforming the Law of Wills* (1994) 53–66.

8 Victorian Law Reform Commission, *Succession Laws: Wills*, Consultation Paper No 11 (2012) 18.

9 Consultation 1 (Wills roundtable). Submissions 25 (Moores Legal); 30a (Law Institute of Victoria); 33 (State Trustees Limited); 35 (Andrew Verspaandonk).

10 Consultation 1 (Wills roundtable).

11 Ibid.

12 Consultations 1 (Wills roundtable); 4 (Legal practitioners from the Goulburn Valley and Loddon Campaspe Community Legal Centres). Submissions 8 (Patricia Strachan); 25 (Moores Legal); 30a (Law Institute of Victoria); 33 (State Trustees Limited); 35 (Andrew Verspaandonk).

13 Submissions 30a (Law Institute of Victoria); 36 (Law Society of New South Wales).

14 Consultation 1 (Wills roundtable). Submissions 8 (Patricia Strachan); 21 (Office of the Public Advocate); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 30a (Law Institute of Victoria); 31 (Seniors Rights Victoria).

15 Consultations 1 (Wills roundtable); 4 (Legal practitioners from the Goulburn Valley and Loddon Campaspe Community Legal Centres). Submissions 8 (Patricia Strachan); 25 (Moores Legal); 30a (Law Institute of Victoria); 31 (Seniors Rights Victoria); 33 (State Trustees Limited).

16 See, eg, submissions 30a (Law Institute of Victoria); 35 (Andrew Verspaandonk); 39 (Carolyn Sparke SC).

- 2.13 Some submissions supported introducing witnessing requirements that are similar to those for executing a power of attorney.¹⁷ However, others noted that this is a fundamentally different type of document, where the person appointed usually has power over all of the donor's assets while the donor is alive.¹⁸
- 2.14 The Commission is of the view that none of these possible changes to the witnessing requirements should be made. Apart from the reasons outlined above, any change to the witnessing requirements could be ineffective because the Court may exercise its power to dispense with the formal requirements which otherwise apply in the making of a will. A will without any witnesses could still be upheld by a court exercising the dispensing power, and a will that did not meet any new witnessing requirement could also be upheld under this power.

Requiring that one of the witnesses be authorised to witness a statutory declaration or affidavit

- 2.15 Currently in Victoria, an enduring power of attorney must be witnessed by two adults, one of whom is authorised to witness a statutory declaration.¹⁹ This includes lawyers, police, medical practitioners, dentists, pharmacists, bank managers, accountants and school principals.²⁰ The Victorian Parliament Law Reform Committee recommended in its 2010 report on powers of attorney that the witnessing requirements should be strengthened and that one of the two witnesses should instead be either a person who is authorised to witness an affidavit or a medical practitioner.²¹
- 2.16 Drawing on the current and proposed requirements for witnessing an enduring power of attorney, the consultation paper put forward the idea that one of the witnesses to a will should be a person who is authorised to witness a statutory declaration or an affidavit. Rigby Cooke Lawyers and Seniors Rights Victoria supported the idea.²² In particular, Rigby Cooke Lawyers pointed out that it would be consistent with the requirement for executing an international will.²³
- 2.17 However, others did not believe it would make any difference in the incidence of undue influence.²⁴ Moores Legal noted that:
- unless the will-maker is well known to the witness or the witness is instructed to make an assessment of the situation, the reality is that the witness is likely to simply sign the document without any detailed assessment.²⁵
- 2.18 The Commission agrees that requiring a professional witness to sign the will is unlikely to bring about the detection or prevention of undue influence. Assessing whether the will-maker has the necessary capacity and is signing the will freely and voluntarily is a complex task, and it is unlikely that this change would assist. In addition, this change would make it more difficult to have a will validly executed, particularly where the will is prepared without the assistance of a legal practitioner.

17 Consultations 1 (Wills roundtable); 4 (Legal practitioners from the Goulburn Valley and Loddon Campaspe Community Legal Centres); 26 (Rigby Cooke Lawyers); 31 (Seniors Rights Victoria).

18 Consultation 1 (Wills roundtable). Submission 39 (Carolyn Sparke SC).

19 *Instruments Act 1958* (Vic) s 125(3). In addition, only one witness is permitted to be a relative of either the donor of the power or a person who will be authorised to exercise the power.

20 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 107A(1).

21 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 77. Persons authorised to witness an affidavit include: a judge, a justice of the peace, a member of parliament, a legal practitioner, a public servant or police officer: *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 123C.

22 Submissions 26 (Rigby Cooke Lawyers); 31 (Seniors Rights Victoria).

23 Submission 26 (Rigby Cooke Lawyers). An international will requires two witnesses as well as an authorised person, who must be a legal practitioner or public notary in an Australian jurisdiction: *Wills Amendment (International Wills) Act 2012* (Vic) s 5. This provision is not yet in force.

24 Submissions 25 (Moores Legal); 35 (Andrew Verspaandonk).

25 Submission 25 (Moores Legal).

Requiring the witness to certify that the will-maker appeared to have capacity and signed freely and voluntarily

- 2.19 The Commission's consultation paper on wills raised the possibility of requiring a witness to a will to certify that the will-maker had the necessary mental capacity to sign their will, and signed the will freely and voluntarily.
- 2.20 This is another proposal based on a requirement that applies when witnessing an enduring power of attorney. Each witness to an enduring power of attorney must certify that the donor signed the document freely and voluntarily and appeared to have the capacity necessary to make the enduring power of attorney.²⁶
- 2.21 While some submissions supported the idea,²⁷ others noted that this is a complicated task and would be beyond the experience of many witnesses.²⁸ Some questioned the value that a court would place on such an assessment provided by a person without expertise in issues of capacity and coercion.²⁹
- 2.22 The Law Institute of Victoria noted that there is still confusion among legal practitioners about the level of capacity required, although the culture and practice surrounding witnessing powers of attorney has reportedly improved since witnesses have been required to certify capacity.³⁰ It is therefore difficult for any non-legal or non-medical witness to certify that the person appeared to have capacity.³¹
- 2.23 The Commission does not believe that such a change to the requirements for witnessing wills would be useful in preventing undue influence. Where a will-maker's capacity is in doubt, a professional report would be more useful to the Court on a subsequent challenge to the will than the view of an unqualified lay witness.

Requiring a medical practitioner to witness and assess the person's capacity

- 2.24 Most submissions opposed the idea of requiring one of the witnesses to the will to be a medical practitioner who would provide an assessment of the will-maker's capacity and freedom of will.³² Some noted that this would impose an unreasonable burden on medical practitioners for little benefit.³³ In addition, issues of coercion and voluntariness are not necessarily medical issues and may require further investigation where undue influence is suspected.³⁴
- 2.25 The view was also put that a specialist report on capacity at the time the will is made is more useful than having a medical practitioner witness it being signed.³⁵ Legal practitioners already consider it good practice to obtain such a report where a client's capacity is in doubt.³⁶
- 2.26 The Commission agrees that requiring a medical practitioner to witness a will would be ineffective in preventing undue influence. It would also place an unreasonable burden on medical practitioners and would make the process of executing a valid will more difficult. Further, it would be unnecessary to apply such a measure to all will-makers, as capacity is not in issue for most will-makers, but applying the measure only to certain categories of will-maker would require arbitrary distinctions to be made (by age or whether the will-maker is in hospital, for example). Such distinctions would risk being discriminatory and not targeting the problem of undue influence. The Commission therefore does not support such a change.

26 *Instruments Act 1958* (Vic) s 125A(1).

27 Submissions 1 (Legal Services Commissioner); 38 (Liz Burton).

28 Submission 35 (Andrew Verspaandonk).

29 Consultation 1 (Wills roundtable).

30 Submission 30a (Law Institute of Victoria).

31

Ibid.

32 Submissions 4 (Name withheld); 26 (Rigby Cooke Lawyers); 35 (Andrew Verspaandonk).

33 Submissions 26 (Rigby Cooke Lawyers); 35 (Andrew Verspaandonk).

34 Submission 35 (Andrew Verspaandonk).

35 Consultation 3 (Legal practitioners in the Goulburn Valley region). Submission 4 (Name withheld).

36 Submissions 8 (Patricia Strachan); 26 (Rigby Cooke Lawyers); 35 (Andrew Verspaandonk). See also *Dickman v Holley* [2013]

NSWSC 18 (31 January 2013) [164].

Requiring the witness to be aware that the document is a will

- 2.27 Section 8 of the Wills Act states that a witness need not be aware that the document they are signing is a will. In the consultation paper on wills the Commission asked whether this section should be amended to provide that a witness must always be aware they are witnessing a will.³⁷
- 2.28 Views expressed in submissions were mixed. While some were in favour of such a change,³⁸ others were not and highlighted disadvantages.³⁹ In particular, Moores Legal noted that, under the current law, the role of the witness is to attest that the document was executed in their presence, not that the document is valid.⁴⁰ In addition, most witnesses would already be aware that they are witnessing a will.⁴¹ Requiring witnesses to be aware that a will is being executed would not make a difference to the possibility of a will-maker being subject to undue influence.⁴² It would also be inconsistent with provisions in other states and territories.⁴³
- 2.29 The Commission agrees that amending section 8 of the Wills Act, to require witnesses to know they are witnessing a will, would not provide will-makers with greater protection from undue influence. In addition, most other states and territories have a similar provision,⁴⁴ so an amendment of this nature would undermine national consistency.

The witness-beneficiary rule

Current law

- 2.30 The witness-beneficiary rule, also called the interested witness rule,⁴⁵ was abolished in Victoria in 1997.⁴⁶
- 2.31 It originated in 1752 in England, as part of the general evidentiary principle that an interested witness is not a credible witness.⁴⁷ While the rules of evidence later changed to enable an interested witness to give evidence, the witness-beneficiary rule survived in succession law. The justification for the rule then became the avoidance of undue influence.⁴⁸
- 2.32 In Victoria, the rule originally prevented a witness or their spouse from taking a benefit under a will they had witnessed.⁴⁹ In 1977, certain exceptions to the rule were introduced,⁵⁰ but the rule was ultimately abolished in Victoria by the *Wills Act 1997* (Vic) on the recommendation of the Victorian Parliament Law Reform Committee.⁵¹
- 2.33 The Committee criticised the effect of the rule and concluded that anyone objecting to a benefit given to a witness to the will could challenge the will on the basis that the will-maker acted under undue influence, or that they lacked knowledge of, or did not approve, the contents of the will.⁵²
- 2.34 Despite the abolition of the rule in 1997, Victorian legal practitioners still consider it good practice not to use a beneficiary as a witness to a will, to avoid any suggestion of impropriety.⁵³

37 Victorian Law Reform Commission, above n 8, 19.

38 Submissions 4 (name withheld); 19 (Association of Independent Retirees); 21 (Office of the Public Advocate); 26 (Rigby Cooke Lawyers); 31 (Seniors Rights Victoria); 38 (Liz Burton); 39 (Carolyn Sparke SC); 40 (Janice Brownfoot).

39 Submissions 8 (Patricia Strachan); 14 (Commercial Bar Association); 25 (Moores Legal); 32 (The Institute of Legal Executives); 33 (State Trustees Limited); 35 (Andrew Verspaandonk).

40 Submission 25 (Moores Legal).

41 Submissions 25 (Moores Legal); 30a (Law Institute of Victoria); 35 (Andrew Verspaandonk).

42 Submissions 33 (State Trustees Limited); 35 (Andrew Verspaandonk).

43 Submission 36 (Law Society of New South Wales).

44 *Wills Act 1968* (ACT) s 13; *Succession Act 2006* (NSW) s 7; *Wills Act* (NT) s 9; *Succession Act 1981* (Qld) s 10(5); *Wills Act 2008* (Tas) s 9.

45 In this report, the Commission uses the term witness-beneficiary rule.

46 *Wills Act 1997* (Vic) s 11.

47 Law Reform Committee, *Reforming the Law of Wills*, above n 7, 84–7.

48 National Committee for Uniform Succession Laws, above n 5, 18; Law Reform Committee, above n 7, 87; D E C Yale, 'Witnessing Wills and Losing Legacies' (1984) 100 *Law Quarterly Review* 453, 462.

49 *Wills Act 1958* (Vic) s 13, as enacted.

50 *Wills Act 1958* (Vic) s 13(3), as amended; *Administration and Probate Act 1958* (Vic) pt V.

51 Law Reform Committee, *Reforming the Law of Wills*, above n 7, 94.

52 Ibid 88–9, 92.

53 Submissions 25 (Moores Legal); 26 (Rigby Cooke Lawyers).

National Committee for Uniform Succession Laws

- 2.35 At the time that the National Committee for Uniform Succession Laws considered the witness-beneficiary rule, two Australian jurisdictions had abolished the rule⁵⁴ and most others had a modified version of the rule that allowed for some exceptions.⁵⁵
- 2.36 While the National Committee acknowledged some disadvantages of the rule, it recommended retaining it in a modified form that allowed for some exceptions.⁵⁶ It recommended that a gift to a witness should not fail in any of the following cases:
- at least two of the witnesses are not beneficiaries
 - everyone who would benefit from the failed gift consents in writing to the gift not failing
 - the court is satisfied that the will-maker knew and approved of the gift and that it was made freely and voluntarily by the will-maker.⁵⁷

Other jurisdictions

- 2.37 South Australia, Western Australia and the Australian Capital Territory have also abolished the witness-beneficiary rule, bringing the number of jurisdictions to have done so to four.⁵⁸
- 2.38 In the other four Australian jurisdictions, the rule exists in the form recommended by the National Committee for Uniform Succession Laws.⁵⁹ In a number of cases in those jurisdictions, a witness-beneficiary has been able to keep a gift under a will where they have been able to demonstrate that the will-maker knew and approved of the gift and that it was made freely and voluntarily.⁶⁰

Views and conclusions

- 2.39 The Commission's consultation paper on wills asked whether the witness-beneficiary rule should be reintroduced in Victoria in the form recommended by the National Committee for Uniform Succession Laws.
- 2.40 The Commission received mixed views on the desirability of this change.⁶¹ The following reasons were given in favour of reintroduction:
- Reintroducing the rule could minimise the risk of undue influence.⁶²
 - Smaller estates cannot bear the cost of a challenge to a will based on suspicious circumstances or undue influence.⁶³
 - Other legal documents require independent witnesses, in particular powers of attorney.⁶⁴
 - Reintroducing the rule would promote national consistency.⁶⁵
 - There would be more opportunity for independent scrutiny of a will where there are two independent witnesses.⁶⁶
 - Due to the exceptions to the rule, where a witness is properly left a gift it will survive either by consent of the other beneficiaries or by court order.⁶⁷

54 South Australia and the Australian Capital Territory: National Committee for Uniform Succession Laws, above n 5, 19.

55 National Committee for Uniform Succession Laws, above n 5, 19.

56 Ibid 22.

57 Ibid.

58 *Wills Act 1936* (SA) s 17; *Wills Act 1968* (ACT) s 15. Section 13 of the *Wills Act 1970* (WA) was repealed in 2003.

59 *Succession Act 2006* (NSW) s 10; *Succession Act 2006* (Qld) s 11; *Wills Act 2000* (NT) s 12; *Wills Act 2008* (Tas) s 12.

60 See *Tonkiss v Graham* [2002] NSWSC 891 (4 October 2002); *Miller v Miller* [2000] NSWSC 767 (2 August 2000).

61 Submissions 21 (Office of the Public Advocate); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 30a (Law Institute of Victoria); 31 (Seniors Rights Victoria); 36 (Law Society of New South Wales); 38 (Liz Burton). Some members of the Commission's succession laws advisory committee supported reintroduction of the witness-beneficiary rule, but most were opposed to it: Advisory Committee (Meeting 2).

62 Submissions 21 (Office of the Public Advocate); 26 (Rigby Cooke Lawyers); 31 (Seniors Rights Victoria).

63 Advisory Committee (Meeting 2).

64 Ibid.

65 Submissions 25 (Moores Legal); 26 (Rigby Cooke Lawyers).

66 Submission 25 (Moores Legal).

67 Ibid.

- 2.41 Others opposed the reintroduction of the rule in any form in Victoria.⁶⁸ They noted that:
- The person trying to persuade the will-maker to make their will in a particular way is more likely than a witness to subject the will-maker to undue influence.⁶⁹
 - The rule can produce injustice in innocent situations⁷⁰ and may interfere with the freedom to make a will, defeating the will-maker's wishes where there is no real issue of impropriety.⁷¹
 - The rule may result in increased litigation to determine whether an exception applies.⁷²
 - Reintroduction of the rule would not advance national consistency, as the rule does not apply in four jurisdictions.⁷³
 - The existence of a witness-beneficiary may provide some evidence of suspicious circumstances or undue influence, so a will could still be challenged by these other means.⁷⁴
- 2.42 The Commission agrees that there are compelling arguments against reintroducing the witness-beneficiary rule. In particular, the Commission does not believe that the rule is an effective measure to prevent or remedy undue influence. Most of those seeking to exercise undue influence take steps to disguise their involvement in the will-making process, including by refraining from acting as a witness to the will.⁷⁵ There were no witness-beneficiaries in any of the recent cases where the Court found undue influence.⁷⁶ Even if the rule could prevent undue influence, it would constitute a blunt instrument for the protection of vulnerable will-makers, given that it would apply to all wills under which a witness receives a benefit.
- 2.43 Further, the rule particularly disadvantages people who make a will themselves (a home-made will) without the assistance of a legal practitioner.⁷⁷ In the Commission's view, the will-making process should not be made significantly more difficult, and people should have the choice to make their wills at home without the assistance of a legal practitioner. The Commission agrees that the rule has the potential to undermine the will-maker's intentions, particularly where the witness-beneficiary has insufficient funds to bring a court case arguing that an exception applies.
- 2.44 Therefore, the Commission does not recommend reintroduction of the witness-beneficiary rule. In the Commission's view, changes that focus on preventing undue influence, and possibly also redefining the existing doctrine of undue influence, would be more effective in protecting older and vulnerable will-makers from undue influence.

68 Consultation 4 (Legal practitioners from the Goulburn Valley and Loddon Campaspe Community Legal Centres). Submissions 4 (name withheld); 14 (Commercial Bar Association); 32 (The Institute of Legal Executives); 35 (Andrew Verspaandonk); 39 (Carolyn Sparke SC).

69 Submission 35 (Andrew Verspaandonk); consultation 4 (Legal practitioners from the Goulburn Valley and Loddon Campaspe Community Legal Centres); Advisory Committee (Meeting 2).

70 Submissions 32 (The Institute of Legal Executives); 39 (Carolyn Sparke SC). Some members of the Commission's succession laws advisory committee also expressed this view: Advisory Committee (Meeting 2).

71 Submission 32 (The Institute of Legal Executives). Some members of the Commission's succession laws advisory committee also expressed this view: Advisory Committee (Meeting 2).

72 Submissions 14 (Commercial Bar Association); 35 (Andrew Verspaandonk).

73 Submission 14 (Commercial Bar Association).

74 Submission 35 (Andrew Verspaandonk). Some members of the Commission's succession laws advisory committee also expressed this view: Advisory Committee (Meeting 2).

75 Neville Crago, 'Reform of the Law of Wills' (1995) 25 *University of Western Australia Law Review* 255, 262; Law Reform Committee, *Inquiry into Powers of Attorney*, above n 21, 88.

76 See *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009); *Dickman v Holley* [2013] NSWSC 18 (31 January 2013); *Brown v Wade* [2010] WASC 367 (9 December 2010); *Petrovski v Nasev* [2011] NSWSC (17 November 2011) 1275. See also submission 35 (Andrew Verspaandonk).

77 Law Reform Committee, *Inquiry into Powers of Attorney*, above n 21, 91; Law Reform Advisory Committee for Northern Ireland, *Attestation of Wills*, Discussion Paper No 12 (2005) 9.

Prevention of undue influence through other changes to the will-making process

- 2.45 The formalities for making a valid will, including the witnessing requirements discussed above, are intended to reduce the risk of undue influence and fraud when a will is being made. However, increasing concern that older and vulnerable will-makers are being subjected to pressure about their wills has led some judges and commentators to suggest other ways of reducing the risk of undue influence in the will-making process.⁷⁸ The key suggestion in this area of prevention is to ensure that legal practitioners take greater care when making wills.
- 2.46 In Victoria, legal practitioners must comply with professional conduct and practice rules. Rule 10 of the *Professional Conduct and Practice Rules* is the only rule that specifically applies to the drafting of a will. The rule only deals with legal practitioners who receive a benefit under a will (for example, an entitlement to professional remuneration where the legal practitioner is appointed as executor) and does not impose any other obligations on legal practitioners drafting wills.⁷⁹
- 2.47 In the consultation paper on wills, the Commission raised various ways that the rules for legal practitioners drafting wills could be strengthened. This section outlines the views of those consulted by the Commission and the Commission's recommendations to improve the will-drafting process in order to reduce the risk of undue influence.

Requirement to obtain a medical capacity assessment

- 2.48 In the consultation paper on wills, the Commission asked whether a legal practitioner who is asked to draft a will by a client should be required to obtain a medical assessment of the client's capacity in particular circumstances.
- 2.49 Some of the responses suggested that this would be a useful change, for example where the will-maker is over a particular age (80 or 85)⁸⁰ or where the will-maker has another known vulnerability such as being in a medical facility or taking medication that affects decision-making.⁸¹
- 2.50 Others put the view that this additional requirement would unnecessarily complicate the process of getting a will made by a legal practitioner.⁸² It may make it more likely that a person makes a home-made will without the scrutiny of a legal practitioner.⁸³ It also undermines the presumption that people have capacity and may act as a disincentive to having a will made at all.⁸⁴ Some also questioned whether medical practitioners would be prepared to undertake this work and what the costs associated with the report would be.⁸⁵
- 2.51 The observation was also made that a capacity assessment is not likely to detect undue influence, which can occur where a will-maker clearly has testamentary capacity.⁸⁶ Susceptibility to undue influence is not necessarily a medical issue.⁸⁷ Further, the requirement would provide no protection to will-makers who do not consult a legal practitioner.⁸⁸

78 See, eg, *Pates v Craig* (Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995); Roger Kerridge, 'Wills Made in Suspicious Circumstances: The Problem of the Vulnerable Testator' (2000) 59(2) *Cambridge Law Journal* 310, 333; Fiona R Burns, 'Elders and Testamentary Undue Influence in Australia' (2005) 28 *University of New South Wales Law Journal* 145, 174 ('Elders and Testamentary Undue Influence').

79 Law Institute of Victoria, *Professional Conduct and Practice Rules* (at 30 June 2005) r 10.

80 But note discussion of introducing special requirements where the will-maker is over a certain age at [2.11].

81 Submissions 14 (Commercial Bar Association); 26 (Rigby Cooke Lawyers).

82 Submissions 25 (Moores Legal); 30a (Law Institute of Victoria); 32 (The Institute of Legal Executives).

83 Submission 8 (Patricia Strachan).

84 Submissions 21 (Office of the Public Advocate); 32 (The Institute of Legal Executives); 33 (State Trustees Limited).

85 Submissions 25 (Moores Legal); 30a (Law Institute of Victoria); 31 (Seniors Rights Victoria); 32 (The Institute of Legal Executives); 35 (Andrew Verspaandonk); 40 (Janice Brownfoot).

86 Submissions 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 32 (The Institute of Legal Executives); 35 (Andrew Verspaandonk).

87 Submission 35 (Andrew Verspaandonk).

88 Submissions 30a (Law Institute of Victoria); 31 (Seniors Rights Victoria).

- 2.52 Submissions recognised that Victorian legal practitioners already consider it good practice to obtain a medical capacity assessment where a client's capacity is in doubt.⁸⁹ The Commission agrees, and notes that the Law Institute of Victoria is preparing guidelines that will assist legal practitioners in deciding what to do in these circumstances. The Commission therefore does not recommend introducing an additional requirement that a medical assessment of capacity be obtained for all will-makers in a particular category.

Guidelines on minimising undue influence

- 2.53 The Commission also sought comments on whether guidelines for legal practitioners on minimising the risk of undue influence would be useful.
- 2.54 There is general support for the idea.⁹⁰ Submissions made many suggestions about what professional guidelines on undue influence should contain, including:
- the importance of taking instructions from the will-maker alone⁹¹
 - common characteristics of how a person subject to undue influence may present⁹²
 - common warning signs of undue influence, for example a sudden change in beneficiary from close family member to recent acquaintance⁹³
 - the role of interpreters who accompany the will-maker⁹⁴
 - the importance of making enquiries about previous wills, and possibly obtaining previous wills⁹⁵
 - the need to take and retain detailed file notes in the event that a will is challenged.⁹⁶
- 2.55 Submissions also highlighted the need for further education and training of legal practitioners in this area.⁹⁷
- 2.56 Although the Law Institute of Victoria is preparing guidelines for legal practitioners on assessing a client's capacity when it is in doubt,⁹⁸ they will not specifically deal with undue influence.
- 2.57 The Commission therefore recommends that the Law Institute of Victoria prepare best practice guidelines for legal practitioners that are designed to reduce the risk of undue influence. These guidelines would be in addition to the forthcoming guidelines on capacity and should cover, among other things:
- the importance of taking detailed instructions from the will-maker alone
 - common risk factors associated with undue influence
 - the need to keep detailed file notes and make enquiries regarding previous wills.
- 2.58 In preparing the guidelines on undue influence, the Law Institute of Victoria will be able to draw from existing guides and resources that document best practice when taking instructions for a will.⁹⁹

89 Submissions 21 (Office of the Public Advocate); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 30a (Law Institute of Victoria); 32 (The Institute of Legal Executives). See also *Dickman v Holley* [2013] NSWSC 18 (31 January 2013) [164].

90 Submissions 14 (Commercial Bar Association); 21 (Office of the Public Advocate); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 31 (Seniors Rights Victoria); 32 (The Institute of Legal Executives); 35 (Andrew Verspaandonk); 40 (Janice Brownfoot).

91 Submissions 1 (Legal Services Commissioner); 14 (Commercial Bar Association); 21 (Office of the Public Advocate); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 31 (Seniors Rights Victoria).

92 Submissions 14 (Commercial Bar Association); 26 (Rigby Cooke Lawyers).

93 Submissions 14 (Commercial Bar Association); 32 (The Institute of Legal Executives); 40 (Janice Brownfoot).

94 Submission 14 (Commercial Bar Association).

95 Submissions 21 (Office of the Public Advocate); 25 (Moores Legal); 26 (Rigby Cooke Lawyers).

96 Submissions 1 (Legal Services Commissioner); 25 (Moores Legal).

97 Submissions 31 (Seniors Rights Victoria); 33 (State Trustees Limited); 40 (Janice Brownfoot). This point was also made by some members of the Commission's succession laws advisory committee: Advisory Committee (Meeting 2).

98 Submission 30a (Law Institute of Victoria).

99 See, eg, British Columbia Law Institute, *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide*, Report No 61 (2011); Nick O'Neill and Carmel Peisah, *Capacity and the Law* (Sydney University Press in Co-operation with the Australian Legal Information Institute (AustLII), 2011) ch 4; Kenneth Shulman et al, 'Assessment of Testamentary Capacity and Vulnerability to Undue Influence' (2007) 164(5) *American Journal of Psychiatry* 725.

Recommendation

- 1 The Law Institute of Victoria should prepare best practice guidelines for legal practitioners on the detection and prevention of undue influence when preparing a will. These guidelines should cover such matters as:
 - (a) the importance of taking detailed instructions from the will-maker alone
 - (b) common risk factors associated with undue influence
 - (c) the need to keep detailed file notes and make inquiries regarding previous wills.

Doctrine of undue influence

- 2.59 According to the doctrine of undue influence that applies in probate proceedings, undue influence involves the imposition of pressure on a person that causes them to make a will that does not reflect their true wishes. In the consultation paper on wills, the Commission asked whether this common law doctrine ('probate undue influence') should be changed.
- 2.60 The main problem with probate undue influence is that it has been too difficult to prove.¹⁰⁰ This may lead to the Court upholding a will that does not in fact reflect the will-maker's true intentions.¹⁰¹ This is particularly concerning given the ageing population and increasing vulnerability of older people making wills. As the population ages, there may be an increasing number of people who, despite having testamentary capacity, are vulnerable to pressure from relatives, caregivers and others.¹⁰²
- 2.61 Undue influence is defined differently in equity¹⁰³ and is not as difficult to prove. This section outlines the legal definition of undue influence in both probate and equity, the law in other jurisdictions and the views of those consulted by the Commission on Victoria's undue influence law. It also outlines the Commission's views on making it easier for a person to challenge a will based on undue influence.

100 Matthew Tyson, 'An Analysis of the Differences Between the Doctrine of Undue Influence with Respect to Testamentary and Inter Vivos Dispositions' (1997) 5 *Australian Property Law Journal* 1, 7; Pauline Ridge, 'Equitable Undue Influence and Wills' (2004) 120 *Law Quarterly Review* 617, 625; John Meredith, 'Miami Advice or California Dreaming: A Statutory Presumption of Testamentary Undue Influence in Australia?' (2011) 31 *Queensland Lawyer* 170, 170; Barbara Hamilton, 'The Doctrine of Unconscionable Bargains in Equity: Potent Sword for Estate Lawyers' (2007) 27 *Queensland Lawyer* 180, 187; Burns, 'Elders and Testamentary Undue Influence', above n 78, 184.

101 Kerridge, above n 78, 310; Pauline Ridge, 'Equitable Undue Influence and Wills' (2004) 120 *Law Quarterly Review* 617; Burns, 'Elders and Testamentary Undue Influence', above n 78, 145; O'Neill and Peisah, above n 99, ch 4.

102 Burns, 'Elders and Testamentary Undue Influence', above n 78, 184.

103 Equity is the system of law, separate from common law, which 'supplements, corrects, and controls the rules of common law': Peter Butt and Peter Nygh (eds), *Encyclopaedic Australian Legal Dictionary (online)* (LexisNexis Butterworths, at 20 March 2012). In this sense, 'common law' refers to 'the law laid down by the common law courts': Trischa Mann and Audrey Blunden (eds), *Australian Law Dictionary* (Oxford, 2010).

Probate undue influence

- 2.62 In Victoria, a will or part of a will may be invalid because of undue influence. The doctrine of undue influence is part of the common law and is not referred to in legislation. Traditionally, undue influence has been considered difficult to prove¹⁰⁴ and ‘virtually a dead letter’ in probate law.¹⁰⁵ Until the Victorian case of *Nicholson v Knaggs* in 2009, there had been only three successful cases of undue influence in relation to wills in Australia—all in the 1800s.¹⁰⁶ Since the decision in *Nicholson v Knaggs* there have been three further successful cases of undue influence in Australia¹⁰⁷ and one in the United Kingdom.¹⁰⁸
- 2.63 Undue influence as a legal concept is distinct from want of testamentary capacity and want of knowledge and approval, although the party challenging a will often raises these issues together.¹⁰⁹ A will-maker must have testamentary capacity in order to be subject to undue influence. If the will-maker does not have testamentary capacity then the will is invalid in any event.

Definition of undue influence

- 2.64 Traditionally, a party seeking to prove probate undue influence needs to demonstrate that coercion occurred.¹¹⁰ The influencer must have overborne the free will of the will-maker so that the will-maker was coerced into doing something they did not wish to do.¹¹¹ Power to control the will-maker is not enough to establish coercion.¹¹² This led some to observe that the law permitted or even encouraged some form of manipulative conduct by potential beneficiaries.¹¹³
- 2.65 In *Nicholson v Knaggs*, Justice Vickery defined ‘undue influence’ by emphasising that:
- The key concept is that of ‘influence’. The influence moves from being benign and becomes undue at the point where it can no longer be said that in making the testamentary instrument the exercise represents the free, independent and voluntary will of the [will-maker]. It is the effect rather than the means which is the focus of the principle.¹¹⁴

104 *Revie v Druitt* [2005] NSWSC 902 (8 September 2005) [54]; *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136 (15 June 2007) [70]; New South Wales Law Reform Commission, *Wills: Execution and Revocation*, Report No 47 (1986) [8.34]; Prue Vines, ‘Challenging the Testator’s Mind by Challenging Lifetime Transactions: *Bridgewater v Leahy* as Backdoor Probate Law?’ (2003) 2 *Australian Property Law Journal* 1, 2; Barbara Hamilton, ‘The Doctrine of Unconscionable Bargains in Equity: Potent Sword for Estate Lawyers’ (2007) 27 *Queensland Lawyer* 180, 180.

105 New South Wales Law Reform Commission, *Wills: Execution and Revocation*, Report No 47 (1986) [8.32]; Pauline Ridge, ‘Equitable Undue Influence and Wills’ (2004) 120 *Law Quarterly Review* 617, 622.

106 *Callaghan v Myers* (1880) 1 NSWLR 351; *Buckley v Millar* (1869) NSWSCR 74; *In the Estate of White* (1892) 18 VLR 715.

107 *Dickman v Holley* [2013] NSWSC 18 (31 January 2013); *Brown v Wade* [2010] WASC 367 (9 December 2010); *Petrovski v Nasev* [2011] NSWSC (17 November 2011) 1275.

108 *Schrader v Schrader* [2013] EWHC 466 (Ch).

109 See, eg, *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009); *Tobin v Ezekiel* [2011] NSWSC 81 (1 March 2011); *Brown v Wade* [2010] WASC 367 (9 December 2010); *Brand v Brand* (Unreported, Supreme Court of New South Wales, Rolfe J, 10 December 1991).

110 *Boyse v Rossborough* (1857) VI H.L.C. 1192, 1211; *Wingrove v Wingrove* (1885) 11 PD 81, 82; *Parfitt v Lawless* (1872) LR 2 P&D 462, 470; *Craig v Lamoureux* [1920] AC 349, 357; *Petrovski v Nasev* [2011] NSWSC 1275 (17 November 2011) [264]. Fiona Burns notes that some colonial cases from the 1800s went beyond coercive conduct only and looked at all the circumstances of the case, but this position was later rejected in Australia: Burns, ‘Elders and Testamentary Undue Influence’, above n 78, 175.

111 *Hall v Hall* (1868) LR 1 P&D 481, 482; *Wingrove v Wingrove* (1885) 11 PD 81, 82; *In the will of Wilson* (1897) 23 VLR 197, 198–9; *Revie v Druitt* [2005] NSWSC 902 (8 September 2005) [51]; *Roebuck v Smoje* [2000] WASC 312 (20 December 2000) [127]; *Re Smallwood* [2008] VSC 74 (18 March 2008) [8].

112 *Revie v Druitt* [2005] NSWSC 902 (8 September 2005) [53]; *De Bruin v De Bruin* [2004] WASC 20 (20 February 2004) [17]; *Craig v Lamoureux* [1920] AC 349, 357; *Wingrove v Wingrove* (1885) 11 PD 81, 82.

113 New South Wales Law Reform Commission, above n 105, [8.34]; Richard Boaden, ‘Undue Influence in Relation to Wills’ (1994) 68 *Law Institute Journal* 56, 57; Kerridge, above n 78, 328; *Brand v Brand* (Unreported, Supreme Court of New South Wales, Rolfe J, 10 December 1991) 117.

114 *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009) [150]. This passage has been cited with approval in *Birt v The Public Trustee of Queensland* [2013] QSC 13 (11 February 2013) [97].

Standard of proof

- 2.66 The traditional position has been that, where there is only circumstantial evidence, undue influence must be the only explanation for the existence of the will.¹¹⁵ In *Nicholson v Knaggs*, Justice Vickery noted that this standard is much higher than the usual civil standard of proof. He held that the correct test is:
- Where there is direct evidence: whether, on the balance of probabilities, the will of the will-maker was overborne to the requisite degree by conduct proven by the direct evidence.
 - Where there is circumstantial evidence: whether the circumstances raise a more probable inference in favour of what is alleged than not, after the evidence has been evaluated as a whole.¹¹⁶
- 2.67 Following *Nicholson v Knaggs*, probate undue influence may now be easier to prove in Victoria.¹¹⁷

Burden of proof

- 2.68 The burden of proof is on the person alleging undue influence.¹¹⁸ This is in contrast to want of knowledge and approval, where the burden of proof is on the person seeking to uphold the will. It is also in contrast to equitable undue influence for lifetime transactions, where the burden of proof is on the person seeking to retain the gift.

Equitable undue influence

- 2.69 While sharing a common title, the doctrines of undue influence in equity and undue influence in probate are based on different principles. The equitable doctrine of undue influence applies to transactions that occur during a person's lifetime. A common suggestion for reform is that this equitable doctrine should also apply to wills.¹¹⁹ This section outlines the equitable doctrine of undue influence.

Definition of undue influence

- 2.70 The equitable doctrine of undue influence allows a lifetime gift or transaction to be set aside where a person is in a position of influence over the donor, unless the person who benefits can satisfy the Court that no undue influence was used.

¹¹⁵ 'It is not sufficient to show that the circumstances attending [the will's] execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis': *Boyse v Rossborough* (1857) VI H.L.C. 1192, 1212; 10 ER 1192, 1212. Followed in: *In the will of Boyd* (1872) VLR (L, E & M) 46, 48; *Craig v Lamoureux* [1920] AC 349, 357; *Winter v Crichton* (1991) 23 NSWLR 116, 121. Fiona Burns has noted that some colonial cases from the 1800s held that undue influence was 'the most likely explanation' for the existence of the will: Burns, 'Elders and Testamentary Undue Influence', above n 78, 154.

¹¹⁶ *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009) [116], [127]. The decision in the Victorian case of *Nicholson v Knaggs* has been applied in Western Australia: *Brown v Wade* [2010] WASC 367 (9 December 2010).

¹¹⁷ See, eg, Andrew Verspaandonk, 'Testamentary Undue Influence: Back to the Future' (Paper presented at the Third Annual Wills and Estates Disputes Intensive: A Conference by Television Education Network, Gold Coast, Queensland, 24 March 2010) 61.

¹¹⁸ *Revie v Druitt* [2005] NSWSC 902 (8 September 2005) [51]; *Winter v Crichton* (1991) 23 NSWLR 116, 121; *Re Smallwood* [2008] VSC 74 (18 March 2008) [9]; *Brand v Brand* (Unreported, Supreme Court of New South Wales, Rolfe J, 10 December 1991) 118; *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009) [108]; *Parfitt v Lawless* (1872) LR 2 P&D 462, 470.

¹¹⁹ New South Wales Law Reform Commission, above n 105, [8.34]; Ridge, above n 105; Barbara Hamilton, 'The Doctrine of Unconscionable Bargains in Equity: Potent Sword for Estate Lawyers' (2007) 27 *Queensland Lawyer* 180, 187; British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework*, Report No 45 (2006) 53–4.

- 2.71 A position of influence includes:
- Categories of presumed influence of one person over the other. These include parent and minor child, doctor and patient, legal practitioner and client.¹²⁰
 - A relationship that is proved to be one of ascendancy, power or domination on the one hand, and dependence or subjection on the other.¹²¹
- 2.72 There is no need for the weaker party to show any wrongful act or threat or even that the stronger party did in fact dominate the weaker party.¹²²

Burden of proof

- 2.73 Where the weaker party has established that there is a relationship of influence, it will be presumed that undue influence was applied by the stronger party. The stronger party must then satisfy the Court that the transaction was the free and independent act of a person exercising judgment, in order to rebut the presumption of undue influence.¹²³ Evidence that the person received independent advice is one way of proving this.¹²⁴
- 2.74 Undue influence may be presumed even where the weaker party is eager for the transaction to occur.¹²⁵

Adoption of equitable undue influence in probate in British Columbia

- 2.75 To overcome the inflexibility of probate undue influence, the Canadian province of British Columbia has passed legislation that will introduce the equitable doctrine of undue influence into the probate context.¹²⁶ The new legislation will come into force in 2014¹²⁷ and provides that:

52 In an action, if a person claims that a will or any provision of it resulted from another person

- (a) being in a position where the potential for dependence or domination of the will-maker was present, and
- (b) using that position to unduly influence the will-maker to make the will or the provision of it that is challenged,

and establishes that the other person was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will or the provision of it that is challenged or to uphold the gift has the onus of establishing that the person in the position where the potential for dependence or domination of the will-maker was present did not exercise undue influence over the will-maker with respect to the will or the provision of it that is challenged.¹²⁸

120 *Anderson v Anderson* [2013] QSC 008 (22 February 2013) [55]; *Mclvor v Westpac Banking Corporation* [2012] QSC 404 (14 December 2012) [14]; *Courtney v Powell* [2012] NSWSC 460 [38] (11 May 2012); G E Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) 221.

121 *Anderson v Anderson* [2013] QSC 008 (22 February 2013) [54]; 'confidence, control, domination or influence': *Mclvor v Westpac Banking Corporation* [2012] QSC 404 (14 December 2012) [36]; *Anderson v McPherson (No 2)* [2012] WASC 19 (25 January 2012) [247]–[248]; R P Meagher, J D Heydon and M J Leeming, *Equity, Doctrines and Remedies* (Butterworths LexisNexis, 2002) 514; G E Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) 221.

122 Matthew Tyson, 'An Analysis of the Differences Between the Doctrine of Undue Influence with Respect to Testamentary and Inter Vivos Dispositions' (1997) 5 *Australian Property Law Journal* 1, 3; Fiona R Burns, 'Undue Influence Inter Vivos and the Elderly' (2002) 26 *Melbourne University Law Review* 499, 507; G E Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) 217.

123 Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2nd ed, 2013) 231.

124 *Mclvor v Westpac Banking Corporation* [2012] QSC 404 [20]; G E Dal Pont, above n 122, 225–6; Michael Evans and Bradley Jones, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2011) [15.21].

125 Ridge, above n 105, 621.

126 *Wills, Estates and Succession Act*, SBC 2009, c 13.

127 Ministry of Justice (British Columbia), 'Date Set for Modernized Wills and Estate Law' (Media Release, 28 March 2013).

128 *Wills, Estates and Succession Act*, SBC 2009, c 13, s 52.

Views and conclusions

- 2.76 Views expressed in submissions and consultations were divided on the question of whether the equitable doctrine of undue influence should be applied in probate. Some saw advantages in such a change, while others were concerned that the equitable doctrine is not appropriate to the probate context.
- 2.77 Those who opposed the idea drew attention to the different contexts in which a person gives a gift during their lifetime and makes a will that leaves a gift after they die:
- A presumption of influence is less relevant to a gift in a will, as a person must leave their property to someone at the end of their life. In contrast, there is usually no clear benefit or reason to give away assets during a person's lifetime where the person may be left in need as a result.¹²⁹
 - Beneficiaries will often legitimately have influence over a will-maker, particularly if they are caring for them in the last years of their life. A presumption of undue influence arising out of these relationships may disturb legitimate gifts and interfere with testamentary freedom.¹³⁰
 - In the case of a lifetime transaction, the weaker party can usually speak for themselves regarding the pressure that was placed on them to enter into a transaction. The will-maker will not be able to provide evidence of their intention or motivation by way of rebuttal of the presumption.¹³¹
 - The equitable doctrine does not focus on improper influence, but looks instead to the conscience of the stronger party. A carer may exercise influence over the will-maker to have a will made but not to have the will include particular provisions. This is not improper but may raise a presumption of undue influence in equity.¹³²
 - Recent decisions suggest that probate undue influence is no longer so difficult to prove and that the common law is already providing better protection for vulnerable will-makers.¹³³
- 2.78 Others noted that there would be advantages in applying the equitable doctrine to probate:
- It would allow for greater scrutiny of wills and may deter undue influence, as it would be easier to prove.¹³⁴
 - It would encourage the use of independent advisors in the making of wills.¹³⁵
 - It would promote consistency in the law, particularly where property is given away close to death.¹³⁶
 - It would align with the separate but associated doctrine of unconscionable dealing, which arguably applies in the probate context.¹³⁷

129 Consultation 1 (Wills roundtable). Submissions 35 (Andrew Verspaandonk); 39 (Carolyn Sparke SC). See also Tyson, above n 122, 10; Burns, 'Elders and Testamentary Undue Influence', above n 78, 153.

130 Advisory Committee (Meeting 2). Submissions 33 (State Trustees Limited); 35 (Andrew Verspaandonk); 39 (Carolyn Sparke SC). See also Fiona R Burns, 'Reforming Testamentary Undue Influence in Canadian and English Law' (2006) 29 *Dalhousie Law Journal* 455, 469, 473; Prue Vines, 'Challenging the Testator's Mind by Challenging Lifetime Transactions: *Bridgewater v Leahy* as Backdoor Probate Law?' (2003) 2 *Australian Property Law Journal* 1, 11; Burns, 'Elders and Testamentary Undue Influence', above n 78, 152.

131 See, eg, *Craig v Lamoureux* [1920] AC 349, 356; Fiona R Burns, 'Reforming Testamentary Undue Influence in Canadian and English Law' (2006) 29 *Dalhousie Law Journal* 455, 469; Prue Vines, 'Challenging the Testator's Mind by Challenging Lifetime Transactions: *Bridgewater v Leahy* as Backdoor Probate Law?' (2003) 2 *Australian Property Law Journal* 1, 11.

132 Consultation 1 (Wills roundtable); submission 35 (Andrew Verspaandonk).

133 Submissions 35 (Andrew Verspaandonk); 39 (Carolyn Sparke SC).

134 Consultation 1 (Wills roundtable). Submissions 26 (Rigby Cooke Lawyers); 30a (Law Institute of Victoria); 31 (Seniors Rights Victoria).

135 New South Wales Law Reform Commission, above n 105, [8.34]; submission 30a (Law Institute of Victoria).

136 Ridge, above n 105, 617; submission 25 (Moore's Legal).

137 Advisory Committee (Meeting 2). See also *Commonwealth Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Louth v Diprose* (1992) 175 CLR 621 and, most recently, *Kakavas v Crown Melbourne Ltd* [2013] HCA 25 (5 June 2013) and the authorities discussed therein.

- 2.79 Moores Legal proposed that an exception to any presumption of undue influence should apply where a will makes a 'regular' gift.¹³⁸ For example, where a person divides their estate equally between multiple children, the person alleging undue influence would be required to prove probate undue influence.¹³⁹
- 2.80 There was also some support for having the tests adopted by Justice Vickery in *Nicholson v Knaggs* included in legislation¹⁴⁰ or for otherwise relaxing the probate doctrine.¹⁴¹
- 2.81 While the Commission can see some merit in passing legislation that makes undue influence easier to prove, either by giving statutory backing to the tests in *Nicholson v Knaggs*¹⁴² or by introducing the equitable doctrine into the probate context, it does not recommend legislative change at this time. As the recent developments in the common law probate doctrine appear to have made undue influence easier to prove, it is not necessary to enshrine it in legislation. Any statutory provision that applies equitable undue influence to probate matters would need to modify the doctrine in order to accommodate the context within which a will is made.
- 2.82 The British Columbia reform is groundbreaking and could signal a direction in the development of the law that Victoria, and other Australian jurisdictions, may want to follow. For this reason, the Commission considers that, after it has been in effect for four years, the Attorney-General should be advised about:
- the effect that the new legislation is having on protecting will-makers against undue influence
 - whether, in view of the development of the common law doctrine in Australia as well as the operation of the British Columbia legislation, a similar provision should be adopted in Victoria.
- 2.83 The Commission expects that the Department of Justice would be in a position to prepare such advice.

Recommendation

- 2 Four years after the legislation comes into effect, the Attorney-General should cause a report to be prepared on:
- (a) the operation of new legislation in British Columbia that imports the equitable doctrine of undue influence into the probate context, and
 - (b) whether a similar provision should be adopted in Victoria.

Other common law rules related to undue influence

- 2.84 In the consultation paper on wills, the Commission outlined other claims that a person may raise concerning the will of an older or vulnerable will-maker. Apart from claiming undue influence, a person may raise a claim that:
- the will-maker did not have testamentary capacity
 - the will-maker did not know and approve the contents of the will
 - the will was brought about by fraud or is a forgery.

138 Submission 25 (Moores Legal).

139 Ibid.

140 Submissions 25 (Moores Legal); 26 (Rigby Cooke Lawyers).

141 Submission 30a (Law Institute of Victoria).

142 Submissions 25 (Moores Legal); 26 (Rigby Cooke Lawyers).

- 2.85 The Commission asked whether changes to any of the relevant rules would assist in reducing the application of undue influence to older and vulnerable will-makers. There was generally little support for any changes to these rules. This section outlines the comments received and the Commission's views on each rule.

Testamentary capacity

- 2.86 In order for a will to be valid, the will-maker must have had testamentary capacity at the time it was made. The test for testamentary capacity is a common law test, classically stated in the 1870 United Kingdom case of *Banks v Goodfellow*.¹⁴³ A person must be of sound mind, memory and understanding to make a will. However, a will-maker is assumed to have been of sound mind unless evidence is presented that calls into question the person's capacity. If such evidence is presented, then the person seeking to uphold the will must establish that the will-maker had capacity to make the will.
- 2.87 According to *Banks v Goodfellow*, in order to have the necessary soundness of mind the person must:
- understand the nature and effect of a will
 - understand the nature and extent of their property
 - comprehend and appreciate the claims to which they ought to give effect
 - be suffering from no disorder of the mind or insane delusion that would result in an unwanted disposition.¹⁴⁴
- 2.88 Submissions noted that medical practitioners do not always have a good understanding of this test when asked to provide an assessment of a person's capacity.¹⁴⁵ Submissions from two barristers supported further interdisciplinary training on the test for testamentary capacity.¹⁴⁶
- 2.89 Some submissions noted that a statutory definition of testamentary capacity would be helpful to legal and medical practitioners.¹⁴⁷ Others also supported the introduction of guidelines on assessing testamentary capacity.¹⁴⁸ Most submissions that addressed this issue conveyed the view that no change to the current law is necessary or desirable.¹⁴⁹
- 2.90 The Commission agrees that there is no need to change the common law test for testamentary capacity. The forthcoming guidelines by the Law Institute of Victoria on capacity assessment, as well as further interdisciplinary training in this area, will be useful in ensuring professionals understand the requirements for testamentary capacity.

Knowledge and approval and suspicious circumstances

- 2.91 In order for a will to be valid, it is necessary for the person seeking a grant of probate to establish that the will-maker had knowledge of and approved the contents of their will. Complying with the formal requirements for validity (for example, the witnessing requirements) and having proof of testamentary capacity is usually enough to establish knowledge and approval.¹⁵⁰

143 (1870) LR 5 QB 549, 565 (Cockburn CJ).

144 Ibid.

145 Submissions 35 (Andrew Verspaandonk); 39 (Carolyn Sparke SC).

146 Ibid.

147 Submissions 14 (Commercial Bar Association); 25 (Moores Legal); 32 (The Institute of Legal Executives). This was also raised in consultation 4 (Legal practitioners from the Goulburn Valley and Loddon Campaspe Community Legal Centres).

148 Submissions 25 (Moores Legal); 32 (The Institute of Legal Executives); 35 (Andrew Verspaandonk). See also discussion on obtaining a medical capacity assessment at [2.48]–[2.52] above, and guidelines being prepared for legal practitioners by the Law Institute of Victoria at [2.56]–[2.57].

149 Submissions 8 (Patricia Strachan); 19 (Association of Independent Retirees); 30a (Law Institute of Victoria); 31 (Seniors Rights Victoria); 33 (State Trustees Limited); 35 (Andrew Verspaandonk); 36 (Law Society of New South Wales); 39 (Carolyn Sparke SC).

150 *Nock v Austin* (1918) 25 CLR 519, 528.

- 2.92 However, where a suspicious circumstance exists, the person seeking to uphold the will must affirmatively prove that there was knowledge and approval of its contents. The onus of proof is on that person, not the person challenging the will.¹⁵¹
- 2.93 The courts have not limited what situations may constitute suspicious circumstances. Courts have held the following circumstances to be suspicious, thus requiring further investigation of ‘the righteousness of the transaction’, that is to say, of the validity of the will:
- A beneficiary is involved in the will-making process, for example by witnessing the will,¹⁵² writing or preparing the will or taking the will-maker to a legal practitioner.¹⁵³
 - The will-maker is ‘blind, illiterate or mentally or physically enfeebled’.¹⁵⁴
 - The will was not read to or by the will-maker before it was executed.¹⁵⁵
 - The will changes a pattern of previous wills by cutting out ‘natural’ beneficiaries and replacing them with recent acquaintances.¹⁵⁶
- 2.94 Submissions that addressed this issue generally agreed that no changes are necessary to this area of the law.¹⁵⁷ However, some noted that guidelines covering knowledge and approval would be useful for practitioners.¹⁵⁸
- 2.95 The Commission agrees that no changes are necessary to this well settled area of the law. It would be useful for the Law Institute of Victoria to include discussion of knowledge and approval and suspicious circumstances in the recommended guidelines on undue influence.

Fraud and forgery

- 2.96 A less common basis for challenging a will is to claim that it was brought about by fraud or that it is a forgery. In the case of fraud, the person challenging the will must show that another person deceived or misled the will-maker.¹⁵⁹ For example, a person may encourage the will-maker to take a false view of a potential beneficiary or mislead the will-maker as to the nature of their relationship with a person. Unlike undue influence, the will-maker’s will is not overborne; rather, the will-maker is deceived or misled.¹⁶⁰
- 2.97 Where a person challenging a will raises the possibility that the will is a forgery, the Court must be satisfied that the document is not a forgery and was signed by the will-maker.¹⁶¹
- 2.98 Submissions that addressed this issue generally agreed that these areas of the law are well settled and do not require any change.¹⁶²
- 2.99 The Commission agrees that no changes to these areas of law are necessary to provide better protection for older and vulnerable will-makers from undue influence.

151 Ibid; *Carney v Hall* [2011] SASC 207 (30 November 2011) [13]; *Able Australia Services v Yammas* [2010] VSC 237 (3 June 2010) [7]; *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009) [152]; *Brown v Wade* [2010] WASC 367 (9 December 2010) [321].

152 *Tonkiss v Graham* [2002] NSWSC 891 (4 October 2002) [104]; *Re Emanuel* [1981] VR 113; *Miller v Miller* [2000] NSWSC 767 (2 August 2000) [33].

153 *Nock v Austin* (1918) 25 CLR 519; *Re Emanuel* [1981] VR 113; *Able Australia Services v Yammas* [2010] VSC 237 (3 June 2010) [97]; *Roebuck v Smoje* [2000] WASC 312 (20 December 2000) [94]; *Barry v Butlin* (1838) 11 Moore 480, 481; 12 ER 1089; *Tyrell v Painton* [1894] P 151 (where the beneficiary’s son wrote and attested the will).

154 *Roebuck v Smoje* [2000] WASC 312 (20 December 2000) [94]; *Able Australia Services v Yammas* [2010] VSC 237 (3 June 2010) [97]; *Shorter v Hodges* (1988) 14 NSWLR 698, 705.

155 *Able Australia Services v Yammas* [2010] VSC 237 (3 June 2010) [97]; *Roos v Kapernkow* (Unreported, Supreme Court of South Australia, Doyle CJ, 21 July 1998) 15.

156 *Petrovski v Nasev* [2011] NSWSC 1275 (17 November 2011) [259].

157 Submissions 8 (Patricia Strachan); 19 (Association of Independent Retirees); 30a (Law Institute of Victoria); 33 (State Trustees Limited); 35 (Andrew Verspaandonk); 36 (Law Society of New South Wales); 39 (Carolyn Sparke SC).

158 Submissions 14 (Commercial Bar Association); 25 (Moores Legal); 31 (Seniors Rights Victoria).

159 *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136 (15 June 2007) [61]–[65].

160 See, eg, *Robertson v Smith* [1998] 4 VR 165.

161 For more information on forgery see Rosalind Croucher and John Croucher, ‘Forgeries and Wills—A Probate Problem’ (2010) 18(1) *Australian Property Law Journal* 1.

162 Submissions 8 (Patricia Strachan); 25 (Moores Legal); 30a (Law Institute of Victoria); 33 (State Trustees Limited); 35 (Andrew Verspaandonk); 36 (Law Society of New South Wales); 39 (Carolyn Sparke SC).

Statutory wills

- 24 Introduction**
- 25 Determining the intentions of the incapacitated person**
- 26 Involvement of the incapacitated person in the decision**
- 28 Accessibility of the statutory wills process**

3. Statutory wills

Introduction

- 3.1 The Commission has been asked to review and report on ‘whether the current requirements that allow the Supreme Court to authorise wills for persons who do not have testamentary capacity should be revised’.
- 3.2 Since 1997, the Supreme Court has had the power under Part 3 of the *Wills Act 1997* (Vic) to authorise a will for a person who lacks testamentary capacity. The Court does not make a will: it determines whether to authorise a will proposed by the applicant. However these wills are commonly referred to as ‘statutory wills’.
- 3.3 The National Committee for Uniform Succession Laws recommended a statutory wills regime that is very similar to Victoria’s scheme.¹ All Australian states and territories now have a similar regime in their succession legislation.²
- 3.4 In the consultation paper on wills, the Commission examined Victoria’s statutory wills scheme in order to determine if it is operating justly, fairly and in accordance with community expectations. It identified three significant matters at the outset. First, as the Court is being asked to authorise a will for a living person, the test that the Court applies to determine the person’s intentions is of fundamental importance. Secondly, given that capacity to make decisions ranges across a broad spectrum, the ability of the person involved to give their views is a significant consideration. Thirdly, the statutory wills scheme is rarely used, so the Commission has examined its accessibility.
- 3.5 Most of those who made submissions or attended consultations told the Commission that the statutory wills system is working well and does not require any major reform. One participant at the wills roundtable suggested allowing applications to be made for a statutory will after the person has died.³ However, the Commission does not favour such a change, as it would create difficulties with overlapping family provision jurisdiction.
- 3.6 This chapter outlines the Commission’s views in relation to:
 - determining the intentions of the incapacitated person
 - involvement of the incapacitated person in decision making
 - accessibility of the statutory wills scheme.

1 National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills*, Queensland Law Reform Commission Miscellaneous Paper No 29 (1997) 40–58.

2 *Wills Act 2000* (NT) pt 3; *Succession Act 1981* (Qld) pt 2 div 4 sub-div 3; *Succession Act 2006* (NSW) ch 2 pt 2.2 div 2; *Wills Act 1968* (ACT) pt 3A; *Wills Act 2008* (Tas) pt 3; *Wills Act 1970* (WA) pt XI; *Wills Act 1936* (SA) s 7.

3 Consultation 1 (Wills roundtable). The current legislation requires that the person without capacity is alive at the time of the application: *Wills Act 1997* (Vic) s 21(3).

Determining the intentions of the incapacitated person

- 3.7 When considering whether to authorise a will proposed by the applicant, the Court must be satisfied that:
- the person does not have testamentary capacity
 - the proposed will reflects what the intentions of the person would be likely to be, or what the intentions of the person might reasonably be expected to be, if he or she had testamentary capacity
 - it is reasonable in all the circumstances for the Court to authorise the will.⁴
- 3.8 In order to determine the incapacitated person's likely intentions, the Wills Act sets out a list of information that the Court may require the applicant to provide, including:
- a reasonable estimate of the size and character of the estate
 - a draft of the proposed will
 - any evidence of the wishes of the person
 - any evidence of the likelihood of the person acquiring or regaining will-making capacity
 - the terms of any will previously made by the person
 - any evidence of the likelihood of a family provision claim being made after the person's death
 - the circumstances of any person for whom provision might reasonably be expected to be made under the will
 - details of any persons who may be entitled to claim on intestacy
 - any evidence of any gift for a charitable or other purpose that the person might reasonably be expected to give or make by will.⁵
- 3.9 The test for a court to authorise a statutory will differs in all Australian states and territories.⁶ The Commission therefore asked in the consultation paper on wills whether the National Committee for Uniform Succession Laws' proposal would be preferable to the Victorian test.⁷
- 3.10 The Victorian test requires that the proposed will reflect 'what the intentions of the person would be likely to be or what the intentions of the person might reasonably be expected to be'.⁸
- 3.11 This test is the result of a 2007 amendment made in response to the decision in *Boulton v Sanders*,⁹ in which the Victorian Court of Appeal interpreted the previous test restrictively. The amendment was designed to allow for applications where the person has never had capacity, as well as where the person lost capacity later in life.¹⁰ Accordingly, the second limb of the test (what the intentions of the person might reasonably be expected to be) is expressed in more objective terms than the first limb (what the intentions of the person would be likely to be).

4 *Wills Act 1997* (Vic) s 26. Under s 26 the Court must be satisfied about these matters as a prerequisite to granting leave to apply as contemplated by s 21(2). However, provided the Court is so satisfied, the Court may deal with the application directly: s 27(2).

5 *Ibid* s 28. This information is provided as part of the application for leave to apply for a statutory will.

6 See: *Wills Act 2000* (NT) s 21(b); *Succession Act 1981* (Qld) s 24(d); *Succession Act 2006* (NSW) s 22(b); *Wills Act 1968* (ACT) s 16E(b); *Wills Act 2008* (Tas) s 24(b); *Wills Act 1970* (WA) s 42(1)(b); *Wills Act 1936* (SA) s 7(3)(b). See also Rosalind Croucher, "An Interventionist, Paternalistic Jurisdiction?" *The Place of Statutory Wills in Australian Succession Law* (2009) 32(3) *University of New South Wales Law Journal* 674, 681.

7 Victorian Law Reform Commission, *Succession Laws: Wills*, Consultation Paper No 11 (2012) 36–9 ('*Wills Consultation Paper*').

8 *Wills Act 1997* (Vic) s 26(b).

9 (2004) 9 VR 495.

10 Victoria, *Parliamentary Debates*, Legislative Assembly, 23 May 2007, 1600 (Rob Hulls, Attorney-General).

- 3.12 In contrast, the National Committee for Uniform Succession Laws recommended that the court should be able to authorise a statutory will that 'is or might be one that would have been made' by the person if they had capacity.¹¹ This test has been adopted in the Northern Territory and Queensland.¹²
- 3.13 Submissions received by the Commission overwhelmingly supported retaining the Victorian test.¹³ There was concern that the term 'might' is too broad and could lead to wills being authorised that the incapacitated person would not have wanted.¹⁴
- 3.14 The Commission agrees that the Victorian test should be retained. While national consistency should be promoted in succession law generally, the Victorian test is preferable because it is more closely aligned with the wishes of a person who has lost capacity and more clearly allows a will to be authorised in situations where the person has never had capacity.¹⁵
- 3.15 Further, the Victorian test was developed in response to Victorian case law and the particular problem identified by that case law. The test therefore achieves a degree of certainty that could be lacking if the National Committee's recommended model were adopted.
- 3.16 The current Victorian test has also found favour in New South Wales. Justice Palmer of the Supreme Court of New South Wales noted the similarity of the Victorian test to the New South Wales test and observed that the words of the Victorian test:

[give] the court far more latitude in applying an objectively reasonable approach to identification of testamentary intention than did the words of the previous section. Indeed, the words of the new section 26(b) are very close in substance to the words of section 22(b) of the NSW Act [is, or is reasonably likely to be, one that would have been made by the person if he or she had testamentary capacity].¹⁶

Involvement of the incapacitated person in the decision

Current law

- 3.17 The Wills Act states that any person may make an application for a statutory will.¹⁷ Applications are usually made by:
- family members
 - other potential beneficiaries such as carers or friends
 - administrators, guardians or legal practitioners involved in the incapacitated person's affairs.
- 3.18 It is legitimate for a beneficiary to bring an application for a statutory will.¹⁸ Many cases are brought by people who are proposing a will under which they would receive a benefit.
- 3.19 In Victoria, the person on whose behalf a statutory will is proposed is entitled to appear when the Court considers the application.¹⁹ However, there is no statutory requirement that the person be involved in the proceedings if possible, or even informed of the proceedings. The legislation imposes no obligation on the applicant to provide the incapacitated person with information or seek to involve them in the decision.

11 National Committee for Uniform Succession Laws, above n 1, 57, Draft Wills Bill 1997 cl 21(b).

12 *Wills Act 2000* (NT) s 21(b); *Succession Act 1981* (Qld) s 24(d).

13 Submissions 14 (Commercial Bar Association); 21 (Office of the Public Advocate); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 30a (Law Institute of Victoria); 33 (State Trustees Limited); 35 (Andrew Verspaandonk); 39 (Carolyn Sparke SC); 40 (Janice Brownfoot). Two submissions supported the National Committee's approach: submissions 19 (Association of Independent Retirees); 32 (The Institute of Legal Executives).

14 Submissions 14 (Commercial Bar Association); 21 (Office of the Public Advocate); 33 (State Trustees Limited); 39 (Carolyn Sparke SC).

15 See also submissions 30a (Law Institute of Victoria); 33 (State Trustees Limited); 39 (Carolyn Sparke SC).

16 *Re Fenwick* [2009] NSWSC 530 (12 June 2009) [147]. See also *Saunders v Pedemont* [2012] VSC 574 (28 November 2012) [92].

17 *Wills Act 1997* (Vic) s 21(2).

18 *AB v CB* [2009] NSWSC 680 (20 July 2009) [23]; *Re Will of Jane* [2011] NSWSC 624 (20 July 2011) [93].

19 *Wills Act 1997* (Vic) s 29(a).

- 3.20 In contrast, the Commission has recently recommended in relation to guardianship laws that those making decisions on behalf of a person without capacity should use a ‘substituted judgment’ approach. This includes, among other things, acting in consultation with the person and encouraging the person to participate in decisions as far as is reasonably possible.²⁰

Other jurisdictions

- 3.21 Comparable statutory wills legislation in New South Wales and the Australian Capital Territory specifies that the court may order separate representation for the incapacitated person.²¹ This may occur where it appears that the interests of the incapacitated person and the applicant are in conflict.²²
- 3.22 In the United Kingdom, the incapacitated person must be given the opportunity to participate in the decision if possible.²³

Views and conclusions

- 3.23 Submissions to the Commission generally agreed that the Wills Act should specify that the Court may order separate representation for the incapacitated person, as well as allowing the person to appear.²⁴ It was noted that this would support the rights of persons with disabilities to participate in legal processes²⁵ and enhance procedural fairness.²⁶
- 3.24 Other submissions conveyed the view that an additional statutory provision allowing for separate representation would not offer any advantage over the current law,²⁷ and that a requirement for separate representation may lead to increased costs for no good reason.²⁸ It was suggested that the views of an incapacitated person who is able to express them could be presented to the Court by affidavit.²⁹
- 3.25 In the Commission’s view, the Wills Act should provide that the Court may order that the incapacitated person be separately represented. While the Court already has the power to order this under its inherent jurisdiction, explicit recognition in the Wills Act may make it more likely that the incapacitated person’s views are taken into account. While the person subject to the application does not have will-making capacity, the person may still be able to express some views or preferences that the Court could take into account.
- 3.26 The Commission notes that ordering separate representation would be in the Court’s discretion and often may not be necessary, particularly where the person is not capable of expressing any views or preferences. However, even in this situation, representation by one of the people entitled to appear (an attorney, guardian or administrator or legal practitioner)³⁰ may be desirable to defend the person’s interests—for example, in relation to the burden of a costs order.

Recommendation

- 3 The Wills Act 1997 (Vic) should expressly provide that the Court may order separate representation for the person on whose behalf an application for a statutory will is made.**

²⁰ Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) 399.

²¹ *Succession Act 2006* (NSW) s 25; *Wills Act 1968* (ACT) s 16H.

²² *AB v CB* [2009] NSWSC 680 (20 July 2009) [13]–[14].

²³ *Mental Capacity Act 2005* (UK) c 9, s 4(4).

²⁴ Submissions 8 (Patricia Strachan); 14 (Commercial Bar Association); 21 (Office of the Public Advocate); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 30a (Law Institute of Victoria); 31 (Seniors Rights Victoria); 32 (The Institute of Legal Executives); 33 (State Trustees Limited); 40 (Janice Brownfoot).

²⁵ Submissions 21 (Office of the Public Advocate); 30a (Law Institute of Victoria).

²⁶ Submission 26 (Rigby Cooke Lawyers).

²⁷ Consultation 1 (Wills roundtable).

²⁸ Submission 39 (Carolyn Sparke SC).

²⁹ *Ibid.*

³⁰ *Wills Act 1997* (Vic) ss 29(b)–(d).

Accessibility of the statutory wills process

- 3.27 Since being given the power to do so, the Supreme Court has authorised approximately 32 statutory wills in 16 years. Wills have been authorised in the following circumstances:
- removing a de facto partner from a previous will where the relationship had broken down³¹
 - removing from a previous will a husband who had been charged with the attempted murder of the incapacitated person³²
 - removing from a previous will a friend who had since misused his position as administrator by selling off the incapacitated person's property and taking the money as a loan to himself³³
 - creating a will for an incapacitated person leaving more than half the estate to a nephew by marriage who was performing a carer's role³⁴
 - remedying a current will where there may have been a problem with lack of capacity, valid execution or ademption.³⁵
- 3.28 The low number of applications for statutory wills may indicate that the system is not being used by those whom it is intended to assist, particularly given that there are many adults in Victoria who lack capacity to make or change a will.
- 3.29 The Commission was told of a number of reasons for the low number of applications. Some depend on the circumstances of the individual:
- A person's existing will or the intestacy provisions are often appropriate to the person's circumstances.³⁶
 - Many potential beneficiaries, particularly carers, would see it as inappropriate to bring an application during the person's lifetime.³⁷
 - Prospective applicants may not have access to relevant information, for example, the person's current will, details of family members and relationships or information about the person's assets.³⁸
- 3.30 Other reasons for low numbers of applications are more closely related to the statutory wills scheme:
- a lack of knowledge about the scheme, both in the legal sector and the wider community³⁹
 - uncertainty about how much an application will cost and who will be required to pay for it⁴⁰
 - the relatively small size of an estate may make the cost of an application unaffordable.⁴¹

31 *Plowright v Burge* [2005] VSC 490 (16 December 2005).

32 *De Gois v Korp* [2005] VSC 326 (18 August 2005).

33 *State Trustees Ltd v Hayden* (2002) 4 VR 229.

34 *Monger v Taylor* [2000] VSC 304 (2 August 2000).

35 Ademption is discussed in Chapter 4 of this report.

36 Consultation 1 (Wills roundtable).

37 *Ibid.*

38 Advisory Committee (Meeting 2).

39 Consultation 1 (Wills roundtable); submission 1 (Legal Services Commissioner).

40 Consultation 1 (Wills roundtable).

41 *Ibid.*

Removing the two-stage process for an application

Current law

- 3.31 The Wills Act currently provides that the Court must grant an applicant leave to apply before the applicant may apply for authorisation of a proposed will.⁴² This two-stage process was originally intended to guard against unmeritorious applications, particularly baseless claims that a person lacks testamentary capacity.⁴³
- 3.32 However, in practice the two stages are combined. Section 27(2) of the Wills Act gives the Court discretion to determine that an application for leave to apply may proceed as an application for an order authorising the proposed will. The Court has invariably used this power.
- 3.33 In a recent Victorian case, Justice Habersberger questioned the utility of the two-stage process:
- In order to obtain leave an applicant must satisfy the Court of the three critical requirements in s 26 and, if required by the Court, give the information set out in s 28, which means putting all relevant evidence before the Court. Leave should only be refused after all of these matters have been taken into account. On the other hand, once leave has been given, it is extremely unlikely, in my opinion, that an order authorising a will to be made would be refused by the Court. It is, therefore, very hard to see why the second step was thought to be necessary as it seems to me that it serves no useful purpose.⁴⁴

Views and conclusions

- 3.34 The Commission suggested in the consultation paper on wills that the two-stage process could be removed from the legislation. Of those who addressed this issue in submissions to the Commission, there was near unanimous support for the idea.⁴⁵ Submissions noted that only one hearing is held in practice⁴⁶ and that costs rules are sufficient to deter unmeritorious or vexatious applications.⁴⁷
- 3.35 The Commission agrees that the two-stage process for a statutory will application in the Wills Act is unnecessary. Applications are usually determined in the one hearing, and the legislation should be amended to reflect that practice. Including a two-stage process in the legislation may deter those who are unfamiliar with the jurisdiction from making an application, as it may seem more complicated than the process actually is. The Commission agrees that a costs order is a sufficient deterrent to vexatious or unmeritorious applications being made.

Recommendation

- 4 An application for a statutory will should be made in one stage rather than two. The requirement at section 21(2) of the *Wills Act 1997* (Vic) to seek leave to make an application for a statutory will should be repealed and consequential amendments made to sections 26–29.**

⁴² *Wills Act 1997* (Vic) ss 21, 26–9.

⁴³ *Boulton v Sanders* (2004) 9 VR 495, 499; *Monger v Taylor* [2000] VSC 304 (2 August 2000) [22].

⁴⁴ *Saunders v Pedemont* [2012] VSC 574 (28 November 2012) [9] (emphasis added).

⁴⁵ Submissions 14 (Commercial Bar Association); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 30a (Law Institute of Victoria); 32 (The Institute of Legal Executives); 39 (Carolyn Sparke SC). The Office of the Public Advocate was opposed to this change, as in its view the two-stage process can prevent vexatious or unmeritorious applications: submission 21 (Office of the Public Advocate).

⁴⁶ Submissions 25 (Moores Legal); 39 (Carolyn Sparke SC).

⁴⁷ Submission 30a (Law Institute of Victoria). Justice DeBelle in South Australia has also noted that an unsuccessful applicant will usually be required to pay costs and that this should be a sufficient disincentive to frivolous or vexatious applications being made: *Hoffman v Waters* [2007] SAS 273 (20 July 2007) [27].

Hearings at the Victorian Civil and Administrative Tribunal

- 3.36 The consultation paper on wills sought views on whether the Guardianship List of the Victorian Civil and Administrative Tribunal (VCAT) should have jurisdiction to hear statutory will applications instead of, or in addition to, the Supreme Court.⁴⁸ The Commission raised this idea in view of the low number of applications that have been heard by the Supreme Court and the possibility that a hearing at VCAT may make the system more accessible.
- 3.37 In Tasmania, jurisdiction to hear applications for statutory wills has been extended to the Guardianship and Administration Board.⁴⁹ However, the board may only hear applications relating to persons who do not have a current will. Tasmania is the only Australian jurisdiction to have extended the statutory wills jurisdiction in this way.
- 3.38 Submissions were divided on whether this would be a desirable reform. Those in favour of VCAT having jurisdiction noted that:
- VCAT is more accessible regionally than the Supreme Court⁵⁰
 - VCAT is less formal and less expensive than the Supreme Court⁵¹
 - VCAT members in the Guardianship List have experience in dealing with persons who have disabilities and lack capacity⁵²
 - senior members with legal expertise could be assigned to these matters to ensure appropriate legal analysis and resolution⁵³
 - a VCAT hearing would be useful for smaller estates where the cost of an application to the Supreme Court may not be justified.⁵⁴
- 3.39 Those who were opposed to VCAT having this jurisdiction noted that:
- VCAT members do not necessarily have expertise in succession law⁵⁵
 - VCAT is not necessarily cheaper than the Supreme Court (in particular, a barrister instructed by a solicitor may still be necessary in VCAT)⁵⁶
 - there is no requirement for VCAT to publish its decisions and its jurisprudence is therefore less developed and less consistent.⁵⁷
- 3.40 While seeing some merit in allowing applications at VCAT for approval of statutory wills, and noting that VCAT could introduce appropriate procedures and ensure that senior members with legal expertise are assigned to these matters, the Commission has concluded that this change in jurisdiction is not necessary. It is not clear that an application process at VCAT would cost less than in the Supreme Court and that the procedure would therefore be more accessible.

48 Victorian Law Reform Commission, *Wills Consultation Paper*, above n 7, 42.

49 *Wills Act 2008* (Tas) ss 29–38.

50 Consultation 3 (Legal practitioners in the Goulburn Valley region). Submission 6 (Victorian Civil and Administrative Tribunal).

51 Consultation 3 (Legal practitioners in the Goulburn Valley region). Submissions 6 (Victorian Civil and Administrative Tribunal); 21 (Office of the Public Advocate); 25 (Moores Legal); 31 (Seniors Rights Victoria).

52 Submissions 6 (Victorian Civil and Administrative Tribunal); 21 (Office of the Public Advocate).

53 Submissions 6 (Victorian Civil and Administrative Tribunal); 25 (Moores Legal).

54 Submission 31 (Seniors Rights Victoria).

55 Submissions 14 (Commercial Bar Association); 26 (Rigby Cooke Lawyers); 30a (Law Institute of Victoria); 33 (State Trustees Limited); 39 (Carolyn Sparke SC).

56 Submissions 35 (Andrew Verspaandonk); 39 (Carolyn Sparke SC).

57 Submission 39 (Carolyn Sparke SC).

Hearings on the papers

- 3.41 Another idea put forward in the consultation paper on wills was the possibility that a judge could determine unopposed statutory will applications based on written information only, with no court hearing.⁵⁸ Hearings 'on the papers' have the potential to reduce the cost of the application as no appearances would be necessary. This procedure is used in New South Wales for this type of matter.⁵⁹
- 3.42 Views on the idea were divided. Some submissions supported hearings on the papers as a way to reduce costs and improve accessibility of the statutory wills procedure.⁶⁰ The Commercial Bar Association did not support hearings on the papers and was concerned that justice should be seen to be done in open court.⁶¹ Moores Legal preferred the idea of hearings on the papers in the Supreme Court to the idea of referring the power to determine statutory wills matters to VCAT.⁶²
- 3.43 The Supreme Court noted that hearings on the papers:
- may not be sufficient to satisfy the Court that the criteria are met and all relevant interests are protected
 - would not allow for greater participation of the incapacitated person.⁶³
- 3.44 The Commission is of the view that hearings on the papers for unopposed matters would not necessarily make the statutory will procedure more accessible. While it is possible that costs may be reduced, the disadvantages outlined by the Supreme Court are sufficient to dissuade the Commission from recommending a change of practice.

Costs rules

- 3.45 There are no costs provisions in the Wills Act or the Court rules that are specific to statutory will applications. Costs are in the discretion of the Court. The starting point for determining who will pay the costs of an application is the general rule that 'costs follow the event', which means in effect that the unsuccessful party pays their own costs and most of the costs of the successful party.
- 3.46 However, the operation of this general rule is not clear where a statutory will application is successful but not contested. In this case, the costs are paid either from the estate of the incapacitated person or by the applicant.⁶⁴
- 3.47 A key difference in statutory will applications compared to usual succession law proceedings is that the incapacitated person is still alive and has care needs due to their lack of capacity. Any order that costs come from the estate of the incapacitated person will deplete the assets of a living person. This factor will weigh heavily with the Court where the estate is modest, and may lead to a successful applicant being denied costs out of the incapacitated person's estate.

58 Victorian Law Reform Commission, *Wills Consultation Paper*, above n 7, 42.

59 *Re Fenwick* [2009] NSWSC 530 (12 June 2009) [263]; *Civil Procedure Act 2005* (NSW) ss 71(d), (f).

60 Submissions 26 (Rigby Cooke Lawyers); 30a (Law Institute of Victoria); 32 (The Institute of Legal Executives); 36 (Law Society of New South Wales).

61 Submission 14 (Commercial Bar Association).

62 Submission 25 (Moores Legal).

63 Submission 37 (Supreme Court of Victoria).

64 The term 'estate' in this context is used to refer to the assets of the incapacitated person.

- 3.48 Given this key difference, the Supreme Court of Victoria has developed specific principles related to costs in statutory will applications. In *Hill v Hill*, which was a successful application by the daughter of an elderly woman who had lost capacity, Justice Byrne observed that other succession proceedings are not truly analogous in determining costs because ‘the will-maker is still alive and entitled, so long as she lives, to enjoy her assets undiminished by the burden of paying the costs of those whose claims anticipate her demise’.⁶⁵ Applicants who stand to benefit from the proposed will, whether or not they are successful, may be required to meet their own costs.
- 3.49 Justice Byrne noted that the successful applicant was a beneficiary and ‘her costs in due course may be recouped from the estate which she may inherit’.⁶⁶ The Court of Appeal has stated:
- Where an application is brought by and for the benefit of persons including the applicant, rather than by a disinterested administrator, the ordinary principles governing costs in adversarial litigation properly apply. It should not be presumed that the estate, rather than an unsuccessful applicant, will be ordered to pay the costs of the proceeding merely because there is ‘a fair case of dispute’.
- In determining whether it is appropriate to exercise the discretion to order that the costs of an application ... be paid from the estate of a living but incapacitated person, the avoidance of any potentially adverse impact on that vulnerable person’s long-term security and welfare will always be an important consideration.⁶⁷
- 3.50 However, where an application is brought by an administrator who receives no benefit under the proposed will, the court will usually allow the administrator costs from the represented person’s estate. Justice Hansen has stated that a disinterested administrator ‘would at least normally be entitled to recoup his costs out of the estate of the represented person. That does not mean that where appropriate he may not recover costs from another party.’⁶⁸
- 3.51 Following a review of 25 successful applications for statutory wills in Victoria, the Commission found that:
- Costs were paid from the estate of the incapacitated person in 15 cases. Ten of these matters involved applicants who received a benefit under the statutory will; four involved disinterested applicants such as administrators; and, in one case, it was not clear whether or not the applicant would benefit.⁶⁹
 - No order for costs was made in nine cases (meaning that the applicant and the defendant, if the matter was contested, paid their own costs).⁷⁰
 - Costs were ordered to be paid by an unsuccessful defendant in one case.⁷¹
- 3.52 In the consultation paper on wills, the Commission outlined the general principles that courts have developed in this area and asked whether specific legislative costs provisions should be enacted for statutory will applications.⁷²

65 *Hill v Hill (No 2)* [2001] VSC 135 (22 May 2001) [8].

66 *Ibid* [9].

67 *Boulton v Sanders* (2004) 9 VR 495, 521 [153]–[154].

68 *Plowright v Burge* [2006] VSC 69 (2 March 2006) [10].

69 *Ibid* [14].

70 See, eg, *Hill v Hill (No 2)* [2001] VSC 135 (22 May 2001); *Monger v Taylor* [2000] VSC 304; *Re Palmer* [2003] VSC 21.

71 *Re Haustorfer* (Unreported, Supreme Court of Victoria, Habersberger J, 23 March 2012).

72 Victorian Law Reform Commission, *Wills Consultation Paper*, above n 7, 43–4.

- 3.53 Most submissions that addressed this issue indicated a preference for the Court to retain its general discretion over costs.⁷³ Reasons given for this included that the current principles are appropriate and fair and must be applied on a case by case basis⁷⁴ and, given that only a small number of applications are made, special provisions need not be enacted.⁷⁵
- 3.54 Other submissions argued that more specific costs rules should apply, for example:
- A distinction should be made between interested and disinterested applicants.⁷⁶
 - There should be a statutory presumption that disinterested applicants receive their costs out of the estate at the time of judgment.⁷⁷
 - There should be a statutory presumption that a successful interested applicant, and any defendant beneficiary or executor, should receive their costs from the incapacitated person's estate after death.⁷⁸
- 3.55 In the Commission's view, it is appropriate for the Court to retain a general discretion in relation to costs for statutory will applications. The costs principles have been developing in a consistent way across Australian jurisdictions and no other jurisdiction has legislative costs principles in this field.⁷⁹ The principles that have been developed so far are generally perceived as fair and appropriate and the Commission considers that they should remain in the discretion of the Court.

73 Submissions 14 (Commercial Bar Association); 25 (Moores Legal); 30a (Law Institute of Victoria); 32 (The Institute of Legal Executives); 33 (State Trustees Limited); 35 (Andrew Verspaandonk).

74 Submissions 14 (Commercial Bar Association); 25 (Moores Legal); 33 (State Trustees Limited).

75 Submission 25 (Moores Legal).

76 Submissions 21 (Office of the Public Advocate); 26 (Rigby Cooke Lawyers); 40 (Janice Brownfoot).

77 Submission 39 (Carolyn Sparke SC).

78 Ibid.

79 *Saunders v Pedemont (No 2)* [2012] VSC 601 (11 December 2012); *Re Will of Jane [No 2]* [2011] NSWSC 883 (12 August 2011); *Hoffman v Waters* [2007] SASC 273 (20 July 2007); *Re Keane*; *Mace v Malone (No 2)* [2011] QSC 98 (25 March 2011); *RAK* [2009] SASC 288 (11 September 2009).

Ademption

- 36 Introduction**
- 37 The ademption rule**
- 40 Acts by substitute decision makers**
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- 42 Model for an exception to ademption**
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- 51 Access to a person's will to prevent ademption**

4. Ademption

Introduction

- 4.1 The Commission has been asked to review and report on ‘the need to clarify when testamentary property disposed of during the will-maker’s lifetime will be adeemed and when it will be protected from ademption’.
- 4.2 ‘Ademption’ is a legal term that describes what happens when something that is left as a gift in a will is no longer owned by the will-maker at the time of their death. If the subject of the gift no longer exists in the same form within the estate it is no longer available to the beneficiary. This can occur in a number of ways:
- The gifted property has been sold (for example, the family home has been sold to fund aged care).
 - The gifted property has been stolen, lost or destroyed (for example, through fire or other natural disaster where insurance may be payable).
 - The gifted property has changed from how it was described in the will (for example, the will refers to shares in a particular company and that company has been taken over by another company).
- 4.3 Careful will drafting can avoid ademption. For example, a beneficiary can be left a percentage of the estate rather than being left a particular property, or a will can state that the beneficiary should also be entitled to the proceeds of the sale or insurance proceeds of a particular item of property or any property held in substitution for the original property.¹
- 4.4 Problems with the ademption rule often occur where the family home has been left to a beneficiary, but prior to the will-maker’s death the home has been sold, usually to fund aged care.² The will-maker may not have the capacity necessary to change their will when this occurs.
- 4.5 In the consultation paper on wills, the Commission sought views on three possible ways to reform the law, with a view to better upholding the will-maker’s intentions:
- changing the ademption rule as a whole to allow consideration of the will-maker’s intentions
 - providing an exception to the ademption rule for actions taken by a person acting under an enduring power of attorney

1 Matthew Groves, ‘Adeply Avoiding Ademption’ (2010) 84(8) *Law Institute Journal* 36, 39; Allan Swan and Chris Groszek, ‘The Widening Scope and Uncertainty of the Doctrine of Ademption’ (2012) 14 *Retirement and Estate Planning Bulletin* 138, 139 (‘The Widening Scope of Ademption’); Christopher Groszek, ‘Going Going Gone: Avoiding Ademption when Assets are Sold’ (2012) 11 *Law Institute Journal* 48, 52 (‘Going Going Gone’).

2 See, eg, *Re Viertel* [1997] 1 Qd R 110; *Simpson v Cuning* [2011] VSC 466 (22 September 2011); *Mulhall v Kelly* [2006] VSC 407 (3 November 2006); *NSW Trustee & Guardian v Bensley* [2012] NSWSC 655 (4 June 2012); *Public Trustee of Qld v Lee* [2011] QSC 409 (19 December 2011); *Power v Power* [2011] NSWSC 288 (14 April 2011); *Moylan v Rickard* [2010] QSC 327 (6 September 2010); *Ensor v Frisby* [2009] QSC 268 (7 September 2009); *Orr v Slender* [2005] NSWSC 1175 (21 November 2005).

- allowing access to a person's will by a person acting under an enduring power of attorney.
- 4.6 This chapter discusses the Commission's recommendations for reform in these areas.
- 4.7 While the Commission is of the view that there is no need to change the ademption rule as a whole, there are convincing reasons why change is desirable where a substitute decision maker sells property. In these cases, the will-maker is usually unable to change their existing will and may be unaware of the sale. The results of ademption in these cases often significantly distort the will-maker's intentions, particularly where the gifted asset is the family home.
- 4.8 This chapter includes an example under each sub-topic to illustrate how the ademption rule currently operates, as well as how it would operate based on the Commission's recommendations for reform.

The ademption rule

Current law

- 4.9 In Victoria the ademption rule is part of the common law—the *Wills Act 1997* (Vic) does not deal with ademption. The law takes an 'identity approach' to determining whether a gift has been adeemed.
- 4.10 When provisions of a will are interpreted, the common law distinguishes between specific and general gifts. Ademption applies only to specific gifts.
- 4.11 A specific gift is a gift of property that is owned by the will-maker and is described in the will in a way that separates it from other assets, for example 'my car'. A general gift is something that the will-maker directs will be obtained by the executor or the value of which will be paid out of the estate by the executor (for example, an amount of money).³
- 4.12 When determining whether ademption has occurred, the court asks two questions:
- Is the gift specific (rather than general)?
 - If it is a specific gift, is the gifted property in the estate?
- 4.13 If the gift is specific and the gifted property is not in the estate, the gift fails. The beneficiary receives nothing and cannot receive the cash equivalent of the gifted property.⁴

Example 1: The ademption rule

Mr Ling owns two units. In his will he leaves the unit he is living in (his home unit) to his daughter and the other unit (his investment unit) to his son. He leaves the rest of his estate (the residuary estate) to his grand-daughter.

Prior to his death, Mr Ling sells his home unit and moves to a nursing home. The proceeds of the sale of the home unit are paid as a bond to the nursing home.

As his unit is no longer in his estate, his daughter will receive nothing and his grand-daughter will receive the bond refund as part of the residuary estate. His son's entitlement to the investment unit is unaffected.⁵

³ *Re Plowright* [1971] VR 128.

⁴ *Ashburner v MacGuire* [1786] 2 BRO. C. C. 62, 63; Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death: Text and Cases* (LexisNexis Butterworths, 3rd ed, 2009) 470.

⁵ In order to avoid this result, Mr Ling could make a new will after the sale or specify in the original will that the gift of the unit includes any proceeds of sale of the unit.

- 4.14 This rule is clear and easy to apply and avoids a case-by-case determination of the will-maker's intent.⁶ It is based on the assumption that if a specific gift is no longer in the estate the will-maker intended that the beneficiary would receive nothing in its place.⁷
- 4.15 Although the rule is certain, it is also inflexible and can therefore produce results that would be contrary to the will-maker's intentions.
- 4.16 In response to the risk of unfair or unexpected outcomes when the rule is applied, the common law has developed various principles and exceptions to the rule.
- 4.17 One principle is that gifts are presumed to be general rather than specific.⁸ For example, a 'legacy equal to 15 per cent of the market value of the house property' was held to be an amount of money rather than a share in the house.⁹ As general gifts are not subject to ademption, this presumption builds in a bias against the gift failing.
- 4.18 Another principle is that if the property has changed in 'name and form only' but is substantially the same thing identified in the will, ademption will not occur.¹⁰ For example, ademption may be avoided where money held in a particular bank account has been moved to another bank account, or a mink coat has been 'converted' into a stole. Gifts of stocks or shares may be saved in this way where there has been a reorganisation, merger or corporate name change.¹¹
- 4.19 An exception to the ademption rule is that a wrongful act by a third party will usually not result in ademption. A fraudulent, tortious or unauthorised act leading to the disposition of property without the will-maker's knowledge has been held to be an exception to ademption.¹² For example, where a person sells a property while seeking to exercise a power of attorney and the conditions for the exercise of the power have not been met, there will be no ademption.¹³
- 4.20 The ademption rule may also not apply to property that is lawfully sold on behalf of a will-maker by an administrator or person acting under an enduring power of attorney (a substitute decision maker). This is discussed in more detail in the next sections.

An alternative approach to ademption

- 4.21 The consultation paper on wills discussed, as a possible alternative to the 'identity approach' taken by the current rule, an 'intention approach' where the court asks: 'Did the will-maker wish the beneficiary to have the value of the property even if it no longer existed at the time of death?'¹⁴
- 4.22 A provision in legislation that set out an intention approach could reflect a presumption against ademption or a presumption in favour of ademption.¹⁵
- 4.23 Views on this issue were divided. Those in favour of a change to an intention approach¹⁶ noted that:

6 Alberta Law Reform Institute, *Wills and the Legal Effect of Changed Circumstances*, Final Report No 98 (2010) 151; Christina Walsh, 'A Costly Application of Strict Statutory Construction: The Ohio Supreme Court's Interpretation of Ohio's Nonademption Statute' (1996–7) 28 *University of Toledo Law Review* 631, 631.

7 Walsh, above n 6, 634.

8 *Re Plowright* [1981] VR 128; *McBride v Hudson* (1962) 107 CLR 604, 616–19.

9 *Moylan v Rickard* [2010] QSC 327 (6 September 2010).

10 *Oakes v Oakes* [1852] 68 Eng Rep 680, 683; *Slater v Slater* [1907] 1 Ch 665, 672; *McBride v Hudson* (1962) 107 CLR 604; *Pohlner v Pfeiffer* (1964) 112 CLR 52, 79; *Re Blake* (2009) 25 VR 27, 35 [43]; *RL v NSW Trustee and Guardian* [2012] NSWCA 39 (19 March 2012); *NSW Trustee and Guardian v Ritchie* [2011] NSWSC 715 (4 July 2011).

11 Mary Lundwall, 'The Case Against the Ademption by Extinction Rule: A Proposal for Reform' (1993–94) 29 *Gonzaga Law Review* 105, 112; Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death: Text and Cases* (LexisNexis Butterworths, 3rd ed, 2009) 470; Note, 'Ademption and the Testator's Intent' (1961) 74 *Harvard Law Review* 741, 744.

12 *Jenkins v Jones* (1866) LR 2 Eq 323, 328; *Earl of Shaftsbury v Countess of Shaftsbury* [1716] 2 Vern 748; *Power v Power* [2011] NSWSC 288 (14 April 2011); *Johnston v Maclarn* [2002] NSWSC 97 (27 February 2002) [17]; *Banks v National Westminster Bank* [2005] EWHC 3479 (Ch) [10], [29]; *RL v NSW Trustee and Guardian* [2012] NSWCA 39 (19 March 2012).

13 *Power v Power* [2011] NSWSC 288 (14 April 2011).

14 Alberta Law Reform Institute, above n 6, 153; Note, 'Ademption and the Testator's Intent' (1961) 74 *Harvard Law Review* 741, 741.

15 Victorian Law Reform Commission, *Succession Laws: Wills*, Consultation Paper No 11 (2012) 48.

16 Those in favour of an intention approach with a presumption against ademption included: submissions 8 (Patricia Strachan); 25 (Moore's Legal). Those in favour of an intention approach with a presumption in favour of ademption included submissions 14 (Commercial Bar Association) and 32 (The Institute of Legal Executives).

- An intention approach would be based on evidence of the will-maker's intention.¹⁷
- A presumption against ademption would remove the need to 'draft around' the current rule when preparing a will.¹⁸
- A presumption against ademption would be more beneficiary-friendly where the will is homemade and the will-maker is unaware of the ademption rule.¹⁹
- An intention approach would be likely to lead to a fairer outcome.²⁰

4.24 Those in favour of retaining the current approach²¹ noted that:

- The current rule is clear and certain.²²
- A person who has testamentary capacity can change their will after property has been disposed of if they do not intend the gift to adeem.²³
- The common law already includes exceptions to ameliorate the impact of the rule.²⁴
- A presumption against ademption may be contrary to the will-maker's intended actions in disposing of the property during their life after the will has been made.²⁵
- A change would create an inconsistency with the settled rules of wills interpretation and lead to speculative litigation over the nature of the will-maker's intention.²⁶

4.25 In particular, it was said that a presumption against ademption would create considerable and unreasonable burdens for estate administration.²⁷ State Trustees noted that:

Some will-makers include in their will (with good intention, but often in the face of professional advice to the contrary) a multitude of specific gifts of personal chattels—for example, jewellery, items of furniture, antique crockery or cutlery, books, etc.—which may individually be of minimal or indeterminate value. It would create an administrative nightmare for the executor if, for any such items that could not be located, there was a presumption against ademption: Would the nature of the item itself be sufficient to rebut the presumption, or would other evidence be required? Would it fall to the residuary beneficiary or beneficiaries, or to the executor, to attempt to rebut the presumption? If non-ademption were upheld, how would the items then be valued? What if there were no evidence of a sale, or a sale price? Even in cases where the items were of insufficient value to warrant litigation, one can easily imagine situations where the administration could become bogged down in controversies over intentions and/or notional valuations, with consequential implications for the legal and other costs borne by the estate.²⁸

4.26 Some individuals and organisations thought it would be useful to have the ademption rule in legislation rather than as part of the common law.²⁹ Others felt that the common law is adequate.³⁰

17 Submission 14 (Commercial Bar Association).

18 Submission 25 (Moores Legal).

19 Ibid.

20 Submissions 14 (Commercial Bar Association); 25 (Moores Legal).

21 This includes: some members of the Advisory Committee, submissions 30a (Law Institute of Victoria); 21 (Office of the Public Advocate); 33 (State Trustees Limited); 36 (Law Society of New South Wales); 38 (Liz Burton); 39 (Carolyn Sparke SC).

22 Advisory Committee (Meeting 2).

23 Ibid.

24 Submission 30a (Law Institute of Victoria).

25 Submission 32 (The Institute of Legal Executives).

26 Submission 39 (Carolyn Sparke SC).

27 Submission 33 (State Trustees Limited).

28 Ibid.

29 Submissions 8 (Patricia Strachan); 25 (Moores Legal); 32 (The Institute of Legal Executives).

30 Submissions 30a (Law Institute of Victoria); 33 (State Trustees Limited).

Commission's views and conclusions

- 4.27 The Commission considers that no change to the common law rule of ademption is necessary. While an intention approach may lead to a fairer outcome for beneficiaries of otherwise adeemed gifts, it also has the potential to significantly increase the costs and time of estate administration, which would disadvantage all beneficiaries.
- 4.28 The current rule is reasonably certain and the common law does allow for exceptions to the rule in some circumstances. The ademption rule is part of the common law in all Australian jurisdictions. Therefore, any legislative provision would not promote national consistency in succession law.
- 4.29 However, the Commission considers that legislation is necessary to provide an exception to the ademption rule where the gifted property is sold or otherwise disposed of by a substitute decision maker. This issue is addressed in the next sections of this chapter.

Acts by substitute decision makers

- 4.30 It is increasingly common for ademption to occur when specifically gifted property in a will is sold by a substitute decision maker—an administrator or a person acting under an enduring power of attorney (financial).
- 4.31 The Victorian Civil and Administrative Tribunal (VCAT) appoints an administrator to make financial and some legal decisions for a person who has a disability and is unable to make reasonable judgments about matters relating to their estate.³¹ A person chooses someone to act under an enduring power of attorney (financial) ('an attorney') by executing a prescribed form before they lose capacity. The attorney may use their powers immediately or only once the donor has lost capacity, depending on the terms of the appointment.³²
- 4.32 Where a substitute decision maker is making financial decisions, the person on whose behalf they are acting has usually lost the capacity to make a will and thus is unable to change a will they had previously made. A common scenario where there is a risk of ademption is when a substitute decision maker sells the family home in order to fund a move to an aged care facility.³³ In a recent Victorian case, Justice Hargrave stated:
- People are living longer than in the past and their physical health is outlasting their mental capacity. It is commonplace for properties owned by incapacitated persons to be sold under the authority of an enduring power of attorney, to fund accommodation bonds and other necessities and comforts for an ageing population.³⁴
- 4.33 These types of cases are expected to become more common as our population ages and will-makers become more likely to lose their will-making capacity towards the end of their lives.³⁵
- 4.34 The law in Victoria currently recognises an exception to ademption in the following two circumstances when a substitute decision maker sells or otherwise disposes of property:
- for acts of an administrator, as provided by section 53 of the *Guardianship and Administration Act 1986* (Vic)
 - for acts of a person acting under an enduring power of attorney, as permitted by a common law exception.

31 *Guardianship and Administration Act 1986* (Vic) s 46(1)(a).

32 *Instruments Act 1958* (Vic) s 117.

33 *Simpson v Cunning* [2011] VSC 466 (22 September 2022) [45]; Groves, 'Adeptly Avoiding Ademption', above n 1, 36; Swan and Groszek, 'The Widening Scope of Ademption', above n 1, 138.

34 *Simpson v Cunning* [2011] VSC 466 (22 September 2011) [45].

35 Groves, 'Adeptly Avoiding Ademption', above n 1, 39; Swan and Groszek, 'The Widening Scope of Ademption', above n 1, 138.

- 4.35 Various policy reasons exist for providing such an exception. The will-maker may be unaware of the sale of the property and will usually not have the capacity to change their will to deal with this situation.³⁶ In these cases, the assumption of the ademption rule—that a person can always change their will to reflect new circumstances—does not apply. Substitute decision makers and beneficiaries may all be children of the will-maker. Ademption can be particularly unfair in this situation.³⁷
- 4.36 Where there is no exception, this may influence the behaviour of a substitute decision maker in a way that does not benefit the will-maker. For example, if the substitute decision-maker knows the terms of the will, they may retain property gifted to them when it would be in the person's best interests to sell, or may sell property to defeat claims of others and increase the residuary estate.³⁸
- 4.37 As discussed further in paragraphs [4.73]–[4.76], the status of the common law exception for persons acting under an enduring power of attorney is uncertain. The Commission has received unanimous support for a legislative exception to ademption that applies to the actions of both types of substitute decision makers in the same way.

Acts by administrators appointed by the Victorian Civil and Administrative Tribunal

Section 53 of the Guardianship and Administration Act

- 4.38 The only legislative exception to ademption that currently applies in Victoria is for actions of administrators appointed by VCAT. Section 53 of the *Guardianship and Administration Act 1986* (Vic) provides that:

Interest of represented person in property not to be altered by sale or other disposition of property

- (1) A represented person and her or his heirs, executors, administrators, next of kin, devisees, legatees and assigns have the same interest in any money or other property arising from or received in respect of any sale, mortgage, exchange, partition or other disposition under the powers given to an administrator by an order of the Tribunal which have not been applied under those powers as she, he or they would have had in the property the subject of the sale, mortgage, exchange, partition or disposition if no sale, mortgage, exchange, partition or disposition had been made.
- (2) For the purposes of this section money arising from the compulsory acquisition or purchase under any Act of property of a represented person is deemed to be money arising from the sale of that property under the powers given to an administrator by an order of the Tribunal.
- (3) An administrator who receives money or other property under this section must keep a separate account and record of the money or other property.
- (4) Money received by an administrator under this section may be invested in any manner in which trust funds may be invested under the *Trustee Act 1958*.
- (5) In this section and section 56 next of kin in relation to a represented person means any person who would be entitled to the property of the represented person or to any share thereof under any law for the distribution of the property of intestates if the represented person had died intestate.

³⁶ Groves, 'Adeply Avoiding Ademption', above n 1, 38.

³⁷ Ibid.

³⁸ National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills*, Queensland Law Reform Commission Miscellaneous Paper No 29 (1997) 113; Walsh, above n 6, 649–50, 657–8.

- 4.39 The following example illustrates how the exception to ademption for the actions of administrators operates in practice.

Example 2: Exception to ademption under section 53

As in example 1, Mr Ling owns two units and, in his will, he leaves the unit he is living in (his home unit) to his daughter, the other unit (his investment unit) to his son, and the rest of his estate (the residue) to his grand-daughter.

In this example, and in the examples that follow, Mr Ling loses capacity after making his will and does not sell his home unit himself.

State Trustees is appointed by VCAT as the administrator of his estate and sells Mr Ling's home unit to pay the bond at the nursing home.

Due to section 53, on Mr Ling's death his daughter will receive the refunded nursing home bond, as well as any other proceeds of sale that have not been spent on Mr Ling's care. His grand-daughter will receive any other assets remaining in the estate that have not come from the sale of the home unit. There is no need to take the matter to Court for a decision.

- 4.40 In its recent review of guardianship laws, the Commission recommended that a similar provision be included in new guardianship legislation and extended to intestacies and joint assets.³⁹ The Commission is aware that its references in this report to section 53 are directed to a provision that is unlikely to remain in its current form because the legislation is being comprehensively revised. However, for ease of exposition, the Commission's discussion in this report concerns the legislation as it applies at the time of writing.

Model for an exception to ademption

- 4.41 It is the Commission's view that any legislative exception to ademption that is introduced for persons acting under an enduring power of attorney should be in the same terms as the legislative exception for administrators appointed by VCAT. The Commission has therefore examined section 53 of the Guardianship and Administration Act to determine if it is the best way to provide for an exception to ademption for both administrators and persons acting under an enduring power of attorney.
- 4.42 In considering the most appropriate model for a legislative exception, the Commission has taken into account legislation in other jurisdictions. A legislative modification of the ademption rule applies to acts of substitute decision makers in South Australia, Queensland and New South Wales.
- 4.43 Section 53 of the Guardianship and Administration Act has proved to be an effective way of avoiding the effects of ademption where an administrator has sold property. The Commission has concluded that it should be retained with some modifications. The modifications would address the following issues:
- the ability of beneficiaries to seek relief where an act of an administrator in selling or disposing of a represented person's property leads to an unjust outcome
 - the treatment of income generated by sale proceeds
 - account-keeping obligations
 - the will-making capacity of represented persons.
- 4.44 These issues are discussed in the following sections. The Commission then proposes that an equivalent provision to section 53, as amended in accordance with its recommendations, should be introduced into the *Instruments Act 1958* (Vic) for people acting under an enduring power of attorney.

Avoiding unjust outcomes

- 4.45 In New South Wales, there are legislative exceptions for actions of persons acting under an enduring power of attorney as well as for administrators.⁴⁰ The exception for attorneys, at section 22 of the *Powers of Attorney Act 2003* (NSW), is in broadly similar terms to section 53 of Victoria's Guardianship and Administration Act. However, section 23 provides that, where this exception would result in one or more beneficiaries 'gaining an unjust and disproportionate advantage or suffering an unjust and disproportionate disadvantage' of a kind not contemplated in the will, the court may alter the effect of the provision.⁴¹ The legislative exception for administrators in New South Wales does not have this added feature that allows beneficiaries to apply to the court to alter the effect of the exception.
- 4.46 In South Australia, a beneficiary may apply to the Supreme Court where their share under a will has been affected by the actions of an administrator or a person acting under an enduring power of attorney. The court may make orders it thinks just to ensure that no beneficiary gains a disproportionate advantage or suffers a disproportionate disadvantage of a kind not contemplated by the will.⁴²
- 4.47 In Queensland, a person may apply to the court where their benefit in another person's estate has been lost because of an action of an administrator or a person acting under an enduring power of attorney. The court may award compensation out of the will-maker's estate.⁴³
- 4.48 The Commission's consultation paper on wills sought views on whether any of these provisions would be preferable to section 53 of the Guardianship and Administration Act as a model for a legislative exception. Submissions generally supported the current section 53 as an exception to the ademption rule for actions of both administrators and persons acting under an enduring power of attorney.⁴⁴
- 4.49 Some also saw merit in Victoria introducing an additional provision, as exists in New South Wales for acts of attorneys, that would allow the court to vary the result under section 53 where a beneficiary gains an 'unjust and disproportionate advantage' or suffers an 'unjust and disproportionate disadvantage'.⁴⁵
- 4.50 Participants at the Commission's wills roundtable suggested such a provision could work well where, for example, the will originally had the effect of treating beneficiaries equally via specific gifts.⁴⁶
- 4.51 Some submissions favoured the Queensland provision where the court may order 'compensation' from the estate based on the actions of a person acting under an enduring power of attorney if the 'same interest' cannot be achieved by a legislative exception to ademption.⁴⁷ However, Moores Legal noted that this is not a jurisdiction of compensation and this terminology is therefore less appealing than the New South Wales model.⁴⁸
- 4.52 An ability to apply to the Supreme Court for an order where the operation of the ademption rule, or an exception to the rule, leads to a beneficiary 'gaining an unjust and disproportionate advantage or suffering an unjust and disproportionate disadvantage' would be a useful addition to the legislation. There would be no need for the substitute decision maker to know the contents of the represented person's will and it would allow the court to later adjust the beneficiaries' entitlements to better reflect the intentions of the will-maker.

40 *Powers of Attorney Act 2003* (NSW) s 22–3; *NSW Trustee and Guardian Act 2009* (NSW) s 83.

41 *Powers of Attorney Act 2003* (NSW) s 23.

42 *Powers of Attorney and Agency Act 1984* (SA) s 11A; *Guardianship and Administration Act 1993* (SA) s 43.

43 *Powers of Attorney Act 1998* (Qld) s 107; *Guardianship and Administration Act 2000* (Qld) s 60.

44 Submissions 25 (Moores Legal); 30a (Law Institute of Victoria); 33 (State Trustees Limited); 39 (Carolyn Sparke SC).

45 Submissions 25 (Moores Legal); 30a (Law Institute of Victoria); 39 (Carolyn Sparke SC).

46 Consultation 1 (Wills roundtable).

47 Submissions 8 (Patricia Strachan); 14 (Commercial Bar Association).

48 Submission 25 (Moores Legal).

- 4.53 The New South Wales provision only applies where the advantage or disadvantage occurs as a result of the legislative exception to ademption. However, a disproportionate result may also occur notwithstanding the application of the exception, as illustrated in examples 3 and 4 below.
- 4.54 The Commission therefore recommends that a beneficiary be able to apply to the Court in both circumstances—where the disproportionate result comes about due to the exception and where it comes about notwithstanding the exception.

Example 3: Disproportionate result notwithstanding a legislative exception to ademption

Mr Ling's administrator spends all of the proceeds of the sale of the home unit on Mr Ling's care before his death. Meanwhile, the value of Mr Ling's investment unit has increased significantly since he made his will leaving it to his son.

The Commission's recommendation would permit Mr Ling's daughter to apply to the court for an adjustment to her and her brother's benefit under the will, arguing that the will contemplated the two siblings being treated equally.

Example 4: Disproportionate result because of a legislative exception to ademption

In this example, instead of an investment unit, Mr Ling owns an investment portfolio of shares valued at a similar amount to his home unit. Mr Ling's will leaves the home unit to his daughter and the rest of his estate (which includes the investment portfolio) to his son.

Mr Ling's administrator sells the home unit and uses the proceeds to pay a nursing home bond. The administrator then spends all the proceeds of the investment portfolio on Mr Ling's care. The nursing home bond is the only asset remaining in Mr Ling's estate at his death and would go to his daughter.

The Commission's recommendation would permit Mr Ling's son to apply to the Court for an adjustment to his and his sister's benefits under the will, arguing that the exception to ademption has led to an unjust and disproportionate disadvantage to him.

Recommendation

- 5 Section 53 of the *Guardianship and Administration Act 1986* (Vic), which modifies the common law of ademption where an administrator sells or otherwise disposes of a represented person's property, should be amended to allow a beneficiary under a will to apply to the Supreme Court for an order where:

- (a) the exception would result in a beneficiary under the will gaining an unjust and disproportionate advantage or suffering an unjust and disproportionate disadvantage of a kind not contemplated in the will
- (b) notwithstanding the exception to ademption, the outcome would result in a beneficiary under the will gaining an unjust and disproportionate advantage or suffering an unjust and disproportionate disadvantage of a kind not contemplated in the will.

The Court would make such orders and direct such conveyances, deeds and things to be executed and done as it thinks fit.

Treatment of income generated by sale proceeds

- 4.55 The Commission has been informed that a current area of uncertainty in the operation of section 53 is the treatment of income generated by sale proceeds. The section refers to ‘any money or other property arising from or received in respect of any sale’. It is not clear whether this includes interest on the proceeds of a sale that were not immediately used for the benefit of the represented person.
- 4.56 In New South Wales, section 83 of the *NSW Trustee and Guardianship Act 2009*, which is broadly equivalent to section 53 of the *Guardianship and Administration Act*, refers to ‘any surplus money and other property arising from any sale’. The New South Wales Court of Appeal has recently commented on whether a beneficiary’s entitlement includes interest that accrues on the net proceeds of sale of a specific gift.
- 4.57 In *RL v NSW Trustee and Guardian*⁴⁹ the Court considered the management of the proceeds of the sale of a garage that the owner, Ms PBL, left to a neighbour in the last will she made before losing capacity. Ms PBL had owned a home unit, associated with which was a car space and a garage. The unit was sold together with the car accommodation to fund her nursing home bond, and the agreed value of the garage at the time of sale was set aside.
- 4.58 While the Court did not need to determine the question of who would be entitled to the interest or any income on the proceeds, Justice Campbell stated that a finding that the neighbour would be entitled may be consistent with the legislation:

There seems to be legitimate room for argument about whether “surplus money ... arising from any sale” in s 83 of the 2009 Act extends to income earned by the fund that is set aside between the time of sale and the time of PBL’s eventual death. The words “arising from” could be argued to envisage a causal enquiry—one asks what is the money that exists at the time of the testatrix’s death that the sale has caused to come into existence. If that construction is right the “surplus money” might extend to interest or other income derived from the net proceeds of sale.

Such a construction might also be argued to be broadly consistent with the policy of s 83, in that if the garage had remained in specie it would presumably have increased in value with time. It could be argued that, in a broad way, it would be administering the estate in a way that does the least damage to PBL’s intentions expressed in the will, in the changed circumstances where sale of the garage has been necessary to provide for PBL’s welfare, if the specific legacy were to attach to the net proceeds of sale, plus interest it earned, but minus any amount that is spent from that fund to make proper provision for PBL.⁵⁰

- 4.59 State Trustees put the view that the legislative exception to ademption should clarify what happens to any interest or growth on the proceeds of sale. In State Trustees’ view, the beneficiary of the specific gift should not be entitled to any interest but should be entitled to the actual sum received by the substitute decision maker less any amount spent on the person’s care.⁵¹ Carolyn Sparke SC stated that the actual value of the gift, including any growth or loss, should pass with the gift.⁵²

49 [2012] NSWCA 39 (19 March 2012).

50 *RL v NSW Trustee and Guardian* [2012] NSWCA 39 (19 March 2012) [108].

51 Submission 33 (State Trustees Limited).

52 Submission 39 (Carolyn Sparke SC).

- 4.60 The Commission agrees that section 53 should clarify what happens to any traceable income earned on sale proceeds. In the Commission's view, the beneficiary of the specific gift should be entitled to this income, as a specifically gifted item would usually increase in value if it had not been sold by the substitute decision maker. The following example illustrates the effect of the proposed amendment.

Example 5: Entitlement to traceable income

Mr Ling's home unit is sold by his administrator for \$400,000. The administrator uses \$300,000 to pay a nursing home bond and invests the remaining \$100,000 in a high interest savings account. Mr Ling's daughter (the beneficiary of the home unit in Mr Ling's will) will be entitled to the balance of this account, including interest, less any amount spent out of the account by the administrator on Mr Ling's care during his lifetime.

Recommendation

- 6 Section 53 of the *Guardianship and Administration Act 1986* (Vic) should be amended to provide that a beneficiary under a will to whom the section applies because an administrator has sold or otherwise disposed of the will-maker's property is entitled to any traceable income generated by any sale proceeds.

Account-keeping obligations

- 4.61 Section 53(3) currently provides that an administrator who receives money or other property 'under this section must keep a separate account and record' of the money or property received.⁵³
- 4.62 The meaning of this obligation is not clear. There are various interpretations that could apply to this section. It could mean that:
- an administrator may simply keep a record of the sale, in a way that complies with an administrator's general account-keeping obligations
 - the proceeds received 'under this section' should be kept in an account that is separate to the represented person's other assets
 - the proceeds should be quarantined and not spent during the person's lifetime except as a last resort.
- 4.63 In State Trustees' view, there should be only an obligation to record and keep an account of transactions. There should not be an obligation to keep the funds in an account that is separate from the person's other assets, as this could have a negative impact on the person's finances while they are alive. A substitute decision maker may also be unaware of what is in the person's will and thus not know that money or property was received under the section.⁵⁴
- 4.64 Moores Legal agreed that there should not be any specific or special accounting obligations where a substitute decision maker has sold specifically gifted property.⁵⁵
- 4.65 The Law Institute of Victoria proposed that substitute decision makers be required to retain the funds in a separate account and that these funds should be used last for payments required in the best interests of the represented person.⁵⁶

53 *Guardianship and Administration Act 1986* (Vic) s 53(3).
54 Submission 33 (State Trustees Limited).
55 Submission 25 (Moores Legal).
56 Submission 30a (Law Institute of Victoria).

- 4.66 In the Commission's view, section 53(3) should not be retained. In particular, there should be no requirement or implication that an administrator should quarantine the proceeds of any sale or spend these proceeds last. Keeping the funds separately may leave an insufficient amount to comfortably meet the needs of the represented person during their lifetime. An administrator should aim to deploy all assets in the best interests of the represented person during their lifetime, not be concerned with the possible entitlement of beneficiaries under the will.
- 4.67 Moreover, the administrator may be unaware of the terms of the will and therefore not know that money or other property received is received 'under this section'. There should be no legislative requirement, consequence or implication that requires a substitute decision maker to know what is in the person's will.
- 4.68 An administrator must lodge accounts each year with VCAT or another person appointed by VCAT. The accounts must provide 'a full and true account of the assets and liabilities of that estate and all receipts and disbursements in respect of that estate.'⁵⁷ These accounts will therefore provide a basis for an executor or court to determine entitlements under an amended section 53.
- 4.69 As noted earlier in this chapter, section 83 of the *NSW Trustee and Guardianship Act 2009* is broadly equivalent to section 53 of the *Guardianship and Administration Act*. However, even though it does not contain an equivalent of section 53(3), it nonetheless has been interpreted as conveying an obligation to keep a separate account. In *RL v NSW Trustee and Guardian* the New South Wales Court of Appeal has found that:
- by implication [section 83 of the *NSW Trustee and Guardianship Act*] gives rise to an obligation [on the administrator] to take steps to administer the estate in such a way that, on [the represented person's] death, it will be possible to identify what is the 'surplus', if any, that s 83 then operates upon. ... A convenient way of achieving that objective is to keep the net proceeds in a separate fund.⁵⁸
- 4.70 The Commission therefore recommends that section 53 be amended to explicitly state that there is no requirement for an administrator to keep any proceeds in an account that is separate from the represented person's other assets.

Recommendation

- 7 Section 53 of the *Guardianship and Administration Act 1986* (Vic) should be amended to:
- (a) no longer require an administrator to keep a separate account and record of the money or other property received upon the sale or other disposition of the represented person's property
 - (b) expressly state that an administrator is not required to keep any proceeds of the sale or other disposition of property separate from the represented person's other assets.

Capacity and persons with administrators appointed

- 4.71 The legal test for the capacity to make a will is not the same as the test of capacity for the purpose of having an administrator appointed to manage a person's financial affairs during their life. It is therefore possible that a person with an administrator may still retain the capacity to make a new will. Where a person's estate and family affairs are simple, the courts have held that the person may change their will despite having an administrator appointed.⁵⁹
- 4.72 Given the difficulties in determining a person's capacity at a particular date in the past after a person has died, the Commission recommends that an amended section 53 should apply to all acts of an administrator, regardless of whether the person had the capacity to change their will at the time the property was sold.

Recommendation

- 8 Section 53 of the *Guardianship and Administration Act 1986* (Vic) should be amended to clarify that it applies whether or not the represented person had testamentary capacity at the time of the sale or other disposition of relevant property.

Acts by persons acting under an enduring power of attorney (financial)

Current law

- 4.73 Traditionally under the common law, the actions of an attorney have not been considered an exception to the ademption rule. However in recent years Victorian judges have recognised such an exception.⁶⁰ In *Simpson v Cuning*, Justice Hargrave identified an exception but also called for legislative reform to clarify this issue:

The issue requires urgent legislative intervention to resolve any doubt. In the meantime, I would follow *Re Viertel* [a Queensland decision] and recognise a further exception to the ademption principle whenever there is an authorised sale by an attorney in circumstances where: (1) the deceased lacked testamentary capacity; (2) the Court is satisfied that the deceased, if possessed of testamentary capacity, would have intended the donee of the asset in the will to have the remaining proceeds of sale; and (3) the remaining proceeds of sale can be identified with sufficient certainty.⁶¹

- 4.74 The effect of the exception identified by Justice Hargrave is illustrated in example 6 below.

Example 6: Common law exception to ademption

Mr Ling owns two units. In his will he leaves the unit he is living in (his home unit) to his daughter and the other unit (his investment unit) to his son. He leaves the rest of his estate (the residue) to his grand-daughter.

Prior to his death Mr Ling appoints his daughter as his enduring power of attorney (financial). His daughter sells Mr Ling's home unit to pay a bond at a nursing home. Based on the common law rule, his daughter may be able to receive the refunded nursing home bond, as well as any other proceeds of sale that have not been spent on Mr Ling's care, if:

- she applies to the Supreme Court
- she can prove that Mr Ling lacked testamentary capacity at the time she sold the home unit

59 *Edwards v Edwards* (2009) 25 VR 40.

60 *Mulhall v Kelly* [2006] VSC 407 (3 November 2006); *Simpson v Cuning* [2011] VSC 466 (22 September 2011).

61 *Simpson v Cuning* [2011] VSC 466 (22 September 2011) [46].

- the proceeds of the sale can be identified with sufficient certainty (which would be the case with the bond but possibly not other proceeds)
- she can demonstrate that her father would have intended her to have the proceeds if he had testamentary capacity.

- 4.75 The status of this common law exception is uncertain. It was originally recognised in a Queensland decision which has since not been followed in Queensland.⁶² The New South Wales Court of Appeal has also rejected the existence of an exception in these circumstances.⁶³
- 4.76 One key difference between an administrator and an attorney, is that depending on the terms of the enduring power, an attorney may be able to deal with a person's assets while the person still has legal capacity to do so themselves.⁶⁴ This issue is addressed further below.

National Committee for Uniform Succession Laws

- 4.77 The National Committee for Uniform Succession Laws considered the possibility of providing an exception to the ademption rule where the subject of a specific gift has been sold by an enduring attorney. It considered allowing the beneficiary to receive an amount equal to the net proceeds of sale of the property, which would be distributed in the same manner as if it were a specific gift.⁶⁵ However, the National Committee did not make any recommendations, stating that the ademption rule as a whole should be reviewed as a discrete project.⁶⁶ This project has not been undertaken.

A legislative exception to ademption

- 4.78 All submissions that addressed the issue agreed that a legislative exception to ademption should be enacted to deal with actions of attorneys.⁶⁷ Most were supportive of a provision similar to section 53 of the Guardianship and Administration Act.⁶⁸
- 4.79 The Commission agrees that section 53, amended as recommended earlier in this chapter, is an appropriate model for a legislative exception for attorneys. It will provide certainty and ensure that the rights of beneficiaries under a will made by a person for whom a substitute decision maker has been appointed are consistent.

Account-keeping obligations

- 4.80 As with administrators, views in submissions varied on what the account-keeping obligations of an attorney who sells a specifically gifted asset should be.
- 4.81 State Trustees, Moores Legal and Carolyn Sparke SC stated that an attorney should not have any special accounting obligations in these circumstances.⁶⁹ Accounting obligations already exist, and the attorney may not be aware of what is in the will. Carolyn Sparke SC noted that keeping funds in a separate account may impact negatively on the person's financial affairs.⁷⁰
- 4.82 Other submissions proposed that attorneys be required to keep any sale proceeds in a separate account⁷¹ and to use these funds as a last resort.⁷²

62 See *The Trust Company Limited v Gibson* [2012] QSC 183 (29 June 2012) [27].

63 *RL v NSW Trustee and Guardian* [2012] NSWCA 39 (19 March 2012) [148]–[187].

64 *Instruments Act 1958* (Vic) s 117.

65 National Committee for Uniform Succession Laws, above n 38, 113.

66 *Ibid* 113–14.

67 Submissions 8 (Patricia Strachan); 14 (Commercial Bar Association); 21 (Office of the Public Advocate); 30a (Law Institute of Victoria); 33 (State Trustees Limited); 39 (Carolyn Sparke SC).

68 Submissions 25 (Moores Legal); 30a (Law Institute of Victoria); 33 (State Trustees Limited); 39 (Carolyn Sparke SC).

69 Submissions 25 (Moores Legal); 33 (State Trustees Limited); 39 (Carolyn Sparke SC).

70 Submission 39 (Carolyn Sparke SC).

71 Submissions 8 (Patricia Strachan); 14 (Commercial Bar Association); 30a (Law Institute of Victoria).

72 Submission 30a (Law Institute of Victoria).

- 4.83 The Commission considers that, for the same reasons that it concluded that the accounting obligations for administrators should be removed from section 53 of the Guardianship and Administration Act, there should be no special or additional accounting obligations where an attorney sells an asset.
- 4.84 An attorney already has an obligation to 'keep and preserve accurate records and accounts of all dealings and transactions' made under the power.⁷³ These records would therefore assist in the tracing of the proceeds of any otherwise adeemed gift.
- 4.85 As noted above, a recent New South Wales Court of Appeal decision has held that the relevant New South Wales provision in relation to administrators implies that funds must be identifiable and that this is to be achieved by putting the funds in a separate account. The Commission therefore recommends that an exception to ademption for attorneys states that there is no requirement that an attorney keep any proceeds of sale separate from the donor's other assets.

Capacity

- 4.86 As noted above, an attorney may act while the person still has capacity, depending on the terms of the appointment.
- 4.87 The Australian jurisdictions that have legislative exceptions to ademption for actions of attorneys take different approaches to the issue of capacity. In South Australia, an application to court can only be made where the donor of the power had suffered a period of legal incapacity while the enduring power of attorney was in force.⁷⁴
- 4.88 In Queensland and New South Wales, the exceptions apply regardless of whether the donor of the power had testamentary capacity at the time of the sale or other dealing.⁷⁵
- 4.89 Views were mixed on whether a legislative exception should apply to any action of an attorney or only those actions taken once the donor has lost capacity.
- 4.90 The Law Institute of Victoria, the Office of the Public Advocate, Carolyn Sparke SC and Patricia Strachan supported an anti-ademption provision only where the donor had lost capacity at the time of the transaction.⁷⁶ Submissions noted that the donor may alter their will if the donor still has capacity.⁷⁷
- 4.91 The Commercial Bar Association and State Trustees supported an exception regardless of whether the donor lacked capacity at the time.⁷⁸ Reasons included:
- It will usually be difficult to determine whether the person had capacity at the time of the transaction.⁷⁹
 - If the exception only applies once a person has lost capacity, the seller may feel the need to have a formal capacity assessment or a court ruling which could delay the transaction and not be in the best interests of the donor.⁸⁰
- 4.92 State Trustees noted that an action by an attorney where there is an express and contemporaneous written direction by the donor in relation to the sale would be subject to the usual rules of ademption. In this case the attorney is not the decision maker but is merely carrying out the decision made by the donor.⁸¹ The Commission agrees with this view.

73 *Instruments Act 1958* (Vic) s 125D.

74 *Powers of Attorney and Agency Act 1984* (SA) s 11A(1).

75 *Powers of Attorney Act 1998* (Qld) s 107; *Powers of Attorney Act 2003* (NSW) ss 22–3.

76 Submissions 8 (Patricia Strachan); 21 (Office of the Public Advocate); 30a (Law Institute of Victoria); 39 (Carolyn Sparke SC).

77 Submissions 30a (Law Institute of Victoria); 32 (The Institute of Legal Executives).

78 Submissions 14 (Commercial Bar Association); 33 (State Trustees Limited).

79 Submission 14 (Commercial Bar Association); consultation 1 (Wills roundtable).

80 Consultation 1 (Wills roundtable).

81 Submission 33 (State Trustees Limited).

- 4.93 The Commission agrees with submissions that support a legislative exception to ademption for any action of an attorney, not only those taken once the donor has lost capacity. Key reasons for this include:
- Determining whether the donor has capacity at the time the attorney needs to act will be time-consuming and any delay may not be in the person's best interests.
 - It avoids the need to determine a person's capacity at the time of the disposition after the person has died, which may be a number of years later.
 - It is consistent with the New South Wales provisions that the Commission has recommended should apply to anti-ademption provisions for substitute decision makers.

Recommendation

- 9 The *Instruments Act 1958* (Vic) should be amended to provide an exception to ademption when property is sold or otherwise disposed of by a person acting under an enduring power of attorney (financial). The exception should align with the exception that will apply to administrators under section 53 of the *Guardianship and Administration Act 1986* (Vic) as amended in accordance with recommendations 5–8, including:
- (a) a right of beneficiaries under a will to apply to the court if the result is unjust
 - (b) no requirement that the attorney keep a separate account and record of the proceeds of the sale or other disposition
 - (c) no requirement that the attorney keep the proceeds of sale or other disposition separate from other assets owned by the donor of the power
 - (d) no requirement that the donor of the power be without will-making capacity at the time of the sale or other disposition.

Warning to donors of enduring powers of attorney (financial)

- 4.94 It would be desirable that donors of enduring powers of attorney (financial) be told at the time they create and confer an enduring power that dispositions pursuant to the power may impact on specific provisions in their will, and that, with this in mind, they should review the operation and effect of their will with a view to overcoming these difficulties. Such a warning could usefully be incorporated in the form pursuant to which enduring powers of attorney (financial) are conferred.

Access to a person's will to prevent ademption

- 4.95 The Commission has recommended that a substitute decision maker should not have any special account-keeping obligations where the subject of a gift in a will has been sold. A substitute decision maker would thus not require access to a person's will in order to comply with account-keeping obligations. However, access to a person's will by a substitute decision maker may still be useful in cases where the decision maker has some choice over which assets to sell or how to deal with the person's personal effects. Access to the person's will may therefore assist in preventing ademption from occurring.

Current law

- 4.96 An attorney does not have the right to access a person's will. In contrast, an administrator appointed by VCAT may open and read a will that they are in possession of.⁸² VCAT may open and read the will of any represented person.⁸³ The Commission has recently recommended that this provision be extended to include the right to apply to VCAT for access to a will that is not in the administrator's possession.⁸⁴ VCAT would then be able to grant access where it is reasonable in the circumstances.⁸⁵
- 4.97 In its recent inquiry into powers of attorney, the Victorian Parliament Law Reform Committee reported mixed views on whether an attorney should be able to access a person's will. It recommended further consultation on this issue.⁸⁶

Views from submissions

- 4.98 Most submissions supported a change to allow an attorney to access a person's will in the same way as recommended for an administrator.⁸⁷ Benefits included:
- The attorney may be able to avoid ademption if the attorney knows that a particular piece of property has been left as a specific gift.⁸⁸
 - The attorney may be able to manage the proceeds separately if he or she is aware of the specific gift.⁸⁹
- 4.99 Submissions generally agreed that an attorney should only be granted access to a will where the donor has lost capacity.⁹⁰
- 4.100 Other issues raised included:
- There is no need for a substitute decision maker to know who the beneficiary of a particular gift is, just that the particular property has been left as a gift. A redacted copy of the will may therefore be useful in preventing ademption while maintaining privacy for the represented person.⁹¹
 - It is important that VCAT be able to determine what, if any, details from the will it is appropriate to disclose. This is particularly important where the substitute decision maker is also a beneficiary under the will.⁹²
 - An alternative could be to allow a holder of a will to provide a redacted copy of the will to a validly appointed attorney, on proof of lack of capacity.⁹³

82 *Guardianship and Administration Act 1986* (Vic) s 58G.

83 *Ibid* s 54.

84 Victorian Law Reform Commission, *Guardianship Final Report*, above n 39, 266.

85 *Ibid*.

86 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 159.

87 Submissions 6 (Victorian Civil and Administrative Tribunal); 14 (Commercial Bar Association); 25 (Moores Legal); 30a (Law Institute of Victoria); 32 (The Institute of Legal Executives); 33 (State Trustees Limited). Carolyn Sparke SC did not support this change: submission 39.

88 Consultation 1 (Wills roundtable).

89 Submission 25 (Moores Legal).

90 Submissions 14 (Commercial Bar Association); 21 (Office of the Public Advocate); 25 (Moores Legal); 30a (Law Institute of Victoria). The Institute of Legal Executives stated that the incapacity should be expected to continue, as opposed to a short-term trauma situation: submission 32.

91 Consultation 1 (Wills roundtable).

92 Submission 33 (State Trustees Limited).

93 Submissions 30a (Law Institute of Victoria); 33 (State Trustees Limited). In State Trustees' view, the holder of the will should be authorised to provide information on specific gifts but not on who the beneficiaries are.

Commission's views and conclusions

- 4.101 The Commission agrees that an attorney should be able to access a person's will in the same way as an administrator. While the Commission does not believe an attorney should be under any obligation to hold funds separately where a specific gift has been sold, knowledge of the person's will may still be useful in preventing what would otherwise be an ademption and achieving greater fairness generally between beneficiaries. A substitute decision maker may be able to prevent ademption in the following circumstances:
- There is a choice of assets to be sold to fund the person's care.
 - There are specific gifts of sentimental items such as jewellery, artwork, family heirlooms, photographs or other items. The substitute decision maker can take reasonable steps to ensure that these items are not disposed of during the person's life.
- 4.102 Where an application is made to VCAT, the Tribunal will be able to consider:
- whether the person has capacity
 - whether access would assist the substitute decision maker in administering the person's estate
 - whether to provide a redacted or full copy of the will, particularly where a substitute decision maker is also a beneficiary.
- 4.103 The Commission believes an application to VCAT is more appropriate than giving the holder of the will a power to inform substitute decision makers about the content of a person's will. A legal practitioner who holds a person's will is doing so on a strictly confidential basis.

Recommendation

- 10 Guardianship legislation should provide for a person acting under an enduring power of attorney (financial) to apply to the Victorian Civil and Administrative Tribunal for a full or redacted copy of a will made by the donor of the power. The Tribunal would be able to grant access only where the donor does not have testamentary capacity.

Intestacy

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5. Intestacy

Introduction

Overview of intestacy in Victoria

- 5.1 If a person's property is not disposed of by a will when they die, that person has died intestate. Intestacy can occur if the person does not have a will, if their will is not valid¹ or if their will only disposes of some of their property. The laws of intestacy determine how the deceased person's property is to be distributed to their partner, children or other relatives.
- 5.2 The *Administration and Probate Act 1958* (Vic) establishes a statutory scheme for the distribution of property on intestacy in Victoria.² The terms of reference direct the Commission to review and report on whether this scheme is operating effectively to achieve just and equitable outcomes.
- 5.3 Under the *Administration and Probate Act*, the deceased person's property that needs to be distributed on intestacy is called the 'residuary estate'. When a person dies intestate, their personal representative is responsible for selling and converting into money all property that was owned by them.³ The residuary estate, for distribution on intestacy, comprises all the money that remains after funeral, testamentary and administration expenses, debts and other liabilities of the estate have been paid.⁴ The residuary estate includes any part of the estate that has been retained unsold and is not required for administration purposes.⁵ For clarity of meaning, this report uses the term 'intestate estate' to describe everything that remains after payment of funeral expenses and debts that is not disposed of by will.
- 5.4 If the deceased person does not have a partner, children or other relatives to whom their intestate estate can be distributed, the estate belongs to the State of Victoria as *bona vacantia*, meaning unclaimed goods or property that has no owner.⁶ However, if the State of Victoria becomes entitled to unclaimed property as a result of the death of any person, the Minister for Finance may distribute the property to:
- any person, whether related to the deceased person or not, who was dependent on the deceased person, or
 - any person for whom the deceased person might reasonably have been expected to make provision (in the opinion of the Minister).⁷

1 Because, for example, it does not comply with the necessary formalities, it was made under the undue influence of another person, or the will-maker lacked capacity to make the will.

2 *Administration and Probate Act 1958* (Vic) pt 1 div 6.

3 Ibid s 38(1). When a person dies intestate, their estate vests in State Trustees until administration is granted and a personal representative appointed: s 19.

4 Ibid ss 38(2), (4).

5 Ibid s 38(4). For example, this may include the deceased person's home in which their partner has elected to acquire an interest: s 37A. For discussion of the deceased person's partner's right to elect to acquire an interest in estate property, see [5.56]–[5.83].

6 *Administration and Probate Act 1958* (Vic) s 55; Peter Butt and Peter Nygh (eds), *Encyclopaedic Australian Legal Dictionary* [online] (LexisNexis Butterworths, at 16 May 2013).

7 *Financial Management Act 1994* (Vic) s 58(3)(a). The *Financial Management Act* refers only to 'the Minister'. The Minister for Finance has responsibility for these sections of the Act under the *General Order: Administration of Acts* (22 April 2013).

- 5.5 Statistics in relation to grants of probate and letters of administration, provided by the Supreme Court of Victoria and published in the Commission's consultation paper on intestacy, indicate that more than seven per cent of grants made each year are for intestate estates.⁸ This figure represents between 1300 and 1400 intestate estates each year.⁹ The figure does not include partial intestacies or take into account informal administration of intestate estates, where no grant is obtained.

National Committee for Uniform Succession Laws

- 5.6 The National Committee for Uniform Succession Laws, which comprised representatives from all states and territories except South Australia, reviewed the laws of intestacy in all Australian states and territories. Its 2007 report on intestacy made 79 recommendations, which, if implemented, would involve significant reform to Victoria's intestacy laws.¹⁰ The recommendations have been substantially implemented in New South Wales and Tasmania.¹¹
- 5.7 The Commission's terms of reference direct it, in undertaking the reference, to have regard to relevant recommendations made by the National Committee. The terms of reference also note that state and territory ministers have agreed to adopt the National Committee's recommendations,¹² with the aim of maximising national consistency.
- 5.8 Accordingly, the Commission takes the view that, unless there are compelling reasons to depart from the recommendations of the National Committee, the Commission should support them. New South Wales and Tasmania have already implemented the National Committee's intestacy recommendations, so national consistency would be promoted by implementing the National Committee's recommendations in relation to intestacy in Victoria.

Areas in which the Commission recommends reform

- 5.9 There are many aspects of Victoria's intestacy scheme that would remain the same under the Commission's recommendations. Intestacy law would continue to operate in respect of property not effectively disposed of by will; a hierarchy of next of kin who are entitled to inherit on intestacy would still exist; and there would be no change to the structure of this hierarchy. Intestate estates would still belong to the State of Victoria when the deceased person does not have next of kin who are entitled to inherit on intestacy. These features of Victoria's intestacy scheme are already consistent with other jurisdictions, and the National Committee for Uniform Succession Laws did not recommend any change in relation to them.
- 5.10 While the basic framework of the intestacy scheme would remain the same, the Commission recommends changing the law concerning:
- the definition of next of kin
 - survivorship
 - the size of the deceased person's partner's share and their right to elect to acquire certain estate property
 - the circumstances in which the deceased person's children are entitled to take
 - some procedural aspects of the intestacy scheme
 - intestate estates of Indigenous people.

⁸ These are grants of letters of administration, which are the grants obtained on intestacy. See Victorian Law Reform Commission, *Succession Laws: Intestacy*, Consultation Paper No 13 (2012) 21.

⁹ Ibid 21.

¹⁰ National Committee for Uniform Succession Laws, *Uniform Succession Laws: Intestacy*, New South Wales Law Reform Commission Report No 116 (2007).

¹¹ *Succession Amendment (Intestacy) Act 2009* (NSW); *Intestacy Act 2010* (Tas).

¹² National Committee for Uniform Succession Laws, above n 10.

- 5.11 The reforms recommended in this chapter would bring greater clarity to intestacy law in Victoria and greater consistency to intestacy law in Australia but, if grafted onto the existing provisions of the Administration and Probate Act, would make Victoria's law unnecessarily complex and confusing. For this reason, the Commission considers that all of the Administration and Probate Act provisions concerning the intestacy scheme should be rewritten, incorporating the reforms to the law recommended in this chapter.
- 5.12 The Commission notes that there are also unnecessary complexities in the intestacy provisions of the Administration and Probate Act, which could be addressed if the provisions were comprehensively redrafted. For example:
- section 51(2) of the Administration and Probate Act provides for distribution to the deceased person's partner on intestacy, if the deceased person is survived by one partner¹³
 - section 52(1)(a) of the Act also provides for distribution to the deceased person's partner on intestacy in these circumstances.¹⁴
- 5.13 Section 51(2) of the Act is the correct and comprehensive provision that sets out distribution to the deceased person's partner, if the deceased person is not survived by multiple partners. Section 52(1)(a) of the Administration and Probate Act is unnecessary as an incomplete restatement of the deceased person's partner's rights on intestacy. Redrafted intestacy provisions, incorporating the Commission's recommended amendments, should address these and any other anomalies in the existing sections.

Setting a limit on next of kin

Current law

- 5.14 In Victoria, there is no limit on the next of kin who are entitled to inherit on intestacy. Rather, the civil law rules of distribution apply, subject to the provisions of the Administration and Probate Act. Intestate estates are distributed to the deceased person's partner or next of kin according to the following hierarchy:
- partner(s)¹⁵ and/or children or other issue¹⁶
 - parents¹⁷
 - siblings, or nieces and nephews when they take as representatives of their deceased parent¹⁸
 - grandparents¹⁹
 - nieces and nephews when they take in their own capacity, rather than as representatives of their deceased parent; aunts and uncles;²⁰ great-grandparents
 - first cousins; great-nieces and great-nephews; great-aunts and great-uncles; great-great-grandparents
 - more remote kin.

13 *Administration and Probate Act 1958* (Vic) ss 51(1)–(2). This section provides for situations in which the deceased person is survived by a partner but no children or other issue, and situations in which the deceased person is survived by a partner and children or other issue.

14 *Ibid* s 52(1)(a). This section provides for situations in which the deceased person is survived by a partner and children or other issue.

15 *Ibid* ss 51(1)–(2), 52(1)(a).

16 *Ibid* s 52(1)(f). Distribution continues indefinitely down this line of lineal descendants, to grandchildren, great-grandchildren and so on, before moving to the next category of next of kin.

17 *Ibid* s 52(1)(b), (e)–(ea).

18 *Ibid* s 52(1)(f)(v).

19 *Ibid*.

20 That is, siblings of the deceased person's parents, not aunts and uncles by marriage.

Proposed change

- 5.15 To 'avoid complexity, delay and expense in the administration of intestate estates', the National Committee for Uniform Succession Laws recommended setting a limit on next of kin who are entitled to inherit on intestacy.²¹
- 5.16 In its consultation paper on intestacy, the Commission asked whether next of kin for the purposes of intestacy in Victoria should be limited to the children of the deceased person's parents' siblings—that is, the deceased person's first cousins—as recommended by the National Committee.²²
- 5.17 Under the National Committee's recommendations, where an aunt or uncle of the deceased person (a brother or sister of the deceased person's parent) would have been entitled to take on intestacy, but predeceases the deceased person, leaving a child or children (first cousins of the deceased person) who survive the deceased person, those first cousins would take the deceased person's aunt's or uncle's share.²³ However, if a first cousin predeceases the deceased person, leaving a child or children (first cousins once removed of the deceased person) who survive the deceased person, those first cousins once removed would not take the deceased person's first cousin's share, and the estate would belong to the State of Victoria as *bona vacantia*.²⁴
- 5.18 Where a brother or sister of the deceased person would have been entitled to take on intestacy but predeceases the deceased person, leaving a child or children (nieces and nephews of the deceased person) who survive the deceased person, those nieces and nephews would take the deceased person's sibling's share.²⁵ If a niece or nephew predeceases the deceased person, leaving a child or children (great-nieces and great-nephews of the deceased person) who survive the deceased person, those great-nieces and great-nephews would take the deceased person's niece's or nephew's share.²⁶ Distribution would continue down this line to great-great-nieces and great-great-nephews, and so on until the entitlement is exhausted.²⁷
- 5.19 If the National Committee's recommended limit were implemented in Victoria, it would exclude the deceased person's great-grandparents, who are the same degree of remoteness as the deceased person's aunts and uncles in Victoria under the civil law, and the deceased person's great-aunts and great-uncles and great-great-grandparents, who are the same degree of remoteness as the deceased person's first cousins in Victoria under the civil law.²⁸ The limitation would also exclude more remote relatives.
- 5.20 Victoria is the only state that does not limit next of kin on intestacy.²⁹ The proposed change would bring Victoria into line with New South Wales, Tasmania, Queensland and Western Australia, which all set the limit at first cousins of the deceased person.³⁰

21 National Committee for Uniform Succession Laws, above n 10, 173.

22 Ibid 173 recommendation 37, Draft Intestacy Bill 2006 cl 32(3); Victorian Law Reform Commission, above n 8, 22.

23 National Committee for Uniform Succession Laws, above n 10, recommendation 37, Draft Intestacy Bill 2006 cl 32(3).

24 Ibid 173 recommendation 37, Draft Intestacy Bill 2006 cl 32(3).

25 Ibid 162 recommendation 34, Draft Intestacy Bill 2006 cl 30(3).

26 Ibid.

27 Ibid.

28 See Victorian Law Reform Commission, above n 8, 19 Figure 1.

29 Some states set a limit on next of kin at first cousins of the deceased person: *Administration Act 1903* (WA) s 14(1) table item 8; *Succession Act 1981* (Qld) s 35(1A); *Succession Act 2006* (NSW) s 131(3); *Intestacy Act 2010* (Tas) s 32(3). Others set the limit at issue of the first cousins of the deceased person: *Administration and Probate Act 1919* (SA) ss 72G(1)(e), 72J(d); *Administration and Probate Act 1929* (ACT) ss 49(5), 49C; *Administration and Probate Act 1969* (NT) s 69(1)(c).

30 *Administration Act 1903* (WA) s 14(1) table item 8; *Succession Act 1981* (Qld) s 35(1A); *Succession Act 2006* (NSW) s 131(3); *Intestacy Act 2010* (Tas) s 32(3). South Australia, the Australian Capital Territory and the Northern Territory extend next of kin to issue of the deceased person's first cousins: *Administration and Probate Act 1919* (SA) ss 72G(1)(e), 72J(d); *Administration and Probate Act 1929* (ACT) ss 49(5), 49C; *Administration and Probate Act 1969* (NT) s 69(1)(c).

Views and conclusions

Setting a limit on next of kin

- 5.21 In submissions to the Commission, there was widespread support for limiting next of kin to the deceased person's first cousins.³¹ The main reasons given in support of limiting next of kin were that:
- Next of kin inquiries can be time consuming and expensive³² and setting a limit will lessen the difficulty and delay involved in locating remote next of kin, who may have had no relationship with the deceased person or who are overseas.³³
 - National consistency would provide greater certainty, particularly for people who own property in more than one state or territory.³⁴
 - More remote next of kin could make an application to the Minister for Finance under the *Financial Management Act 1994* (Vic) or could make a family provision application in certain circumstances, where they believe they should have received a share.³⁵
 - Cases involving remote next of kin are rare and the additional costs and time taken in locating them are not justified.³⁶
- 5.22 Several submissions were opposed to setting a limit on next of kin on the basis that it would result in more estates passing to the State of Victoria as *bona vacantia*.³⁷ The Law Institute of Victoria's submission argued that people expect family to inherit, irrespective of whether there was a close or distant relationship.³⁸
- 5.23 However, the Commission notes that fewer than five per cent of estates administered by State Trustees involve next of kin who are more remote than the deceased person's first cousins and most fall within the first two classes of next of kin.³⁹ If next of kin were limited to first cousins, only a relatively small number of estates that would currently be distributed to a deceased person's more remote relatives would pass to the State of Victoria instead. The Commission agrees that the cases are so few that the time and expense involved in locating more remote next of kin is not justified. As noted in submissions, there is the potential for more remote next of kin to apply to the Minister for Finance or make a family provision claim in some circumstances, if they believe that they should have received a share.
- 5.24 If the unlimited definition of next of kin in Victoria were to be retained, the fact that all other states and territories limit next of kin who are entitled to inherit on intestacy means that remote next of kin of a deceased person who lived permanently in Victoria or owned immovable property in Victoria, and died intestate, may receive a windfall that they would not be entitled to anywhere else in Australia. This creates an anomaly, particularly where a deceased person owned immovable property in multiple jurisdictions.

31 Submissions 8 (Patricia Strachan); 14 (Commercial Bar Association); 19 (Association of Independent Retirees); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 31 (Seniors Rights Victoria); 32 (The Institute of Legal Executives); 33 (State Trustees Limited); 36 (Law Society of New South Wales).

32 Submission 8 (Patricia Strachan).

33 Submissions 25 (Moores Legal); 26 (Rigby Cooke Lawyers). Members of the Commission's succession laws advisory committee also made this point.

34 Submission 31 (Seniors Rights Victoria).

35 Submissions 14 (Commercial Bar Association); 32 (The Institute of Legal Executives).

36 Advisory Committee (Meeting 3).

37 Submissions 23 (Family Voice Australia); 30b (Law Institute of Victoria); 39 (Carolyn Sparke SC); 40 (Janice Brownfoot).

38 Submission 30b (Law Institute of Victoria).

39 Information provided by State Trustees (2 November 2012). State Trustees administers between 500 and 1000 intestate estates each year and is the only repository of this type of information.

- 5.25 In the Commission's view, the arguments against setting a limit on next of kin do not warrant departure from the National Committee's recommendation. For practicality, and to promote certainty and national consistency, next of kin entitled to inherit on intestacy should be limited to children of the deceased person's parents' siblings—first cousins of the deceased person. First cousins of the deceased person would take as representatives of the deceased person's parent's siblings who do not survive the deceased person.⁴⁰
- 5.26 The Commission also considers that a list of those entitled to take on intestacy should be included in the Administration and Probate Act. Distribution among relatives should be set out as in the *Succession Act 2006* (NSW).⁴¹
- 5.27 Under the recommended scheme, the intestate estate would be distributed according to the following hierarchy:
- partner(s) (in some circumstances, shared with children or other issue)⁴²
 - children, or other issue when they take as representatives of their deceased parent⁴³
 - parents
 - siblings, or nieces and nephews or great-nieces and great-nephews, when they take as representatives of their deceased parent⁴⁴
 - grandparents
 - aunts and uncles, or first cousins when they take as representatives of their deceased parent.

Recommendations

- 11 The entitlements of all next of kin on intestacy should be clearly set out in the *Administration and Probate Act 1958* (Vic).
- 12 Next of kin who are entitled to inherit on intestacy should be limited to children of the deceased person's parents' siblings (the deceased person's first cousins).

⁴⁰ All shares on intestacy would be by representation (*per stirpes*), in accordance with the Commission's recommendation 34 at [5.144] below.

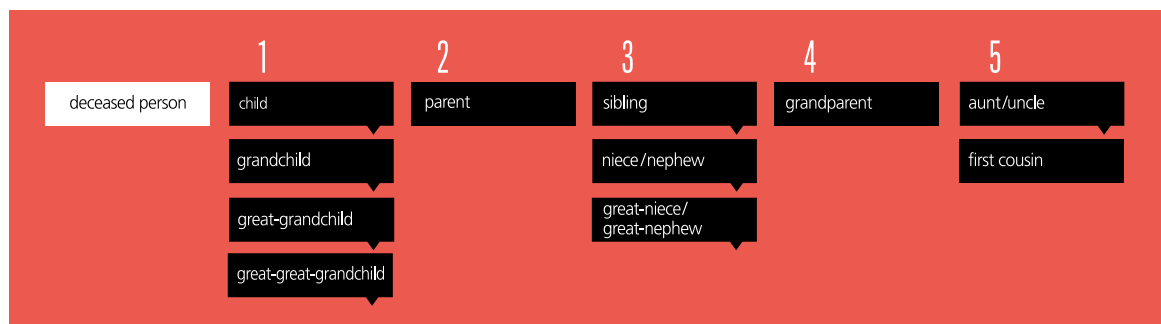
⁴¹ *Succession Act 2006* (NSW) pt 4.3.

⁴² See [5.114] below for the Commission's recommendation in relation to entitlements as between the deceased person's partner(s) and children.

⁴³ See [5.131] below for the Commission's recommendations in relation to the entitlements of children.

⁴⁴ Distribution would continue indefinitely down this line until the entitlement is exhausted. See, eg, *Succession Act 2006* (NSW) s 129(3).

Figure 1: Distribution to next of kin under the recommended scheme, where no partner survives the deceased



5.28 The effect of recommendation 12, where the deceased person is not survived by a partner, is illustrated by **Figure 1**. In interpreting **Figure 1**, the following points should be noted:

- It is relevant only where the deceased person is not survived by a partner.
- Distribution would only be to the deceased person's parent(s) if the deceased person was not survived by any children, grandchildren, great-grandchildren, great-great-grandchildren or other issue down this line.
- Distribution would only be to the deceased person's sibling(s) if the deceased person was not survived by any children or other issue, or parent(s). Nieces and nephews and other descendants down this line would take as representatives of their deceased parent(s).
- Distribution would only be to the deceased person's grandparent(s) if the deceased person was not survived by any children or other issue, parent(s), sibling(s), niece(s) or nephew(s), great-niece(s) or great-nephew(s) or other descendants of their siblings.
- Distribution would only be to the deceased person's aunt(s) or uncle(s)—that is, siblings of their parent(s)—if the deceased person was not survived by any children or other issue, parent(s), sibling(s), niece(s) or nephew(s), great-niece(s) or great-nephew(s) or other descendants of their siblings, or grandparent(s). The deceased person's first cousin(s) would take as representatives of their deceased parent(s), but there would be no distribution to children or other issue of first cousin(s) if any first cousin(s) did not survive the deceased person.
- If the deceased person was not survived by any children or other issue, parent(s), sibling(s), niece(s) or nephew(s), great-niece(s) or great-nephew(s) or other descendants of their siblings, grandparent(s), aunt(s) or uncle(s) or first cousins, the estate would be *bona vacantia*.

Entitlements to take in more than one capacity

5.29 The National Committee also recommended that, where a person is entitled to take in more than one capacity on intestacy, they should be able to take in each capacity.⁴⁵ This could arise where, for example:

- The deceased person's parents' respective siblings marry one another and have children—for example, where the deceased person's mother's sister (the deceased person's maternal aunt) and father's brother (paternal uncle) marry and have a child (the deceased person's first cousin). If the deceased person's married maternal aunt and paternal uncle both fail to survive the deceased person, the deceased person's first cousin would be entitled to take both their deceased mother's share and their deceased father's share.

- The deceased person's siblings' respective children (the deceased person's nieces and nephews) marry one another as first cousins and have children (the deceased person's great-nieces and great-nephews). If the deceased person's married niece and nephew both fail to survive the deceased person, the deceased person's great-nieces and great-nephews would be entitled to take both their deceased mother's share and their deceased father's share.

5.30 The Commission considers that, as recommended by the National Committee, next of kin who are entitled to take on intestacy in more than one capacity should be permitted to take in each capacity in which they are entitled.

Recommendation

13 Persons entitled to inherit on intestacy in more than one capacity should be entitled to take in each capacity.

Survivorship

Current law

- 5.31 In Victoria, there is no requirement that a person entitled to inherit on intestacy survive the deceased person by any amount of time; it is sufficient that they survive the deceased person at all.⁴⁶
- 5.32 This differs from the position that applies to beneficiaries under a will. They must survive the deceased person by 30 days in order to take their benefit, unless a contrary intention is expressed in the will.⁴⁷ This creates an inconsistency in relation to partial intestacies, where a person is a beneficiary under the will and is also entitled to a share in relation to the partial intestacy. If this person dies within 30 days of the deceased person, they (or their estate) would not be entitled to the gift under the will, in the absence of a contrary intention in the will, but they would be entitled to their share on intestacy.

Proposed change

- 5.33 To achieve consistency with the survivorship requirement in relation to wills, and to address the problem of relatives dying within a short time of one another, the National Committee for Uniform Succession Laws recommended that those entitled to a share on intestacy should survive the deceased person by 30 days to take their share on intestacy, unless the survivorship requirement would result in *bona vacantia*.⁴⁸ The *bona vacantia* exception recognises that, where there are next of kin within the defined classes, it is preferable for the deceased person's estate to pass to them, even though they may die shortly after the deceased person, rather than to the State of Victoria.
- 5.34 Queensland already had a 30-day survivorship requirement when the National Committee made its recommendations,⁴⁹ and South Australia has a 28-day survivorship requirement that applies only to the deceased person's spouse and domestic partner,⁵⁰ although neither of these states has a *bona vacantia* exception. Both New South Wales and Tasmania have implemented the National Committee's recommendation.⁵¹

⁴⁶ To 'survive' the deceased person means to live longer than them.

⁴⁷ *Wills Act 1997* (Vic) s 39.

⁴⁸ National Committee for Uniform Succession Laws, above n 10, 195–6 recommendation 40, Draft Intestacy Bill 2006 cls 4(2)–(3).

⁴⁹ *Succession Act 1981* (Qld) s 35(2).

⁵⁰ *Administration and Probate Act 1919* (SA) s 72E.

⁵¹ *Succession Act 2006* (NSW) s 107(2); *Intestacy Act 2010* (Tas) s 8(2).

- 5.35 The National Committee also recommended that the survivorship requirement should apply to children who were conceived, but not yet born, at the date of the deceased person's death.⁵² It recommended that, to inherit their share, such children should be required to survive for at least 30 days after birth.⁵³ As with the general survivorship requirement, it recommended that this requirement should not apply if it would result in *bona vacantia*.⁵⁴ This recommendation has been adopted in New South Wales and Tasmania.⁵⁵ Children who were conceived but not yet born at the date of the deceased person's death are recognised on intestacy in Victoria,⁵⁶ but no survivorship requirement applies to them, as no survivorship requirement applies to any person entitled to take on intestacy.
- 5.36 In its consultation paper on intestacy, the Commission asked whether the National Committee's recommended approach to survivorship should be adopted in Victoria.⁵⁷

Views and conclusions

- 5.37 In submissions to the Commission, there was general support for introducing a 30-day survivorship requirement.⁵⁸ Only one submission opposed the idea.⁵⁹ The main reasons given in support of the introduction of a survivorship requirement were:
- consistency with the survivorship requirement under wills⁶⁰ and the way people generally draft their wills⁶¹
 - consistency with other Australian states and territories⁶²
 - ensuring that a deceased person's assets generally remain in their own bloodline and avoiding the quirk that can occur when relatives die in quick succession, where property passes to one person and then shortly thereafter to their estate.⁶³
- 5.38 In consultation, representatives of the NSW Trustee and Guardian said that the survivorship amendment is working well in New South Wales and noted that they have experienced a number of cases where spouses die within a short time of each other, which means that the requirement is justified.⁶⁴
- 5.39 The reasons provided in submissions and consultations in support of a survivorship requirement were broadly similar to those given by the National Committee when recommending the requirement.⁶⁵ The National Committee also noted that the period of 30 days would not delay administration unduly and, in some cases, would avoid the costs and delay involved in 'double administration'.⁶⁶
- 5.40 The Commission considers that the reasons in support of a survivorship requirement are compelling and that a 30-day survivorship requirement should operate in relation to intestacy, unless it would result in *bona vacantia*. The Commission considers that the survivorship requirement should apply to children conceived, but not yet born, at the date of the deceased person's death, as recommended by the National Committee.

52 National Committee for Uniform Succession Laws, above n 10, 195–6 recommendation 40, Draft Intestacy Bill 2006 cl 4(2)(b).

53 Ibid.

54 Ibid 195–6 recommendation 40, Draft Intestacy Bill 2006 cls 4(2)–(3).

55 Succession Act 2006 (NSW) s 107(1)(b); Intestacy Act 2010 (Tas) s 8(1)(b).

56 Administration and Probate Act 1958 (Vic) s 5(2).

57 Victorian Law Reform Commission, above n 8, 23.

58 Submissions 14 (Commercial Bar Association); 19 (Association of Independent Retirees); 23 (Family Voice Australia); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 30b (Law Institute of Victoria); 31 (Seniors Rights Victoria); 33 (State Trustees Limited); 35 (Andrew Verspaandonk); 36 (Law Society of New South Wales); 39 (Carolyn Sparke SC); 40 (Janice Brownfoot).

59 Submission 8 (Patricia Strachan). The Commission does not consider it a serious risk that the introduction of a survivorship requirement would increase the likelihood of beneficiaries being murdered within the 30-day survivorship period, as suggested in this submission.

60 Submissions 14 (Commercial Bar Association); 23 (Family Voice Australia); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 31 (Seniors Rights Victoria); 35 (Andrew Verspaandonk); 39 (Carolyn Sparke). Members of the Commission's succession laws advisory committee also made this point: Advisory Committee (Meeting 3).

61 Submission 26 (Rigby Cooke Lawyers).

62 Submissions 35 (Andrew Verspaandonk); 36 (Law Society of New South Wales).

63 Submissions 39 (Carolyn Sparke SC); 40 (Janice Brownfoot). Carolyn Sparke gave the example of a partner of the deceased person who is not the parent of the deceased person's children: the majority of the estate may pass to that partner, and then into their estate if they die soon after the deceased person, benefiting the partner's side of the family rather than the deceased person's children.

64 Consultation 9 (NSW Trustee and Guardian).

65 National Committee for Uniform Succession Laws, above n 10, 195–6.

66 Ibid 195.

Recommendations

- 14 Next of kin should be required to survive the deceased person for 30 days in order to inherit on intestacy, unless the survivorship requirement would result in *bona vacantia*.
- 15 Children who are conceived but not yet born at the date of the deceased person's death should be required to survive for at least 30 days after birth in order to inherit on intestacy, unless the survivorship requirement would result in *bona vacantia*.

The partner's share

Current law

Recognition of partners on intestacy

- 5.41 If a person dies intestate leaving a partner, the hierarchy of distribution on intestacy prioritises the partner. For the purposes of intestacy, the Administration and Probate Act defines the deceased person's partner as their spouse or domestic partner.⁶⁷ Spouse means someone who was married to the deceased person at the time of the deceased person's death.⁶⁸ Domestic partner⁶⁹ means either a registered domestic partner⁷⁰ or an unregistered domestic partner.⁷¹
- 5.42 Registered caring partner is also defined⁷² and included in the provisions that deal with the situation where the deceased person is survived by more than one partner.⁷³ However, registered caring partner is not included in the definition of partner,⁷⁴ so registered caring partners do not appear to be entitled to take as the deceased person's partner on intestacy. This is discussed further from [5.53] below.

67 *Administration and Probate Act 1958* (Vic) s 3(1) (definition of 'partner').

68 *Ibid* s 3(1) (definition of 'spouse').

69 *Ibid* s 3(1) (definition of 'domestic partner').

70 Someone who, at the date of the deceased person's death, was in a registered domestic relationship with the deceased person within the meaning of the *Relationships Act 2008* (Vic): *Administration and Probate Act 1958* (Vic) s 3(1) (definition of 'registered domestic partner'). 'Registered domestic relationship' is defined as a relationship, registered in the Relationships Register, involving two people, who are not married or in another registered relationship, where one or both of the parties provide personal or financial commitment and support of a domestic nature for the material benefit of the other, not for fee or reward and irrespective of their genders and whether or not they are living under the same roof: *Relationships Act 2008* (Vic) ss 6(b)–(c), 10(3)(a), 5 (definition of 'registrable domestic relationship').

71 A person other than a registered domestic partner of the deceased person who, although not married to the deceased person, was living with the deceased person at the time of their death as a couple and on a genuine domestic basis, and had either lived with the deceased person in that manner continuously for the previous two years or is a parent of a child of the deceased person who was under the age of 18 at the time of the deceased person's death: *Administration and Probate Act 1958* (Vic) s 3(1) (definition of 'unregistered domestic partner'). In determining whether a person was the deceased person's unregistered domestic partner, all circumstances of their relationship are taken into account, including certain factors set out in the Relationships Act: *Administration and Probate Act 1958* (Vic) s 3(3); *Relationships Act 2008* (Vic) s 35(2).

72 Someone who was in a registered caring relationship with the deceased person at the time of the deceased person's death: *Administration and Probate Act 1958* (Vic) s 3(1) (definition of 'registered caring partner'). 'Registered caring relationship' is defined as a relationship, registered in the Relationships Register, involving two adults, who are not a couple or married to each other, and who may or may not otherwise be related by family, where one or both of the parties provide personal or financial commitment and support of a domestic nature for the material benefit of the other, not for fee or reward and irrespective of their genders and whether or not they are living under the same roof: *Relationships Act 2008* (Vic) ss 6(b)–(c), 10(3)(ab), 5 (definition of 'registrable caring relationship').

73 *Administration and Probate Act 1958* (Vic) s 51A.

74 *Ibid* s 3(1) (definition of 'partner').

The partner's share on intestacy

5.43 The deceased person's partner's share on intestacy will depend on:

- the size of the estate
- whether the deceased person is also survived by children or other issue
- whether the deceased person is also survived by another partner or other partners who are also entitled to a share.

Distribution when the deceased person is survived by multiple partners is discussed below from [5.89].

5.44 Victorian law recognises two situations in which the deceased person's partner is entitled to take the entire intestate estate:

- where the deceased person is survived by one partner, but no children or other issue⁷⁵
- where the deceased person is survived by one partner, and children or other issue, but the value of the intestate estate does not exceed \$100,000.⁷⁶

5.45 If the deceased person is survived by a partner and children or other issue, and the value of the intestate estate exceeds \$100,000, the deceased person's partner must share the intestate estate with the deceased person's children or other issue.⁷⁷ In this situation, the deceased person's partner is entitled to all of the following:⁷⁸

- the deceased person's personal chattels⁷⁹
- \$100,000 plus interest⁸⁰ on that amount
- one third of the balance of the estate.

5.46 In this situation, the deceased person's children or other issue share the remaining two thirds of the intestate estate between them.⁸¹ The deceased person's partner's statutory legacy and share of the remainder are only relevant where the deceased person is survived by a partner and children or other issue who are entitled to a share on intestacy. The circumstances in which the Commission considers that the deceased person's children should be entitled to a share on intestacy are discussed below from [5.117].

Proposed change

5.47 When the deceased person is survived by both a partner and children or other issue who are entitled to a share on intestacy, the National Committee for Uniform Succession Laws recommended increasing the partner's share of the intestate estate as follows:

- increasing the partner's statutory legacy to \$350,000, adjusted to reflect changes in the Consumer Price Index (CPI) between 1 January 2006 and 1 January in the year of the deceased person's death,⁸² and
- increasing the partner's share of the remainder from one third to one half.⁸³

75 Ibid s 51(1).

76 Ibid s 51(2)(b).

77 Ibid ss 51(2)(c), 52(1)(f).

78 Ibid s 51(2)(c).

79 Personal chattels are personal property, as distinct from real property. Money, securities and property used for business purposes are excluded from the definition of personal chattels: *ibid* s 5(1) (definition of 'personal chattels').

80 Interest is calculated from the date of death to the date of payment of the legacy, and the rate of interest is fixed from time to time under section 2 of the *Penalty Interest Rates Act 1983* (Vic) less 2.5%: *Administration and Probate Act 1958* (Vic) ss 51(2)(c)(ii), (3).

81 *Administration and Probate Act 1958* (Vic) s 52(1)(f). Entitlements of the deceased person's children or other issue are discussed below at [5.117].

82 National Committee for Uniform Succession Laws, above n 10, 70–1 recommendation 6, Draft Intestacy Bill 2006 cls 8(1), (4), 14(b).

83 Ibid 75–6 recommendation 8, Draft Intestacy Bill 2006 cls 14(c), 28(2).

- 5.48 It was the National Committee's view that the statutory legacy should permit the deceased person's partner to continue living in the manner to which they had become accustomed, and permit them to buy essential estate items.⁸⁴ Further, the National Committee considered that the one-third share of the remainder, which the deceased person's partner currently receives in Victoria, is too small.⁸⁵
- 5.49 The Commission's consultation paper on intestacy asked whether, when the deceased person is survived by both a partner and children or other issue who are also entitled to a share on intestacy, the deceased person's partner's statutory legacy and share of the remainder should be increased as recommended by the National Committee.⁸⁶
- 5.50 Both Tasmania and New South Wales have increased the partner's statutory legacy to \$350,000, adjusted to reflect changes in the CPI by application of a formula.⁸⁷ However, the New South Wales formula takes into account changes between the December 2005 CPI number and the CPI number for the quarter immediately before the deceased person's death, while the Tasmanian formula takes into account changes between the December 2009 CPI quarter and the CPI quarter immediately before the deceased person's death.⁸⁸ The effect of this is that the statutory legacy in New South Wales is now \$427,684.95,⁸⁹ while in Tasmania it is only \$380,063.60.⁹⁰
- 5.51 The CPI number used in both New South Wales and Tasmania is the 'All Groups Consumer Price Index number, being the weighted average of the 8 capital cities, published by the Australian Statistician in respect of that quarter.'⁹¹
- 5.52 Under the National Committee's recommendations, the deceased person's partner would still take the entire intestate estate if the deceased person were not also survived by children or other issue who were entitled to a share—these recommendations only relate to situations in which the deceased person is survived by both a partner and children or other issue who are also entitled to a share.⁹² Although the partner's statutory legacy and share of the remainder would increase, the overall framework of Victoria's legislative provisions in this area would remain the same. The deceased person's partner would still receive the deceased person's personal chattels, a statutory legacy plus interest, and a share of the remainder—only the size of the statutory legacy and share of the remainder would change.

Views and conclusions

The definition of partner

- 5.53 As discussed above at [5.41]–[5.42], the definition of partner in the Administration and Probate Act refers only to spouse and domestic partner,⁹³ and domestic partner includes only registered and unregistered domestic partners. It does not include registered caring partners.⁹⁴ The right to inherit on intestacy is conferred on people who fall within the definition of partner, and so excludes the deceased person's registered caring partner.

84 Ibid 63–4.

85 Ibid 75.

86 Victorian Law Reform Commission, above n 8, 27.

87 *Succession Act 2006* (NSW) s 106(2); *Intestacy Act 2010* (Tas) s 7(2).

88 Ibid.

89 CPI adjusted legacy = \$350,000 x (CPI number preceding the deceased person's death/CPI number for December 2005). So for the March 2013 quarter, for example, the CPI adjusted legacy = \$350,000 x (102.4 x 83.8) = \$427,684.95: *Succession Act 2006* (NSW) s 106(2); Australian Taxation Office, *Consumer Price Index (CPI) Rates* <<http://www.ato.gov.au/taxprofessionals/content.aspx?doc=/content/1566.htm>>.

90 CPI adjusted legacy = \$350,000 x (CPI number preceding the deceased person's death/CPI number for December 2009). So for the March 2013 quarter, for example, the CPI adjusted legacy = \$350,000 x (102.4 x 94.3) = \$380,063.60: *Intestacy Act* (2010) s 7(2); Australian Taxation Office, above n 89.

91 *Succession Act 2006* (NSW) s 106(9); *Intestacy Act 2010* (Tas) s 7(9).

92 See [5.131] below for the Commission's recommendations in relation to the more limited circumstances in which the deceased person's children should be able to inherit on intestacy.

93 *Administration and Probate Act 1958* (Vic) s 3(1) (definition of 'partner').

94 Ibid s 3(1) (definition of 'domestic partner').

The Administration and Probate Act defines registered caring partner,⁹⁵ but this person appears only to be entitled to inherit on intestacy in limited circumstances, where the deceased person is survived by both a registered caring partner and an unregistered domestic partner.⁹⁶

- 5.54 Submissions and consultations did not address whether registered caring partners are, or should be, entitled to inherit on intestacy in the same circumstances as spouses, registered domestic partners and unregistered domestic partners. Further, the problem does not appear to have been considered by the Probate Registry of the Supreme Court of Victoria yet, as the Commission understands that the Supreme Court only received its first intestacy claim by a registered domestic partner in 2012.⁹⁷
- 5.55 It is unlikely that Parliament intended that registered caring partners inherit on intestacy only when the deceased person is survived by both a registered caring partner and an unregistered domestic partner, but not when they are the only surviving partner of the deceased person. Indeed, the explanatory memorandum for the bill that introduced registered caring partners into the Administration and Probate Act specified that 'it is intended that the provisions of the *Administration and Probate Act 1958* that apply to domestic partners apply equally to partners in registered caring relationships'.⁹⁸
- 5.56 For this reason, the Commission recommends that the position of registered caring partners under the Administration and Probate Act be clarified to ensure that registered caring partners are entitled to inherit on intestacy in the same circumstances as spouses, registered domestic partners and unregistered domestic partners.

Recommendations

- 16 The definition of partner in the *Administration and Probate Act 1958* (Vic) should be amended to include registered caring partners, as defined in the *Administration and Probate Act 1958* (Vic) by reference to the *Relationships Act 2008* (Vic).
- 17 Registered caring partners should be entitled to inherit on intestacy in the same circumstances as spouses, registered domestic partners and unregistered domestic partners.

95 'Registered caring partner' is defined as someone who was in a registered caring relationship with the deceased person at the time of the deceased person's death: *ibid* s 3(1) (definition of 'registered caring partner'). 'Registered caring relationship' is defined as a relationship, registered in the Relationships Register, involving two adults, who are not a couple or married to each other, and who may or may not otherwise be related by family, where one or both of the parties provide personal or financial commitment and support of a domestic nature for the material benefit of the other, not for fee or reward and irrespective of their genders and whether or not they are living under the same roof: *Relationships Act 2008* (Vic) ss 6(b)–(c), 10(3)(ab), 5 (definition of 'registrable caring relationship').

96 *Administration and Probate Act 1958* (Vic) s 51A.

97 Advisory Committee (Meeting 3).

98 Explanatory Memorandum, Relationships Amendment (Caring Relationships) Bill 2008 (Vic) 10; *Relationships Amendment (Caring Relationships) Act 2009* (Vic) sch 1 item 2.

The partner's statutory legacy

The amount of the statutory legacy

- 5.57 All submissions that responded to this issue supported increasing the deceased person's partner's statutory legacy,⁹⁹ with most supporting an increase to \$350,000 adjusted to reflect changes in the CPI.¹⁰⁰ Reasons given in support of increasing the deceased person's partner's statutory legacy included:
- promoting a nationally consistent approach¹⁰¹
 - ensuring that the deceased person's partner is adequately provided for, so that the potential for family disputes and litigation is minimised¹⁰²
 - enabling the deceased person's partner to modestly house themselves.¹⁰³
- 5.58 The Supreme Court of Victoria expressed the view that statutory legacy provisions 'were originally intended to ensure that the matrimonial home (if any) was preserved for the surviving partner'.¹⁰⁴ It considered the current statutory legacy to be inadequate and said that it 'should be substantially increased to preserve the intention of the provisions'.¹⁰⁵
- 5.59 However, some submissions that supported an increase in the statutory legacy were unsure about the amount of the increase,¹⁰⁶ and others suggested that it should be linked to the size of the estate.¹⁰⁷ The Property and Probate Section of the Commercial Bar Association was concerned that, if the legacy were increased to \$350,000, it would reduce the children's share and could result in claims being made against the estate that would ultimately deplete it.¹⁰⁸ It considered that the legacy should be adjusted according to CPI, with a minimum of \$150,000 and a maximum of \$350,000.¹⁰⁹ Rigby Cooke Lawyers considered that a legacy of \$350,000 would be excessive for small estates, and that the legacy should be \$150,000 or five per cent of the estate, whichever was greater.¹¹⁰
- 5.60 The Commission notes these concerns, but is of the view that the deceased person's partner's needs—for housing, for example—do not abate simply because the intestate estate for distribution is only modest. The partner's statutory legacy should be of a fixed amount. If the intestate estate is not sufficiently large to allow for the partner's statutory legacy and share of the remainder, as well as the deceased person's children's share of the remainder, the deceased person's children's share should be reduced to the necessary extent. This is consistent with the current approach to partners and children on intestacy—if the value of the intestate estate does not exceed \$100,000, the deceased person's partner takes the entire intestate estate to the exclusion of children or issue.¹¹¹

99 Submissions 14 (Commercial Bar Association); 19 (Association of Independent Retirees); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 30b (Law Institute of Victoria); 31 (Seniors Rights Victoria); 33 (State Trustees Limited); 36 (Law Society of New South Wales); 39 (Carolyn Sparke SC); 40 (Janice Brownfoot).

100 Submissions 19 (Association of Independent Retirees); 30b (Law Institute of Victoria); 32 (The Institute of Legal Executives); 33 (State Trustees Limited); 36 (Law Society of New South Wales); 39 (Carolyn Sparke SC); 40 (Janice Brownfoot).

101 Submission 36 (Law Society of New South Wales).

102 Submission 31 (Seniors Rights Victoria).

103 Submission 39 (Carolyn Sparke SC).

104 Submission 37 (Supreme Court of Victoria).

105 Ibid.

106 Submissions 8 (Patricia Strachan); 25 (Moores Legal).

107 Submissions 14 (Commercial Bar Association); 26 (Rigby Cooke Lawyers).

108 Submission 14 (Commercial Bar Association).

109 Ibid.

110 Submission 26 (Rigby Cooke Lawyers).

111 *Administration and Probate Act 1958* (Vic) s 51(2).

- 5.61 In consultation, representatives of the NSW Trustee and Guardian noted that the partner's statutory legacy, increased in New South Wales in accordance with the National Committee's recommendations, is now approximately \$420,000.¹¹² They considered the increase to be an improvement, but noted that it may not be sufficient to allow the deceased person's partner to acquire the home, if it is located in metropolitan Sydney.¹¹³ The Commission considers that this is further reason to set the minimum statutory legacy at \$350,000, adjusted to reflect changes in the CPI.
- 5.62 Seniors Rights Victoria considered that, where the deceased person's partner lived with them in the principal place of residence, they should receive that residence in place of the \$350,000 adjusted statutory legacy.¹¹⁴ However, as the partner has a right to acquire certain estate property, discussed below from [5.70]¹¹⁵ the Commission does not consider that changing the partner's statutory legacy in this way is necessary.

Adjusting the statutory legacy to reflect changes in the Consumer Price Index (CPI)

- 5.63 Several submissions commented on the way in which the statutory legacy should be adjusted to reflect changes in the CPI. Moores Legal agreed that the CPI would be a useful mechanism for adjusting the statutory legacy without needing to amend the legislation from time to time.¹¹⁶ The Law Institute of Victoria expressed the view that the statutory legacy should be adjusted by the CPI on the first of January every year, ideally by regulation so that practitioners do not need to refer to the CPI.¹¹⁷ Seniors Rights Victoria agreed that the legacy should be in regulations, to allow for updates in accordance with the CPI, increases in property values, or a major recession.¹¹⁸ The Supreme Court of Victoria considered that the statutory legacy should be kept up to date by way of regulations or a statutory formula linked to the CPI or similar, without the need for statutory amendment.¹¹⁹
- 5.64 At the time of writing its intestacy report, the National Committee chose \$350,000 as an appropriate base amount for the statutory legacy at 1 January 2006. By keeping the base statutory legacy amount the same, but only adjusting from December 2009, the Tasmanian formula does not take into account changes in the CPI between December 2005 and December 2009. The New South Wales formula, on the other hand, takes into account changes in the CPI between December 2005 and the last published CPI number before the deceased person's date of death. The current adjusted statutory legacy in New South Wales is \$427,684.95,¹²⁰ while the current adjusted statutory legacy in Tasmania is \$380,063.60.¹²¹
- 5.65 The Commission considers that the New South Wales approach is more representative of the National Committee's intentions for adjustment of the partner's statutory legacy. For consistency with New South Wales, the partner's statutory legacy should be adjusted in Victoria as it is in New South Wales. Calculating the statutory legacy would not place an onerous burden on personal representatives administering intestate estates, as it only needs to be done quarterly. However, it would be of assistance to personal representatives if the quarterly CPI adjusted statutory legacies were published on the Supreme Court of Victoria Probate Office website.

112 Consultation 9 (NSW Trustee and Guardian).

113 Ibid.

114 Submission 31 (Seniors Rights Victoria).

115 At [5.88] below, the Commission recommends extending the partner's right of election beyond the shared home to any property that forms part of the residuary estate.

116 Submission 25 (Moores Legal).

117 Submission 30b (Law Institute of Victoria).

118 Submission 31 (Seniors Rights).

119 Submission 37 (Supreme Court of Victoria).

120 CPI adjusted legacy = \$350,000 x (CPI number preceding the deceased person's death/CPI number for December 2005). So for the March 2013 quarter, for example, the CPI adjusted legacy = \$350,000 x (102.4 x 83.8) = \$427,684.95: *Succession Act 2006* (NSW) s 106(2); Australian Taxation Office, above n 89.

121 CPI adjusted legacy = \$350,000 x (CPI number preceding the deceased person's death/CPI number for December 2009). So for the March 2013 quarter, for example, the CPI adjusted legacy = \$350,000 x (102.4 x 94.3) = \$380,063.60: *Intestacy Act* (2010) s 7(2); Australian Taxation Office, above n 89.

Recommendations

- 18 Where the deceased person is survived by a partner¹²² and children or other issue who are entitled to a share on intestacy, the deceased person's partner's statutory legacy should be increased to \$350,000 and adjusted to reflect changes in the All Groups Consumer Price Index number according to the following formula:
- $A = \$350,000 \times B/C$, where
- A represents the Consumer Price Index adjusted legacy
 - B represents the All Groups Consumer Price Index number for the last quarter for which such a number was published before the date of the deceased person's death
 - C represents the All Groups Consumer Price Index number for the December 2005 quarter.
- 19 The Supreme Court of Victoria should publish the quarterly Consumer Price Index adjusted statutory legacies on its website.

Interest on the statutory legacy

- 5.66 As recommended by the National Committee,¹²³ and implemented in both New South Wales and Tasmania,¹²⁴ the Commission considers that the deceased person's partner should be entitled to interest on their statutory legacy if it is not paid, or not paid in full, within one year after the deceased person's death. As in New South Wales and Tasmania, interest should be paid for the period between the first anniversary of the deceased person's death and the date of payment of the legacy in full.¹²⁵ For consistency with New South Wales and Tasmania, it should be calculated at the rate of two per cent above the cash rate last published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.¹²⁶

Recommendations

- 20 The deceased person's partner should be entitled to interest on the statutory legacy to which they are entitled on intestacy, or any part thereof, that is not paid within one year after the deceased person's death.
- 21 Interest on a statutory legacy to which a deceased person's partner is entitled on intestacy should be calculated between the first anniversary of the deceased person's death and the date of payment of the legacy in full, in accordance with a rate that is two per cent above the cash rate last published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.

122 At [5.114] below, the Commission recommends that where the deceased person is survived by multiple partners, as well as children or other issue who are entitled to a share, the partners should share the statutory legacy that one partner would have received.

123 National Committee for Uniform Succession Laws, above n 10, 21 recommendation 6.

124 *Succession Act 2006* (NSW) s 106(1)(b); *Intestacy Act 2010* (Tas) s 7(1)(b).

125 *Ibid.*

126 *Succession Act 2006* (NSW) s 106(5); *Intestacy Act 2010* (Tas) s 7(5).

The partner's share of the remainder

- 5.67 Most submissions also supported increasing the deceased person's partner's share of the remainder of the intestate estate, after payment of the statutory legacy, to one half.¹²⁷ It was noted that this would be consistent with the way that people draft their wills and would provide the deceased person's partner with greater resources to purchase the family home.¹²⁸
- 5.68 However, one submission considered that the partner's share of the remainder, as well as the statutory legacy, should be linked to the size of the estate.¹²⁹ Another was unsure whether a one-half share of the remainder would be any better than one third, but noted that this was consistent with the higher priority given to the deceased person's partner than their children on intestacy.¹³⁰
- 5.69 The Commission recommends that, where the deceased person is survived by a partner and children who are entitled to a share on intestacy, the partner's share of the remainder of the intestate estate after payment of the statutory legacy should be increased from one third to one half. The Commission also considers that, in these circumstances, the deceased person's partner should continue to be entitled to the deceased person's personal chattels.

Recommendation

- 22 Where the deceased person is survived by a partner¹³¹ and children or other issue who are entitled to a share on intestacy, the partner's share of the remainder of the intestate estate should be increased to one half.

The partner's right to elect to acquire an interest in certain property

Current law

- 5.70 When a person dies intestate, any place of residence or part of a place of residence owned by them becomes part of the estate that is distributed according to the laws of intestacy. Depending on the size of the intestate estate, if the deceased person is survived by both a partner and children or other issue, the intestate estate is shared between the partner and children or other issue.¹³² Additionally, if the deceased person is survived by more than one partner, they may have to share the intestate estate between them.¹³³ In these situations, it is possible that the partner who lived with the deceased person at the time of their death will not be entitled to the deceased person's share in the home in which they lived.

127 Submissions 8 (Patricia Strachan); 19 (Association of Independent Retirees); 26 (Rigby Cooke Lawyers); 30b (Law Institute of Victoria); 32 (The Institute of Legal Executives); 33 (State Trustees Limited); 36 (Law Society of New South Wales); 40 (Janice Brownfoot).
128 Submission 26 (Rigby Cooke Lawyers), although this submission questioned whether there should be an increase in both the legacy and the share of the remainder.
129 Submission 14 (Commercial Bar Association).
130 Submission 25 (Moores Legal).
131 At [5.114] below, the Commission recommends that where the deceased person is survived by multiple partners, as well as children or other issue who are entitled to a share, the partners should share the portion of the remainder that one partner would have received.
132 *Administration and Probate Act 1958* (Vic) ss 51(2), 52(1)(f). See discussion at [5.45] above.
133 *Ibid* s 51A.

- 5.71 The Administration and Probate Act contains a provision to remedy this in some circumstances. If a person dies intestate as to an interest in the shared home—that is, the principal place of residence that they shared with their partner at the time of their death—the deceased person’s partner may elect to acquire that interest at its value at the date of the deceased person’s death.¹³⁴
- 5.72 If the partner elects to acquire the interest in the shared home, their share of the intestate estate is reduced by the value of that interest.¹³⁵ If the value of the interest in the shared home is greater than the partner’s share of the intestate estate, the partner must pay the difference into the estate, either before distribution of the estate or within 12 months of making the election, whichever is sooner.¹³⁶
- 5.73 If the shared home is part of a larger property and cannot be severed from that property without subdivision, then a reference to the shared home is deemed to be a reference to the entire property.¹³⁷ This includes situations where the shared home is part of a farm.¹³⁸
- 5.74 The partner’s right to elect to acquire an interest in the shared home exists despite anything to the contrary in the Administration and Probate Act.¹³⁹ This raises a number of questions about the effect of an election on the administration of the estate:
- Can the personal representative sell a property in respect of which a partner has made an election if it is required for estate administration purposes?
 - Alternatively, can the deceased person’s partner only make an election after the personal representative has paid debts, liabilities, funeral and testamentary expenses?

Proposed change

- 5.75 The National Committee for Uniform Succession Laws considered that limiting the partner’s right of election to the shared home creates unnecessary complexity in the administration of intestate estates, and observed that the deceased person’s partner may wish to acquire other property in the estate, such as a holiday home or intellectual property in relation to a business venture.¹⁴⁰
- 5.76 To address these concerns, the National Committee recommended that the deceased person’s partner should be entitled to elect to acquire an interest in any estate property in the intestate estate, not just the shared home.¹⁴¹ It recommended that the surviving partner should provide satisfaction for the interest in the property they had elected to acquire by first relying on their share of the intestate estate, and then paying the difference into the intestate estate, if the value of the interest is greater than the value of their share in the intestate estate.¹⁴²
- 5.77 The National Committee specified that elections should require court authorisation if:
- the property forms part of a larger aggregate, and
 - the acquisition could substantially diminish the value of the remainder or make the administration of the estate more difficult.¹⁴³

134 Ibid ss 37A(2), (6). The deceased person’s personal representative must notify the partner of their right to elect to acquire the deceased person’s interest in the shared home in writing within 30 days of the grant of administration, if the personal representative is not themselves the deceased person’s surviving partner who is entitled to elect: s 37A(4). The partner must make their election in writing: s 37A(5). If the deceased person is survived by children or other issue, notice of the partner’s rights and the election itself must show the sworn value of the deceased person’s interest in the shared home at the date of death: s 37A(6).

135 *Administration and Probate Act 1958* (Vic) s 37A(7)(a).

136 Ibid s 37A(7)(b).

137 Ibid s 37A(10).

138 Ibid s 37A(11).

139 Ibid s 37A(2).

140 National Committee for Uniform Succession Laws, above n 10, 82–3.

141 Ibid 82–6 recommendation 9, Draft Intestacy Bill 2006 cl 16(1).

142 Ibid 104 recommendation 19, Draft Intestacy Bill 2006 cl 21.

143 Ibid 104 recommendation 20, Draft Intestacy Bill 2006 cl 16(2). It recommended that surviving children or other issue, or the personal representative, should be able to apply to the Supreme Court in these circumstances.

- 5.78 Examples of this given by the National Committee included:
- a part of a building, where the deceased person had an interest in the whole building
 - registered or registrable interest in land used for agricultural purposes
 - a building used as a hotel, motel, boarding house or hostel at the time of the deceased person's death
 - a shared home, part of which was used for a purpose other than a domestic purpose at the time of the deceased person's death.¹⁴⁴
- 5.79 When authorising an election, the National Committee recommended that the court should be permitted to impose conditions, including a condition that the partner pay compensation to the estate in addition to consideration for the property.¹⁴⁵
- 5.80 The National Committee also considered that the personal representative should not be permitted to dispose of property from the intestate estate, except to a partner who has elected to acquire it, unless any of the following applies:
- the personal representative is the partner entitled to make the election
 - time for exercising the election has elapsed and no election has been made
 - the election requires court authorisation, but such authorisation has been refused or the application for authorisation has been withdrawn
 - the partner has notified the personal representative in writing that he or she does not intend to acquire the property from the estate
 - sale of the property is required to meet liabilities of the estate
 - the property is perishable or likely to decrease rapidly in value.¹⁴⁶
- 5.81 As discussed below, the National Committee recommended that rights of election should not apply where the deceased person is survived by more than one partner.¹⁴⁷ It also made a number of recommendations about procedure, notice, time periods and property valuation for the purposes of election.¹⁴⁸
- 5.82 New South Wales and Tasmania have implemented the National Committee's recommendations in these terms, but have clarified some ambiguities that appeared in the National Committee's draft legislation.¹⁴⁹ For example:
- The New South Wales legislation provides that the personal representative is not to dispose of property unless sale of the property is required to meet 'funeral and administration expenses, debts and other liabilities of the estate' (not just 'liabilities', as recommended by the National Committee).¹⁵⁰
 - Both the New South Wales and Tasmanian legislation specify that, when authorising an election, the Court may 'impose such conditions as it considers just and equitable' (this guidance was not included in the National Committee's draft provision).¹⁵¹

144 Ibid 102.

145 Ibid 104 recommendation 20, Draft Intestacy Bill 2006 cl 16(3).

146 Ibid 107 recommendation 21, Draft Intestacy Bill 2006 cl 22.

147 National Committee for Uniform Succession Laws, above n 10, 117, Draft Intestacy Bill 2006 cl 11; see [5.115] below.

148 National Committee for Uniform Succession Laws, above n 10, 88–99 recommendations 10–18, Draft Intestacy Bill 2006 cls 17–20.

149 *Succession Act 2006* (NSW) pt 4.2 div 2; *Intestacy Act 2010* (Tas) pt 2 div 2.

150 *Succession Act 2006* (NSW) s 121(1)(e).

151 Ibid s 115(3); *Intestacy Act 2010* (Tas) s 16(3).

Views and conclusions

- 5.83 All but one¹⁵² of the submissions that addressed this question agreed that the partner's right to elect to acquire estate property should be extended to other property in the intestate estate.¹⁵³ The view was expressed that extending elections would promote national consistency.¹⁵⁴ The Property and Probate Section of the Commercial Bar Association suggested that extending elections could reduce the number of claims made against the estate by partners of the deceased person, in relation to property that the partner helped to acquire or preserve although they were not registered on the title.¹⁵⁵ Rigby Cooke Lawyers noted that it would be useful if a deceased person's partner were able to elect to acquire an interest in a business that they had been operating with the deceased person, permitting them to generate future income.¹⁵⁶
- 5.84 The submission that was opposed to extending the partner's right of election considered that estate assets might have sentimental value to the deceased person's children.¹⁵⁷ A member of the Commission's succession laws advisory committee shared this concern, particularly in relation to second partners acquiring property to the exclusion of the children of an earlier relationship.¹⁵⁸ Other members of the advisory committee considered that the partner's rights of election should be extended to other estate property.¹⁵⁹
- 5.85 One submission suggested that the effect of elections on children could be tempered by a right for children to elect to take the property ahead of it being sold by the personal representative.¹⁶⁰ However, this would create unnecessary complexity, given the Commission's recommended limits on the circumstances in which both partner(s) and children are entitled to take.¹⁶¹
- 5.86 To promote clarity and national consistency, the Commission recommends that the National Committee's proposals in relation to elections should be implemented in Victoria, in the terms implemented in New South Wales.
- 5.87 The National Committee's recommended provisions, as implemented in New South Wales, would clarify the effect of elections on estate administration and the personal representative's duties to pay debts and liabilities of the estate. In New South Wales, the election provisions apply to any property in the 'intestate estate'—that is, in the case of a deceased person who leaves a will, property not effectively disposed of by will and, in all other cases, property left by the deceased person.¹⁶² This means that the partner's right of election applies to any property left by the deceased person and not disposed of by will, not just that property which remains after administration of the estate.
- 5.88 The legislation should also specify that the onus is on the deceased person's partner to apply to the Court for authorisation when required, as they are the party seeking authorisation of their election. This was not made clear in the National Committee's draft provisions or those implemented in New South Wales and Tasmania.¹⁶³ Otherwise, the Commission considers that the National Committee's recommendations in relation to elections should be implemented in the same manner as they have been implemented in division 2 of part 4.2 of the *Succession Act 2006* (NSW).¹⁶⁴

152 Submission 8 (Patricia Strachan).

153 Submissions 14 (Commercial Bar Association); 19 (Association of Independent Retirees); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 30b (Law Institute of Victoria); 32 (The Institute of Legal Executives); 33 (State Trustees Limited); 36 (Law Society of New South Wales); 39 (Carolyn Sparke SC); 40 (Janice Brownfoot).

154 Submission 36 (Law Society of New South Wales).

155 Submission 14 (Commercial Bar Association).

156 Submission 26 (Rigby Cooke Lawyers).

157 Submission 8 (Patricia Strachan).

158 Advisory Committee (Meeting 3).

159 Ibid.

160 Submission 25 (Moores Legal).

161 See discussion at [5.117] below.

162 *Succession Act 2006* (NSW) s 101 (definition of 'intestate estate').

163 See National Committee for Uniform Succession Laws, above n 10, Draft Intestacy Bill 2006 cl 16(2); *Succession Act 2006* (NSW) s 115; *Intestacy Act 2010* (Tas) s 16(2).

164 *Succession Act 2006* (NSW) ss 114–21.

Recommendations

- 23 The deceased person's partner should have a right to elect to acquire an interest in any property in the intestate estate on intestacy.
- 24 If the deceased person's partner elects to acquire an interest in property from the intestate estate, they should satisfy the price of this interest:
 - (a) first from money to which the partner is entitled from the intestate estate and, if that is insufficient,
 - (b) from money paid by the partner to the estate on or before the date of the transfer.
- 25 If the partner of the deceased person wishes to elect to acquire property from the intestate estate, they should be required to apply to the Supreme Court for authorisation of the election if:
 - (a) the property forms part of a larger aggregate, and,
 - (b) the acquisition could substantially diminish the value of the remainder of the property or make the administration of the estate substantially more difficult.
- 26 When authorising an election by the deceased person's partner to acquire property from the intestate estate, the Supreme Court should:
 - (a) be able to impose such conditions as it considers just and equitable, including a condition that the partner pay compensation to the estate in addition to consideration to be given for the property
 - (b) be required to refuse authorisation of an election if it considers that the diminution of the value of the remainder of the estate, or difficulties in administration, cannot be adequately addressed by granting an authorisation subject to conditions.
- 27 A personal representative should not be permitted to dispose of property from an intestate estate, except to a partner who has elected to acquire it, unless any of the following applies:
 - (a) the personal representative is the partner entitled to make the election
 - (b) time for exercising the election has elapsed and no election has been made
 - (c) the election requires the Court's authorisation but the necessary authorisation has been refused or the application for authorisation has been withdrawn
 - (d) the partner has notified the personal representative, in writing, that he or she does not propose to exercise the right to acquire property from the estate
 - (e) sale of the property is required to meet funeral and administration expenses, debts and other liabilities of the estate
 - (f) the property is perishable or likely to decrease rapidly in value.
- 28 Details of the expanded right of the deceased person's partner to elect to acquire property from the intestate estate, including in relation to notice requirements, time limits and valuation of property, should be based on the recommendations of the National Committee for Uniform Succession Laws, as reflected in sections 114–121 of the *Succession Act 2006* (NSW).

Multiple partners

Current law

- 5.89 As noted above, it is possible for a deceased person to be survived by both:
- a spouse, registered domestic partner or registered caring partner, and
 - an unregistered domestic partner.¹⁶⁵
- 5.90 The Administration and Probate Act establishes a sliding scale to determine how the partner's share is to be distributed between the partners.¹⁶⁶ The partner's share may comprise the entire intestate estate, if there are no children or other issue who are entitled to a share on intestacy, or it may comprise a part of the intestate estate, in accordance with the rules for distribution when the deceased person is survived by both partner(s) and children or other issue.¹⁶⁷
- 5.91 Where the deceased person is survived by more than one partner, the portion of the partner's share that each partner will receive depends on the length of the relationship between the deceased person and their unregistered domestic partner.¹⁶⁸ To be recognised as the deceased person's unregistered domestic partner for the purposes of intestacy, a person must:
- have been living with the deceased person on a genuine domestic basis at the time of the deceased person's death, and
 - have lived in that manner for at least two years immediately before the deceased person's death, or
 - be the parent of a child of the deceased person who was under the age of 18 at the time of the deceased person's death.¹⁶⁹
- 5.92 Once these requirements are satisfied in relation to the unregistered domestic partner, division of the partner's share between the partners is subject to the sliding scale, with the unregistered domestic partner receiving a larger share the longer the relationship.¹⁷⁰ If the unregistered domestic relationship is six years or more in length, the unregistered domestic partner takes to the exclusion of the spouse, registered domestic partner or registered caring partner.¹⁷¹
- 5.93 The provisions in the Administration and Probate Act do not appear to deal with the situation in which the deceased person is survived by more than one unregistered caring partner.

Proposed change

- 5.94 The National Committee for Uniform Succession Laws proposed two mechanisms for determining shares on intestacy when the deceased person is survived by more than one partner, depending on whether the deceased person is also survived by children or other issue who are also entitled to a share.
- 5.95 In its consultation paper on intestacy, the Commission asked whether the National Committee's recommended approach to multiple partners should be adopted in Victoria.¹⁷²

165 A person can never have a spouse and a registered domestic partner or registered caring partner at the same time. This is because in order to register a domestic or caring relationship, a person must not be married or in another registered relationship: *Relationships Act 2008* (Vic) ss 6(b)–(c).

166 *Administration and Probate Act 1958* (Vic) s 51A(1).

167 *Ibid* s 51A(2).

168 *Ibid* s 51A(1).

169 *Ibid* s 3(1) (definition of 'unregistered domestic partner'). When determining whether persons were unregistered domestic partners, all circumstances of their relationship are to be taken into account, including factors set out in the *Relationships Act 2008* (Vic) s 35(2): s 3(3).

170 *Administration and Probate Act 1958* (Vic) s 51A(1).

171 *Ibid*.

172 Victorian Law Reform Commission, above n 8, 28–9.

Where there are no children or other issue who are entitled to a share

- 5.96 The National Committee recommended that, where the deceased person is survived by multiple partners but no children or other issue who are also entitled to a share, the intestate estate should be distributed between the partners:
- in accordance with a written distribution agreement made between the partners, or
 - in accordance with a distribution order made by the court on application by a partner or the personal representative, or
 - equally between the partners.¹⁷³
- 5.97 It recommended that, if the parties make a distribution agreement, the agreement should be submitted to the personal representative.¹⁷⁴ It recommended that either a partner or the personal representative should also be able to apply to the Supreme Court for a distribution order.¹⁷⁵ On application for a distribution order, the National Committee recommended that the Court should be able to order that the property be distributed between the partners in any way it considers just and equitable, including awarding the entire intestate estate to one partner to the exclusion of the other(s).¹⁷⁶ The order may also include conditions.¹⁷⁷ No criteria were recommended to guide the Court in its decision making, nor were any criteria included in New South Wales or Tasmanian legislation.
- 5.98 The National Committee recommended that certain notice should have been given, and certain time periods should have elapsed, before the personal representative could distribute the estate equally between the parties.¹⁷⁸ It also recommended that, under these provisions, none of the deceased person's partners should have specific rights to the deceased person's personal effects or to a statutory legacy.¹⁷⁹
- 5.99 The National Committee considered that, under these provisions, the distribution of particular items from the intestate estate could be subject to negotiation between the partners.¹⁸⁰ These recommendations in relation to multiple partners were based on law already in operation in Queensland¹⁸¹ and have since been implemented in the recommended form in New South Wales and Tasmania.¹⁸²

Where there are children or other issue who are entitled to a share

- 5.100 Where the deceased person is survived by multiple partners and children or other issue who are also entitled to a share on intestacy, the National Committee recommended that the partners should each be entitled to their own statutory legacy—rateably if there were insufficient funds—and a share of half the residue of the estate.¹⁸³
- 5.101 Tasmania implemented the provisions as recommended by the National Committee, providing that where any children or issue are also entitled to a share, the partners receive:
- the deceased person's personal effects, in accordance with the sharing provisions
 - a statutory legacy each
 - a share of one half of the remainder of the intestate estate, in accordance with the sharing provisions.¹⁸⁴

173 National Committee for Uniform Succession Laws, above n 10, 118 recommendation 23, Draft Intestacy Bill 2006 cl 26.

174 Ibid Draft Intestacy Bill 2006 cl 23(2)(a).

175 Ibid Draft Intestacy Bill 2006 cls 4(1) (definition of 'Court'), 27(1).

176 Ibid cls 27(3)–(4).

177 Ibid Draft Intestacy Bill 2006 cl 27(5).

178 Ibid Draft Intestacy Bill 2006 cls 26(2)–(4).

179 Ibid 117.

180 Ibid.

181 *Succession Act 1981* (Qld) ss 35(1), 36, sch 2 pt 1 cls 1–2; National Committee for Uniform Succession Laws, above n 10, 116.

182 *Succession Act 2006* (NSW) ss 122, 125; *Intestacy Act 2010* (Tas) ss 23–7.

183 National Committee for Uniform Succession Laws, above n 10, 117–8 recommendation 23, Draft Intestacy Bill 2006 cl 25.

184 *Intestacy Act 2010* (Tas) 25.

- 5.102 New South Wales took the same approach in all but one respect—in these circumstances, multiple partners share one statutory legacy instead of each receiving their own.¹⁸⁵

The partner's right to elect to acquire property

- 5.103 The National Committee recommended that the partner's right to acquire certain estate property should not apply when the deceased person is survived by more than one partner.¹⁸⁶ This is the case under the New South Wales and Tasmanian legislation.¹⁸⁷

Views and conclusions

Where there are no children or other issue who are entitled to a share

- 5.104 The Commission received mixed views in submissions. Many agreed that, where the deceased person is not also survived by children or issue who are entitled to a share on intestacy, the deceased person's partners should be able to share the intestate estate between them by distribution agreement, distribution order, or equally.¹⁸⁸ The Property and Probate Section of the Commercial Bar Association noted that the ability to apply for a distribution order in the event of a dispute may reduce the number of family provision claims brought.¹⁸⁹ The Law Society of New South Wales was in favour of a nationally consistent position.¹⁹⁰
- 5.105 Some submissions, however, considered that there should be no change to the existing law.¹⁹¹ State Trustees and Carolyn Sparke SC noted that it is rare for a deceased person to be survived by more than one partner.¹⁹² Rigby Cooke Lawyers expressed concern that failure to reach a distribution agreement could result in litigation and that seeking a distribution order could result in costs to the estate.¹⁹³ Some submissions noted that equal distribution between the parties would not usually be a fair outcome.¹⁹⁴
- 5.106 Moores Legal suggested that a distribution agreement should be lodged with the Probate Registry.¹⁹⁵ However, the Commission considers that submitting the distribution agreement to the personal representative in writing is sufficient.
- 5.107 The Institute of Legal Executives expressed the view that, if a distribution agreement is adopted, there should be no adverse duty implications.¹⁹⁶ Under the *Duties Act 2000* (Vic), distribution pursuant to a distribution agreement would be subject to the exemption for property passing on intestacy and no duty would be chargeable.¹⁹⁷
- 5.108 The Commission considers that the National Committee's recommendations about multiple partners' entitlements, where there are no children or other issue who are entitled to a share, would allow parties or the Court to arrive at the fairest possible outcome. It is more tailored than Victoria's current one-size-fits-all sliding scale approach and is far likelier to result in an outcome that all parties are satisfied with. Although there may be some expense involved in reaching an agreement or obtaining a distribution order, it is likely to be less than the cost of commencing family provision proceedings to redress an unfair outcome. The option for distributing the estate equally between the parties would exist, in any event, as a low-cost alternative.

185 *Succession Act 2006* (NSW) s 124.

186 National Committee for Uniform Succession Laws, above n 10, 117, Draft Intestacy Bill 2006 cl 11.

187 *Succession Act 2006* (NSW) s 114; *Intestacy Act 2010* (Tas) s 15.

188 Submissions 14 (Commercial Bar Association), although the Commercial Bar Association expressed reservations about whether dividing the estate equally between the parties would produce a just outcome; 19 (Association of Independent Retirees); 25 (Moores Legal); 30b (Law Institute of Victoria); 31 (Seniors Rights Victoria); 36 (Law Society of New South Wales); 40 (Janice Brownfoot).

189 Submission 14 (Commercial Bar Association).

190 Submission 36 (Law Society of New South Wales).

191 Submissions 8 (Patricia Strachan); 26 (Rigby Cooke Lawyers); 33 (State Trustees Limited); 39 (Carolyn Sparke SC), although she stated that she did not have strong views about this and could see some merit in allowing for distribution agreements and distribution orders.

192 Submissions 33 (State Trustees Limited); 39 (Carolyn Sparke SC).

193 Submission 26 (Rigby Cooke Lawyers).

194 Submissions 14 (Commercial Bar Association); 26 (Rigby Cooke Lawyers); 40 (Janice Brownfoot).

195 Submission 25 (Moores Legal).

196 Submission 32 (The Institute of Legal Executives).

197 *Duties Act 2000* (Vic) s 42.

Recommendation

- 29 Where the deceased person is survived by multiple partners, but no children or other issue who are entitled to a share on intestacy, the *Administration and Probate Act 1958* (Vic) should provide for the intestate estate to be distributed:
- (a) in accordance with a distribution agreement, or
 - (b) in accordance with a distribution order, or
 - (c) equally between the partners.

Where there are children or other issue who are entitled to a share

- 5.109 Several submissions agreed with the National Committee that, where the deceased person is survived by multiple partners and children or other issue who are entitled to a share, each partner should receive their own statutory legacy.¹⁹⁸
- 5.110 However, a number of submissions expressed the view that the partners should share the statutory legacy that one partner would have received, as well as sharing the deceased person's personal chattels and one half of the remainder.¹⁹⁹ Some submissions argued that it may be unfair for each partner to receive their own legacy²⁰⁰ and that this could result in the deceased person's children missing out entirely unless the estate is large.²⁰¹ The Law Society of New South Wales stated that it favoured national consistency,²⁰² and the Commission notes that New South Wales has not implemented this recommendation—the partners share the statutory legacy that one partner would have received.
- 5.111 This is one area in which there is a distinction between national consistency and the National Committee's recommendations, as New South Wales has diverged from the National Committee's recommendation on this point. The Commission considers that, where national consistency is not possible, consistency between Victoria and New South Wales is desirable. Further, the Commission agrees that, in many circumstances, each partner receiving their own statutory legacy would exclude the deceased person's children or issue who are entitled to a share on intestacy.
- 5.112 The New South Wales legislation specifies that sharing of the deceased person's personal effects, statutory legacy and share of the remainder is to be done in accordance with the general sharing provisions—that is, by distribution agreement, distribution order or equally between the parties.²⁰³
- 5.113 Although the Commission recognises that a partner's needs do not abate because of the existence of other partners, the circumstances in which multiple partners are entitled to a share is unusual. In these unusual circumstances, the Commission considers that the New South Wales position, which permits sharing of the statutory legacy between the partners by distribution agreement or distribution order, provides a better solution than Victoria's current one-size-fits-all statutory formula.
- 5.114 If a partner feels that distribution in accordance with these provisions, including sharing the statutory legacy, does not make adequate provision for their proper maintenance and support, it will still be possible for them to make a family provision claim.

198 Submissions 14 (Commercial Bar Association); 19 (Association of Independent Retirees); 30b (Law Institute of Victoria).
199 Submissions 36 (Law Society of New South Wales); 25 (Moores Legal); 33 (State Trustees Limited).
200 Submissions 25 (Moores Legal); 39 (Carolyn Sparke SC).
201 Submissions 25 (Moores Legal); 33 (State Trustees Limited).
202 Submission 36 (Law Society of New South Wales).
203 *Succession Act 2006* (NSW) ss 124, 125(1).

Recommendation

- 30 Where the deceased person is survived by multiple partners and children or other issue who are entitled to a share on intestacy, the deceased person's personal chattels, adjusted statutory legacy, interest on the adjusted statutory legacy (if any) and one half of the remainder of the intestate estate should be shared between the partners:
- (a) in accordance with a distribution agreement, or
 - (b) in accordance with a distribution order, or
 - (c) equally between the partners.

The partner's right to elect to acquire property

- 5.115 The Law Institute of Victoria suggested that whichever partner had been living with the deceased person in the shared home at the deceased person's date of death should be permitted to elect to acquire the deceased person's interest in the shared home.²⁰⁴ However, the National Committee recommended against this where the deceased person is survived by multiple partners, and rights of election do not apply in New South Wales and Tasmania in these circumstances.²⁰⁵
- 5.116 The Commission considers that allowing partners to elect to acquire the home that they shared with the deceased person, where the deceased person is survived by more than one partner, would unduly complicate estate administration. It is likely that a distribution agreement reached between the parties, or a distribution order made by the Court, would take into account whether a partner resided in a house that formed part of the intestate estate. The Commission does not consider that the partner's right of election should apply where there are multiple partners.

Recommendation

- 31 Where the deceased person is survived by multiple partners, there should be no right to elect to acquire an interest in particular estate property.

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Submission 30b (Law Institute of Victoria).
National Committee for Uniform Succession Laws, above n 10, 117, Draft Intestacy Bill 2006 cl 11; *Succession Act 2006* (NSW) s 114; *Intestacy Act 2010* (Tas) s 15.

Entitlements of the deceased person's children or issue

Current law

- 5.117 If the deceased person is survived by children, but is not survived by a partner, the deceased person's children share the entire intestate estate equally between them.²⁰⁶
- 5.118 As discussed above, when the deceased person is survived by both a partner and children, and the intestate estate is large enough to accommodate both the interests of the partner and children, the intestate estate is shared between them.²⁰⁷ If the estate is sufficiently large, the deceased person's partner receives: the deceased person's personal chattels; a statutory legacy, which is a lump sum plus interest; and a share of the remainder of the intestate estate.²⁰⁸ The deceased person's children share the remainder of the intestate estate between them in equal shares.²⁰⁹
- 5.119 If any of the deceased person's children have already died, their children or other issue take as their representatives.²¹⁰ References to 'children' in the following discussion include the children or other issue of children who died before the deceased person.²¹¹

Proposed change

- 5.120 The National Committee for Uniform Succession Laws considered that allowing for the deceased person's children to inherit on intestacy in circumstances where their surviving parent is entitled to a share creates unnecessary complexity, given that those children could expect to inherit from their other parent later in life.²¹² Providing the children a share in these circumstances may necessitate sale of the family home and the National Committee expressed concern that, with an ageing population, the needs of an elderly spouse are likely to be greater than those of independent, adult children.²¹³
- 5.121 In response to these concerns, the National Committee recommended that the children of the deceased person should not be entitled to a share on intestacy if:
- their other parent survives the deceased person and is entitled to a share on intestacy, and
 - all surviving children of the deceased person are also children of that surviving parent or another partner of the deceased person who is entitled to a share on intestacy.²¹⁴
- 5.122 To ensure that children of other relationships—that is, children who were not children of a surviving partner of the deceased person—are provided for, it recommended that they should be entitled to a share on intestacy.²¹⁵ To prevent disharmony in families, the National Committee recommended that, where any such children exist, the intestate estate should be shared between the surviving partner(s) and all children of the deceased person.²¹⁶

206 *Administration and Probate Act 1958* (Vic) s 52(1)(f).

207 See [5.45].

208 *Administration and Probate Act 1958* (Vic) s 51(2). The Commission has recommended that the deceased person's partner's statutory legacy be increased to \$350,000 indexed to the Consumer Price Index and that the deceased person's partner receive one half of the remainder, rather than one third.

209 *Ibid* s 52(1)(f).

210 *Ibid*.

211 Or, under the Commission's recommended survivorship requirement, fail to survive the deceased person by 30 days. See [5.31] above for discussion of survivorship.

212 National Committee for Uniform Succession Laws, above n 10, 35.

213 *Ibid* 36.

214 *Ibid* 52 recommendation 4, Draft Intestacy Bill 2006 cls 13, 28(2).

215 *Ibid* 50, 52 recommendation 4, Draft Intestacy Bill 2006 cls 13, 28(2).

216 *Ibid* 52 recommendation 4, Draft Intestacy Bill 2006 cls 13, 28(2).

- 5.123 The deceased person's children would share the remaining intestate estate, after payment of the statutory legacy and one half of the remainder to the deceased person's partner(s), between them in equal shares.²¹⁷ If any children of the deceased person did not survive the deceased person by 30 days, leaving children or other issue who survived the deceased person by 30 days, those children or other issue would take the share their deceased parent (the deceased person's child) would have been entitled to.²¹⁸
- 5.124 Where the deceased person is not survived by a partner, but is survived by children or issue, they would share the entire intestate estate between them, as is currently the case.²¹⁹
- 5.125 Both New South Wales and Tasmania have adopted these recommendations of the National Committee.²²⁰ The Commission's consultation paper on intestacy asked whether Victoria should adopt this approach to the entitlements of children.²²¹

Views and conclusions

- 5.126 In submissions to the Commission's consultation paper on intestacy, there was widespread support for the National Committee's recommendations in relation to the entitlements of partners and children.²²² The Law Institute of Victoria said that this approach is consistent with how people draft their wills.²²³
- 5.127 Moores Legal also suggested that children should be able to make an application to the court where the operation of the default scheme would have an unfair outcome.²²⁴ However, the Commission considers the family provision jurisdiction sufficient to redress outcomes that are perceived as unfair.
- 5.128 Several submissions, however, were opposed to the recommendation.²²⁵ The Property and Probate Section of the Commercial Bar Association expressed strong opposition on the basis that removing provision for children on intestacy would be inconsistent with the responsibility to provide for children that is clearly recognised in the family provision jurisdiction.²²⁶ However, the Commission does not believe that this recommendation removes provision for children of the deceased, as suggested by the Commercial Bar Association. Rather, it defers provision for them until their surviving parent dies, with the aim of minimising disruption and prioritising the deceased person's spouse at the time of the deceased person's death. Despite the fact that the deceased person's child may not be entitled on intestacy at the time of their parent's death, they would still be able to make a family provision application at that time. This would address any immediate needs of the deceased person's children that are not recognised by deferring their inheritance until their surviving parent dies.

217 Ibid 52 recommendation 4, Draft Intestacy Bill 2006 cl 28(3)(b). If there is only one child, that child takes the entire remainder of the residuary estate, after payment of the partner's statutory legacy and share of the remainder: cl 28(3)(a).

218 Ibid Draft Intestacy Bill 2006 cl 28(4).

219 Ibid Draft Intestacy Bill 2006 cl 28.

220 *Succession Act 2006* (NSW) s 112, 127; *Intestacy Act 2010* (Tas) s 28(2). As noted in the consultation paper, the position in all other states and territories is similar to that in Victoria—children are entitled to a share of the remainder regardless of whether they are also children of the deceased person's surviving partner.

221 Victorian Law Reform Commission, above n 8, 31.

222 Submissions 19 (Association of Independent Retirees); 25 (Moores Legal); 30b (Law Institute of Victoria); 33 (State Trustees Limited); 36 (Law Society of New South Wales); 40 (Janice Brownfoot).

223 Submission 30b (Law Institute of Victoria).

224 Submission 25 (Moores Legal).

225 Submissions 8 (Patricia Strachan); 14 (Commercial Bar Association); 26 (Rigby Cooke Lawyers).

226 Submission 14 (Commercial Bar Association).

- 5.129 Carolyn Sparke SC noted that if the partner's statutory legacy is sufficiently large, the family home may not need to be sold, resolving one of the main criticisms of the current approach to partners and children.²²⁷ However, the National Committee's recommendation in relation to the entitlements of the deceased person's children would ensure that the family home would not need to be sold in the majority of cases. The Commission considers this to be a desirable outcome.
- 5.130 Where the deceased person is survived by partner(s) and children, the Commission considers that the National Committee's recommended approach to distribution between partners and children strikes a fair balance. It is desirable to defer children's inheritance and minimise disruption where their surviving parent is a partner of the deceased who is entitled to a share on intestacy. The National Committee's recommended approach takes adequate account of children of previous relationships.
- 5.131 In order to promote national consistency, and simplify distribution of intestate estates between partners and children, the Commission recommends that children of the deceased person should only take where any children of the deceased are not also children of a surviving partner who is entitled to a share on intestacy.

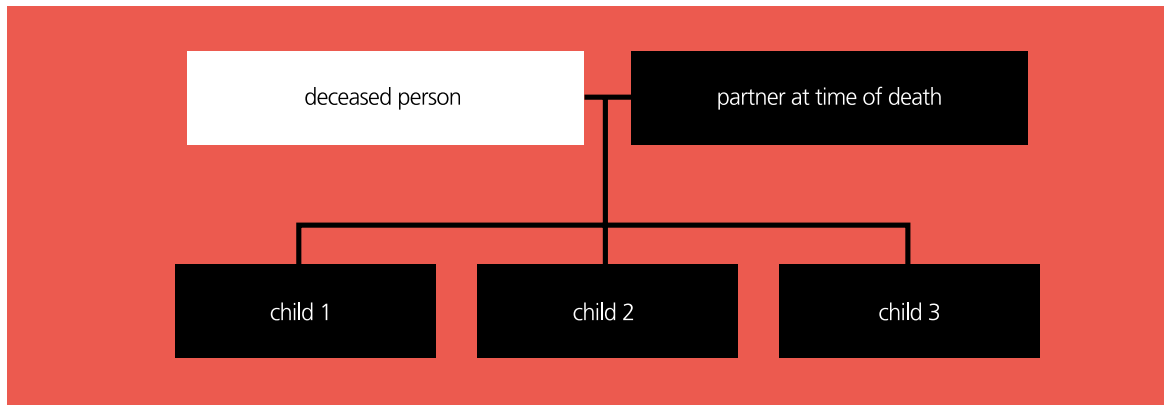
Recommendations

- 32 Children or other issue of a deceased person should not be entitled to a share on intestacy if:
- (a) they are children or issue of a surviving partner of the deceased person who is entitled to a share on intestacy, and
 - (b) all surviving children or issue of the deceased person are also children or issue of that surviving partner or another partner of the deceased person who is entitled to a share on intestacy.
- 33 If any of the children of a deceased person are not children of a surviving partner of the deceased person who is entitled to a share on intestacy, then all children of the deceased person should be entitled to an equal share on intestacy.

Examples

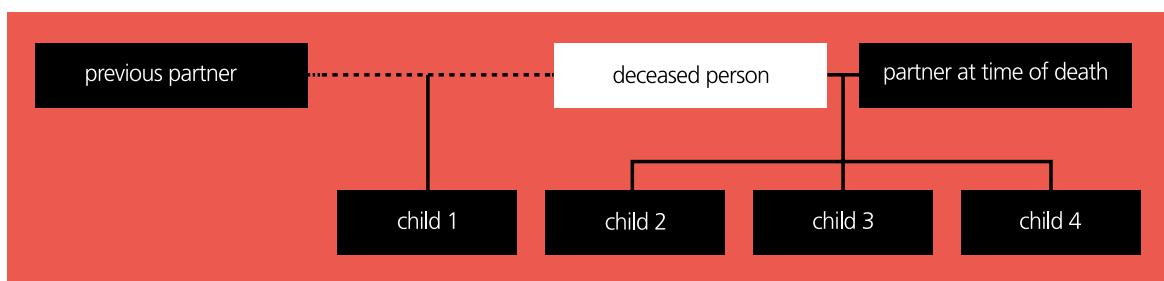
- 5.132 In the example illustrated by **Figure 2**, the deceased person's children would not be entitled to a share on intestacy, as they are all also children of a partner of the deceased person at the time of the deceased person's death, who is entitled on intestacy. Therefore, the deceased person's children could expect to inherit from their surviving parent later in life. The deceased person's partner would be entitled to the entire intestate estate.

Figure 2: Survived by a partner and children of that relationship



- 5.133 In the situation illustrated by **Figure 3**, the deceased person's children would all be entitled to a share on intestacy, because child 1 is a child of the deceased person's previous partner, who is not entitled to a share on intestacy. In this situation, all of the deceased person's children are entitled to a share on intestacy. The deceased person's partner at the time of the deceased person's death would be entitled to:
- the deceased person's personal chattels
 - a statutory legacy of \$350,000, adjusted to reflect changes in the CPI
 - interest on the statutory legacy, if applicable
 - one half of the remainder of the intestate estate.²²⁸
- 5.134 Child 1, child 2, child 3 and child 4 would share the remaining one half of the intestate estate in equal shares.

Figure 3: Survived by a partner and by children of both that relationship and a previous relationship



Per stirpes or per capita distribution

Current law

- 5.135 If a child or sibling of the deceased person would have been entitled to a share on intestacy, but did not survive the deceased person, their children are entitled to take their share. In Victoria, that person's children take their share either *per stirpes* (by stock) or *per capita* (by head).
- 5.136 If a child of the deceased person would have been entitled to a share on intestacy but did not survive the deceased person, leaving children who survive the deceased person, that child's children—the deceased person's grandchildren—take their deceased parent's share as representatives.²²⁹ Distribution to the deceased person's grandchildren in this circumstance is *per stirpes*—they share their deceased parent's share equally between them, but do not become equal recipients with the deceased person's surviving children.²³⁰ Even if all of the deceased person's children fail to survive the deceased person, leaving only grandchildren or other issue, those grandchildren or issue still only take *per stirpes*, as representatives.²³¹
- 5.137 Where one of the deceased person's siblings would have been entitled to a share on intestacy, but did not survive the deceased person, leaving children who survive the deceased person, that sibling's children—the deceased person's nieces or nephews—take their deceased parent's share as representatives.²³² Similarly, where some, but not all, of the deceased person's siblings would have been entitled to a share on intestacy, but failed to survive the deceased person, leaving children who survive the deceased person, the children of those siblings take their deceased parent's share as representatives.²³³ Distribution to the deceased person's nieces and nephews in these circumstance is *per stirpes*—they share their deceased parent's share equally between them, but do not become equal recipients with the deceased person's surviving siblings.²³⁴
- 5.138 However, distribution to the deceased person's nieces and nephews is different when *all* of the deceased person's siblings fail to survive the deceased person. In this situation, all nieces and nephews take in equal shares, *per capita*, not *per stirpes* as representatives of their deceased parents.²³⁵ This is different from the treatment of grandchildren of the deceased, for example, when all children of the deceased person fail to survive them.²³⁶

Proposed change

- 5.139 The National Committee considered that it would be illogical to allow for *per capita* distribution to collateral relatives only (nieces, nephews and cousins),²³⁷ and not lineal relatives (grandchildren, great-grandchildren and so on).²³⁸ The National Committee also noted that, even if *per capita* distribution were equally applied to collateral and lineal relatives:
- the rule would still be arbitrary
 - the need for *per capita* distribution would arise only rarely
 - application of *per stirpes* distribution in some instances and *per capita* in others would involve complexity and delay.²³⁹

229 *Administration and Probate Act 1958* (Vic) s 52(1)(f). References to the deceased person's children's children here include other issue down this line, for example, the deceased person's great-grandchildren, great-great-grandchildren, and so on.

230 *Ibid* s 52(1)(f)(ii).

231 *Ibid*.

232 *Ibid* s 52(1)(f)(iii). Also note that there is no representation down this line after the deceased person's brothers' and sisters' children. This means that although nieces' and nephews' children (the deceased person's great-nieces and great-nephews), and others down this line, can inherit on intestacy, they only take if they are the deceased person's next of kin; they do not take as a deceased sibling's representative.

233 *Ibid*.

234 *Ibid* s 52(1)(f)(ii).

235 *Ibid* s 52(1)(f)(vi).

236 See discussion at [5.136] above.

237 Note that this reference to cousins is relevant only to South Australian law, not Victorian law. First cousins take *per capita* at each generation in South Australia, but do not take by representation in Victoria: *Administration and Probate Act 1958* (Vic) s 52(1)(f)(iii).

238 National Committee for Uniform Succession Laws, above n 10, 147.

239 *Ibid* 147–8.

- 5.140 Accordingly, it recommended that *per capita* distribution should be abolished and that distribution should be *per stirpes* in all circumstances.²⁴⁰ This would mean that distribution to the deceased person's nieces and nephews would always be *per stirpes*, even where all of the deceased person's siblings are deceased. This would bring distribution to the deceased person's nieces and nephews into line with distribution to grandchildren, great-grandchildren and so on.
- 5.141 The Commission's consultation paper on intestacy asked whether *per capita* distribution should be abolished in Victoria and *per stirpes* distribution applied in all circumstances or, alternatively, whether *per capita* distribution should be retained and extended beyond the deceased person's nieces and nephews at each generation.²⁴¹
- 5.142 Victoria is one of only two states that retain *per capita* distribution in any form when next of kin take by representation.²⁴² Adopting the National Committee's recommendations would bring Victoria into line with most other states and territories.

Views and conclusions

- 5.143 Most submissions that addressed this question agreed with the National Committee's proposal that *per capita* distribution should be abolished and *per stirpes* distribution should be applied in all cases.²⁴³ In support of *per stirpes* distribution, Carolyn Sparke SC expressed the view that *per stirpes* distribution 'best reflects our general notion of the way private property is passed down—that it primarily tends to pass down the family branches'.²⁴⁴ Some submissions agreed that distributing intestate estates *per stirpes* in all instances would be more consistent with the way wills are prepared,²⁴⁵ and with the distribution of intestate estates in other parts of Australia.²⁴⁶ Moores Legal concluded that, since 'either rule is fairly arbitrary', a rule that is consistent with broader practice is preferable.²⁴⁷
- 5.144 The Law Institute of Victoria preferred retaining *per capita* distribution, but applying it equally to nieces and nephews and grandchildren, when all siblings or children of the deceased person have already died.²⁴⁸ However, the Commission agrees with the view expressed in other submissions and by the National Committee that, given the arbitrary nature of either rule, it is preferable to promote consistency with other Australian states and territories. Only Victoria and South Australia retain any form of *per capita* distribution, so to promote national consistency, the Commission recommends that *per capita* distribution should be abolished and *per stirpes* distribution applied in all cases, including where all members of the preceding generation are deceased.

Recommendation

- 34** Where next of kin take by representation, *per capita* distribution on intestacy should be abolished and *per stirpes* distribution should be applied in all cases.

240 Ibid 147–8 recommendation 28.

241 Victorian Law Reform Commission, above n 8 36.

242 South Australia allows for *per capita* distribution to the deceased person's nieces and nephews if all of the deceased person's siblings are deceased and to the deceased person's first cousins if all of the deceased person's aunts and uncles are deceased: *Administration and Probate Act 1919* (SA) s 72J(b)(iv); National Committee for Uniform Succession Laws, above n 10, 140.

243 Submissions 8 (Patricia Strachan); 14 (Commercial Bar Association); 19 (Association of Independent Retirees); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 33 (State Trustees Limited); 36 (Law Society of New South Wales); 40 (Janice Brownfoot).

244 Submission 39 (Carolyn Sparke SC). While Carolyn Sparke contended that '[t]he present system of *per stirpes* distribution is appropriate and does not need change', application of *per stirpes* distribution in all instances, including to the deceased person's nieces and nephews, would require change.

245 Submissions 25 (Moores Legal); 26 (Rigby Cooke Lawyers).

246 Submissions 25 (Moores Legal); 36 (Law Society of New South Wales).

247 Submission 25 (Moores Legal).

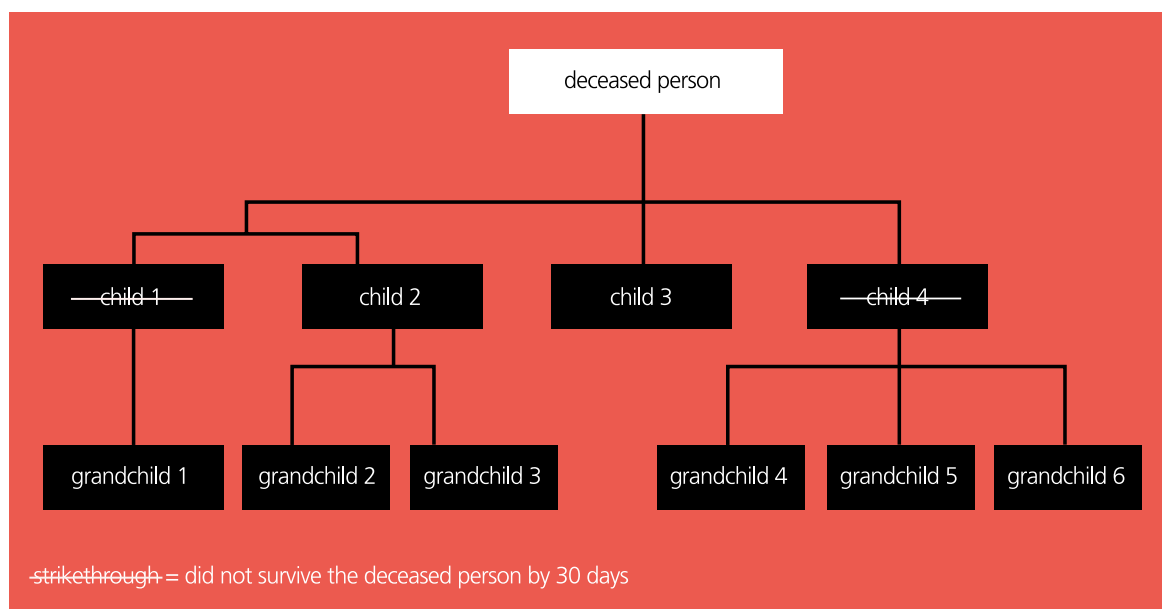
248 Submission 30b (Law Institute of Victoria).

Examples

5.145 Distribution under the recommended scheme in the situation illustrated by **Figure 4** would be the same as distribution under the current Victorian law. As is the case under the current law:

- grandchild 1 would take child 1's share as child 1's representative
- child 2 would take their own share, as they have survived the deceased person by 30 days;²⁴⁹ grandchild 2 and grandchild 3 would not receive a share
- child 3 would take their own share, as they have survived the deceased person by 30 days
- grandchild 4, grandchild 5 and grandchild 6 would share child 4's share equally between them as child 4's representatives.

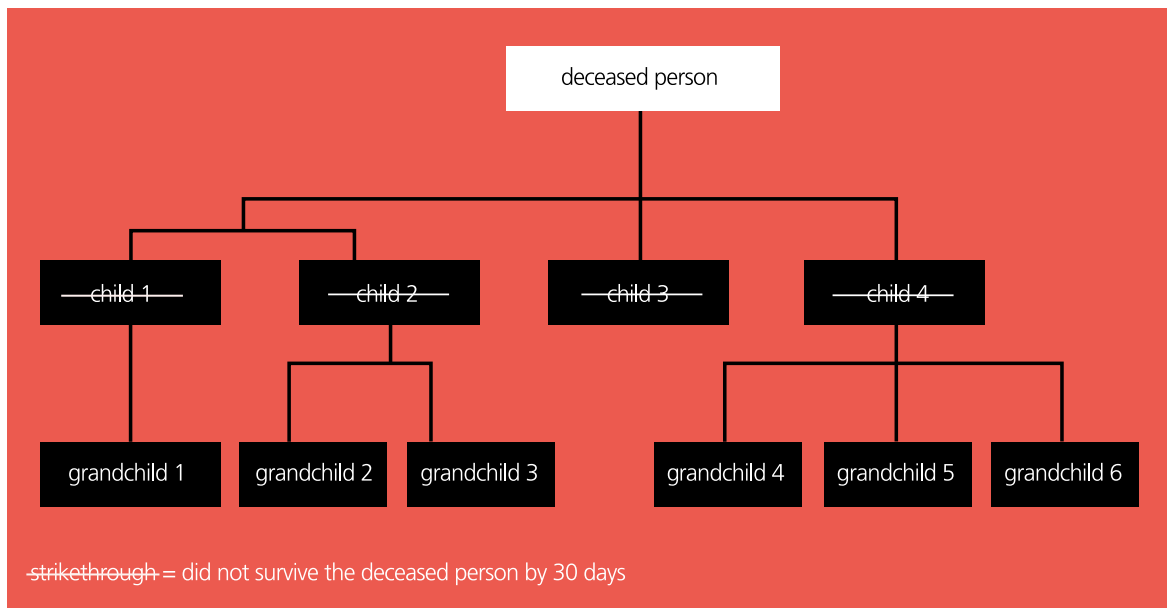
Figure 4: One or more children who would have been entitled to a share do not survive the deceased person by 30 days



5.146 Distribution under the recommended scheme in the situation illustrated by **Figure 5** would be the same as distribution under the current Victorian law. As is the case under the current law:

- grandchild 1 would take child 1's share as child 1's representative
- grandchild 2 and grandchild 3 would share child 2's share as child 2's representatives
- child 3's share would go back into the intestate estate to be shared among the others who are entitled to a share, as child 3 is not survived by children or issue
- grandchild 4, grandchild 5 and grandchild 6 would share child 4's share equally between them as child 4's representatives.

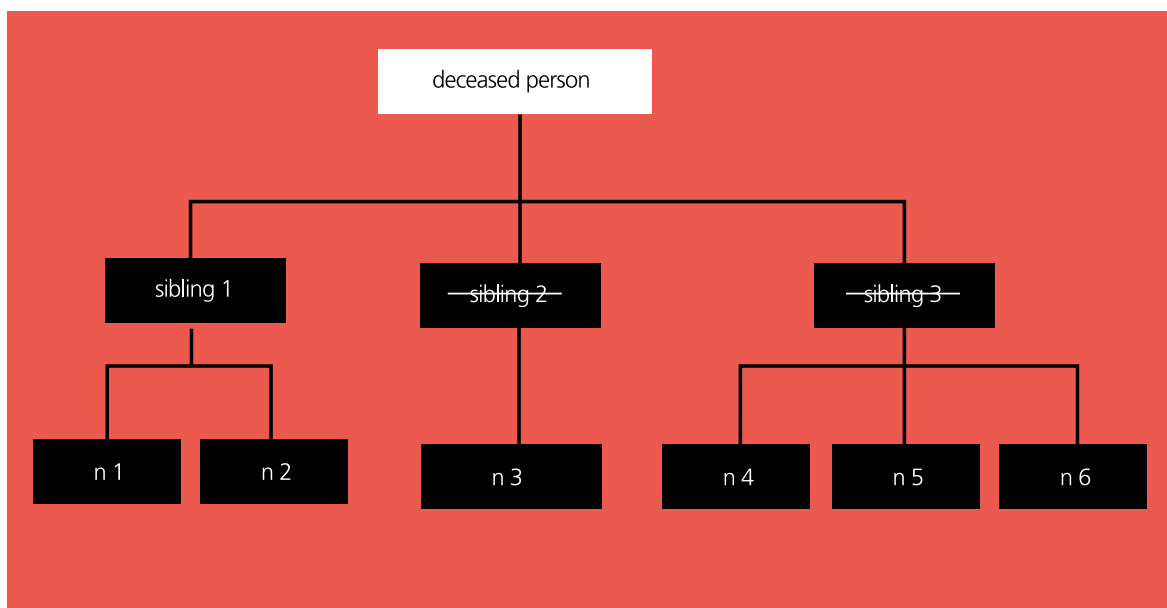
Figure 5: None of the children who would have been entitled to a share survive the deceased person by 30 days



5.147 Distribution under the recommended scheme in the situation illustrated by **Figure 6** would be the same as distribution under the current Victorian law. As is the case under the current law:

- sibling 1 would take their own share, as they have survived the deceased person by 30 days²⁵⁰
- niece/nephew 3 would take sibling 2's share as sibling 2's representative
- nieces/nephews 4, 5 and 6 would take sibling 3's share as sibling 3's representatives.

Figure 6: One or more siblings who would have been entitled to a share do not survive the deceased person by 30 days



- nieces/nephews 1 and 2 would take sibling 1's share as sibling 1's representatives—one sixth of the intestate estate each
- niece/nephew 3 would take sibling 2's share as sibling 2's representative—one third of the intestate estate
- nieces/nephews 4, 5 and 6 would take sibling 3's share as sibling 3's representatives—one ninth of the intestate estate each.

```
graph TD; A[deceased person] --> B[sibling 1]; A --> C[sibling 2]; A --> D[sibling 3]; B --> E[n 1]; B --> F[n 2]; C --> G[n 3]; D --> H[n 4]; D --> I[n 5]; D --> J[n 6];
```

deceased person

~~sibling 1~~

~~sibling 2~~

~~sibling 3~~

n 1

n 2

n 3

n 4

n 5

n 6

~~striethrough~~ = did not survive the deceased person by 30 days
n = niece or nephew

Taking benefits into account

Current law

- 5.149 In Victoria, some types of benefit received by the deceased person's children during the deceased person's lifetime must be taken into account when determining that child's share on intestacy.²⁵² Only benefits in the form of settlement or advancement need to be accounted for.²⁵³ Advancement means something given by the parent to establish the child in life or to make provision for him or her, not 'a mere casual payment'.²⁵⁴ Settlement means a gift of property for permanent provision, or provision that continues into the future.²⁵⁵ The rule requiring lifetime benefits to be taken into account on intestacy is referred to as the 'hotchpot' rule. The rule originates from the Statute of Distributions, which was enacted in England in 1670 and on which Victoria's intestacy laws are based.²⁵⁶
- 5.150 Benefits received by the deceased person's children or other issue under a will on partial intestacy must also be taken into account when determining their share of the intestate estate.²⁵⁷

Proposed change

- 5.151 The National Committee considered that any advantages of a rule requiring lifetime benefits to be taken into account (hotchpot) were equivocal at best, and that the difficulties involved in accounting for those benefits outweighed any perceived equality that the rule achieved.²⁵⁸ It recommended that this requirement be abolished.²⁵⁹
- 5.152 It also took the view that, having recommended abolition of hotchpot, there was no need to continue taking testamentary benefits into account on partial intestacy.²⁶⁰ It contended that abolition of the requirements to take lifetime and testamentary benefits into account when determining shares on intestacy would simplify the administration of estates.²⁶¹
- 5.153 The Commission's consultation paper on intestacy asked whether the requirements to take lifetime and testamentary benefits into account should be abolished or, alternatively, whether:
- the requirements to take both types of benefits into account should be retained and extended beyond the deceased person's children and other issue, and
 - references to advancement and settlement should be replaced with more modern, simplified terminology.²⁶²
- 5.154 Adopting the National Committee's proposed change would bring Victorian law into line with the law in New South Wales,²⁶³ Tasmania,²⁶⁴ Queensland²⁶⁵ and Western Australia.²⁶⁶

252 Ibid s 52(1)(f)(i). If a child of the deceased person predeceases the deceased person, benefits received by that child during the deceased person's lifetime are also taken into account when determining that child's representatives' share on intestacy.

253 Ibid.

254 *Taylor v Taylor* (1875) LR 20 Eq 155, 157.

255 I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (Law Book Company, 2nd ed, 1989) 442.

256 For further discussion of the origins and operation of the hotchpot rule, see *ibid* 212–19.

257 *Administration and Probate Act 1958* (Vic) s 53(a).

258 National Committee for Uniform Succession Laws, above n 10, 219.

259 Ibid 219 recommendation 43, Draft Intestacy Bill 2006 cl 41(a).

260 Ibid 224–5 recommendation 44, Draft Intestacy Bill 2006 cl 41(b).

261 Ibid 219, 225.

262 Victorian Law Reform Commission, above n 8, 38, 40.

263 New South Wales had repealed its hotchpot provisions in 1977 and had not had a requirement to bring testamentary benefits into account: for discussion of this, see National Committee for Uniform Succession Laws, above n 10, 217, 222. The *Succession Act 2006* (NSW) now contains an express provision stating that testamentary and lifetime benefits do not affect shares on intestacy: s 140.

264 Following the National Committee's intestacy report, Tasmania introduced a provision stating that testamentary and lifetime benefits do not affect shares on intestacy: *Intestacy Act 2010* (Tas) s 41.

265 Queensland was the first jurisdiction to repeal its hotchpot provisions in 1968: *Succession Acts Amendment Act 1968* (Qld). It had not had a requirement to bring testamentary benefits into account. For discussion of this, see National Committee for Uniform Succession Laws, above n 10, 217, 222.

266 Western Australia repealed its hotchpot provisions in 1976: *Administration Act Amendment Act 1976* (WA) s 3. It had not had a requirement to bring testamentary benefits into account. For discussion of this, see National Committee for Uniform Succession Laws, above n 10, 214, 217, 222.

Views and conclusions

- 5.155 Of the submissions to the Commission's consultation paper on intestacy that addressed this question, all except one considered that the rule requiring lifetime benefits to be taken into account (hotchpot) should be abolished.²⁶⁷ In support of abolishing hotchpot, the Property and Probate Section of the Commercial Bar Association contended that abolishing the hotchpot rule would be likely to promote certainty.²⁶⁸ Moores Legal noted that the rule arbitrarily assumes that the deceased person would have wanted to treat their children equally, which is often not the case, and considered that there is no justification for the rule applying only to benefits received by the deceased person's children.²⁶⁹
- 5.156 Although Carolyn Sparke SC noted that she did not have strong views on this matter, she considered that hotchpot should be retained and extended beyond the deceased person's children and their representatives.²⁷⁰
- 5.157 In consultation, representatives of the NSW Trustee and Guardian expressed the view that taking lifetime benefits into account is very difficult and that a line must be drawn somewhere.²⁷¹
- 5.158 Most submissions agreed with the National Committee that, once hotchpot was abolished, there should no longer be a requirement to take testamentary benefits into account.²⁷² Again, Carolyn Sparke SC considered that the rule requiring testamentary benefits to be taken into account when determining shares on intestacy should be retained and extended beyond the deceased person's children and representatives.²⁷³
- 5.159 The Commission considers that, in order to promote national consistency and in the absence of strong reasons to the contrary, there should no longer be a requirement to take lifetime and testamentary benefits received by a child of the deceased person into account when determining that child's, or their representatives', share on intestacy. This should be achieved by way of a specific legislative provision, in the terms recommended by the National Committee and implemented in New South Wales and Tasmania.

Recommendation

- 35 The *Administration and Probate Act 1958* (Vic) should be amended to provide that the distribution of an intestate estate is not affected by dispositions made by the deceased person:
- during the deceased person's lifetime, or
 - in the case of a partial intestacy, by will.

267 Submissions 8 (Patricia Strachan); 14 (Commercial Bar Association); 19 (Association of Independent Retirees); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 30b (Law Institute of Victoria); 33 (State Trustees Limited); 36 (Law Society of New South Wales); 40 (Janice Brownfoot).
268 Submission 14 (Commercial Bar Association).
269 Submission 25 (Moores Legal).
270 Submission 39 (Carolyn Sparke SC).
271 Consultation 9 (NSW Trustee and Guardian).
272 Submissions 14 (Commercial Bar Association); 19 (Association of Independent Retirees); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 30b (Law Institute of Victoria); 33 (State Trustees Limited); 40 (Janice Brownfoot).
273 Submission 39 (Carolyn Sparke SC).

Intestate estates of Indigenous people

The problem

- 5.160 Intestacy laws often provide an inadequate framework for the distribution of the intestate estates of Aboriginal and Torres Strait Islander people, and the National Committee for Uniform Succession Laws questioned ‘whether it is appropriate, or always appropriate, for the general law to apply without qualification in cases where an Indigenous person dies intestate’.²⁷⁴ It noted that distribution on intestacy in Australian law is reflective of English law and society and may, therefore, be inappropriate for the distribution of some Aboriginal and Torres Strait Islander people’s estates on intestacy.²⁷⁵
- 5.161 Academic literature suggests that different conceptions of ownership of property,²⁷⁶ and different kinship patterns,²⁷⁷ mean that the general intestacy law is often not applicable in the Indigenous context. Further, intestacy laws affect a high proportion of Aboriginal and Torres Strait Islander people, as rates of will-making are low.²⁷⁸ No statistics about intestacy of Indigenous people were obtained through submissions and consultations, but the Arts Law Centre of Australia made this point:

our experience is that the personal hardship and emotional stress felt by Aboriginal and Torres Strait Islander families dealing with intestacy is so great that reforms are justified even if the statistics are low. We suspect that many families just give up in this situation either forfeiting, or failing to understand, their entitlements.²⁷⁹

The National Committee’s proposed change

- 5.162 The National Committee recommended provisions based on legislation that was already in operation in the Northern Territory.²⁸⁰ The provisions permit a person, who claims to be entitled to a share of an Indigenous person’s intestate estate, to apply to the Supreme Court for what is effectively a variation of the general intestacy law.²⁸¹
- 5.163 The National Committee recommended that, as in the Northern Territory, the person who claims to be entitled ‘under the customs and traditions of the community or group’ to which the deceased Indigenous person belonged should be able to apply to the Supreme Court for an order.²⁸² It recommended that the application be accompanied by a distribution plan, prepared in accordance with the traditions of the deceased person’s group or community.²⁸³
- 5.164 The provisions recommended by the National Committee have been adopted in New South Wales and Tasmania.²⁸⁴
- 5.165 In its consultation paper on intestacy, the Commission asked whether more flexible provisions are needed for the distribution of Indigenous intestate estates and, if so, what form they should take.²⁸⁵

274 National Committee for Uniform Succession Laws, above n 10, 228.

275 Ibid.

276 Lidia Xynas, ‘Succession and Indigenous Australians: Addressing Indigenous Customary Law Notions of “Property” and “Kinship” in a Succession Law Context’ (2011) 19 *Australian Property Law Journal* 199, 207–12; Prue Vines, ‘Consequences of Intestacy for Indigenous People in Australia: The Passing of Property and Burial Rights’ (2004) 8 *Australian Indigenous Law Review* 1, 1–2.

277 Vines, above n 276, 1–2.

278 National Committee for Uniform Succession Laws, above n 10, 229; Xynas, above n 276, 207–12; Vines, above n 276, 1. This was reiterated in one submission and in consultations: submission 11 (Arts Law Centre of Australia); consultations 8 (Dr Mark McMillan) and 10 (Arts Law Centre of Australia).

279 Submission 11 (Arts Law Centre of Australia). The Arts Law Centre is the national community legal centre for the arts, providing legal information on a range of arts-related legal issues to artists and art organisations. It is involved ‘in the worlds of both art and law’ and represents ‘a large group of Aboriginal and Torres Strait Islander artists, including Victorian artists’: Arts Law Centre of Australia, *About Us* <<http://www.artslaw.com.au/about/>>.

280 National Committee for Uniform Succession Laws, above n 10, 237–46, recommendation 45.

281 *Administration and Probate Act 1969* (NT) pt III div 4A.

282 National Committee for Uniform Succession Laws, above n 10, 246 recommendation 45; *Administration and Probate Act 1969* (NT) s 71B(1).

283 National Committee for Uniform Succession Laws, above n 10, 246 recommendation 45; *Administration and Probate Act 1969* (NT) s 71B(2).

284 *Succession Act 2006* (NSW) ss 133–5; *Intestacy Act 2010* (Tas) ss 34–6.

285 Victorian Law Reform Commission, above n 8, 42.

Views and conclusions

5.166 The Commission’s consultation paper on intestacy highlighted a number of problems with the Northern Territory provisions and the National Committee’s proposed provisions. The National Committee provisions went some way to remedying two problems identified in relation to the Northern Territory legislation:

- In the Northern Territory legislation, no guidance is provided to the Court about how the Indigenous intestacy provisions should interact with the general intestacy provisions in the event of a dispute.²⁸⁶ The National Committee’s proposed provisions specified that a distribution order operates ‘to the exclusion of all other provisions governing the distribution of the intestate estate’.²⁸⁷ However, it remains unclear whether, in the event of a dispute, the Court would make a distribution order.
- The Northern Territory provisions apply only to Aboriginal and Torres Strait Islander people who have not entered into a marriage under the *Marriage Act 1961* (Cth).²⁸⁸ This limitation is not included in the National Committee’s recommended provisions.²⁸⁹

5.167 Several other problems remain with the proposed provisions:

- Provisions of this type have been used very rarely in the Northern Territory. This may indicate that the process of making a Supreme Court application is inaccessible.
- The provisions are not clear about the evidence or criteria that the Court must take into account when deciding whether to make a distribution order. The references in the National Committee’s recommended provision to ‘laws, customs, traditions and practices of the Indigenous community or group to which the intestate belonged’ do not specify how such evidence should be put before the Court.²⁹⁰

5.168 Few submissions commented on the question of Indigenous intestate estates.²⁹¹ However, those that did were in general agreement that more flexible provisions are required for the distribution of intestate estates of Indigenous people.²⁹² Among these submissions, there were mixed views about the form that such provisions should take. Some supported provisions along the lines of the Northern Territory provisions, recommended by the National Committee.²⁹³ Other submissions suggested alternatives to the National Committee’s model.²⁹⁴

5.169 The Arts Law Centre of Australia reiterated that the scheme should not be dependent on a court application and made the following points:²⁹⁵

- There needs to be a different starting point for Aboriginal and Torres Strait Islander people on intestacy. This should be achieved by giving less priority to the deceased person’s partner over their children and recognising traditional law adoptions, within the framework of the general intestacy law.
- The scheme should apply if the deceased person identified as Aboriginal or Torres Strait Islander. An opt-in or opt-out approach, that relies on application to a court, is not workable.

286 This problem was raised by the Court in one of the few Northern Territory cases: *Application by the Public Trustee for the Northern Territory* [2000] NTSC 52 (30 June 2000).

287 National Committee for Uniform Succession Laws, above n 10, Draft Intestacy Bill 2006 cl 36.

288 *Administration and Probate Act 1969* (NT) s 71.

289 National Committee for Uniform Succession Laws, above n 10, Draft Intestacy Bill 2006 pt 4.

290 Ibid Draft Intestacy Bill 2006 cl 35(3). The Arts Law Centre of Australia reiterated this point in its submission and in consultations: submission 11 (Arts Law Centre of Australia); consultation 10 (Arts Law Centre of Australia).

291 Submissions 8 (Patricia Strachan); 19 (Association of Independent Retirees); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 36 (Law Society of New South Wales). State Trustees Limited said that it had no strong view, but noted that cultural matters could be taken into account in a family provision application: submission 33 (State Trustees Limited).

292 Submissions 11 (Arts Law Centre of Australia); 14 (Commercial Bar Association); 30b (Law Institute of Victoria); 32 (The Institute of Legal Executives); 40 (Janice Brownfoot).

293 Submissions 30b (Law Institute of Victoria)—the Law Institute also suggested that there should be a definition of ‘tribal next of kin’ who are entitled to apply; 32 (The Institute of Legal Executives); 40 (Janice Brownfoot).

294 Submissions 11 (Arts Law Centre of Australia); 14 (Commercial Bar Association).

295 Submission 11 (Arts Law Centre of Australia); consultation 10 (Arts Law Centre of Australia).

- 5.170 Dr Mark McMillan expressed the view that any solution must be localised and recognise the differences in communities, and that a standardised national approach is unlikely to do this.²⁹⁶ He noted that the experience of Indigenous people in the Northern Territory is not necessarily the same as that in Victoria.²⁹⁷
- 5.171 The Commission has carefully considered the criticisms of the National Committee's recommended model, including its opt-in application and reliance on court proceedings. Any scheme that operates parallel to the general intestacy law will necessarily involve a determination by someone about whether the provisions applying to Aboriginal and Torres Strait Islander people should apply in a particular instance, and who should be entitled to a share under such provisions. As an alternative to the Supreme Court, the Arts Law Centre suggested that a determination could be made by State Trustees or the Victorian Civil and Administrative Tribunal.²⁹⁸ However, the Commission does not consider that either of these processes would necessarily be more accessible, expert or substantially more cost-effective than the Supreme Court.
- 5.172 While the Commission considers that the National Committee's recommended approach is broad enough to take account of traditional law adoptions and the different priority that partners have, compared to children, in some communities, it acknowledges that it does not provide a different starting point for Indigenous people. Instead, it requires people to apply to the Supreme Court for a variation of the general intestacy law. It does not import concepts of kinship and next of kin, specific to Indigenous communities, into the general law. Implementation of the National Committee's recommended model would promote national consistency. However, the Commission is not satisfied, following research and consultation, that the recommended model would greatly assist Aboriginal and Torres Strait Islander families in Victoria.
- 5.173 For these reasons, the Commission does not recommend adoption of the provisions recommended by the National Committee, as implemented in New South Wales and Tasmania.
- 5.174 In this important area, where access and enfranchisement is of great significance, the Commission recommends that further consideration should be given to:
- designing a more accessible scheme for distribution of Indigenous intestate estates, that does not necessarily require a Supreme Court application
 - determining whether a decision maker is needed to determine whether the Indigenous intestacy scheme applies in a particular instance and who should be entitled to a share and, if so, who that decision maker should be
 - incorporating concepts of traditional law adoption and next of kin, as relevant to Indigenous communities in Victoria, into the general intestacy law by way of definition
 - defining the types of information that should be accepted to prove the laws, customs, traditions and practices of the group to which the deceased person belonged and the existence of a relationship with the deceased person.
- 5.175 The Commission considers that further research and community consultation is necessary to design a scheme for distribution of the estates of Indigenous people who die intestate in Victoria. It is the Commission's view that the general intestacy law is not appropriate for many Indigenous people and that it should be tailored to the specific needs of Indigenous communities in Victoria.

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Consultation 8 (Dr Mark McMillan).
Ibid.
Consultation 10 (Arts Law Centre of Australia).

- 5.176 The Koori Justice Unit within the Victorian Department of Justice coordinates development and delivery of Victoria's Koori²⁹⁹ justice policies and programs, including the Aboriginal Justice Agreement.³⁰⁰ The Unit promotes the partnership between the Victorian Government and Koori communities, and establishes networks to facilitate community engagement in Koori justice programs, policies and initiatives.³⁰¹
- 5.177 An Aboriginal Justice Forum meets at least three times per year, and brings together senior representatives of the Koori Community and the Justice, Human Services, Health and Education government portfolios.³⁰² There are also nine Regional Aboriginal Justice Advisory Committees, which form a network that has a number of responsibilities, including to advocate for and promote improved justice outcomes and Koori justice initiatives to both Koori communities and government agencies.³⁰³
- 5.178 The Commission considers that this important work should be furthered and built upon, and that the Department of Justice, through the Koori Justice Unit, the Aboriginal Justice Forum and relevant networks, should conduct further consultation in relation to the intestate estates of Indigenous people. Such consultation should be undertaken with the aim of devising an appropriate intestacy scheme that is tailored to the needs of Indigenous communities in Victoria.

Recommendation

- 36 The Attorney-General should have the Department of Justice prepare a report about the distribution of the intestate estates of Indigenous people in Victoria, including the need for any legislative reform. This report should build on the work of the National Committee for Uniform Succession Laws and the findings of the Commission, and be based on further community consultation.

299 'Koori' is the preferred term for use in relation to the Victorian Aboriginal Justice Agreement and all related reports, policies, programs and initiatives: Department of Justice, Victoria, *Victorian Aboriginal Justice Agreement Phase 3 (AJA3): A Partnership between the Victorian Government and Koori Community* (2013) 7 ('Victorian Aboriginal Justice Agreement Phase 3').

300 The Victorian Aboriginal Justice Agreement was developed by the Victorian Government, the Victorian Aboriginal Justice Advisory Committee, the Aboriginal and Torres Strait Islander Commission and the Aboriginal community, with the aim of maximising Aboriginal participation in the development of policies and programs in all areas of the justice system: Department of Justice, Victoria, *Victorian Aboriginal Justice Agreement Phase 1 (AJA1): A Partnership between the Victorian Government and Koori Community* (2004) 3. Phase 2 was launched in 2006 and Phase 3 in 2013.

301 Department of Justice, Victoria, *Koori Justice Unit* <<http://www.justice.vic.gov.au/utility/contact+us/koori+justice+unit.shtml>>.

302 Department of Justice, Victoria, *Victorian Aboriginal Justice Agreement Phase 3*, above n 299, 68.

303 Department of Justice, Victoria, *Regional Aboriginal Justice Advisory Committee* <<http://www.justice.vic.gov.au/utility/contact+us/regional+aboriginal+justice+advisory+committee.shtml>>.

Family provision

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6. Family provision

Introduction

Current law and terms of reference

- 6.1 In Victoria, any person can apply for a court order to redistribute a deceased person's estate in their favour if they believe that the deceased person had a responsibility to provide for them, and did not do so. This area of law, family provision, exists in some form in all Australian states and territories. Family provision law recognises that, although people are free to give away their property by will after they die, or to not make a will at all, they also have a responsibility to provide for certain people, usually family members.
- 6.2 In Victoria, family provision is governed by Part IV of the *Administration and Probate Act 1958* (Vic). The Commission's terms of reference directed it to review and report on:
- whether Part IV of the *Administration and Probate Act 1958* concerning family provision applications is operating justly and effectively, having regard to its objective of providing for the proper maintenance and support of persons for whom a deceased had a responsibility to make provision.
- 6.3 Under the *Administration and Probate Act*, any person can apply to the County Court or Supreme Court for a share, or a larger share, of a deceased person's estate. When hearing a family provision claim, the court must decide whether:
- the deceased person had responsibility to provide for the person making the application (the applicant)
 - distribution of the deceased person's estate by their will, intestacy laws, or both, makes adequate provision for the proper maintenance and support of the applicant and, if not, the amount of further provision that should be made.¹
- 6.4 The many factors that the court must consider in making these decisions include:
- the nature of the relationship between the applicant and the deceased person
 - the size of the estate
 - the financial resources and needs of the applicant
 - contributions by the applicant to building up the estate.²

1 *Administration and Probate Act 1958* (Vic) ss 91(1), (3)–(4). Intestacy laws determine how a person's property is distributed after they die if it is not disposed of by a will. Intestacy is defined in the glossary and discussed in Chapter 5.

2 *Administration and Probate Act 1958* (Vic) ss 91(4)(e)–(p). For discussion of this, see Victorian Law Reform Commission, *Succession Laws: Family Provision*, Consultation Paper No 12 (2012) 19.

- 6.5 If the court is satisfied that the deceased person had responsibility to provide for the applicant, and that the will or intestacy provisions failed to make adequate provision for the proper maintenance and support of the applicant, it may order that further provision should be made for the applicant out of the deceased person's estate.³
- 6.6 The court decides each case on its own merits, after balancing the relevant statutory criteria. There are no definitive rules about when a family provision claim will succeed. As discussed in the Commission's consultation paper on family provision, applicants in a range of different relationships with the deceased person have been successful or unsuccessful, based on the individual circumstances of each case.⁴
- 6.7 It is important to note, however, that the vast majority of family provision claims are not ultimately decided by the courts; they are usually settled by agreement between the parties.

Overview of the problems with family provision law in Victoria

- 6.8 In the course of this reference, the Commission has heard a number of criticisms about the operation of family provision law in Victoria. The Commission identified several in its consultation paper on family provision:
- a belief that the current law encourages opportunistic or non-genuine claims
 - the high legal costs in family provision proceedings and the fact that they are often borne by the estate, even where a family provision claim fails
 - the settlement of a high proportion of claims that may not otherwise have succeeded at trial
 - the fact that, due to the high rate of settlement, the courts have little oversight over costs in family provision matters
 - the lack of certainty that exists in this jurisdiction and the difficulties experienced by legal practitioners when advising clients about the validity and strength of the claim
 - the perception of some members of the public that their will can effectively be challenged by anyone, and that they do not truly have freedom to dispose of their property by will.
- 6.9 In relation to such concerns, the Commission sought comments about:
- the factors that affect a decision to settle a family provision proceeding
 - the extent to which the current law allows applicants to make family provision claims that are opportunistic or non-genuine
 - whether summary dismissal proceedings or existing costs rules deter opportunistic family provision applicants
 - whether costs orders unfairly impact on estates
 - which procedures in the County Court and Supreme Court are working well to reduce costs, and whether any additional measures would assist with this.

3 *Administration and Probate Act 1958* (Vic) ss 91(1)–(3). This order is called a 'maintenance order' in the Act. The Commission refers to this as a 'family provision order' for clarity.

4 For discussion of this, see Victorian Law Reform Commission, above n 2, 20–3.

- 6.10 Many submissions expressed the view that costs rules and the power of the court to summarily dismiss claims are not effective in deterring opportunistic or non-genuine claims.⁵ Both the Law Institute of Victoria and Arnold Bloch Leibler considered that the current law allows opportunistic and non-genuine family provision claims ‘to a significant extent’.⁶ State Trustees said that it had experienced such claims on many occasions.⁷ A County Court practice note adverts to the existence of such a problem, stating that, ‘In some cases, a plaintiff may issue proceedings where there is little merit in the claim or alternatively an appearance is filed where a defendant has no real defence’.⁸
- 6.11 Some legal practitioners, however, considered that the problem of opportunistic claims is not widespread.⁹ Barrister Andrew Verspaandonk said that, although ‘try on’ claims are made, they represent a relatively modest proportion of the overall number of claims made, but they do gain notoriety.¹⁰ Carolyn Sparke SC agreed that marginal cases are relatively few in number, but are overrepresented in the media.¹¹ Whatever the extent of the problem, it is clear that opportunistic claims, legal costs, uncertainty in the jurisdiction and the high rate of settlement are closely related.
- 6.12 Settlement is prevalent in the family provision jurisdiction, with one barrister noting that, ‘In my experience, almost all such claims resolve at the point of mediation’.¹² Although the merits of a claim¹³ and the desire to preserve family relationships¹⁴ affect the decision about whether to settle, a number of submissions expressed the view that settlement is not always, or even usually, based on the merits of the claim and an outcome that is best for all parties.

Concerns about costs

- 6.13 The Legal Services Commissioner said that, in complaints made in relation to family provision proceedings, some unmeritorious claims appear to have been settled not on the merits of the claim, but because costs of the litigation are likely to be paid out of the estate.¹⁵ In preliminary comments on the terms of reference, Equity Trustees Ltd agreed with this contention, noting that settlement does occur to protect the value of the estate.¹⁶
- 6.14 The Property and Probate Section of the Commercial Bar Association and the Law Institute of Victoria agreed that the risk that an unsuccessful plaintiff will receive their costs out of the estate motivates some defendant personal representatives to settle claims.¹⁷ State Trustees also noted the existence of the practice of settling unmeritorious claims to prevent incurring further legal costs and eroding the estate, referred to colloquially as ‘go away money’.¹⁸

5 Submissions 25 (Moores Legal); 30a (Law Institute of Victoria); 33 (State Trustees Limited); 35 (Andrew Verspaandonk); 39 (Carolyn Sparke); 42b (Arnold Bloch Leibler); 46 (Robert Cornall AO). Equity Trustees Limited also expressed the preliminary view that changes to the way in which costs are awarded in family provision matters ‘may reduce the frequency of marginal claims’: preliminary comments on terms of reference, provided by Equity Trustees Ltd at meeting with the Financial Services Council (21 September 2012).

6 Submissions 30a (Law Institute of Victoria); 42b (Arnold Bloch Leibler).

7 Submission 33 (State Trustees Limited).

8 County Court of Victoria, *Practice Note No PNCI 2-2012 — Operation and Management of the Damages and Compensation List (Revised)*, 1 November 2012, 21.

9 Submissions 10 (Shane Newton); 35 (Andrew Verspaandonk). Consultation 7 (Law Institute of Victoria Wills & Estates Discussion Group). Equity Trustees Limited questioned the extent to which the concern about opportunistic claims is based in fact: preliminary comments on terms of reference, provided by Equity Trustees Ltd at meeting with the Financial Services Council (21 September 2012).

10 Submission 35 (Andrew Verspaandonk).

11 Submission 39 (Carolyn Sparke SC).

12 Submission 35 (Andrew Verspaandonk).

13 Submissions 30a (Law Institute of Victoria); 42b (Arnold Bloch Leibler).

14 Submissions 25 (Moores Legal); 30a (Law Institute of Victoria); 32 (The Institute of Legal Executives).

15 Submission 1 (Legal Services Commissioner).

16 Preliminary comments on terms of reference, provided by Equity Trustees Ltd at meeting with the Financial Services Council (21 September 2012).

17 Submission 14 (Commercial Bar Association); 32a (Law Institute of Victoria). See also submission 46 (Robert Cornall AO).

18 Submission 33 (State Trustees Limited). This practice was also noted in consultation: consultations 6 (Law Institute of Victoria Wills & Estates Discussion Group); 18 (Legal practitioners in Wodonga).

- 6.15 Arnold Bloch Leibler expressed the view that, even if a family provision claim is successfully defended, ‘there is very little prospect that the plaintiff will be ordered to pay the estate’s costs’.¹⁹ State Trustees noted that costs still ‘default’ to the estate in the majority of instances.²⁰ Further, the Law Institute of Victoria considered that:
- plaintiffs can expect solicitor-client costs from the estate despite being unsuccessful at trial, which has a chilling effect on mediations and encourages executors to settle even unmeritorious claims.²¹
- 6.16 The Supreme Court of Victoria noted that costs orders in family provision proceedings affect not only how claims are brought, but also how they are defended:
- the usual disincentive to a defendant opposing a meritorious claim does not necessarily exist in family provision matters. While a defendant executor who has an interest in the estate has an incentive to prevent diminution of the estate through legal costs, a defendant executor with no interest in the estate will not. Their costs will be met by the estate almost universally, and they may adopt the position that they are under an obligation to defend the will ... In the Court’s experience, defendants who are not also beneficiaries can on occasion unreasonably resist meritorious claims.²²
- 6.17 A member of the public who had been the executor and a beneficiary of a will against which a successful family provision claim has been made said that ‘huge legal expenses’, fear of a worse result and mistrust of the system all contribute to the decision to settle.²³ Some members of the legal profession considered that the considerable costs involved are ‘almost invariably’ a factor resulting in settlement.²⁴ While the Cancer Council Victoria noted that the high rate of settlement ‘provides a check against unfounded claims progressing’,²⁵ it also noted that legal costs up to mediation are still commonly borne by the estate.²⁶
- 6.18 The Commission also heard that lawyers’ practices contribute to the costs problem in family provision. Several submissions suggested that ‘no win, no fee’ practices and uplift fees contributed to high legal costs in family provision proceedings.²⁷ The Supreme Court of Victoria noted that costs will only rarely be judicially determined, so the costs charged by legal practitioners need to be scrutinised.²⁸ Moores Legal reiterated that courts rarely have the opportunity to examine the parties’ costs and make a determination about whether they are reasonable and proportionate.²⁹ A member of the Commission’s succession laws advisory committee noted that, because the court does not have control over costs at the point of mediation, practitioners often grossly overestimate their costs at this stage.³⁰ Additionally, one submission from a member of the public noted that where a family is ‘fractured or dysfunctional’ parties may not care about costs ramifications, ‘in fact they delight in them’.³¹
- 6.19 The Commercial Bar Association noted that the size of the estate is another important factor in decisions made to settle family provision applications.³² A charitable beneficiary expressed the view that it may not be worthwhile to pursue a weak claim to trial, because the costs of doing so would be exorbitant relative to the size of the estate. The Property and Probate Section of the Commercial Bar Association noted that, in the case of smaller estates, settlement is likely where it becomes apparent to the defendant that their net return if the matter proceeds to trial will be less than an amount that can be agreed upon at mediation.³³

19 Submission 42b (Arnold Bloch Leibler). See also submission 46 (Robert Cornall AO).

20 Submission 33 (State Trustees Limited).

21 Submission 30a (Law Institute of Victoria). Different measures of costs are discussed below at [6.88]–[6.120].

22 Submission 37 (Supreme Court of Victoria).

23 Submission 13 (David Shalders).

24 Submission 25 (Moores Legal). See also submission 26 (Rigby Cooke Lawyers).

25 Submission 28 (Cancer Council Victoria).

26 Ibid.

27 Submissions 14 (Commercial Bar Association); 37 (Supreme Court of Victoria).

28 Submission 37 (Supreme Court of Victoria). Different measures of costs are discussed below at [6.88]–[6.120].

29 Submission 25 (Moores Legal).

30 Advisory Committee (Meeting 4).

31 Submission 13 (David Shalders).

32 Submission 14 (Commercial Bar Association).

33 Ibid.

- 6.20 Other charitable beneficiaries said that their motivation to settle can be influenced by: the availability and potential costs of legal advice and representation; the chance that the application will be successful; and the reputational risks to the charity, and how it may be portrayed in the media, irrespective of the validity or strength of the application.³⁴ The Commission also heard that charities may be compelled to settle as soon as possible because of immediate financial requirements.³⁵

Uncertainty about whether the claim will succeed

- 6.21 Submissions from law firms emphasised the uncertainty that exists in the family provision jurisdiction:
- Because family provision matters are so fact-based, it is difficult to accurately predict the advice that the opponent will be given.³⁶
 - The case-by-case nature of determinations means that it is difficult to predict whether a claim will succeed and, in the event of success, the amount of any order for provision.³⁷
 - 'There may be 50 judges and 50 different decisions and none of them would be wrong.'³⁸
 - 'It is only at the time of judgment that the parties know for certain whether the plaintiff was indeed a person for whom the deceased had a responsibility to provide.'³⁹
- 6.22 In consultation, representatives of the Law Institute of Victoria's Succession Law Committee noted that the uncertainty in family provision creates difficulty for solicitors advising their client as will-maker, applicant or executor.⁴⁰ The Supreme Court of Victoria agreed that, due to the highly discretionary nature of the jurisdiction, a defendant can rarely be entirely confident of success.⁴¹ As well as making it difficult for legal practitioners to advise their clients, uncertainty contributes to the likelihood of settlement.⁴² However, barrister Andrew Verspaandonk noted that the effect of uncertainty can be mitigated by appropriately qualified advice,⁴³ and legal practitioners in Colac did not consider it difficult to advise a client about whether they have a valid claim.⁴⁴

Non-financial costs

- 6.23 The time and mental energy demanded of the parties in family provision proceedings is also at play in decisions to settle. Arnold Bloch Leibler noted that family embarrassment and the desire for confidentiality, as well as family stress, contribute to decisions to settle family provision claims.⁴⁵ The Law Institute of Victoria cited 'the trauma of going through the process and a public hearing' as a reason for settlement,⁴⁶ and the Institute of Legal Executives noted the emotional effort involved for parties if a matter 'drags on'.⁴⁷

34 Submissions 15 (Alzheimer's Australia); 20 (Include a Charity); 24 (Royal Society for the Prevention of Cruelty to Animals).
35 Submissions 20 (Include a Charity); 24 (Royal Society for the Prevention of Cruelty to Animals).
36 Submission 25 (Moore's Legal).
37 Ibid.
38 Submission 26 (Rigby Cooke Lawyers).
39 Submission 42b (Arnold Bloch Leibler).
40 Consultation 6 (Law Institute of Victoria Succession Law Committee).
41 Submission 37 (Supreme Court of Victoria).
42 Submissions 30a (Law Institute of Victoria); 35 (Andrew Verspaandonk).
43 Submission 35 (Andrew Verspaandonk).
44 Consultation 20 (Legal practitioners in Colac).
45 Submission 42b (Arnold Bloch Leibler).
46 Submission 30a (Law Institute of Victoria).
47 Submission 32 (The Institute of Legal Executives).

- 6.24 In barrister Andrew Verspaandonk's view, the parties' desire to avoid a hearing and get on with their lives is the strongest incentive to settle family provision claims:

All practitioners know that there are non-financial costs to litigation. These are particularly pointed in Family Provision litigation where the trigger for the litigation has been the death of a loved one. In my experience, both plaintiffs and defendants have been keen to resolve the proceeding ... simply to have it all over and done with ... This also occurs even where the merits of the case would justify a continuation to trial.⁴⁸

Discrepancy between the law and community expectations

- 6.25 There is a perception that the law does not accord with community expectations. A member of the public who had been an executor and beneficiary of an estate against which a family provision claim had been made expressed dismay that, in her view, a judge had been permitted to over-rule her mother's wishes where all children had been equally provided for.⁴⁹ Another member of the public in a similar situation expressed the view that people do not want their wills changed and are generally not aware that this can happen.⁵⁰
- 6.26 Include a Charity and a legal practitioner from a community legal centre agreed that many people are unaware that their final wishes can be altered after their death.⁵¹ Retirees surveyed by the Association of Independent Retirees unanimously expressed the view that they did not want their wills to be challenged, with one asking 'Why pay to make a will when ultimately my wishes will be challenged?'⁵²

Recommended areas for reform

- 6.27 Most possible reforms in response to the problems identified in family provision, as discussed in this chapter, are directed to four aspects of the operation of the law:
- court jurisdiction
 - eligibility to make a family provision claim
 - costs rules
 - procedure.
- 6.28 In relation to family provision, there seems to be little possibility of achieving national consistency by implementing the recommendations of the National Committee for Uniform Succession Laws. Where desirable, the Commission has drawn from law and practice in New South Wales, with a view to achieving consistency between the two most populous states in Australia.
- 6.29 Aspects of family provision law that were raised in the consultation paper, but for which no change is proposed, are:
- the time within which to bring an application
 - notional estate.

48 Submission 35 (Andrew Verspaandonk).

49 Submission 9 (Deirdre Lampard).

50 Submission 13 (David Shalders).

51 Submission 20 (Include a Charity); consultation 4 (Legal practitioners from the Goulburn Valley and Loddon Campaspe Community Legal Centres).

52 Submission 19 (Association of Independent Retirees).

Court jurisdiction

Current court jurisdiction

- 6.30 Both the County Court and the Supreme Court have unlimited jurisdiction to hear and determine family provision claims.⁵³ The County Court has had jurisdiction to hear family provision claims 'where the value of the estate does not exceed its jurisdictional limit' since 1986,⁵⁴ and it has had unlimited civil jurisdiction since 2007.⁵⁵
- 6.31 In its consultation paper on family provision, the Commission asked whether family provision proceedings were generally less costly in the County Court than in the Supreme Court.⁵⁶ In consultation and submissions, stakeholders raised a range of views about court jurisdiction generally.

Victorian Civil and Administrative Tribunal

- 6.32 The Victorian Civil and Administrative Tribunal (VCAT) proposed that it should have jurisdiction to determine family provision applications.⁵⁷ In consultation, representatives from VCAT suggested that VCAT should have exclusive jurisdiction over family provision claims in respect of estates of a limited value, perhaps up to \$200,000, and concurrent jurisdiction with the County Court and Supreme Court over all other family provision claims.⁵⁸
- 6.33 VCAT gave the following reasons why it should have jurisdiction in family provision matters:⁵⁹
- It offers an accessible service, conducting hearings throughout Victoria and with supported offices in a number of regional hubs.
 - It has a comprehensive existing alternative dispute resolution system and is able to accredit mediators.
 - It is a lower cost jurisdiction.
 - Members are assigned to lists based on their expertise, and a number of legally-qualified members have experience in wills and estates.
 - It has experience dealing with self-represented litigants.
- 6.34 Some individuals and organisations supported the idea that VCAT should hear and determine family provision proceedings.⁶⁰ Seniors Rights Victoria expressed the view that its clients would be more likely to take disputed matters to VCAT than to court because of VCAT's less formal atmosphere and cost effectiveness.⁶¹ Some legal practitioners suggested that giving VCAT jurisdiction could reduce opportunistic claims.⁶²

53 *Administration and Probate Act 1958* (Vic) ss 91(1), 90 (definition of 'Court').

54 *Courts Amendment Act 1986* (Vic) s 17(a); *Administration and Probate Act 1958* (Vic) s 90 (definition of 'Court').

55 *County Court Act 1958* (Vic) s 37, as amended by the *Courts Legislation (Jurisdiction) Act 2006* (Vic) s 3, which commenced on 1 January 2007. This means that the reference to the County Court's jurisdictional limit in the *Administration and Probate Act* is now unnecessary: *Administration and Probate Act 1958* (Vic) s 90 (definition of 'Court').

56 Victorian Law Reform Commission, above n 2, 44.

57 Submission 6 (Victorian Civil and Administrative Tribunal).

58 Consultation 14 (Victorian Civil and Administrative Tribunal).

59 Some of these views were put forward in submission 6 (Victorian Civil and Administrative Tribunal) and some in consultation 14 (Victorian Civil and Administrative Tribunal).

60 Submissions 1 (Legal Services Commissioner); 13 (David Shalders); 31 (Seniors Rights Victoria); 38 (Liz Burton). Consultations 5 (Open day); 18 (Legal practitioners in Wodonga), although some participants at this meeting were strongly opposed to the idea.

61 Submission 31 (Seniors Rights Victoria).

62 Consultation 18 (Legal practitioners in Wodonga), although some participants at this meeting were strongly opposed to the idea.

- 6.35 However, there has been substantial opposition to this proposal within the legal profession.⁶³ Concerns about VCAT hearing family provision claims included a perceived lack of expertise, insufficient regard for the rules of evidence and inconsistent decision making.⁶⁴ The view was expressed that it is already difficult to ensure consistency in decision making between the Supreme Court and County Court, and this would be compounded if VCAT were given jurisdiction in family provision matters.⁶⁵
- 6.36 In consultation, representatives of VCAT said that lawyers often attend mediations and compulsory conferences. If VCAT had jurisdiction in family provision matters, VCAT took the view that the parties would not necessarily require legal representation, but legal representation would not be discouraged. Although professional advocates generally need leave to appear, in some lists leave is usually granted.⁶⁶
- 6.37 Based on VCAT's description of how the jurisdiction would operate, it seems likely that parties would be legally represented at VCAT, as they usually are in court. When defending a family provision claim, a prudent executor would most likely engage legal representation to defend the claim. Given that legal fees are the main contributor to costs, any costs saving at VCAT would be minimal if parties were legally represented. Even if family provision claims were only heard by legally qualified members or senior members, there would be a need for them to be trained and gain expertise in the jurisdiction.
- 6.38 Family provision is a complex area of the law and, notwithstanding that VCAT could develop the expertise, systems and practices necessary for it to exercise the jurisdiction, this is a separate matter from the existence of any need to extend the jurisdiction beyond the Supreme and County Courts. The Commission is not persuaded that any such need exists. Family provision applications would not necessarily be disposed of more cheaply at VCAT as legal representation is a practical necessity in family provision applications. The Commission is of the view that efforts need to be directed towards improving procedures in the Supreme and County Courts rather than on extending the jurisdiction to VCAT or the Magistrates' Court.⁶⁷
- 6.39 For these reasons, the Commission does not recommend that VCAT should have jurisdiction in family provision.

County Court of Victoria

- 6.40 In 2011–12, 489 family provision proceedings were initiated in the Supreme Court.⁶⁸ In the same period, 168 family provision proceedings were initiated in the County Court.⁶⁹
- 6.41 The County Court has said that it has the capacity to hear a greater number of cases than it is currently hearing and that it is able to provide expeditious service.⁷⁰ It proposed that it should have exclusive jurisdiction to hear family provision claims involving gross estates up to a particular value.⁷¹

63 Submission 39 (Carolyn Sparke SC). Consultations 3 (Legal practitioners in the Goulburn Valley region); 18 (Legal practitioners in Wodonga); 20 (Legal practitioners in Colac). Advisory Committee (Meeting 4).

64 Consultations 3 (Legal practitioners in the Goulburn Valley region); 18 (Legal practitioners in Wodonga); 20 (Legal practitioners in Colac); Advisory Committee (Meeting 4).

65 Advisory Committee (Meeting 4).

66 Consultation 14 (Victorian Civil and Administrative Tribunal).

67 See the discussion on procedure below at [6.121]–[6.162].

68 Supreme Court of Victoria, *2011–12 Annual Report* (2012) 52.

69 Information provided by the County Court of Victoria, 13 June 2013.

70 Consultation 15 (County Court of Victoria).

71 Ibid.

- 6.42 A number of submissions did not consider costs to be significantly less in the County Court than in the Supreme Court,⁷² with one submission noting that the work and responsibility involved in preparing a case for the County Court is the same and costs charged by legal practitioners are unlikely to be any less.⁷³ However, other legal practitioners agreed that the more expeditious service in the County Court results in reduced legal costs.⁷⁴ One practitioner considered that reduced filing fees and reduced counsel's fees also contributed to lower costs in the County Court.⁷⁵ Some legal practitioners also noted the regional presence of the County Court.⁷⁶ There was also a perception by some members of the public that family provision matters were too costly in the Supreme Court and should be heard in a lower court.⁷⁷
- 6.43 At a meeting of Supreme Court associate judges, some participants expressed the view that some claims in relation to small estates do not need to be heard in the Supreme Court. However, other participants at this meeting strongly opposed the idea of giving the County Court exclusive jurisdiction over smaller estates, expressing the view that parties should be able to choose their jurisdiction. It was emphasised that it is important to manage the proceeding to minimise costs, regardless of the court.⁷⁸
- 6.44 The point was made in consultation that the Supreme Court is the traditional family provision jurisdiction,⁷⁹ because probate is granted by the Supreme Court.⁸⁰ The Commission was also told that some law firms routinely commence proceedings in the Supreme Court rather than the County Court, regardless of the size of the estate.⁸¹ It is not clear whether this is a result of the Supreme Court historically having jurisdiction for family provision, or whether it is the result of concerns expressed by some legal practitioners that the County Court brings matters on too quickly, lacks the necessary expertise or does not offer consistent decision making before the same judges.⁸²
- 6.45 The Commission considers that any concerns about the expertise or quality of decision making in the County Court are without basis. Practitioners who were experienced in conducting family provision proceedings were satisfied with the quality of the service provided in the County Court. However, the Commission considers that, for as long as both the County Court and the Supreme Court have unlimited jurisdiction in family provision, the traditional practice of the majority of claims being commenced in the Supreme Court will continue.
- 6.46 For these reasons, the Commission recommends that the County Court should have exclusive jurisdiction over family provision claims where the net value of the estate does not exceed \$500,000. Estates of this amount are likely to be relatively simple estates, with no more than one piece of real property (if any). The Commission considers that cordoning off a portion of family provision claims for the County Court to determine will build greater confidence in the County Court among members of the legal profession.
- 6.47 The relevant provisions of the Administration and Probate Act should be amended to provide for this.⁸³

72 Submissions 14 (Commercial Bar Association); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 33 (State Trustees Limited); 35 (Andrew Verspaandonk); 39 (Carolyn Sparke SC).

73 Submission 35 (Andrew Verspaandonk). A member of the Commission's succession laws advisory committee also noted that practitioners were likely to charge the same hourly rate whether they are in the County Court or Supreme Court: Advisory Committee (Meeting 4). Different measures of costs are discussed below at [6.88]–[6.120].

74 Consultation 3 (Legal practitioners in the Goulburn Valley region); Advisory Committee (Meeting 3).

75 Consultation 3 (Legal practitioners in the Goulburn Valley region).

76 Consultation 18 (Legal practitioners in Wodonga).

77 Consultation 5 (Open day).

78 Consultation 16 (Supreme Court of Victoria—Associate Judges).

79 Consultation 15 (County Court of Victoria).

80 Consultation 16 (Supreme Court of Victoria—Associate Judges).

81 Consultation 3 (Legal practitioners in the Goulburn Valley region).

82 Advisory Committee (Meetings 3 and 4).

83 *Administration and Probate Act 1958* (Vic) s 90 (definition of 'Court').

Recommendation

- 37 The *Administration and Probate Act 1958* (Vic) should be amended to:
- (a) grant the County Court exclusive jurisdiction over family provision claims where the value of the net estate does not exceed \$500,000
 - (b) specify that the County Court and Supreme Court have concurrent jurisdiction in relation to all other family provision proceedings
 - (c) remove reference to the County Court's jurisdictional limit.

6.48 It was also suggested that the County Court should have jurisdiction to determine will construction issues arising in family provision matters. However, it seems that it already has this power under the *County Court Civil Procedure Rules 2008* (Vic).⁸⁴ Accordingly, the Commission does not consider it necessary to make a recommendation on this matter.

Eligibility to make a family provision claim

Current law

- 6.49 The Administration and Probate Act does not limit who may make a family provision application; anyone may apply. In this regard, Victorian law differs from the law in all other Australian states and territories, where family provision legislation sets out a list of eligible persons.
- 6.50 Until 1997 in Victoria, only the deceased person's widow, widower or children could make a family provision application.⁸⁵ Family provision eligibility was considered by the Attorney-General's Law Reform Advisory Council.⁸⁶ The government ultimately concluded that the law was too restrictive and was excluding some people who had legitimate claims, and that it should be amended to enable a wider category of people to apply for family provision.⁸⁷
- 6.51 Victoria's current approach to eligibility is described as 'criteria-based', because statutory criteria must be considered when determining whether the deceased person had responsibility to provide for a person—that is, whether the person is eligible for family provision.⁸⁸ This is in contrast to the 'status-based' or 'list-based' approach adopted in all other Australian jurisdictions,⁸⁹ where legislation lists those who are eligible to make a family provision application, based on the relationship (usually a familial relationship) that the applicant had with the deceased person.⁹⁰

84 *County Court Civil Procedure Rules 2008* (Vic) O54.

85 *Administration and Probate Act 1958* (Vic) s 91. 'Widow' was defined as including a former wife entitled to payments of alimony or maintenance: *Administration and Probate (Family Provision) Act 1962* (Vic) s 5, which amended *Administration and Probate Act 1958* (Vic) s 91.

86 The Advisory Council and process leading up to the amendments is discussed by Justice Bell in *Whitehead v State Trustees Ltd* [2011] VSC 424 (2 September 2011) [24]. Rosalind Croucher gave an expert report to the Advisory Council: Rosalind Atherton (Croucher), *Victorian Attorney-General's Law Reform Advisory Council Expert Report 1: Family Provision* (1997).

87 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 October 1997, 433 (Jan Wade, Attorney-General); *Wills Act 1997* (Vic) s 55 amended *Administration and Probate Act 1958* (Vic) s 91(1).

88 National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General*, Queensland Law Reform Commission Report No 58 (2004) 3–4 ('*Family Provision Supplementary Report*'); Rosalind Croucher, 'Towards Uniform Succession in Australia' (2009) 83 *Australian Law Journal* 728, 738 ('Towards Uniform Succession'). Croucher uses the terminology 'criteria-based' or 'circumstances' approach interchangeably: at 739. The question of whether or not the deceased person had responsibility to provide for an applicant—that is, whether the applicant is an eligible applicant—is part of the jurisdictional question to be determined by the court: does the court have jurisdiction to make a family provision order?: *Singer v Berghouse* (1994) 181 CLR 201, 208–9 (Mason CJ, Deane and McHugh JJ). The other part of this jurisdictional question is whether adequate provision has been made for the applicant's proper maintenance and support: at 208–9.

89 Although a combined list and circumstances approach is taken in New South Wales, discussed below at [6.66]–[6.73].

90 *Testator's Family Maintenance Act 1912* (Tas) s 3A: spouse, children, parents if no spouse or children, former partner entitled to maintenance; *Family Provision Act 1969* (ACT) s 7: partner, child and, in certain circumstances, stepchild, grandchild and parent; *Family Provision Act 1970* (NT) s 7: partner and child and, in certain circumstances former partner, stepchild, grandchild and parent; *Inheritance (Family Provision) Act 1972* (SA) s 6: partner, former partner, child and, in certain circumstances, child of a partner, grandchild, parent, sibling; *Family Provision Act 1972* (WA) s 7: partner, former partner receiving maintenance, child and, in certain circumstances, grandchild, stepchild and parent; *Succession Act 1981* (Qld) ss 40–1: partner, child, stepchild, dependant parent, dependant parent of a child of the deceased person, dependant person under 18 years of age.

- 6.52 Because of the criteria-based approach to eligibility to make a family provision application in Victoria, applicants in a variety of relationships with the deceased person have had family provision orders made in their favour. Most successful applicants were in a familial relationship with the deceased person, for example, children of the deceased person, domestic partners and spouses.⁹¹ Step-parents may also have a responsibility to provide for their stepchildren, where the relationship is akin to a parent-child relationship⁹² or where the step-parent's estate was largely derived from the stepchild's natural parent.⁹³
- 6.53 A grandparent does not have responsibility to provide for their grandchild merely by virtue of that relationship; additional or special factors need to be shown.⁹⁴ In one case, provision was made for the deceased person's grand-daughter because, although it was not a relationship of dependence, the grand-daughter had significant financial need, had lost her father early in life and had not inherited anything from his estate.⁹⁵ Similar reasoning applies to whether responsibility is owed by an aunt or uncle to their niece or nephew.⁹⁶
- 6.54 Occasionally, the courts have recognised relationships other than typical family relationships as giving rise to a responsibility to provide, based on the individual circumstances of the case. In *Unger v Sanchez*, for example, the Supreme Court ordered provision for a friend and neighbour of the deceased person, who had had a relationship with the deceased person 'closely akin to that of a daughter to an elderly mother'.⁹⁷ In *Whitehead v State Trustees*, the Court ordered provision for the deceased person's 'close personal companion and sexual partner' and her son.⁹⁸ The Court held that, although the deceased person and applicant had not been in a domestic relationship, they and the applicant's son 'represented a social unit which was tantamount to a family'.⁹⁹ In *Borebor v Keane*, the Court ordered that provision be made for a child whom the deceased person had believed to be his daughter.¹⁰⁰ Although the applicant had lived overseas for her whole life, and a DNA test proved she was not his biological child, the deceased person had supported her as though she were his daughter.¹⁰¹

The problems with family provision eligibility

- 6.55 The Victorian criteria-based approach to family provision eligibility takes account of cases in which, although there is no typical family relationship, a family-like responsibility exists. It is sufficiently flexible to allow for unique circumstances that cannot be foreseen by legislators.
- 6.56 In the cases heard and determined by the courts, there is no practical problem with eligibility. Judges hear the evidence and make a determination based on the individual facts and circumstances of the case. This was verified in consultation with judges of the County Court and judges and associate judges of the Supreme Court.¹⁰²

91 Examples of these cases are set out in Victorian Law Reform Commission, above n 2, 21–2. Submission 5 (Samantha Renwick) provided a discussion of trends in the family provision case law, following the 1997 amendments to family provision.

92 See, eg, *Quinn v Robertson* [2009] VSC 245 (10 June 2009); *Paola v State Trustees Ltd* [2012] VSC 158 (26 April 2012).

93 See, eg, *McKenzie v Topp* [2004] VSC 90 (39 March 2004); *James v Day* [2004] VSC 290 (17 August 2004); *Keets v Marks* [2005] VSC 172 (20 May 2005); *Robertson v Koska* [2010] VSC 134 (16 April 2010). The responsibility of a step-parent has also been recognised in a case where the applicant's natural parent was not yet deceased and the applicant had immediate, high financial need: *McCann v Ward* [2012] VSC 63 (1 March 2012).

94 *Scarlett v Scarlett* [2012] VSC 515 (1 November 2012) [101].

95 *Ibid* [110]–[115]. The applicant had not inherited anything from her father, because her father had not inherited anything from his own father (the deceased person's late husband) following a falling out: at [115]. Similarly, in *Petrucci v Fields*, provision was ordered for the deceased person's widowed daughter-in-law and grandchildren: *Petrucci v Fields* [2004] VSC 425 (29 October 2004). For other cases involving claims by grandchildren, see, eg, *Leahey v Trescowthick* [1999] VSC 409 (22 October 1999); *Sherlock v Guest* [1999] VSC 431 (12 November 1999); *MacEwan Shaw v Shaw* (2003) 11 VR 95; *Subasa v State Trustees Ltd* [2007] VSC 399 (12 October 2007).

96 See, eg, *Jackson v Newns* [2011] VSC 32 (18 February 2011).

97 *Unger v Sanchez* [2009] 541 (1 December 2009) [88].

98 *Whitehead v State Trustees Ltd* [2011] VSC 424 (2 September 2011) [326]. This decision was upheld on appeal: *State Trustees Ltd v Bedford* [2012] VSCA 274 (16 November 2012).

99 *Whitehead v State Trustees Ltd* [2011] VSC 424 (2 September 2011) [326].

100 *Borebor v Keane* [2013] VSC 35 (19 February 2013).

101 *Ibid* [73].

102 Consultations 15 (County Court of Victoria); 16 (Supreme Court of Victoria—Associate Judges); 17 (Supreme Court of Victoria—Judges).

- 6.57 However, as discussed above from [6.12], family provision claims are usually settled before they are heard by the court. One barrister noted that, ‘In my experience, almost all such claims resolve at the point of mediation’.¹⁰³ In some respects, the decision to settle a family provision claim is not greatly different to the decision to settle other types of civil claim: there is less risk involved; the costs are less; the parties have the opportunity to resolve the matter in a way that is mutually satisfactory. However, the great degree of uncertainty in relation to family provision eligibility means that claims are being settled that would perhaps be unlikely to succeed at trial.¹⁰⁴
- 6.58 Further, the Law Institute of Victoria’s submission suggested that the unlimited class of family provision claimants makes it difficult for the court to exercise its summary judgment jurisdiction: ‘Without considering all relevant facts, it is difficult to determine whether an application has no real prospect of success, which would require a full hearing on the issues’.¹⁰⁵ The Legal Services Commissioner criticised the apparent ease with which family provision claims can be made¹⁰⁶ and another submission expressed the view that the current law in relation to eligibility is cast too broadly and comes close to requiring judges to rewrite wills.¹⁰⁷

Options raised in the Commission’s consultation paper

- 6.59 The Commission’s consultation paper set out three mutually exclusive options for reform of eligibility to make a family provision claim:
- implementing the National Committee’s recommended approach, which is broadly similar to the responsibility test currently in operation in Victoria
 - introducing a flexible list of eligible applicants, as in New South Wales
 - retaining Victoria’s responsibility test, but introducing a threshold requirement of dependence and/or financial need.¹⁰⁸

The National Committee’s recommended model

- 6.60 The National Committee recommended that people in the following categories should be eligible to make a family provision claim:
- the deceased person’s spouse at the time of the deceased person’s death
 - the deceased person’s de facto partner at the time of the deceased person’s death
 - a non-adult child of the deceased person, defined as a person who was under the age of 18 at the time of the deceased person’s death, including natural and adopted children but not stepchildren
 - a person to whom the deceased person owed a responsibility to provide maintenance, education or advancement in life.¹⁰⁹
- 6.61 The National Committee recommended that those in the first three categories—spouse, de facto partner, non-adult child—would be automatically entitled to apply for family provision, whereas the court would be required to consider a list of statutory factors in relation to applicants in the fourth proposed category to determine whether the person was an eligible applicant.¹¹⁰

103 Submission 35 (Andrew Verspaandonk).

104 See the discussion of views from submissions and consultations, from [6.12].

105 Submission 30a (Law Institute of Victoria). This submission noted the recent decisions of Associate Justice Mukhtar in *Jackson v Newsns* [2011] VSC 32 (18 February 2011) and *Napolitano v State Trustees Limited* [2012] VSC 345 (15 August 2012), but said ‘it is unclear whether these judgments signal a greater willingness on the part of the court to exercise its inherent power of summary dismissal’.

106 Submission 1 (Legal Services Commissioner).

107 Submission 46 (Robert Cornall AO).

108 Victorian Law Reform Commission, above n 2, 37–40.

109 National Committee for Uniform Succession Laws, *Family Provision Supplementary Report*, above n 88, 8–10, Draft Intestacy Bill 2006 cls 6–7; National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision*, Queensland Law Reform Commission Miscellaneous Paper No 28 (1997) 26 (*‘Family Provision Report’*).

110 National Committee for Uniform Succession Laws, *Family Provision Report*, above n 109, 27–8.

- 6.62 The National Committee's fourth category was drafted with Victoria's legislation in mind.¹¹¹ Although it represents a slightly different approach to Victoria's current law, the inclusion of the general fourth category means that adopting the National Committee's recommended test would not limit the class of people entitled to apply for family provision in Victoria.

Victoria's responsibility test with a threshold requirement of dependence and/or need

- 6.63 In its consultation paper on family provision, the Commission also raised the possibility of retaining Victoria's current responsibility test for eligibility for family provision, but requiring the applicant:
- to have been wholly or partly dependent on the deceased person immediately before the deceased person's death, and/or
 - to demonstrate financial need.¹¹²
- 6.64 Under this option, applicants would not be limited by whether they were in a particular relationship with the deceased person, and the test would remain one of whether adequate provision had been made for their proper maintenance and support. However, a person would not be able to apply unless they had been wholly or partly dependent on the deceased person, or were able to demonstrate financial need.
- 6.65 This option recognised that dependency and financial need are often central to the court's decision about whether or not provision should be made for a family provision applicant.

The flexible New South Wales list of eligible applicants

- 6.66 The Commission proposed one other option in relation to eligibility to make a family provision application: introducing a flexible list of eligible persons, as exists in New South Wales.¹¹³
- 6.67 The New South Wales legislation recognises the deceased person's spouse, de facto partner and child as eligible to make a family provision application in all circumstances.¹¹⁴ It also recognises the following people as eligible in certain circumstances:¹¹⁵
- a former wife or husband of the deceased person
 - a grandchild of the deceased person who was, at any time, wholly or partly dependent on the deceased person
 - a member of the deceased person's household who was, at any time, wholly or partly dependent on the deceased person
 - a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death. A close personal relationship is defined as a 'relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support or personal care'.¹¹⁶ It does not include relationships in which care and support are provided for fee or reward.¹¹⁷

111 In relation to the National Committee's fourth proposed category of eligibility, the wording had originally been 'a person to whom the deceased owed a special responsibility to provide maintenance education or advancement in life': National Committee for Uniform Succession Laws, *Family Provision Report*, above n 109, 26. However, in the 2004 supplementary family provision report, the National Committee removed the word special 'for consistency with Victorian legislation': National Committee for Uniform Succession Laws, *Family Provision Supplementary Report*, above n 88, 4 (footnote 26).

112 Victorian Law Reform Commission, above n 2, 40.

113 *Ibid* 38.

114 *Succession Act 2006* (NSW) ss 57(1)(a)–(c).

115 *Ibid* ss 57(1)(d)–(f).

116 *Ibid* s 3(3).

117 *Ibid* s 3(4).

- 6.68 The court may only make a family provision order in respect of an applicant in one of these categories if it is satisfied, having regard to all the past and present circumstances of the case, that there are ‘factors which warrant the making of the application’.¹¹⁸ This approach establishes two classes of applicant—those who are regarded as ‘natural objects of testamentary recognition’ and those who are ‘potentially appropriate objects of testamentary recognition, depending upon their circumstances’.¹¹⁹
- 6.69 ‘Factors which warrant the making of the application’ is not defined by the Succession Act,¹²⁰ and the Court has held that, in practice, factors which warrant the making of the application are largely coextensive with the factors that the Court must consider anyway when determining a family provision application.¹²¹ However, factors which warrant the making of the application are generally defined as:
- factors which when added to facts which render the applicant an ‘eligible person’ give him or her the status of a person who would be generally regarded as a natural object of testamentary recognition by a deceased.¹²²
- 6.70 An example of one factor which warranted the making of an application by a dependent household member of the deceased person was that the applicant had been ‘brought up as a permanent member’ of the deceased person’s family.¹²³
- 6.71 The Supreme Court of New South Wales has also held that, for the purposes of a family provision claim, dependence is not limited to financial dependence, but includes a person relying on or looking to the deceased, rather than others, for anything necessary or desirable for their maintenance and support.¹²⁴ Further, there has been judicial consideration of what it means to be a member of a household, with the Supreme Court of New South Wales finding that it is possible to be a member of more than one household at once, and that household membership may be evidenced by regularly attending a household and staying overnight.¹²⁵
- 6.72 In determining whether any applicant is an eligible applicant, the court may have regard to a range of statutory criteria.¹²⁶ These statutory criteria are similar to those considered by the Victorian courts when determining family provision claims.¹²⁷
- 6.73 Although the Commission noted that the New South Wales approach to eligibility was not likely, of itself, to resolve all problems in the jurisdiction, it was canvassed as a way in which to limit what have been described as opportunistic or speculative claims in Victoria.¹²⁸

Views and conclusions

- 6.74 A number of submissions received by the Commission supported retaining Victoria’s current ‘responsibility’ test for family provision eligibility with no change.¹²⁹ These submissions considered that the problem of opportunistic claims is not widespread¹³⁰ and would not be resolved by introducing a list of eligible claimants.¹³¹ Some submissions were concerned that introducing a list of eligible claimants would arbitrarily exclude otherwise meritorious claims.¹³²

118 Ibid s 59(1)(b).

119 *Diver v Neal* [2009] NSWCA 54 (18 March 2009) [8] (Basten JA, Allsop P and Ipp JA agreeing), citing *Churton v Christian* (1988) 13 NSWLR 241, 252, in which Priestly JA applied the reasoning of *Re Fulop (decd)* (1987) 8 NSWLR 679, 681 (McLelland J).

120 *Drury v Smith* [2012] NSWSC 1067 (18 September 2012) [137] (Hallen AsJ); *Wilcox v Wilcox* [2012] NSWSC 1138 (2 October 2012) [16] (Pembroke J); *Russell v NSW Trustee and Guardian* [2013] NSWSC 370 (18 April 2013) [53] (Hallen AsJ).

121 *Diver v Neal* [2009] NSWCA 54 (18 March 2009) [8] (Basten JA, Allsop P and Ipp JA agreeing).

122 *Re Fulop (decd)* (1987) 8 NSWLR 679, 681 (McLelland J). This case was decided under the equivalent provision of the former *Family Provision Act 1982* (NSW) and was approved in substance by the Court of Appeal in *Churton v Christian* (1988) 13 NSWLR 241.

See *Drury v Smith* [2012] NSWSC 1067 (18 September 2012) [137] (Hallen AsJ); *Diver v Neal* [2009] NSWCA 54 (18 March 2009) [8] (Basten JA, Allsop P and Ipp JA agreeing).

123 See, eg, *Slack v Rogan* [2013] NSWSC 522 (10 May 2013) [120].

124 See, eg, *Marando v Rizzo* [2012] NSWSC 739 (5 July 2012) [61] (Hallen AsJ).

125 See, eg, *Popescu v Borun* [2011] NSWSC 1532 (16 December 2011) [98]–[99] (Macready AsJ).

126 *Succession Act 2006* (NSW) ss 60(1)(a), (2). The court may also have regard to these criteria when determining whether to make a family provision order and the nature of any such order: s 60(1)(b).

127 *Administration and Probate Act 1958* (Vic) ss 91(4)(e)–(p).

128 Victorian Law Reform Commission, above n 2, 39.

129 Submissions 10 (Shane Newton); 25 (Moore Legal); 26 (Rigby Cooke Lawyers); 35 (Andrew Verspaandonk); 39 (Carolyn Sparke).

130 Submissions 10 (Shane Newton); 35 (Andrew Verspaandonk); 39 (Carolyn Sparke).

131 Submission 10 (Shane Newton).

132 Submissions 10 (Shane Newton); 30a (Law Institute of Victoria)—some members.

- 6.75 Barrister Andrew Verspaandonk expressed the view that, given that claims have succeeded under the current Victorian law that would never have succeeded under the previous law, ‘it seems inappropriate to cut off the prospect that similar claims may succeed in the future, in an attempt to weed out apparently unworthy claims’.¹³³ He suggested that the issue should be addressed by costs rules.¹³⁴ Carolyn Sparke SC said that the current law allows the court to have regard to ‘the full variety of human relationships’ and that the court should not be artificially restrained in its task.¹³⁵ Some participants in consultations considered that Victoria’s current responsibility test should be retained.¹³⁶
- 6.76 Two submissions supported retaining Victoria’s responsibility test, but introducing a threshold requirement of financial need and dependence.¹³⁷ The Property and Probate Section of the Commercial Bar Association supported introduction of a threshold requirement of financial need where the value of the estate does not exceed \$250,000.¹³⁸
- 6.77 Two further submissions suggested taking a more limited view, with one proposing a return to the original Victorian legislation, under which only the deceased person’s widow, widower and children were entitled,¹³⁹ and the other supporting a system under which only spouses (but not domestic partners), infant children and some dependent adult children would be entitled.¹⁴⁰
- 6.78 Two submissions supported introduction of a modified version of the National Committee’s proposed model. One suggested that the National Committee’s recommendation should be implemented without the responsibility category, which would effectively mean that only the deceased person’s spouse, domestic partner and non-adult child would be entitled.¹⁴¹ The other suggested the National Committee model, with a threshold requirement of financial need.¹⁴²
- 6.79 The Law Institute of Victoria did not present a unanimous view, with a minority supporting retention of Victoria’s current approach and a majority expressing support for limiting eligibility in some way, but being divided about the best way to achieve this.¹⁴³
- 6.80 A majority of submissions on the question of family provision eligibility supported introduction of the New South Wales approach.¹⁴⁴ State Trustees expressed the view that, although the National Committee’s proposed categories for eligibility ‘have much to offer’, the New South Wales legislation ‘provides a reasonably comprehensive description of the people who ought to be able to apply’.¹⁴⁵ Further, it considered that, as no state has adopted the National Committee’s recommended model, implementing the New South Wales approach in Victoria would promote greater consistency between jurisdictions.¹⁴⁶ A majority of members of the Commission’s succession laws advisory committee supported the New South Wales eligibility test, while others supported retaining Victoria’s current test.¹⁴⁷

133 Submission 35 (Andrew Verspaandonk).

134 Ibid.

135 Submission 39 (Carolyn Sparke).

136 Consultation 3 (Legal practitioners in the Goulburn Valley region)—some participants at this meeting thought the current test should be retained, while others thought that it was too broad.

137 Submissions 13 (David Shalders); 14 (Commercial Bar Association).

138 Submission 14 (Commercial Bar Association).

139 Submission 8 (Patricia Strachan).

140 Submission 23 (Family Voice Australia).

141 Submission 38 (Liz Burton).

142 Submission 19 (Association of Independent Retirees).

143 Submission 30a (Law Institute of Victoria).

144 Submissions 1 (Legal Services Commissioner); 15 (Alzheimer’s Australia); 32 (The Institute of Legal Executives); 33 (State Trustees Limited); 36 (Law Society of New South Wales); 42b (Arnold Bloch Leibler), although Arnold Bloch Leibler suggested that grandchildren should be permitted to claim irrespective of dependence. See also submission 46 (Robert Cornall AO), which expressed the view that eligibility ‘should be significantly tightened (possibly along the lines of the New South Wales legislation)’.

145 Submission 33 (State Trustees Limited).

146 Ibid.

147 Advisory Committee (Meeting 3).

- 6.81 The Supreme Court of New South Wales and legal practitioners put the view that the New South Wales model is operating well.¹⁴⁸ However, the Law Society of New South Wales suggested that stepchildren should be included in the list of eligible applicants who must show ‘factors which warrant the making of the application’.¹⁴⁹ Presently, stepchildren who had been dependent members of the deceased person’s household would be permitted to claim.¹⁵⁰ However, stepchildren would otherwise be excluded. The Elder Law and Succession Committee of the New South Wales Law Society has recommended that stepchildren be included in the New South Wales legislation.¹⁵¹
- 6.82 The Law Society of New South Wales noted that there is a possibility that when a person’s natural parent dies, their entire estate may pass to their spouse (the person’s step-parent), and the step-parent may not later provide for the stepchild.¹⁵² The Law Society considered that including a stepchild as an eligible family provision applicant would reduce litigation, as step-parents would be encouraged to provide for their stepchildren in their own wills.¹⁵³ Although the stepchild could make a claim against their natural parent’s estate at the time of their death, many stepchildren may not, in the expectation that their step-parent would later provide for them. Stepchildren are included in the Queensland family provision legislation.¹⁵⁴
- 6.83 Although the Commission notes the view expressed in some submissions that the current law should be retained, it is not satisfied that costs rules and procedural changes alone can address all the problems in relation to family provision. While there is disagreement about the extent of the problem of opportunistic or non-genuine claims, it is clear that the problem does exist. There is a need for greater certainty on both sides in family provision applications. Further, some weight must be given to community expectations that a will is a clear expression of one’s wishes. If freedom of testation is the fundamental premise of succession law, then some limits need to be placed on exceptions to, and alterations of, expressions of that freedom.
- 6.84 The Commission considers that the New South Wales approach to family provision eligibility represents a good compromise. It would provide greater certainty to legal practitioners, prospective applicants and defendant personal representatives, while ensuring that most claims in the typical categories of responsibility are not excluded. Although some cases at the margins, which may currently be provided for under the Victorian legislation, may be excluded under the more limited New South Wales approach, the Commission considers that this is justifiable to promote greater certainty in family provision.
- 6.85 The Commission considers that the Victorian statutory criteria should be retained, as well as the test of whether adequate provision has been made for the applicant’s proper maintenance and support. The court should continue to take these factors into account when determining:
- whether adequate provision was made for the applicant’s proper maintenance and support
 - the amount of further provision that should be made, if any.
- 6.86 The court should be able to take the factors into account when determining whether the applicant is an eligible person in the context of a decision as to whether there are factors warranting the making of the application.

148 Consultations 11 (Supreme Court of New South Wales); 12 (Law Society of New South Wales).
 149 Submission 36 (Law Society of New South Wales); consultation 12 (Law Society of New South Wales).
 150 *Succession Act 2006* (NSW) s 57(1)(e).
 151 Consultation 12 (Law Society of New South Wales).
 152 *Ibid.*
 153 *Ibid.*
 154 *Succession Act 1981* (Qld) s 40 (definition of ‘child’).

- 6.87 The Commission only recommends change in relation to the threshold determination of who is an eligible person. The test for provision and the statutory criteria are substantially the same in Victoria and New South Wales and any differences do not impact on the issue of eligibility.

Recommendation

- 38 Victoria should replace its 'responsibility' test for eligibility to make a family provision claim with a test based on the New South Wales test for eligibility, but extended to include stepchildren. To this end, section 91(1) of the *Administration and Probate Act 1958* (Vic) should be repealed and replaced with provisions in the following terms:

The following are eligible persons who may apply to the court for a family provision order in respect of the estate of a deceased person:

- (a) a person who was the wife or husband of the deceased person at the time of the deceased person's death
- (b) a person with whom the deceased person was living in a registrable domestic relationship¹⁵⁵ or registered domestic relationship at the time of the deceased person's death
- (c) a child¹⁵⁶ of the deceased person
- (d) a former wife or husband of the deceased person
- (e) a person:
 - (i) who was, at any particular time, wholly or partly dependent on the deceased person, and
 - (ii) who is a grandchild of the deceased person or was, at that particular time or any other particular time, a member of the household of which the deceased person was a member
- (f) a person with whom the deceased person was living in a registrable caring relationship or registered caring relationship¹⁵⁷
- (g) a stepchild of the deceased person.

155 The New South Wales legislation uses the terminology 'de facto relationship', as defined in the *Interpretation Act 1987* (NSW): *Succession Act 2006* (NSW) s 57(1)(b). This is the terminology also used in the *Property (Relationships) Act 1984* (NSW). The Commission considers it appropriate to use the Victorian equivalents from the *Relationships Act 2008* (Vic), which are 'registrable domestic relationship' and 'registered domestic relationship'.

156 The New South Wales legislation further defines 'child' in relation to a de facto or domestic relationship: *Succession Act 2006* (NSW) s 57(2). Consideration would need to be given to the definition of 'child' in Victoria in these circumstances.

157 The New South Wales legislation uses the terminology 'close personal relationship': *Succession Act 2006* (NSW) s 57(1)(f). This terminology comes from the *Property (Relationships) Act 1984* (NSW) s 5. The Commission considers it appropriate to use the Victorian equivalent from the *Relationships Act 2008* (Vic), which are 'registrable caring relationship' and 'registered caring relationship'.

Recommendations

- 39 The *Administration and Probate Act 1958* (Vic) should provide that the court may, on application under the relevant provisions, make a family provision order in relation to the estate of a deceased person, if it is satisfied that:
- (a) the person in whose favour the order is to be made is an eligible person, and
 - (b) in the case of a person who is an eligible person by reason only of paragraph (d), (e), (f) or (g), in recommendation 38 above—having regard to all the circumstances of the case (whether past or present) there are factors which warrant the making of the application, and
 - (c) at the time when the court is considering the application, adequate provision for the proper maintenance and support of the person in whose favour the order is to be made has not been made by the will of the deceased person, or by the operation of the intestacy provisions, or both.
- 40 The court should:
- (a) be permitted to consider the criteria set out in sections 91(4)(e)–(p) of the *Administration and Probate Act 1958* (Vic) when determining whether the applicant is an eligible person and, where relevant, whether there are factors which warrant the making of the application
 - (b) be required to consider the criteria set out in sections 91(4)(e)–(p) of the *Administration and Probate Act 1958* (Vic) when determining:
 - (i) whether adequate provision was made for the applicant’s proper maintenance and support
 - (ii) the amount of further provision that should be made, if any.

Costs rules

Current law

- 6.88 Although family provision proceedings are civil proceedings, costs rules operate differently in family provision than in other types of civil proceedings.

Costs orders in civil proceedings generally

- 6.89 The *Supreme Court Act 1986* (Vic) provides that:
- Unless otherwise expressly provided for by this or any other Act or by the Rules, the costs of and incidental to all matters in the Court, including the administration of estates and trusts, is in the discretion of the Court and the Court has full power to determine by whom and to what extent the costs are to be paid.¹⁵⁸
- 6.90 Similarly, the *County Court Act 1958* (Vic) states that ‘The costs of and incidental to all proceedings are in the discretion of the Court and the Court may determine by whom and to what extent the costs are to be paid’.¹⁵⁹

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Supreme Court Act 1986 (Vic) s 24.
County Court Act 1958 (Vic) s 78A(1).

- 6.91 Further, the overarching purpose of the *Civil Procedure Act 2010* (Vic) and rules of court in relation to civil proceedings is ‘to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute’.¹⁶⁰ The Civil Procedure Act provides that, in addition to any other power a court may have in relation to costs, a court may make any order as to costs it considers appropriate to further the overarching purpose.¹⁶¹ Without limiting this, the Civil Procedure Act provides that the court may:¹⁶²
- make different awards of costs in relation to different parts of a proceeding or up to or from a specified stage of the proceeding
 - order that the parties bear costs as specified proportions of costs
 - award costs in a specified sum or amount
 - fix or cap recoverable costs in advance.
- 6.92 The Civil Procedure Act also places an overarching obligation on parties and their legal representatives to ensure that costs are reasonable and proportionate to the complexity or importance of the issues in dispute and the amount in dispute.¹⁶³
- 6.93 Ordinarily in civil proceedings costs follow the event—that is, the unsuccessful party pays their own costs and some of the costs of the other side. Until recently, the unsuccessful party was usually required to pay the successful party’s costs on a ‘party and party’ basis, defined by rules of the Supreme Court and County Court as ‘all costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party’,¹⁶⁴ and no more. Recovering party and party costs from the unsuccessful party did not cover everything paid by the successful party to their legal representatives. A party could also be ordered to pay the other party’s costs on a ‘solicitor and client’ basis, a higher measure of costs that was defined as ‘all costs reasonably incurred and of reasonable amount’.¹⁶⁵
- 6.94 Recent amendments to the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) have replaced references to costs on the party and party basis and the solicitor and client basis with ‘costs on a standard basis’, meaning ‘all costs reasonably incurred and of reasonable amount’.¹⁶⁶ This definition was previously used for costs on the solicitor and client basis.¹⁶⁷ References in the *County Court Civil Procedure Rules 2008* (Vic) to costs on the party and party basis and the solicitor and client basis remain but at the time of writing the County Court Rules Committee was considering whether references to these measures of costs should be amended.¹⁶⁸

Costs orders in family provision proceedings

- 6.95 The Supreme Court of Victoria has noted that, ‘in applications under Part IV, orders for costs very often depart from the ordinary rule applicable in civil litigation’.¹⁶⁹ Rather than the costs rules applied in other civil proceedings, special costs rules apply in family provision proceedings. The Administration and Probate Act specifies that, in family provision proceedings, the court may:

160 *Civil Procedure Act 2010* (Vic) s 7.

161 *Ibid* s 65C(1).

162 *Ibid* s 65C(2).

163 *Ibid* s 24.

164 *County Court Civil Procedure Rules 2008* (Vic) r 63A.29; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 63.29, repealed by *Supreme Court (Chapter I New Scale of Costs and Other Costs Amendments) Rules 2012* (Vic) r 15, which commenced on 1 April 2013.

165 *County Court Civil Procedure Rules 2008* (Vic) r 63A.30; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 63.30.

166 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 63.30.

167 *Ibid* r 63.30, substituted by *Supreme Court (Chapter I New Scale of Costs and Other Costs Amendments) Rules 2012* (Vic) r 17, which commenced on 1 April 2013.

168 *County Court Civil Procedure Rules 2008* (Vic) rr 63A.29, 63A.30.

169 *Re Bull; Bentley v Brennan (No 2)* [2006] VSC 226 (30 June 2006) [3].

- under section 97(7)—order that the applicant pay their own costs and the costs of the defendant personal representative, if the court is satisfied that the application ‘has been made frivolously, vexatiously or with no reasonable prospect of success’¹⁷⁰
- under section 97(6)—subject to section 97(7), make any order that is, in the court’s opinion, just.¹⁷¹

6.96 In *Re Bull; Bentley v Brennan*, Justice Byrne considered that the legislation empowered, rather than directed, the Court to make a costs order against the plaintiff in the circumstances in section 97(7) because ‘in the ordinary course, an order for costs in family provision cases may not be made against a plaintiff simply because the application has failed’.¹⁷² His Honour characterised section 97(7) as a ‘reminder and encouragement offered to the Court ... intended to operate as a disincentive to would-be applicants whose claims to a moral entitlement are tenuous’.¹⁷³ This view of section 97(7) accords with the second reading speech upon introduction of the provision, in which then Attorney-General, the Hon. Jan Wade, said that the provision was intended ‘to ensure that only genuine applications are made’.¹⁷⁴

6.97 More recently, the Supreme Court has held that section 97(7) of the Administration and Probate Act does not limit the Court’s power to make costs orders against unsuccessful family provision applicants to the circumstances contemplated by that subsection. In *Re Carn; Moerth v Moerth (No 2)*, Associate Justice Gardiner held that, even where the plaintiff’s claim is not made frivolously, vexatiously or with no reasonable prospect of success, there will be cases in which it will nevertheless be just that the unsuccessful plaintiff pay the costs of the defendant personal representative.¹⁷⁵ Further, in *Webb v Ryan*, Justice Whelan stated:

I do not think the effect of s 97(7) is to confine the Court’s power to award costs against an applicant to the specific circumstances provided for in that subsection ... The Court must address s 97(7), but, where it does not apply, the Court must still exercise its discretion under s 24 of the Supreme Court Act¹⁷⁶ in the light of the facts of the case, and must, under s 97(6) of the Act, determine what order is just.¹⁷⁷

6.98 Based on these decisions, section 97(7) does not prevent the court from making an order as to costs in any case that it considers just. Moreover, where a case does not fall within section 97(7) and the plaintiff’s claim was not made frivolously, vexatiously or without reasonable prospect of success, the court is not prevented from ordering an unsuccessful plaintiff to pay the costs of the estate.

6.99 However, it is clear that sections 97(6) and 97(7) of the Administration and Probate Act have affected the costs orders made in family provision proceedings. The Supreme Court has noted that in New South Wales, unlike in Victoria, the courts have been more willing to apply general costs principles, including the principle that costs generally follow the event.¹⁷⁸

6.100 On occasion in Victoria, unsuccessful plaintiffs have had their costs paid by the estate.¹⁷⁹ However, this is rare and Associate Justice Gardiner recently emphasised that the unsuccessful applicant should not expect to have their costs out of the estate.¹⁸⁰ That could happen in a particular case, but the court’s starting point would be that the unsuccessful applicant should bear their own costs or, if their case was particularly unmeritorious, pay the costs of the estate.¹⁸¹

170 Administration and Probate Act 1958 (Vic) s 97(7).

171 Ibid s 97(6).

172 *Re Bull; Bentley v Brennan (No 2)* [2006] VSC 226 (30 June 2006) [7].

173 Ibid [7].

174 Victoria, Parliamentary Debates, Legislative Assembly, 9 October 1997, 436 (Jan Wade, Attorney-General).

175 *Re Carn; Moerth v Moerth (No 2)* [2011] VSC 275 (29 June 2011) [29]. This was not such a case, as Associate Justice Gardiner held that one of the plaintiff’s claims had no reasonable prospects of success: at [48].

176 This is the provision which specifies that, unless otherwise expressly provided for under any Act, costs are in the discretion of the Court: *Supreme Court Act 1986* (Vic) s 24, set out at [6.89] above.

177 *Webb v Ryan (Costs)* [2012] VSC 431 (20 September 2012) [28].

178 Ibid [34]–[35].

179 Examples of such cases are cited in *Webb v Ryan (Costs)* [2012] VSC 431 (20 September 2012) [32].

180 *Re Carn; Moerth v Moerth (No 2)* [2011] VSC 275 (4 March 2011) [26] (Gardiner AsJ).

181 Ibid [26]–[31] (Gardiner AsJ).

- 6.101 Where a family provision claim fails, it is most common for there to be no order as to costs,¹⁸² meaning that the unsuccessful applicant bears their own costs and the defendant personal representative receives their costs out of the estate.¹⁸³
- 6.102 It is rare for the court to order an unsuccessful applicant in family provision to pay the costs of the estate. In *Re Carn; Moerth v Moerth (No 2)*, Associate Justice Gardiner found that the claim by one applicant had been made with no reasonable prospects of success,¹⁸⁴ although it seems that even if that threshold had not been met, his Honour would have considered it just for costs to follow the event.¹⁸⁵ The Court ordered the applicant to reimburse the estate for the defendant personal representative's costs on a party and party basis.¹⁸⁶
- 6.103 In the costs judgment in *Webb v Ryan*, Justice Whelan did not find that the applicants' claim had been made frivolously, vexatiously or with no reasonable prospects of success.¹⁸⁷ However, his Honour nevertheless held that it was 'a case where costs should follow the event, as is the usual rule in civil litigation'.¹⁸⁸ Further, because the applicants had unreasonably rejected an offer of compromise, they were ordered to pay the defendant personal representative's costs on the solicitor and client basis, rather than on the party and party basis.¹⁸⁹

The problems with family provision costs rules

- 6.104 As discussed above, Supreme Court authority shows that for an unsuccessful family provision applicant to be ordered to pay the defendant personal representative's costs, it is not necessary for the claim to fall within section 97(7) of the Administration and Probate Act—that the claim was made frivolously, vexatiously or with no reasonable prospect of success. The Court has shown a willingness to make such costs orders where the plaintiff's claim is unsuccessful.¹⁹⁰ This appears to be the beginning of a trend towards the general costs principles applying in family provision proceedings.¹⁹¹
- 6.105 However, despite the decisions of the Supreme Court of Victoria, discussed above, both the Commercial Bar Association and the Law Institute of Victoria considered that there is still a risk that an unsuccessful plaintiff would receive their costs out of the estate.¹⁹² Further, Arnold Bloch Leibler noted that it was unlikely that an unsuccessful plaintiff would be ordered to pay the estate's costs.¹⁹³ The Law Institute of Victoria queried whether section 97(7) was well known, and said that it is 'rarely enforced by the courts'.¹⁹⁴ Arnold Bloch Leibler expressed the view that section 97(7) is 'rarely or insufficiently applied'.¹⁹⁵
- 6.106 As discussed at [6.10] above, many do not believe that existing costs rules deter opportunistic applicants.

182 *Webb v Ryan (Costs)* [2012] VSC 431 (20 September 2012) [33].

183 See, eg, *Collicot v McMillan* [1999] 3 VR 803—in relation to the unsuccessful plaintiff (there were multiple plaintiffs); *Coombes v Ward (No 2)* [2002] VSC 84 (27 March 2002); *Re Bull; Bentley v Brennan (No 2)* [2006] VSC 226 (30 June 2006). The defendant personal representative's costs are generally 'had and retained out of the estate' on the indemnity basis, meaning all costs, except those that are of an unreasonable amount and have been unreasonably incurred: *County Court Civil Procedure Rules 2008* (Vic) r 63A.30.1; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 63.30.1.

184 *Re Carn; Moerth v Moerth (No 2)* [2011] VSC 275 (4 March 2011) [48].

185 *Ibid* [47].

186 *Ibid* [54]. The defendant personal executor's costs, over and above party and party costs, were paid out of the estate on a trustee basis (that is, an indemnity basis): at [54].

187 *Webb v Ryan (Costs)* [2012] VSC 431 (20 September 2012) [40].

188 *Ibid* [41].

189 *Ibid* [53]–[54].

190 See, eg, *Re Carn; Moerth v Moerth (No 2)* [2011] VSC 275 (4 March 2011); *Webb v Ryan (Costs)* [2012] VSC 431 (20 September 2012).

191 See discussion of this in *Webb v Ryan (Costs)* [2012] VSC 431 (20 September 2012) [37]–[38]; submission 35 (Andrew Verspaandonk).

192 Submissions 14 (Commercial Bar Association); 30a (Law Institute of Victoria).

193 Submission 42b (Arnold Bloch Leibler).

194 Submission 30a (Law Institute of Victoria).

195 Submission 42b (Arnold Bloch Leibler).

Options raised in the Commission's consultation paper

- 6.107 The Commission raised several options for reform of costs rules in family provision in its consultation paper on family provision and asked whether, when a family provision application is unsuccessful:
- there should be a legislative presumption that the applicant will not receive their costs from the estate
 - the starting point should either be that costs follow the event (the unsuccessful party pays the successful party's costs) or that no order as to costs is made (each party bears its own costs).¹⁹⁶

Views and conclusions

- 6.108 In the costs judgment in *Webb v Ryan*, Justice Whelan noted that 'Family provision cases are different to other civil cases in some respects', but considered that 'the tendency to move towards the application of general costs principles, whilst recognising the special characteristics of family provision cases where they are relevant, is a sound and sensible approach'.¹⁹⁷ In his submission, barrister Andrew Verspaandonk noted this move towards application of general costs principles in family provision proceedings.¹⁹⁸
- 6.109 A number of submissions expressed the view that the court's discretion in relation to costs should not be restrained.¹⁹⁹ However, some legal practitioners suggested that more stringent costs rules could deter opportunistic claims and have a 'trickle down' effect on mediation.²⁰⁰ There was strong support for a legislative presumption that an unsuccessful family provision applicant should not have their costs paid by the estate.²⁰¹ However, barrister Andrew Verspaandonk warned that a legislatively stated presumption that an unsuccessful plaintiff should not have their costs paid by the estate could be 'interpreted as a presumption that inhibited the court from ordering that an unsuccessful plaintiff pay the estate's costs in an appropriate case'.²⁰²
- 6.110 Several submissions considered that, in addition to the presumption that the unsuccessful applicant should not have their costs paid by the estate, the starting point should then be that the unsuccessful applicant bears their own costs.²⁰³ Others thought that the starting point should be that costs follow the event (and the unsuccessful applicant pays the defendant personal representative's costs).²⁰⁴ The Supreme Court of Victoria's submission cited *Webb v Ryan* and suggested that general cost principles could apply in family provision proceedings—which would be that costs follow the event.²⁰⁵ Some members of the Commission's succession laws advisory committee supported this approach, while others considered that it would operate too harshly in family provision proceedings.²⁰⁶

¹⁹⁶ Victorian Law Reform Commission, above n 2, 41–2.

¹⁹⁷ *Webb v Ryan (Costs)* [2012] VSC 431 (20 September 2012) [37]–[38].

¹⁹⁸ Submission 35 (Andrew Verspaandonk).

¹⁹⁹ Submissions 32 (The Institute of Legal Executives); 35 (Andrew Verspaandonk); 39 (Carolyn Sparke SC).

²⁰⁰ Consultation 3 (Legal practitioners in the Goulburn Valley region). See also consultation 18 (Legal practitioners in Wodonga).

²⁰¹ Submissions 1 (Legal Services Commissioner); 13 (David Shalders); 14 (Commercial Bar Association); 15 (Alzheimer's Australia);

19 (Association of Independent Retirees); 20 (Include a Charity); 24 (Royal Society for the Prevention of Cruelty to Animals);

25 (Moores Legal); 26 (Rigby Cooke Lawyers); 30a (Law Institute of Victoria); 39 (Carolyn Sparke SC); 42b (Arnold Bloch Leibler);

Advisory Committee (Meeting 3).

²⁰² Submission 35 (Andrew Verspaandonk).

²⁰³ Submissions 15 (Alzheimer's Australia); 25 (Moores Legal).

²⁰⁴ Submissions 14 (Commercial Bar Association); 19 (Association of Independent Retirees); 20 (Include a Charity); 24 (Royal Society for the Prevention of Cruelty to Animals); 26 (Rigby Cooke Lawyers); 30a (Law Institute of Victoria); 38 (Liz Burton)—although her answer was contingent on different eligibility considerations; 42b (Arnold Bloch Leibler).

²⁰⁵ Submission 37 (Supreme Court of Victoria).

²⁰⁶ Advisory Committee (Meeting 3).

- 6.111 A small minority of submissions considered that applicants should be required to pay the costs whether successful or unsuccessful.²⁰⁷ However, the Commission notes that this position would be harsher than that which applies in other types of civil proceedings and does not consider it appropriate that such a rule should apply in relation to family provision proceedings.
- 6.112 The Institute of Legal Executives and State Limited did not believe that there should be any change to the existing costs rules,²⁰⁸ with State Trustees suggesting that this could be reviewed after a period of time, if the new delineations in relation to family provision eligibility were not producing better outcomes.²⁰⁹ The Institute of Legal Executives considered that the court was best placed to decide how the costs of the parties should be borne.²¹⁰
- 6.113 The Commission notes the concerns about limiting the court's discretion to make orders as to costs and agrees that the court is best placed to determine what order as to costs is just in all the circumstances. However, the Commission considers that legislative amendment is necessary to ensure that any possible limiting effect of section 97(7) is removed and the court is free to make any order as to costs that it considers just.
- 6.114 The Commission agrees with Andrew Verspaandonk's contention that:
if legislative options were clearly wide, it would serve to remind practitioners (and some litigants who examine legislation and case law online) of the width of outcomes that could occur under the rubric of a 'just' order as to costs.²¹¹
- 6.115 Rather than a legislative presumption, which could have the unintended consequence of limiting the courts' discretion as to costs in family provision proceedings, the Commission considers that the Administration and Probate Act should specify that the court may make any order as to costs that it considers just, and then list several examples of the costs orders that the court may make in family provision proceedings.

Recommendation

- 41 Sections 97(6) and 97(7) of the *Administration and Probate Act 1958* (Vic) should be repealed and replaced by provisions that:
- (a) specify that the court may make any order as to the costs of a family provision application that is, in the court's opinion, just
 - (b) set out a non-exhaustive list of the types of costs orders that the court may make, including:
 - (i) an order that each party bear their own costs
 - (ii) an order that the estate pay the costs of an applicant, whether successful or unsuccessful, on any basis and to any extent
 - (iii) an order that an applicant pay the costs of a personal representative, on any basis and to any extent.

207 Submissions 8 (Deirdre Lampard); 19 (Association of Independent Retirees); 41 (Victorian Farmers Federation). However, the Association of Independent Retirees also expressed the view that, as a starting point, costs should follow the event.

208 Submissions 32 (The Institute of Legal Executives); 33 (State Trustees Limited).

209 Submission 33 (State Trustees Limited).

210 Submission 32 (The Institute of Legal Executives).

211 Submission 35 (Andrew Verspaandonk).

- 6.116 Although the court already has power to cap costs under the Civil Procedure Act²¹² and has done so on occasion in family provision proceedings,²¹³ the Commission considers that it would be useful to reiterate this power alongside the family provision costs provisions in the Administration and Probate Act. The inclusion of such a provision in the Administration and Probate Act is justified on the same basis as listing examples of possible costs orders—it would embolden judicial officers and serve as a reminder to practitioners in the jurisdiction that this was possible. A judge of the Supreme Court supported this view.²¹⁴

Recommendation

- 42 The family provision costs provisions in the *Administration and Probate Act 1958* (Vic) should specify that the court has the power to cap costs.

- 6.117 Nothing in the family provision costs provisions should limit any other powers of the County Court or Supreme Court.

Recommendation

- 43 The family provision costs provisions in the *Administration and Probate Act 1958* (Vic) should specify that they do not otherwise limit:
- (a) the Supreme Court's existing jurisdiction
 - (b) the County Court's existing jurisdiction
 - (c) any other powers of a court arising or derived from the common law or under any other Act (including any Commonwealth Act), rule of court, practice note or practice direction.²¹⁵

Measure of costs

- 6.118 Previously, a successful family provision claimant usually received their costs out of the estate on the solicitor and client basis.²¹⁶ Arnold Bloch Leibler stated in its submission that it could see no real justification for awarding costs on the solicitor and client basis in family provision, especially now that there is no solicitor and client basis in the Supreme Court of Victoria's new scale of costs.²¹⁷
- 6.119 In its submission, the Supreme Court noted the recent change from costs on the party and party basis and the solicitor and client basis to costs on the standard basis, and said that 'the standard order for costs in all cases will be equivalent to the usual basis for costs in [family provision] matters'.²¹⁸ It considered that this change means that this aspect of costs in family provision 'will therefore be less significant in the future in comparison to other matters'.²¹⁹

²¹² *Civil Procedure Act 2010* (Vic) s 65C(2).

²¹³ *Cangia v Cangia* [2008] VSC 455 (31 October 2008) (Justice Whelan).

²¹⁴ Consultation 16 (Supreme Court of Victoria—Judges).

²¹⁵ See *Civil Procedure Act 2010* (Vic) s 53.

²¹⁶ *Re Bull; Bentley v Brennan (No 2)* [2006] VSC 226 (30 June 2006) [3]; *Re Sitch (No 2)* [2005] VSC 383 (11 August 2005) [2]; *Whitehead v State Trustees Ltd (No 2)* [2011] VSC 516 (19 October 2011) [6]. The Supreme Court reiterated this in its submission: submission 37 (Supreme Court of Victoria).

²¹⁷ Submission 42b (Arnold Bloch Leibler).

²¹⁸ Submission 37 (Supreme Court of Victoria).

²¹⁹ *Ibid.*

- 6.120 Given the recent introduction of the standard measure of costs in the Supreme Court, the Commission does not consider it necessary to make any recommendations about the appropriate measure of costs in family provision proceedings. However, it would be desirable for measures of costs to be consistent as between the Supreme and County Courts and, as noted above, at the time of writing, the County Court Rules Committee was considering whether references to party and party costs and solicitor and client costs in the *County Court Civil Procedure Rules 2008* (Vic) should be amended.

Procedure

The problems that family provision procedures seek to address

- 6.121 The Commission has heard a range of views about the particular aspects of family provision proceedings that may result in high legal costs. One such factor was that the disputes are often between family members. As noted above, a submission from a member of the public expressed the view that where a family is ‘fractured or dysfunctional’ parties may not care about costs ramifications, ‘in fact they delight in them’.²²⁰ This contention was confirmed, to some extent, by research conducted by Professor Prue Vines for the Australasian Institute of Judicial Administration, which found that costs in family provision proceedings were more likely to be disproportionate in disputes between siblings, and disputes between a second spouse and children of the first marriage.²²¹
- 6.122 A number of legal practitioners and judicial officers also noted that affidavits can be excessively long in family provision proceedings. The view was expressed that this is partly due to uncertainty in the jurisdiction, as applicants seek to include any information that might bear on the outcome of their claim. It is also caused, in part, by the cathartic purpose served by affidavits in intractable family disputes, as parties seek to tell their story about what happened over the course of many years.
- 6.123 Additionally, because the courts typically have no control over costs at the point of mediation, concern has been expressed that practitioners may ‘grossly overestimate’ their costs up to the point of mediation.²²² The Commission heard suggestions that some practitioners simply adopt an amount for costs based on what the other lawyers present at mediation are claiming.²²³
- 6.124 Procedures in family provision proceedings, even before a claim reaches the court, must be directed to narrowing the issues in dispute, ensuring that only relevant information is prepared by legal practitioners and minimising overall costs to the parties and to the estate.

Current family provision procedures

- 6.125 A number of procedures are already in operation in the County Court and Supreme Court in family provision proceedings, in order to minimise costs and expedite resolution of cases.
- 6.126 In its 2011–12 annual report, the Supreme Court described its approach to case management in family provision proceedings, noting that it strives to be proactive and minimise costs to the parties where estates are small.²²⁴

220 Submission 13 (David Shalders).

221 Prue Vines, *Bleak House Revisited? Disproportionality in Family Provision Estate Litigation in New South Wales and Victoria* (Australasian Institute of Judicial Administration, 2011) 31.

222 Advisory Committee (Meeting 4).

223 Advisory Committee (Meeting 3).

224 Supreme Court of Victoria, above n 68, 52.

- 6.127 Similarly, a County Court practice note states that, ‘The aim of the County Court in civil litigation is to list, hear and determine cases quickly and cost-effectively, consistent with the demands of justice and in particular with the requirements of the *Civil Procedure Act 2010* (Vic)’.²²⁵ To this end, the practice note sets out a number of procedures for family provision proceedings and emphasises the need to define the legal issues in dispute, so that ‘the Court’s aim to determine a proceeding quickly and cheaply’ is not frustrated and so that adjournments may be avoided.²²⁶
- 6.128 The Commission has heard a range of views about practices in both the County Court and the Supreme Court that are intended to keep costs down, as well as proposals for new procedures, some of which are based on the law in other jurisdictions.

Position statements

- 6.129 A number of submissions noted the use of ‘position papers’ or ‘position statements’ at mediation and trial, instead of affidavits.²²⁷ Some supported this measure and considered that it is working well to reduce costs,²²⁸ and the Law Institute of Victoria was in favour of requiring a four-page position statement rather than an affidavit in cases involving small estates.²²⁹
- 6.130 There was strong support in both the County Court and the Supreme Court for the use of position statements.²³⁰ The Supreme Court associate judges said that affidavits are quite often not required by the Court in family provision matters, especially in relation to small estates.²³¹ The Supreme Court said that sometimes an affidavit is ordered in relation to the content of the estate, with all other matters to be dealt with by position statement.²³²
- 6.131 The County Court practice note specifies that, whether parties apply for a judicial settlement conference or intend to mediate the proceeding, ‘the claimant must file and serve a statement setting out the essentials of the claimant’s case in a summary form’. It prescribes what should be included in an applicant’s statement—short statements about the relevant statutory criteria.²³³ The practice note specifies that ‘it is critically important that these statements be a summary’, and should therefore not exceed three pages, must only contain factual material, and ‘must not be used as a vehicle for raising contentious issues or for making submissions of fact or law’.²³⁴
- 6.132 Representatives of both the County Court and the Supreme Court and a number of legal practitioners agreed that, if position statements are to be used, they should be binding or ‘with prejudice’, so that they may be relied upon if the matter proceeds to trial.²³⁵ The County Court practice note specifies this.²³⁶

225 County Court of Victoria, *Practice Note No PNCI 2–2012 — Operation and Management of the Damages and Compensation List (Revised)*, 1 November 2012, 1.

226 Ibid 21–5.

227 Submissions 25 (Moore Legal); 26 (Rigby Cooke Lawyers); 30a (Law Institute of Victoria); 35 (Andrew Verspaandonk); 37 (Supreme Court of Victoria); 39 (Carolyn Sparke SC). For consistency and ease of reference, the Commission uses the term ‘position statement’ in this section.

228 Submissions 25 (Moore Legal); 26 (Rigby Cooke Lawyers); 30a (Law Institute of Victoria).

229 Submission 30a (Law Institute of Victoria).

230 Consultations 17 (Supreme Court of Victoria—Judges).

231 Consultation 16 (Supreme Court of Victoria—Associate Judges).

232 Submission 37 (Supreme Court of Victoria).

233 The relevant statutory criteria are at *Administration and Probate Act 1958* (Vic) ss 91(4)(e)–(p).

234 County Court of Victoria, *Practice Note No PNCI 2–2012 – Operation and Management of the Damages and Compensation List (Revised)*, 1 November 2012, 22–3.

235 Preliminary meeting with the County Court, 23 October 2012; consultations 16 (Supreme Court of Victoria—Associate Judges); 17 (Supreme Court of Victoria—Judges).

236 County Court of Victoria, *Practice Note No PNCI 2–2012 – Operation and Management of the Damages and Compensation List (Revised)*, 1 November 2012, 22.

- 6.133 However, some legal practitioners expressed the view that it is difficult to produce a worthwhile position statement and any cost saving is minimal.²³⁷ The Supreme Court noted that, even where it does not order affidavits prior to mediation and requires parties to file short position statements, the parties often choose to file affidavits prior to the first directions hearing.²³⁸

Pro forma affidavits

- 6.134 The Commission heard a number of suggestions that, where affidavits are required, there should be some direction about what is included in them and how long they should be.
- 6.135 A practice note of the Supreme Court of New South Wales prescribes what information is to be contained in the plaintiff's affidavit in family provision proceedings. It includes a section for each of the relevant statutory criteria considered by the court when determining a family provision application.²³⁹ Judges of the Supreme Court of New South Wales noted that the pro forma affidavit was developed in extensive consultation with the New South Wales legal profession and was working well in practice.²⁴⁰
- 6.136 The Commission heard mixed views about whether introduction of a pro forma affidavit would be desirable in family provision proceedings. A judge of the Supreme Court of Victoria expressed the view that the parties in family provision proceedings should not prepare pro forma affidavits as a matter of course. He considered that large amounts of information could still be included under each heading, and the practice could invite high legal costs at the outset of the proceeding, as the other side responds to the applicant's affidavit in kind.²⁴¹ Associate judges of the Supreme Court of Victoria noted that most practitioners follow a type of template affidavit already.²⁴²
- 6.137 Carolyn Sparke SC expressed the view that, while there may be some role for the length of affidavits to be limited to a certain number of pages, with costs consequences for exceeding that length, it may be better to educate practitioners, because 'practitioners who understand the jurisdiction will draft proper affidavits and will do so efficiently'.²⁴³ A member of the Commission's succession laws advisory committee suggested that the plaintiff's affidavit should be no longer than five pages.²⁴⁴

Oral evidence

- 6.138 The County Court has expressed a preference for conducting shorter hearings in family provision proceedings where an estate is small, giving parties a short time to put their case and asking direct questions that elicit much more useful information than affidavits.²⁴⁵ Similarly, the Supreme Court has expressed its willingness to order an early trial that is to proceed by way of *viva voce* evidence.²⁴⁶ *Viva voce* evidence is oral evidence, rather than evidence by affidavit.
- 6.139 Although some costs are involved in producing a proof of evidence for the trial to proceed in this way, the Supreme Court considered that *viva voce* evidence reduces costs by avoiding the use of lengthy affidavits and irrelevant material, allowing judges to 'get to the heart of the matter'.²⁴⁷ The effect of reliance on position statements, discussed above, is that at trial evidence would be given orally.²⁴⁸

237 Submissions 35 (Andrew Verspaandonk); 39 (Carolyn Sparke SC).

238 Submission 37 (Supreme Court of Victoria).

239 Supreme Court of New South Wales, *Practice Note No SC Eq 7 — Supreme Court Family Provision*, 12 February 2013, cl 6(a), Annexure 1.

240 Consultation 11 (Supreme Court of New South Wales).

241 Consultation 17 (Supreme Court of Victoria—Judges).

242 Consultation 16 (Supreme Court of Victoria—Associate Judges).

243 Submission 39 (Carolyn Sparke SC).

244 Advisory Committee (Meeting 3).

245 Preliminary meeting with the County Court, 23 October 2012; consultation 15 (County Court of Victoria).

246 Submission 37 (Supreme Court of Victoria).

247 Ibid; consultation 17 (Supreme Court of Victoria—Judges).

248 See [6.129]–[6.133].

Private mediation and judicial mediation

6.140 The Supreme Court's 2011–12 annual report states:

Where estates are small, the applications are referred to mediation before an associate judge. Those mediations are identified at an early stage and the parties are directed to file a position statement rather than affidavit material. The aim is to minimise cost to the parties.²⁴⁹

6.141 The Supreme Court annual report specifies that, of 65 mediations held before an associate judge in 2011–12:

- 59 settled at mediation
- one settled after mediation
- two requested further time to negotiate
- three were ultimately listed for trial.²⁵⁰

6.142 This accords with anecdotal evidence put to the Commission about high rates of settlement in the family provision jurisdiction, whether through judicial mediation or private mediation.

6.143 The County Court practice note specifies that parties are required to attend a judicial settlement conference, presided over by a judge, or a mediation within 60 days of the date of filing and service of an appearance.²⁵¹

6.144 There were mixed views about the effectiveness of judicial mediation, compared with private mediation. Some legal practitioners expressed the view that judicial conferences are not as effective as private mediation, as there is a perception that private mediators take a more interventionist approach,²⁵² while judges can be more 'hands off'.²⁵³ The Supreme Court of Victoria, however, noted that 91 per cent of claims involving small estates (\$300,000 to \$400,000) were resolved following judicial mediation in 2011–12.²⁵⁴

6.145 A practice note of the Supreme Court of Victoria emphasises that 'Judicial mediation is not a substitute for mediation by appropriately qualified private mediators, rather it is another option that may be employed in appropriate cases'.²⁵⁵ The practice note then sets out guidelines for referral of matters to judicial mediation and matters that will not ordinarily be referred for judicial mediation. For example, a case that has previously been to an unsuccessful private mediation, or a case where there is a risk of disproportionate costs, may be referred to judicial mediation.²⁵⁶

Estimates of costs and affidavits as to costs

6.146 In consultation, the view was expressed that, because the court does not usually have oversight of costs at the time of mediation, practitioners often overestimate their costs.²⁵⁷ To address this concern, it was suggested that practitioners should be required to bring an assessment or estimate of their costs to mediation.²⁵⁸ Such an assessment could be based on the relevant court scale, to provide an even basis for comparison.²⁵⁹

249 Supreme Court of Victoria, above n 68, 52.

250 Ibid 52.

251 County Court of Victoria, *Practice Note No PNCI 2–2012 – Operation and Management of the Damages and Compensation List (Revised)*, 1 November 2012, 22.

252 Submission 30a (Law Institute of Victoria).

253 Submission 35 (Andrew Verspaandonk).

254 Submission 37 (Supreme Court of Victoria); consultation 16 (Supreme Court of Victoria—Associate Judges). See also, Supreme Court of Victoria, above n 68, 52.

255 Supreme Court of Victoria, *Practice Note No 2 of 2012 – Judicial Mediation Guidelines*, 30 March 2012 [4].

256 Ibid [7]–[8].

257 Advisory Committee (Meeting 4).

258 Ibid.

259 Ibid.

- 6.147 Members of the Commission's succession laws advisory committee suggested that it should be possible for practitioners with experience in the area to estimate costs, at least as falling within a particular range.²⁶⁰ Importantly, such a requirement would allow the 'real people' (the parties) involved in the proceeding to get some notice of costs.²⁶¹ However, it was emphasised that such estimates should not be used as a basis on which to cap costs.²⁶²
- 6.148 Associate judges of the Supreme Court also noted that, as of this year, they have been requiring affidavits as to costs and have been enforcing the Civil Procedure Act requirement that costs be proportionate to the complexity or importance of the issues in dispute and the amount in dispute.²⁶³

Summary determination

- 6.149 Through the consultation process, the Commission raised the possibility of a specific rule permitting both the County Court and the Supreme Court to summarily determine family provision proceedings where the value of the estate was less than a certain amount.
- 6.150 In South Australia, for example, the court may determine a family provision proceeding summarily when:
- there are reasonable grounds on which to conclude that the net estate of the deceased that will be available for distribution will be less than \$500,000, and
 - it is in the interests of justice to do so.²⁶⁴
- 6.151 Summary determination:
- may be made by a master
 - is to proceed in accordance with such directions as are given by the court
 - may be on the basis of evidence that does not conform with the rules of evidence, and
 - is to have as a primary object the minimisation of costs and an expeditious but just resolution of the action.²⁶⁵
- 6.152 If an action should have been, but was not, summarily determined, the court may order the plaintiff to bear any costs that might have been avoided if the proceeding had been summarily determined.²⁶⁶
- 6.153 Various practices of the County Court and the Supreme Court indicate that some degree of summary determination already exists in the family provision jurisdiction. For example, the reliance on position statements in both courts suggests an innovative approach to the evidence that will be accepted in order to minimise costs, as does the willingness to proceed on the basis of oral evidence rather than by affidavit.
- 6.154 The Law Institute of Victoria also noted that both the County Court and the Supreme Court are deciding more cases 'on the papers', and expressed the view that this was working well, although it did not elaborate on what was meant by 'on the papers'.²⁶⁷
- 6.155 A rule in terms of the South Australian rule would specify the courts' powers to give directions and make orders about the conduct of family provision proceedings, which both the County Court and the Supreme Court are already doing to a significant extent. There was general support for the introduction of such a rule in Victoria.²⁶⁸

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Ibid.

261

Ibid.

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Ibid.

263 Consultation 16 (Supreme Court of Victoria—Associate Judges); *Civil Procedure Act 2010* (Vic) s 24.

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Supreme Court Civil Rules 2006 (SA) r 312(12).

265

Ibid r 312(12A).

266

Ibid r 312(13).

267

Submission 30a (Law Institute of Victoria).

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Consultations 15 (County Court of Victoria); 16 (Supreme Court of Victoria—Associate Judges); 17 (Supreme Court of Victoria—Judges).

- 6.156 In relation to the South Australian rule, a judge of the Supreme Court of Victoria expressed the view that there should still be some regard to the rules of evidence, particularly relevance.²⁶⁹ However, a master of the South Australian Supreme Court noted that there were no concerns about the sub-rule that permits the court to summarily determine a family provision claim on the basis of evidence that does not conform with the rules of evidence.²⁷⁰ There may be marginally relevant material in an affidavit, for example, but the Court addresses this by assessing what weight to give the evidence.²⁷¹

Views and conclusions

- 6.157 The Commission recognises that the courts have control of their own procedures and considers that they are best placed to determine how a particular case should proceed. It is appropriate for the courts to retain their discretion in relation to the use of position statements, affidavits, presentation of evidence, referral of matters to private or judicial mediation, and all other procedural aspects of family provision proceedings.
- 6.158 A point made by both the County Court and the Supreme Court was that consistency between the two courts is of paramount importance.²⁷² The Commission recommends, therefore, that both the County Court and the Supreme Court should consider including the procedures discussed above in equivalent practice notes or, where relevant, rules of court.

Recommendation

- 44 The County Court and Supreme Court should consider including in equivalent practice notes or rules of court:
- (a) reference to position statements and direction as to the length, form and content of position statements for use in family provision proceedings²⁷³
 - (b) provision concerning pro forma affidavits in family provision proceedings, similar to those referred to in Practice Note SC Eq 7 of the Supreme Court of New South Wales²⁷⁴
 - (c) guidelines in relation to when a family provision matter will be referred to judicial mediation²⁷⁵
 - (d) a requirement that parties to family provision proceedings bring to mediation an estimate of their costs to date, based on the relevant court scale²⁷⁶
 - (e) reference to the courts' powers to order affidavits as to costs at any stage of a family provision proceeding
 - (f) reference to the courts' powers to cap costs and make other orders as to costs in family provision proceedings.²⁷⁷

269 Consultation 17 (Supreme Court of Victoria—Judges).

270 Consultation 24 (Supreme Court of South Australia); *Supreme Court Civil Rules 2006* (SA) r 312(12A)(c).

271 Consultation 24 (Supreme Court of South Australia).

272 Consultations 15 (County Court of Victoria); 16 (Supreme Court of Victoria—Associate Judges).

273 See, eg, County Court of Victoria, *Practice Note No PNCI 2–2012 — Operation and Management of the Damages and Compensation List (Revised)*, 1 November 2012, 22–3.

274 See, eg, Supreme Court of New South Wales, *Practice Note No SC Eq 7 — Supreme Court Family Provision*, 12 February 2013, cl 6(a), Annexure 1.

275 See, eg, Supreme Court of Victoria, *Practice Note No 2 of 2012 — Judicial Mediation Guidelines*, 30 March 2012.

276 *County Court Civil Procedure Rules 2008* (Vic) app 1, as substituted by *County Court (Chapter I Scale of Costs Amendment) Rules 2012* (Vic) r 4; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) app A, as substituted by *Supreme Court (Chapter I New Scale of Costs and Other Costs Amendments) Rules 2012* (Vic) r 38.

277 See the Commission's discussion and recommendations in relation to costs rules and capping costs, above at [6.88]–[6.120].

Summary determination

- 6.159 The Commission also considers that a rule in the terms of the South Australian rule permitting summary determination of family provision proceedings may be useful for family provision proceedings in Victoria where the estate is small. The South Australian rule reflects practices that are already in place, to some extent, in both the County Court and Supreme Court.
- 6.160 The Commission notes that if an equivalent Victorian rule were limited to proceedings in which the net value of the estate does not exceed \$500,000, as it is in South Australia, the effect of the Commission's recommendations in relation to court jurisdiction would mean that the rule would only apply to proceedings in the County Court. There has been suggestion in South Australia of increasing the limit to net estates not exceeding \$700,000.²⁷⁸
- 6.161 The Commission considers that the application of a summary determination rule should be limited by the size of the estate, as there would be potential costs consequences for a party when proceedings are not determined summarily because of the actions of that party, but should have been. The Commission considers that it would be appropriate to initially limit application of the rule to proceedings in which the net value of the estate does not exceed \$500,000. This would limit operation of the rule to the County Court. If the County Court were to adopt such a rule, and it operated well in practice, consideration could then be given to increasing the limit, and extending the rule's operation to the Supreme Court.
- 6.162 As noted above, under the South Australian rules, if a family provision action under \$500,000 should have been, but was not, summarily determined, the Court may order the plaintiff to bear any costs that might have been avoided if the proceeding had been summarily determined.²⁷⁹ The Commission considers that such a costs rule would be useful to encourage parties to seek summary determination in appropriate cases, but that it should apply only where a matter should have been determined summarily and, because of the actions of a party, was not. Such a rule, if adopted, should specify that it does not limit the Court's discretion as to costs in family provision proceedings.²⁸⁰

Recommendations

- 45 The County Court should consider including in its *County Court Civil Procedure Rules 2008* (Vic) a rule permitting it to determine a family provision application summarily when:
- (a) there are reasonable grounds on which to conclude that the net estate of the deceased person that will be available for distribution will be less than \$500,000, and
 - (b) it is in the interests of justice to do so.
- 46 The County Court should consider whether its *County Court Civil Procedure Rules 2008* (Vic) should provide that summary determination of a family provision application:
- (a) is to proceed in accordance with such directions as are given by the Court
 - (b) may be on the basis of evidence that does not conform with the rules of evidence
 - (c) is to have as a primary object the minimisation of costs and an expeditious but just resolution of the action.

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Consultation 24 (Supreme Court of South Australia).
Supreme Court Civil Rules 2006 (SA) r 312(13).
See [6.115]–[6.117] above for the Commission's recommendations in relation to costs rules.

Recommendation

47 The County Court should consider including in its *County Court Civil Procedure Rules 2008* (Vic) a rule that permits the Court to order a party to pay any costs that might have been avoided if a family provision application had been determined summarily if:

- (a) because of the party's actions, the family provision application was not determined summarily and proceeded to trial, and
- (b) at trial the Court finds that the family provision application should have been determined summarily.

The summary determination costs rule should specify that it does not limit any other power of the Court in relation to costs.

Other areas for reform raised in the Commission's consultation paper

Farm property

- 6.163 As noted in submissions and consultations, particular difficulties arise when dealing with farm property under succession laws.²⁸¹ The Victorian Farmers Federation explained the common practice of the second generation working on the farm for a long time, and land being transferred from the first generation to the second in recognition of work done day to day. The submission noted that, under such an arrangement, non-farm siblings may not be provided for out of the farm property, which can cause significant difficulties between on-farm and off-farm siblings.²⁸² David Shalders' submission describes his personal experience: he had agreed to work on the farm with his parents all his life because he was to inherit the land.²⁸³ However, he also had sisters who had not worked on the farm and the Court ordered further provision to be made for them out of his mother's estate.²⁸⁴
- 6.164 Solicitors in Colac noted that it can be extremely difficult to subdivide farms, as local planning laws prevent subdivision under 40 hectares.²⁸⁵ Solicitors in Wodonga noted that subdivision can be a particular problem in relation to wills drafted a long time ago, which propose to subdivide property in a way that is no longer permitted.²⁸⁶
- 6.165 The Victorian Farmers Federation emphasised the importance of succession planning.²⁸⁷ However, solicitors noted that there is no 'magic bullet' in relation to the problems associated with farm property, and expressed the view that, even with careful succession planning, family disputes may still occur.²⁸⁸
- 6.166 Some regional solicitors supported the introduction of a provision allowing the recipients of lifetime gifts to sign a release of their rights to make a family provision claim, such as exists subject to court approval under the *Succession Act 2006* (NSW).²⁸⁹ In support of introducing such a provision, it was argued that, where there has been an intergenerational transfer of farm property, a recipient of that property should be precluded from making a family provision claim.²⁹⁰ Arnold Bloch Leibler also supported the introduction of a provision permitting court-approved release of a person's right to make a family provision claim.²⁹¹

281 Submissions 13 (David Shalders); 14 (Commercial Bar Association); 41 (Victorian Farmers Federation). Consultations 3 (Legal practitioners in the Goulburn Valley region); 4 (Legal practitioners from the Goulburn Valley and Loddon Campaspe Community Legal Centres); 12 (Law Society of New South Wales); 18 (Legal practitioners in Wodonga); 20 (Legal practitioners in Colac).

282 Submission 41 (Victorian Farmers Federation).

283 Submission 13 (David Shalders).

284 *Torney v Shalders* [2009] VSC 268 (3 July 2009).

285 Consultation 20 (Legal practitioners in Colac).

286 Consultation 18 (Legal practitioners in Wodonga).

287 Submission 41 (Victorian Farmers Federation).

288 Consultation 20 (Legal practitioners in Colac).

289 Consultation 18 (Legal practitioners in Wodonga); *Succession Act 2006* (NSW) s 95.

290 Consultation 18 (Legal practitioners in Wodonga).

291 Submission 42b (Arnold Bloch Leibler).

- 6.167 Under the New South Wales Succession Act, a person may apply to the court for approval of a release of their rights to apply for family provision.²⁹² In determining an application for approval of a release, the court is to take into account all the circumstances of the case, including whether:
- it is to the advantage of the releasing party to make the release, financially or otherwise
 - it is prudent for the releasing party to make the release
 - the provisions of any agreement to make the release are fair and reasonable
 - the releasing party has taken independent advice in relation to the release and, if so, has given due consideration to that advice.²⁹³
- 6.168 Legal practitioners in New South Wales noted that the Succession Act release provision is used where there has been a transfer of farm property by family agreement, and also where there has been a family law settlement.²⁹⁴
- 6.169 Although such a provision would have general application, it would be particularly useful to encourage lifetime transfers of farm property, by heading off family provision claims following death. It is the Commission's view that such a provision would assist estate planning during a will-maker's life and prevent some family disputes after death.

Recommendation

- 48** The *Administration and Probate Act 1958* (Vic) should permit any person to apply to the court for approval of a release of their rights to make a family provision application, as provided by sections 95 and 96 of the *Succession Act 2006* (NSW).

Notional estate

The New South Wales notional estate provisions recommended by the National Committee

- 6.170 In all Australian states and territories except New South Wales, family provision can usually only be made out of property that is in the deceased person's estate.²⁹⁵ However, notional estate provisions in New South Wales allow certain property that is not part of the deceased person's estate to be designated as notional estate to satisfy a successful claim for family provision, or pay the costs of family provision proceedings.²⁹⁶ The Commission's consultation paper on family provision discussed notional estate.²⁹⁷ The National Committee for Uniform Succession Laws recommended that notional estate provisions based on the New South Wales legislation should be adopted in all Australian states and territories.²⁹⁸

²⁹² *Succession Act 2006* (NSW) ss 95(1)–(2).

²⁹³ *Ibid* s 95(3). These factors are also considered retrospectively, in relation to the time at which the releasing party agreed to make the release: s 95(3).

²⁹⁴ Consultation 12 (Law Society of New South Wales).

²⁹⁵ However, in Queensland, a *donatio mortis causa*—or gift made in anticipation of death—is regarded as estate property for the purposes of a family provision application: *Succession Act 1981* (Qld) s 41(12). For discussion of this, see: Rosalind Croucher, 'Conflicting Narratives in Succession Law—A Review of Recent Cases' (2007) 14 *Australian Property Law Journal* 179, 191; John K de Groot and Bruce W Nickel, *Family Provision in Australia* (LexisNexis Butterworths, 4th ed, 2012) 53. Additionally, in all states and territories except Victoria, Queensland and Tasmania, property that has been distributed from the estate may be subject to a family provision order in certain circumstances: *Family Provision Act 1969* (ACT) s 20; *Family Provision Act 1970* (NT) s 20; *Inheritance (Family Provision) Act 1972* (SA) s 14(3); *Inheritance (Family and Dependents Provision) Act 1972* (WA) s 8.

²⁹⁶ *Succession Act 2006* (NSW) ss 78(1), 63(5), 99.

²⁹⁷ Victorian Law Reform Commission, above n 2, 30–4.

²⁹⁸ National Committee for Uniform Succession Laws, *Family Provision Supplementary Report*, above n 109, ch 6; National Committee for Uniform Succession Laws, *Family Provision Supplementary Report*, above n 88, ch 3.

6.171 The New South Wales provisions allow the court to designate property as notional estate if it is property that has already been distributed from the estate, or property that has been subject to a 'relevant property transaction'.²⁹⁹ Generally speaking, relevant property transactions captured by the legislation are acts or omissions by the deceased person:

- for which full valuable consideration was not received
- that took place within a certain time before the deceased person's death
- that resulted in property not accruing to the deceased person's estate.³⁰⁰

6.172 Examples of the types of transactions that are sometimes covered are failure to sever a joint tenancy and failure to make a binding superannuation nomination in favour of the deceased person's personal representative.³⁰¹ A transaction that took place up to three years before the deceased person's death can be captured if it was entered into with the intention of depriving someone of family provision, or up to one year before the deceased person's death if it was entered into when the deceased person had a responsibility to make provision for someone.³⁰²

6.173 The court can only make a notional estate order if it is satisfied of any of the following:

- the deceased person left no estate
- the deceased person's estate is insufficient to make a family provision order, or any order as to costs, that the court thinks should be made
- provision should not be made wholly out of the deceased person's estate because other people are entitled to apply for family provision orders or because there are special circumstances.³⁰³

6.174 The National Committee recommended the adoption of notional estate provisions in response to concerns that people were 'avoiding their family provision responsibilities by divesting themselves of property during their lifetime'.³⁰⁴ However, in 1996, the National Committee had published an issues paper, in which it noted that:

Whether it would be possible to persuade the other States and Territories to follow this approach may perhaps depend on how successful it has been in New South Wales in practice ... An evaluation of the legislation, from a New South Wales perspective, must be undertaken as part of the project.³⁰⁵

6.175 No such evaluation of the New South Wales provisions has been undertaken, and the need for such provisions and the effectiveness of the provisions in meeting such a need (if one does exist) has never been demonstrated. The National Committee's recommendation to adopt the New South Wales provisions was not based on empirical research demonstrating the need for such provisions, but rather because the provisions existed and had been in operation for some time, and there was 'nothing hugely wrong with them'.³⁰⁶

299 *Succession Act 2006* (NSW) ss 79–81.

300 *Ibid* ss 75, 83(1).

301 *Succession Act 2006* (NSW) s 75. For the New South Wales Supreme Court's confirmation that superannuation benefits are captured by these provisions, see, eg, *Cabban v Cabban* [2010] NSWSC 1433 (13 December 2010) [41] (Macready AsJ).

302 *Succession Act 2006* (NSW) s 80(2) (emphasis added).

303 *Ibid* s 88.

304 National Committee for Uniform Succession Laws, *Family Provision Supplementary Report*, above n 109, 93–4; National Committee for Uniform Succession Laws, *Family Provision Supplementary Report*, above n 88, 14, 19–26. The National Committee had also considered draft notional estate provisions in New Zealand, but preferred the New South Wales model on the basis that the provisions were more comprehensive, had been in operation for 17 years and 'by all accounts are now well regarded within that jurisdiction': National Committee for Uniform Succession Laws, *Family Provision Supplementary Report*, above n 109, 93.

305 National Committee for Uniform Succession Laws, *Uniform Succession Laws: Family Provision*, Queensland Law Reform Commission Working Paper No 47 (1995) 43.

306 Croucher, 'Towards Uniform Succession', above n 88, 740. For further discussion of notional estate, see Victorian Law Reform Commission, above n 2, 30–4.

Views and conclusions

- 6.176 The Commission’s consultation paper on family provision asked whether people do in fact deal with their assets during their lifetime in order to minimise the property that is in their estate and frustrate the operation of family provision laws and, if so, whether they should be entitled to do so.³⁰⁷
- 6.177 Several submissions agreed that sometimes people structure their assets so that the majority of those assets fall outside the reach of family provision legislation.³⁰⁸ However, a judge of the Supreme Court of Victoria made the point that there is a difference between a person dealing with their assets to avoid family provision legislation, and doing so to avoid their responsibility to provide for certain people. While a gift of property during life may have the effect of reducing the property in a person’s estate, the gift may give effect to that same responsibility to provide.³⁰⁹ State Trustees said that it did not consider it likely that people have sought to frustrate the operation of family provision laws, ‘even if their actions may have that effect’.³¹⁰
- 6.178 A number of those who made submissions were opposed to the introduction of notional estate provisions.³¹¹ Moores Legal considered that it was arbitrary to place a time limit on transactions, and expressed the view that, given the incursion into property rights that family provision already represents, it is not justifiable to take the step of unwinding lifetime dispositions.³¹² Arnold Bloch Leibler considered that lifetime transactions should only be overturned if they involved undue influence or duress.³¹³ The Law Institute of Victoria generally agreed that people should be able to deal with their property in any manner they see fit during their lifetime.³¹⁴
- 6.179 Carolyn Sparke SC considered that individuals should be permitted to make gifts to family and friends while they are still alive and ‘feel the satisfaction of knowing that their assets are in the hands of those they wish them to be’.³¹⁵ To retain this freedom, she considered that notional estate provisions should not be introduced.³¹⁶ Barrister Andrew Verspaandonk also put the point strongly in his submission:
- I strongly believe that people should have the entitlement to exercise their property rights while they are alive, even if the effect would be to limit the extent of their estate upon their death. Private property rights are already significantly encroached upon at the point of death by the existence of Family Provision legislation. Given that testamentary dispositions are actually gifts, the law ought not reach back into the lifetime of the testator to further interfere with property rights. If people are prepared to compromise their own enjoyment of property rights by alienation *inter vivos*, they should be free to do so.³¹⁷
- 6.180 The Supreme Court of Victoria said that, ‘on balance, the law ought not to detract from the general proposition that persons are able to deal with their property as they wish’. However, it noted that if there is evidence in Victoria of people entering into ‘artificial arrangements designed to avoid their moral obligation’, then introduction of a notional estate scheme may be necessary.³¹⁸

307 Victorian Law Reform Commission, above n 2, 34.

308 Submissions 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 35 (Andrew Verspaandonk); 42b (Arnold Bloch Leibler).

309 Consultation 17 (Supreme Court of Victoria—Judges).

310 Submission 33 (State Trustees Limited).

311 Submissions 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 30a (Law Institute of Victoria)—a majority of survey respondents;

33 (State Trustees Limited); 35 (Andrew Verspaandonk); 39 (Carolyn Sparke SC); 42b (Arnold Bloch Leibler).

312 Submission 25 (Moores Legal).

313 Submission 42b (Arnold Bloch Leibler).

314 Submission 30a (Law Institute of Victoria).

315 Submission 39 (Carolyn Sparke SC).

316 Ibid. The submission notes that this view was supported by other members of the Bar with whom it was discussed.

317 Submission 35 (Andrew Verspaandonk).

318 Submission 37 (Supreme Court of Victoria).

- 6.181 Of those who supported the introduction of a notional estate scheme in Victoria, most proposed departure from the New South Wales model. A minority of survey respondents represented in the Law Institute of Victoria's submission considered that notional estate provisions should be introduced, but should be more limited in scope than the New South Wales provisions.³¹⁹ The Institute of Legal Executives said that, if notional estate provisions were introduced, they should be carefully drafted, to prevent the unfair erosion of a person's freedom to deal with their assets during life.³²⁰ Both the Commercial Bar Association and barrister Shane Newton considered that notional estate provisions should be introduced, but should apply only to transactions entered into with the intention of defeating a claim for family provision.³²¹
- 6.182 Participants in consultations in New South Wales were supportive of the notional estate scheme,³²² and the submission of the Elder Law and Succession Committee of the Law Society of New South Wales expressed the view that 'if one subscribes to the concept of family provision, then the concept of notional estate must follow'.³²³ However, representatives of the NSW Trustee and Guardian noted that it is typically the transactions within 12 months of the deceased person's death that are the target of applications for notional estate, where no intention needs to be proved.³²⁴ Consultees also noted that notional estate is primarily used to meet orders for family provision, not costs orders.³²⁵
- 6.183 The Commission considers that a notional estate scheme that only applied to transactions entered into with the intention of avoiding family provision obligations could be easily circumvented. Further, intention is difficult to prove, as evidenced by the clear preference for the notional estate provisions in New South Wales which do not require proof of intention to defeat a possible family provision claim. The Commission also agrees that any notional estate scheme that does not require some intention on the part of the deceased person risks being too far-reaching and unduly limiting of a person's right to dispose of their property during their life.
- 6.184 The New South Wales notional estate provisions themselves were not purpose-designed, having been based on the former death duty provisions.³²⁶
- 6.185 The Commission also considers that any transaction entered into before death may have the effect of benefiting the same people who could later be family provision claimants. The gift during life may give effect to the person's responsibility to provide, but does this before death rather than after.
- 6.186 In the absence of clear evidence demonstrating the need for such provisions in Victoria, or the effectiveness of such provisions in New South Wales, the Commission does not recommend the introduction of notional estate provisions in Victoria.

Time limit to make a family provision claim

- 6.187 In the consultation paper on family provision, the Commission asked whether the current period within which a family provision claim can be made—six months from the grant of representation³²⁷—is satisfactory, too short or too long. The National Committee for Uniform Succession Laws recommended that an application for provision should be made no later than 12 months after the date of the deceased person's death.³²⁸

319 Submission 30a (Law Institute of Victoria).

320 Submission 32 (The Institute of Legal Executives).

321 Submissions 10 (Shane Newton); 14 (Commercial Bar Association).

322 Submission 36 (Law Society of New South Wales). Consultations 9 (NSW Trustee and Guardian); 11 (Supreme Court of New South Wales); 12 (Law Society of New South Wales).

323 Submission 36 (Law Society of New South Wales).

324 Consultation 9 (NSW Trustee and Guardian).

325 Consultations 9 (NSW Trustee and Guardian); 12 (Law Society of New South Wales).

326 See, eg, Croucher, 'Towards Uniform Succession', above n 88, 740.

327 *Administration and Probate Act 1958* (Vic) s 99.

328 National Committee for Uniform Succession Laws, *Family Provision Supplementary Report*, above n 88, Draft Family Provision Bill 2004 cl 9.

- 6.188 Most of the submissions that addressed this point considered the current time limit to be satisfactory.³²⁹ State Trustees emphasised the need to balance the interests of ‘vulnerable potential claimants’ with ‘the desirability of expeditious, efficient and certain administration’, but said that on balance it preferred retention of the current time frame, provided that eligibility is limited to deter speculative claims.³³⁰ Barrister Andrew Verspaandonk noted that the current time limit allows sufficient time for advice and consideration, while extensions of time are permitted by the Administration and Probate Act.³³¹ Carolyn Sparke SC pointed out that the time taken to obtain probate plus six months typically gives people about eight months from the date of the deceased person’s death to make an application.³³²
- 6.189 Other submissions considered the period of six months from the grant of representation to be too long.³³³ One submission suggested that the six-month limit ‘was adopted in “horse and buggy” days when there was no instant means of communication as there is today’ and is unfair on executors and beneficiaries. This person recommended that the period be reduced from six months from the grant of representation to three.³³⁴
- 6.190 One submission expressed the view that the period of six months from the date of the grant of representation is too short, and it and one other submission considered that the period should be 12 months from the date of death, as in New South Wales.³³⁵
- 6.191 Moores Legal considered that the limitation period was probably satisfactory, but proposed a formal process to allow estates to be distributed earlier ‘if it appears unlikely that a claim would be brought’.³³⁶ This submission proposed that:
- if the executor is notified by all ‘natural’ beneficiaries that they do not intend to bring a claim, the executor is then able to distribute the estate within the limitation period without becoming personally liable to meet any later claim.³³⁷
- 6.192 The submission suggests that, to guard against the possibility of someone outside the range of ‘natural’ beneficiaries of the estate bringing a claim, the executor could take out an insurance policy, at the estate’s expense, to indemnify the executor against any later claim.³³⁸
- 6.193 On balance, the Commission considers that the period of six months from the date of the grant of representation strikes an appropriate balance between providing notice to interested persons and efficiency. In the Commission’s view, Moores Legal’s proposal establishes a potentially complex regime of insurance, liability and litigation. Under such a scheme, there would be a real risk of someone outside the class of ‘natural’ beneficiaries making a claim against an already distributed estate. There are further difficulties in defining who constitutes a ‘natural’ beneficiary of the estate.
- 6.194 Additionally, there is already limited protection for personal representatives who make distributions for the maintenance, support or education of the deceased person’s partner or child within six months from the date of the grant.³³⁹ The type of reform proposed by Moores Legal would, at best, allow for distribution only several months earlier than would otherwise be possible. For these reasons, the Commission does not recommend such an approach.

329 Submissions 14 (Commercial Bar Association); 19 (Association of Independent Retirees); 26 (Rigby Cooke Lawyers); 30a (Law Institute of Victoria); 33 (State Trustees Limited); 35 (Andrew Verspaandonk); 39 (Carolyn Sparke SC); 42b (Arnold Bloch Leibler).

330 Submission 33 (State Trustees Limited).

331 Submission 35 (Andrew Verspaandonk).

332 Submission 39 (Carolyn Sparke SC).

333 Submissions 13 (David Shalders); 16 (Henry Dixon).

334 Submission 16 (Henry Dixon).

335 Submissions 8 (Patricia Strachan); 36 (Law Society of New South Wales).

336 Submission 25 (Moores Legal).

337 Ibid.

338 Ibid.

339 *Administration and Probate Act 1958* (Vic) s 99A(1).

- 6.195 The current six-month period within which to make a family provision claim in Victoria commences from the date of the grant of representation.³⁴⁰ As noted above, the National Committee for Uniform Succession Laws recommended that an application for provision should be made no later than 12 months after the date of the deceased person's death.³⁴¹
- 6.196 Most submissions that addressed this point considered that time should begin to run from the date of the grant of representation.³⁴² The Property and Probate Division of the Commercial Bar Association observed that the grant provides notice to prospective family provision applicants that the time within which to exercise their rights has commenced. It pointed out that this type of public notification is not given in jurisdictions where time begins to run from the deceased person's date of death.³⁴³
- 6.197 Patricia Strachan and the Law Society of New South Wales considered that a time limit of 12 months should start to run from the deceased person's date of death.³⁴⁴
- 6.198 On balance, the Commission considers that six months from the date of grant provides an adequate period within which to obtain legal advice and commence proceedings. Further, the grant itself performs an important role in notifying interested parties of when time has started to run. If a caveat is lodged against the making of a grant of representation, the Registrar of Probates of the Supreme Court must give the person who lodged the caveat notice when any application for a grant is made.³⁴⁵ The court's power to grant an extension of time operates as a sufficient safeguard. For these reasons, the Commission does not recommend any change in relation to the time within which to bring a family provision claim.

Notice of intention to make a family provision claim

- 6.199 The submission of the Property and Probate Section of the Commercial Bar Association raises a point that is separate from, but related to, the time limit and extension of time in family provision. Under the Administration and Probate Act, personal representatives are not personally liable for making distributions from the estate after the six-month limitation period has passed, where there has been no notice of a family provision application or intended application.³⁴⁶
- 6.200 Notice provided to the personal representative of an intention to make a family provision application, in writing and signed, lapses after three months and cannot be renewed. After three months, the personal representative can 'act as if he had not received the notice' unless, within that three months, notice is received that a family provision application has been made to the court.³⁴⁷
- 6.201 In the view of the Property and Probate Section of the Commercial Bar Association, these provisions effectively give rise to a nine-month period within which to make a family provision claim, if notice is given on the last day of the six-month period.³⁴⁸ The submission states that consideration should be given to clarifying the effect of giving such notice.³⁴⁹

340 Ibid s 99.

341 National Committee for Uniform Succession Laws, *Family Provision Supplementary Report*, above n 88, Draft Family Provision Bill 2004 cl 9.

342 Submissions 14 (Commercial Bar Association); 30a (Law Institute of Victoria); 35 (Andrew Verspaandonk).

343 Submission 14 (Commercial Bar Association).

344 Submissions 8 (Patricia Strachan); 36 (Law Society of New South Wales).

345 *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 8.02(b).

346 *Administration and Probate Act 1958* (Vic) s 99A(3).

347 Ibid s 99A(4).

348 Submission 14 (Commercial Bar Association).

349 Ibid.

- 6.202 The relevant provisions of the Administration and Probate Act are:
- Section 99, which states that no application shall be heard by the court unless the application is made within six months of the grant of representation or the court grants an extension of time.
 - Section 99A, which allows prospective family provision claimants to provide notice to the personal representative and effectively extend the time in which they may make a claim to nine months.³⁵⁰
- 6.203 It is not clear whether someone who provides notice to the personal representative of their intention to make a family provision claim within six months of the date of grant, but does not file their application in the court within that time, would be required to apply to the court for an extension of time. It seems likely, however, that this provision is only intended to protect the personal representative for certain distributions, and not give rise to an extension of time without court order. The Commission considers that the interaction between the relevant provisions should be clarified to specify that they relate only to the liability of personal representatives for distributions made, and do not give rise to a nine-month period within which to make a family provision claim.

Recommendation

- 49 Section 99A of the *Administration and Probate Act 1958* (Vic) should be amended to clarify that:
- (a) it relates only to protection of personal representatives, and
 - (b) it does not affect the time within which a family provision application must be made under section 99 of the *Administration and Probate Act 1958* (Vic).

- 6.204 The Commercial Bar Association also pointed out that section 99 of the Administration and Probate Act still refers to Part V of the Administration and Probate Act.³⁵¹ Part V previously dealt with witness beneficiaries and was repealed by the *Wills Act 1997* (Vic). If an application was made under Part V of the Administration and Probate Act, section 99 of the Act allowed for time within which to make a family provision application to be extended.³⁵² The Commission recommends that the reference to Part V should be removed from section 99 of the Administration and Probate Act.

Recommendation

- 50 The second proviso to section 99 of the *Administration and Probate Act 1958* (Vic), which refers to Part V of that Act, should be removed.

350 See, in particular, *Administration and Probate Act 1958* (Vic) s 99A(4).
351 Submission 14 (Commercial Bar Association).
352 *Administration and Probate Act 1958* (Vic) s 99.

Executors' costs and commission

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7. Executors' costs and commission

Introduction

Terms of reference

- 7.1 Almost all executors are trusted friends or relatives of the will-maker. The remainder provide executorial services in a professional capacity. They include legal practitioners, accountants, financial advisers and trustee companies and are referred to as 'professional executors' in this report.
- 7.2 Executors cannot claim money from the estate for their time and trouble unless they are authorised to do so. Trustee companies are authorised by legislation to charge for executorial services.¹ All other executors need the informed consent of the will-maker or beneficiaries, or otherwise can seek authorisation from the Supreme Court.
- 7.3 Payments to executors are commonly in the form of commission, expressed as a percentage of the capital and income of the estate. Some professional executors charge fees instead of claiming commission; others claim commission for their executorial responsibilities and charge fees for any additional services they provide.
- 7.4 The Commission has been asked to review and report on two issues relating to payments made to executors:
 - whether there should be special rules for legal practitioners who act as executors and also carry out legal work on behalf of the estate, including rules for the charging of costs and commission
 - whether a court should have the power to review and vary costs and commission charged by executors.
- 7.5 The first issue concerns executors who are legal practitioners. The second concerns all executors but is particularly relevant to professional executors because they are more likely than a will-maker's friend or relative (who is also often a beneficiary) to charge for their services.
- 7.6 At the heart of both issues lies the conflict between duty and interest that can arise when an executor charges the estate for their time and trouble. An executor has a duty to act in the interests of the beneficiaries. However, in claiming a reward from the estate for meeting their executorial responsibilities, they are drawing from assets to which a beneficiary might otherwise have been entitled.

- 7.7 Unless the conflict of duty and interest is carefully managed, the assets are at risk of being depleted by excessive or unnecessary charges. The risk is exacerbated when:
- The executor is a professional who also drafted the will and it contains a clause that authorises the payment of commission. Here, a further conflict of duty and interest arises because the professional owes a duty to act in the best interests of the client but has a personal interest in securing appropriate remuneration for all services rendered in the administration of the estate.
 - The executor is a professional who is authorised by a remuneration clause in the will to charge the estate for any professional services they provide in addition to charging commission for their executorial responsibilities. Here, it is left up to the executor to determine which services attract the operation of the remuneration clause and which attract the operation of the commission clause.
- 7.8 Although the terms of reference draw attention to the actions of legal practitioners, it is important to note that other professional executors are increasingly being appointed and are charging for their services. Compared to the legal profession, there is less regulation of the executorial services they provide, yet conflicts of interest can similarly arise.²

Legal practitioner executors

- 7.9 There are cogent reasons why legal practitioners are appointed as executors, and it is in the community's interest that they continue to provide executorial services. Most legal practitioners act in the best interests of will-makers and beneficiaries. Their duty to act in their client's interests is the cornerstone of the profession's ethical standards and legal obligations.
- 7.10 It is therefore concerning that some legal practitioner executors have taken unfair advantage of their position by:
- charging the estate without the informed consent of the will-maker or beneficiaries
 - claiming excessive amounts
 - receiving both commission and professional fees for the same services.³
- 7.11 In this chapter, the Commission considers a number of measures to reduce the incidence of unethical and unlawful charging practices by legal practitioner executors. Its recommendations aim to improve compliance by legal practitioner executors with their ethical and legal obligations, and assist beneficiaries in understanding those obligations and enforcing them when necessary. They also recognise that some of the problems identified are not confined to the legal profession and need broader solutions.
- 7.12 Decisions about whether specific rules for legal practitioners are necessary, and the form they should take if they are, need to be made in the context of the existing regulatory framework. The regulatory framework within which legal practitioner executors currently operate is described briefly in the next section. The discussion then turns to the rules that should apply.⁴

² For example, the New South Wales Supreme Court recently found that an executor who had been the deceased person's financial adviser was in serious breach of his duties because of a conflict of interests. The executor had transferred funds from the estate to his personal account, and in turn to his company that was in financial difficulties, before the amount was repaid to the estate without interest several months later: *Chick v Grosfeld* [2012] NSWSC 1166 (25 September 2012) [23].

³ See, eg, *Walker v D'Alessandro* [2010] VSC 15 (5 February 2010); *Re Estate of Zsuzanna Gray* [2010] VSC 173 (30 April 2010); *Szmulewicz v Recht* [2011] VSC 368 (10 August 2011); *Legal Services Commissioner v Hession (Legal Practice)* [2010] VCAT 1328 (11 August 2010).

⁴ See [7.35]–[7.114].

Regulation of the legal profession

Legal Profession Act

- 7.13 The legal profession in Victoria is regulated under the *Legal Profession Act 2004* (Vic). The Act establishes a co-regulatory framework, along the lines of a national model developed by the former Standing Committee of Attorneys General.⁵
- 7.14 The peak regulator is the Legal Services Board, which is an independent authority established by the Act. Among its functions is the responsibility to make and approve legal practice rules.⁶
- 7.15 With the board's approval, the Law Institute of Victoria may make legal practice rules for legal practitioners other than barristers, and the Victorian Bar may make rules for barristers.⁷ The Law Institute of Victoria's *Professional Conduct and Practice Rules 2005* are applicable to legal practitioner executors and are discussed in more detail later in this chapter.
- 7.16 The chief executive officer of the Legal Services Board is the Legal Services Commissioner, another statutory office created under the Legal Profession Act. The Legal Services Commissioner has an obligation to:
- ensure that complaints against legal practitioners are dealt with in a timely and effective manner
 - educate the legal profession about issues of concern to the profession and consumers of legal services
 - educate the community about legal issues and the rights and obligations that flow from the client-practitioner relationship.⁸
- 7.17 A number of the functions of the Legal Services Board and the Legal Services Commissioner have been delegated to the Law Institute of Victoria and the Victorian Bar.⁹

Complaints and discipline

- 7.18 A complaint to the Legal Services Commissioner may involve a civil complaint, a disciplinary complaint, or both.¹⁰
- 7.19 A civil complaint is a civil dispute, including a costs dispute, between a law practice or legal practitioner and a person about the provision of legal services. A beneficiary under a will can complain to the Legal Services Commissioner about legal fees charged to the estate, if the disputed amount is \$25,000 or less and the complaint is made within the prescribed time limit.¹¹ The definition does not extend to disputes about commission charged by a legal practitioner executor for executorial services, as these services are not considered to be legal services.

5 Now known, since September 2011, as the Standing Council on Law and Justice. It comprises Commonwealth, state and territory Attorneys-General and the New Zealand Minister for Justice.

6 *Legal Profession Act 2004* (Vic) s 3.2.9(1).

7 The Board's rules prevail to the extent of any inconsistency with rules made by the Law Institute of Victoria or the Victorian Bar: *ibid* ss 3.2.9(2)–(4).

8 Submission 45 (Legal Services Commissioner).

9 Legal Services Board, *Current External Delegations* (September 2012) <http://www.lsb.vic.gov.au/documents/Current_LSB_External_Delegation_Master_List_Sept_2012.pdf>; Legal Services Commissioner, *Current External Delegations* (April 2010) <http://www.lsc.vic.gov.au/documents/Current_LSC_External_Delegations_Master_List_April_2010.pdf>.

10 *Legal Profession Act 2004* (Vic) s 4.2.1(2).

11 Within 60 days after the legal costs were payable or, if an itemised bill was requested, within 30 days after the request was complied with. The Legal Services Commissioner has the discretion to accept a costs dispute made within four months of the end of the relevant period: *ibid* ss 4.2.7(2)–(4).

- 7.20 The Legal Services Commissioner must attempt to resolve civil disputes, taking any action necessary. This may include referring the matter for mediation and, in the case of a costs dispute, arranging for a non-binding assessment of legal costs.¹² If the dispute is unable to be resolved, the Commissioner notifies the parties accordingly and informs them of their right to apply to the Victorian Civil and Administrative Tribunal (VCAT) for an arbitrated resolution. VCAT can make any of a range of orders set out in the Legal Profession Act, or any order it thinks fit, to finalise the dispute.¹³
- 7.21 A disciplinary complaint is a complaint about a legal practitioner's conduct that, if established, would amount to either:
- unsatisfactory professional conduct,¹⁴ or
 - professional misconduct.¹⁵
- 7.22 The Act sets out the conduct that does, or could, fall within each of these categories. A contravention by a legal practitioner executor of the Professional Conduct and Practice Rules may fall into either category.¹⁶
- 7.23 Anyone may make a disciplinary complaint, including a beneficiary under a will.¹⁷ The Legal Services Commissioner may also investigate the conduct of the legal practitioner in the absence of a disciplinary complaint, or if the complaint is withdrawn.¹⁸
- 7.24 If the investigation of the complaint shows that the legal practitioner would be likely to be found guilty of unsatisfactory professional conduct, the Legal Services Commissioner has a number of options available. These include:
- taking no further action
 - cautioning the practitioner
 - reprimanding or fining the practitioner
 - requiring the practitioner to pay compensation, or
 - seeking to prosecute the practitioner in VCAT.¹⁹
- 7.25 If it is likely that the legal practitioner would be found guilty of professional misconduct, the Legal Services Commissioner must seek to prosecute the practitioner in VCAT. If a legal practitioner is found guilty:
- they may be fined
 - their ability to practise law may be amended, suspended or curtailed, or
 - they may be subject to any other order that VCAT thinks fit.²⁰

12 *Legal Profession Act 2004* (Vic) s 4.3.5.

13 *Ibid* s 4.3.17.

14 Conduct occurring in connection with the practice of law that falls short of the standard of competence or diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner: *ibid* s 4.4.2.

15 Unsatisfactory professional conduct where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and any conduct that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in practice: *Legal Profession Act 2004* (Vic) s 4.4.3.

16 *Ibid* ss 4.4.4–4.4.6.

17 *Ibid* s 4.2.4(2).

18 *Ibid* s 4.4.8.

19 *Ibid* s 4.4.13.

20 *Ibid* s 4.4.17.

Proposed new uniform law

- 7.26 Victoria is developing a new regulatory scheme for the legal profession in conjunction with New South Wales, and the enabling legislation is expected to be introduced to Parliament during 2013. It is based on draft national legislation that was prepared in 2011 under the auspices of the Council of Australian Governments.²¹
- 7.27 Although only Victoria and New South Wales are proceeding with the reform at this time, they have agreed to changes that are intended to reduce costs and make the scheme more attractive to smaller jurisdictions.²²
- 7.28 The new scheme has many of the same features as the co-regulatory scheme established by the Legal Profession Act. The role of peak regulator will be assumed by a joint Legal Services Council, and a Commissioner for Uniform Legal Services Regulation will be established. Both entities will be created by Victorian legislation but located in New South Wales. Functions will also be conferred directly on the Victorian Legal Services Board and Legal Services Commissioner.²³
- 7.29 The new uniform law will be underpinned by uniform rules. The Law Council of Australia has issued a set of *Australian Solicitors' Conduct Rules*²⁴ that were prepared with a view to the introduction of uniform rules across all jurisdictions. These rules are likely to be submitted to the new Legal Services Council for consideration and adoption.
- 7.30 The Australian Solicitors' Conduct Rules are very similar to the Law Institute of Victoria's Professional Conduct and Practice Rules. Significantly, the rule that applies to legal practitioners who draft wills that appoint them as executor, discussed later in this chapter, is almost identical.²⁵
- 7.31 At the time of writing this report, the proposed new uniform legislation had not been introduced into Parliament but was well advanced. Recommendations to amend the Legal Profession Act would not be relevant, but the Commission has not seen the legislation that will underpin the new regulatory scheme. Therefore, when the Commission has identified shortcomings in the current scheme, it has directed its recommendations to ensuring that the problems will not persist under the new scheme.

Other legislation

- 7.32 Although the Legal Profession Act imposes obligations on legal practitioners when providing legal services, and avenues for resolving disputes and complaints, the Australian Consumer Law also applies to the legal services they provide.²⁶ However, it is not clear that a beneficiary would have standing to make a complaint about legal costs charged to the estate, as the estate—not the beneficiaries—is liable to pay. In any event, it is likely that any conduct that contravenes the customer service guarantees under the Australian Consumer Law will be behaviour for which the legal practitioner can be disciplined under the Legal Profession Act as well.²⁷
- 7.33 Legal practitioner executors must also comply with the requirements that apply to all other executors. An executor who applies to the Supreme Court for a grant of probate must provide an affidavit containing detailed information about the will, the will-maker, the witnesses and the executors. The affidavit must also include an undertaking that, if probate is obtained, the executor will 'well and truly collect and administer' the estate 'according to law'.²⁸

21 Attorney-General's Department, *Legal Profession National Law* (31 May 2011) <<http://www.ag.gov.au/Consultations/Pages/NationalLegalProfessionalReform.aspx>>.

22 Alex Boxsell, 'Regulatory Reform Hits Funding Wall', *Australian Financial Review* (Sydney), 3 May 2013, 38.

23 Information provided by the Department of Justice, 30 May 2013.

24 Law Council of Australia, *Australian Solicitors' Conduct Rules* (June 2011).

25 Law Institute of Victoria, *Professional Conduct and Practice Rules 2005* (30 September 2005) r 10.1; Law Council of Australia, *Australian Solicitors' Conduct Rules* (June 2011) r 12.4.1.

26 *Australian Consumer Law and Fair Trading Act 2012* (Vic).

27 Civil Justice Research Group, 'The Impact of Australian Consumer Law on Lawyers' (Transcript of proceedings of a roundtable held at Melbourne Law School, Melbourne, 28 May 2012) 5.

28 *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 2A.04(2)(c)(i).

- 7.34 Executors are assigned some specific responsibilities by legislation and various duties that arise from common law and equity and the powers of the Court.²⁹ The Supreme Court may remove an executor who is unfit to act in that office.³⁰ It will order the removal of an executor if satisfied that is necessary for the due and proper administration of the estate and the advancement of the interests of the beneficiaries.³¹

Special rules for legal practitioner executors

Obtaining informed consent

The problem

- 7.35 In legal terms, the relationship between an executor and a beneficiary under the will is of a fiduciary nature. The executor—the fiduciary—has been entrusted by the will-maker to exercise powers and discretions that affect the interests of the beneficiary. The beneficiary is vulnerable to any abuse by the executor of the position. As a consequence, the executor has a duty to act in the beneficiary's interests.
- 7.36 The connection between the relationship and the duty was explained by Justice Mason in *Hospital Products International Pty Ltd v United States Surgical Corporation*:
- It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed.³²
- 7.37 The extent of the duty depends on the circumstances but there is a general requirement that executors act free of charge. They have no automatic entitlement to be paid for meeting their responsibilities.
- 7.38 A legal practitioner who is asked to prepare a will that appoints them as executor must obtain the client's informed consent before including any clause that authorises them, or their law firm, to charge the estate a fee or commission for their services.
- 7.39 If a legal practitioner is appointed executor under a will that does not contain a commission or charging clause, they can seek the informed consent of the beneficiaries. Alternatively, they can apply to the Supreme Court under section 65 of the *Administration and Probate Act 1958* (Vic). The Court may allow commission as is 'just and reasonable' for the executor's 'pains and trouble', though it may not exceed five per cent of the value of the estate.³³
- 7.40 Legal practitioners' duty to avoid conflicts of interest pervades all aspects of the legal services they provide and is emphasised in their professional rules of conduct.³⁴ However, there is persistent concern that some legal practitioner executors are charging the estates they administer without consent or in circumstances where the person who gave the consent was not fully informed about the decision they were asked to make. This concern, and the Commission's recommendations for reform, are discussed in the next two sections.³⁵

29 For example, executors have a duty to keep 'such a record that their transactions can be understood and brought into the form of regular accounts if necessary': *Grunden v Nissen* [1911] VLR 267, 271–2; and they must present accounts of the estate when required: *Administration and Probate Act 1958* (Vic) s 28(1); *Supreme Court (Administration and Probate) Rules 2004* (Vic), r 6.03(1).

30 *Administration and Probate Act 1958* (Vic) s 34(1)(c).

31 Matthew Groves, 'The Forced Removal of Executors' (2007) 81(6) *Law Institute Journal* 56, 56.

32 *Hospital Products International Pty Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 97 (Mason J).

33 Trustee companies need not rely on either informed consent or Supreme Court authorisation as they have a statutory entitlement to charge: *Corporations Act 2001* (Cth) pt 5D.3 (applicable to licensed trustee companies); *Trustee Companies Act 1984* (Vic) s 21 (applicable to State Trustees Limited). See also Victorian Law Reform Commission, *Succession Laws: Executors*, Consultation Paper No 14 (2012) 22–3.

34 For example, The Victorian Bar Incorporated, Practice Rules (22 September 2009) r 72; Law Institute of Victoria, Professional Conduct and Practice Rules 2005 (30 September 2005) r 9.

35 [7.41]–[7.74].

The will-maker's consent

- 7.41 The will-maker's consent to the executor being paid from the estate for providing executorial services, legal services, or both, is conveyed by the inclusion of commission and charging clauses in the will. However, some legal practitioners have been drafting wills that contain commission and charging clauses without the fully informed consent of the will-maker. People making wills often do not really understand these clauses.³⁶

Rule 10.1

- 7.42 The Law Institute of Victoria has approached the problem by including rule 10.1 in the Victorian *Professional Conduct and Practice Rules 2005*:

Receiving a Benefit under a Will or other Instrument

- 10.1 A practitioner who receives instructions from a client to draw a will appointing the practitioner or an associate of the practitioner an executor must inform the client in writing before the client signs the will –
- 10.1.1 of any entitlement of the practitioner, or the practitioner's firm or associate, to claim commission;
 - 10.1.2 of the inclusion in the will of any provision entitling the practitioner, or the practitioner's firm or associate, to charge legal costs in relation to the administration of the estate, and;
 - 10.1.3 if the practitioner or the practitioner's firm or associate has an entitlement to claim commission, that the person could appoint as executor a person who might make no claim for commission.
- 7.43 Not all legal practitioners follow rule 10.1, even though a failure to comply may constitute unsatisfactory professional conduct or professional misconduct. The Supreme Court's Probate Users Committee, a forum for legal practitioners and the Court to discuss succession law and practice, has expressed concern about the problem. Sharing this concern, the Registrar of Probates issued a reminder notice to all legal practitioners in 2010. However, there is no evidence that the level of compliance has improved. The Probate Registry has observed that a small but recurring percentage of legal practitioners consistently draft wills that contain generous commission clauses. Where it can be seen that a will was drafted after the Registrar's notice was issued, a requisition is raised to seek proof of compliance with the rule.³⁷
- 7.44 The Commission was told that legal practitioners who frequently draft wills that appoint them, or a member of their law practice, as executor do follow rule 10.1. Inexperienced practitioners look for guidance in legislation and would not think of consulting the Professional Conduct and Practice Rules.³⁸ One legal practitioner commented that, in his experience, clients who have been given the information required by rule 10.1 no longer want to appoint the legal practitioner as executor.³⁹

36 Advisory Committee (Meeting 1).

37 Ibid.

38 Informal discussions with staff of the Legal Services Commissioner; consultation 7 (Law Institute of Victoria Wills & Estates Discussion Group).

39 Advisory Committee (Meeting 4).

Reform proposals

- 7.45 The consultation paper on executors invited submissions on improving the existing rules for ensuring that will-makers are fully informed about the possible costs to the estate of appointing a legal practitioner executor. The proposals considered by the Commission included:
- requiring a will appointing a legal practitioner as executor to be witnessed by an independent witness
 - requiring the will-maker to obtain independent advice before agreeing to the inclusion of a commission clause
 - incorporating rule 10.1 into legislation
 - incorporating a new rule on obtaining informed consent into legislation.

Independent witness

- 7.46 The Commission sought comments on the idea of introducing a rule that a will appointing a legal practitioner as executor must be witnessed by someone who is independent and external to the legal practice.⁴⁰ Such a rule could provide some protection against unfair practices, if the witness were able to understand the consequences of any commission or charging clauses and assess whether or not they were reasonable.
- 7.47 The proposal received some support as a means of reducing problems that can arise when a legal practitioner is appointed as executor under a will.⁴¹ The Institute of Legal Executives suggested that perhaps there should be two independent witnesses.⁴² The Commercial Bar Association observed that merely witnessing the will would be of little benefit unless the witness also certified that they believed that the will-maker was advised appropriately in certain matters.⁴³ Both organisations said that there would have to be exceptions to the rule.
- 7.48 Some of those who opposed the idea said that compliance with rule 10.1 is sufficient and that a legal practitioner always has the option of bringing in an independent witness in any case.⁴⁴ Rigby Cooke Lawyers said that it would make the process unnecessarily difficult,⁴⁵ and Moores Legal questioned whether it would be effective:
- If the will is witnessed by another member of the same firm, it is questionable how ‘independent’ they will really be; if witnessed by someone outside the firm, it would seem even less likely that the will-maker will receive complete advice about the solicitor-executor’s rights in relation to commission and other possible costs to the estate.⁴⁶
- 7.49 As discussed in Chapter 2, the Commission considered a similar proposal as a possible means of protecting will-makers from undue influence and concluded that it would be ineffective and would increase the complexity of the will-making process. The Commission does not support this proposal for the same reasons.

40 Victorian Law Reform Commission, above n 33, 34.

41 Submissions 1 (Legal Services Commissioner); 14 (Commercial Bar Association); 22 (Paul Bravender-Coyle); 32 (The Institute of Legal Executives); 40 (Janice Brownfoot).

42 Submission 32 (The Institute of Legal Executives).

43 Submission 14 (Commercial Bar Association).

44 Submissions 8 (Patricia Strachan); 30a (Law Institute of Victoria). State Trustees did not support the proposal either: submission 33 (State Trustees Limited).

45 Submission 26 (Rigby Cooke Lawyers).

46 Submission 25 (Moores Legal).

Independent advice

- 7.50 It was suggested in consultations that the will-maker should receive independent advice before a commission clause is included in the will.⁴⁷ A comparison was made with binding financial agreements under the *Family Law Act 1975* (Cth). Each party to a binding financial agreement must obtain independent legal advice, and the practitioners who provide it must provide a written statement that the advice was given.⁴⁸
- 7.51 Those against the idea said that clients will not want to pay the cost of independent advice, notwithstanding the fact that this is not a problem when making a binding financial agreement.⁴⁹ It was also said that a client who trusts the legal practitioner enough to appoint them as executor is likely to accept their word about what a reasonable or normal rate of remuneration would be.⁵⁰
- 7.52 The Commission agrees that clients should be encouraged to seek independent advice about including a commission clause in favour of either the legal practitioner who drafts the will or another member of the law practice. However, for the following reasons it has concluded that it should not be a statutory requirement:
- Independent advice is not a necessary component of informed consent. The Commission considers that the courts should continue to determine what the components of informed consent should be in any given circumstance.
 - It could be of uncertain net benefit to the client in view of the cost and delay. The Commission is mindful of the need not to discourage members of the public from using legal practitioners when making a will.
 - The circumstances in which a person enters a binding financial agreement with a current or former partner that could affect their future financial security, and the associated risks, are quite distinct from those that exist when a person makes a will for the distribution of their estate after death.

Incorporate rule 10.1 into legislation

- 7.53 An idea that the Commission put forward in the consultation paper on executors was to incorporate rule 10.1 into the *Wills Act 1997* (Vic).⁵¹ By appearing in legislation that any legal practitioner seeking information about the requirements for preparing a valid will would consult, it would be more likely to be noticed and followed. Elevating the requirement to a statutory duty would also reinforce the need to seek the will-maker's consent.
- 7.54 Mixed views were expressed in submissions that commented on this idea. Some supported it,⁵² some opposed any statutory duty⁵³ and some suggested modifying the rule.⁵⁴ Reasons given for supporting the idea were that it would create a general rule rather than applying only to legal practitioners,⁵⁵ and that the current failure of practitioners to comply with the rule shows that it is not well known and its force is not sufficiently felt.⁵⁶

47 Consultations 3 (Legal practitioners in the Goulburn Valley region); 7 (Law Institute of Victoria Wills & Estates Discussion Group).

48 *Family Law Act 1975* (Cth) ss 90G(b)–(c).

49 Consultation 7 (Law Institute of Victoria Wills & Estates Discussion Group).

50 Consultation 18 (Legal practitioners in Wodonga).

51 Victorian Law Reform Commission, above n 33, 34–5.

52 Submissions 8 (Patricia Strachan); 14 (Commercial Bar Association); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 40 (Janice Brownfoot).

53 Submissions 22 (Paul Bravender-Coyle); 30a (Law Institute of Victoria); 32 (The Institute of Legal Executives); 42a (Arnold Bloch Leibler).

54 Submissions 32 (The Institute of Legal Executives); 33 (State Trustees Limited); 39 (Carolyn Sparke SC).

55 Submission 14 (Commercial Bar Association).

56 Submission 25 (Moores Legal).

- 7.55 The idea was opposed by those who argued that compliance with professional rules is sufficient (even if rule 10.1 needs to be modified)⁵⁷ or that the common law should apply.⁵⁸ The Law Institute of Victoria maintained that rules can be more easily changed than legislative provisions when new problems are identified.⁵⁹
- 7.56 The Commission does not support the incorporation of rule 10.1 into legislation. Although there would be benefits in giving statutory recognition to the need to obtain the will-maker's informed consent, complying with rule 10.1 does not ensure that the will-maker's informed consent is obtained.
- 7.57 Rule 10.1 merely requires the legal practitioner to draw the client's attention to what the will states. The client is notified about commission and legal costs that the practitioner, law practice or associate will charge the estate under the terms of the will, and the fact that the client could appoint as executor someone who might not claim commission. The wording of the rule does not suggest that the procedure is more than a formality; that it is in aid of gaining the consent on which the entitlement to be paid from the estate is based.
- 7.58 The limitations of rule 10.1 are illustrated in *Szmulewicz v Recht*.⁶⁰ In that case, Justice Habersberger found that the legal practitioner who drafted a will failed to fully disclose all relevant facts about a commission clause to the will-maker. The will-maker should have been given more details than required by rule 10.1, including that:
- the executors had no automatic right to receive commission, so the will-maker did not have to include the clause
 - in the absence of the clause, the executors could still apply under section 65 of the Administration and Probate Act and be allowed commission not exceeding five per cent for their 'pains and trouble as is just and reasonable'
 - including the commission clause entitled the executors to receive 3.5 per cent of capital and five per cent of income irrespective of the amount of work performed by them in the administration of the estate and without any independent scrutiny, such as by the Supreme Court under section 65
 - including the commission clause meant that the beneficiaries would be unable to challenge the level of remuneration or subject it to independent scrutiny, such as by the Supreme Court under section 65
 - the rates included in the clause were those decided by the solicitor and accountant who were nominated as executors; they were not fixed by law and thus could ultimately be reduced by the will-maker.⁶¹
- 7.59 The Commission considers that rule 10.1 should be revised to align with the standards now required by the Court. Currently, any decision to amend rule 10.1 to overcome its limitations is a matter for the Law Institute of Victoria. An almost identical rule appears in professional conduct and practice rules made by the Law Society of New South Wales⁶² and, as noted in [7.30], the Australian Solicitors' Conduct Rules prepared by the Law Council of Australia. All three professional associations may well be involved in preparing uniform conduct rules under the proposed uniform law.
- 7.60 The introduction of the uniform rules provides an opportunity for the profession to revise the rule in all its forms. It should be amended to ensure that a legal practitioner preparing a will that includes commission and charging clauses complies with their fiduciary duty to obtain the will-maker's informed consent.

57 Submission 32 (The Institute of Legal Executives).

58 Submission 22 (Paul Bravender-Coyle).

59 Submission 30a (Law Institute of Victoria).

60 [2011] VSC 368 (10 August 2011), discussed in Victorian Law Reform Commission, above n 33, 20.

61 *Szmulewicz v Recht* [2011] VSC 368 (10 August 2011) [43]. The legal practitioner in *Szmulewicz* was unaware of the existence of rule 10. However as compliance with professional rules does not necessarily satisfy the fiduciary obligations of a legal practitioner to a client, the decision in *Szmulewicz* did not turn on whether the legal practitioner complied with rule 10: see [39]–[40].

62 Law Society of New South Wales, *Professional Conduct and Practice Rules: Legal Profession Act 1987* (10 June 1994) r 11.1; Law Council of Australia, *Australian Solicitors' Conduct Rules* (June 2011) r 12.4.1.

Recommendation

- 51** The Law Institute of Victoria or other relevant body should revise the conduct and practice rules that apply to legal practitioners who prepare a will or other instrument under which they receive a benefit to expressly require the practitioner to obtain the client's informed consent to the payment of the benefit.

Incorporating a new rule on informed consent into legislation

- 7.61 Rather than giving rule 10.1 in its current form statutory force, a modified version could be incorporated into legislation. It could explicitly require the will-maker's informed consent to any commission or charging clauses that benefit the drafter of the will, and set out the range of details that must be explained to the will-maker, along the lines of the comments made by Justice Habersberger in *Szmulewicz*. This would raise awareness of the need to seek informed consent and overcome the limitations of rule 10.1.
- 7.62 The Commission has concluded, however, that it would be unwise to specify in legislation what the will-maker should be told because the details depend on the circumstances. As the High Court observed in *Maguire v Makaronis*:
- What is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given.⁶³
- 7.63 A provision covering all possible scenarios would be so comprehensive that compliance would introduce unnecessary formality into the process of making a will. In addition, legal practitioners could be tempted to simply give will-makers a page of fine print to read and sign, to create evidence of compliance with the provision rather than ensuring that the client is fully informed about the decision they are being asked to make. Once in legislation, it would be difficult to amend and would constrict the development by the courts of the law around informed consent.
- 7.64 The Commission's preferred solution is to introduce a statutory provision that draws attention to the need to seek the will-maker's informed consent without prescribing what the will-maker needs to be told. What constitutes informed consent will depend on the circumstances of each case, including the nature of the clause in question, the nature of the information given to the will-maker at the time, and such other matters to which the Court would have regard.
- 7.65 The new provision would clarify the obligation while accommodating different circumstances and allowing for the law concerning informed consent to continue to be developed by the courts. In addition, it would amend Victorian legislation in a way that would not cause material inconsistencies with other jurisdictions.
- 7.66 The consultation paper on executors indicated that any such new provision should be in the form of an amendment to the Wills Act, as it is the natural repository of all provisions dealing with the drafting and execution of wills. However, the Commission has come to the view that all rules concerning the payment of commission and other amounts to executors should be co-located in the Administration and Probate Act.

Recommendation

- 52 A new provision should be inserted into the *Administration and Probate Act 1958* (Vic) to the effect that a professional executor is unable to rely on a remuneration or commission clause in a will unless the will-maker gave their informed written consent to the inclusion of the clause, before the will was executed.

The beneficiaries' consent

- 7.67 What the beneficiaries need to know in order to give their informed consent to the payment of commission to an executor also depends on the circumstances. In *Walker v D'Alessandro*, Justice T M Forrest set out the 'bare minimum' that the executor should disclose:
- (a) The work that he has done to justify the commission. This should be done with particularity.
 - (b) If he is invoicing the estate for legal fees and disbursements he ought identify with particularity what constitutes the basis for same. Only then can a beneficiary accurately measure the 'pains and troubles' occasioned to the executor beyond the subject matter of those legal fees and disbursements.
 - (c) That the beneficiaries are entitled to have this Court assess his commission pursuant to s 65 of the [Administration and Probate] Act. This needs to be explained fully.
 - (d) That it is desirable that the beneficiaries seek independent legal advice as to their position on this issue of consent. In many cases where the beneficiaries are unsophisticated people and the issues are complex he ought insist upon them receiving independent legal advice and ought not enter into any commission agreement until they have.⁶⁴
- 7.68 Legal practitioner executors commonly tell beneficiaries that, if they do not agree to the payment of commission, there will be a greater cost to the estate because the executor would then apply to the Supreme Court for authorisation. The cost of the application, which may be \$10,000 or more,⁶⁵ is usually met from the estate. They are also told that, if they give their consent, the estate will be distributed sooner.
- 7.69 As a result, beneficiaries can feel coerced into agreeing to the payment of commission because they fear that otherwise their share of the estate will be depleted by legal costs. In some cases, the commission charged is significantly higher than what the Supreme Court would be likely to authorise.
- 7.70 Sometimes the beneficiaries' consent is not sought at all. For example, where the beneficiaries include charities, executors are known to have drawn a commission from the estate without consent in the expectation that the charitable beneficiaries will not notice.⁶⁶ The executors in these cases are not necessarily legal practitioners, which suggests that any legislative response should apply generally rather than being directed to legal practitioner executors.

⁶⁴ *Walker v D'Alessandro* [2010] VSC 15 (5 February 2010) [30].

⁶⁵ The application is costly because counsel is often briefed and affidavits setting out the executor's 'pains and trouble' in detail are prepared. If the beneficiaries contest the application, the costs escalate further and the estate is at risk of being depleted. One practitioner said that no beneficiary, properly advised, would go to court when they can just pay out the commission: Advisory Committee (Meeting 1). An Associate Judge told the Commission that the costs involved in applying for commission commonly end up as high as the commission itself: consultation 16 (Supreme Court of Victoria—Associate Judges).

⁶⁶ Consultation 2 (Include a Charity, Peter MacCallum Cancer Centre, Heart Foundation Victoria).

- 7.71 The Commission sought submissions on whether the principles in *D'Alessandro* should have a statutory basis.⁶⁷ All but one of the submissions received in response agreed that the common law concerning the minimum information that should be disclosed to beneficiaries when they are being asked to consent to the payment of commission should be in legislation.⁶⁸ The exception was the submission from the Association of Independent Retirees, which suggested that perhaps they should be set out in the Professional Conduct and Practice Rules.⁶⁹
- 7.72 The proposal to provide a statutory basis to the principles in *D'Alessandro* was welcomed because it would set out a clear requirement in legislation that would apply to all executors and could be considered by beneficiaries who are thinking of making a complaint. However, members of the advisory committee cautioned against it. They said that the common law is sufficient and warned that setting out the principles in legislation would create uncertainty for executors about whether an agreement they made with the beneficiaries would subsequently be set aside.⁷⁰
- 7.73 Although it would be convenient to have the principles in legislation, the Commission has decided not to recommend it, for the same reasons that it did not recommend giving statutory backing to the common law requirements when seeking a will-maker's consent to charge for executorial services.⁷¹
- 7.74 However, there would be benefit in introducing a statutory provision that highlights the need to seek the beneficiaries' informed consent. It would apply to all executors and alert them to the requirement while allowing for the common law to continue to develop and avoiding inconsistency with equivalent legislation in other jurisdictions. The general wording should assuage concern that a failure to provide all details as listed in legislation, even if informed consent was given in the circumstances, would be grounds for the agreement to be set aside.

Recommendation

- 53 A new provision should be inserted into the *Administration and Probate Act 1958* (Vic) to the effect that an executor may receive commission from the assets of an estate provided that the executor obtains the fully informed consent of all interested beneficiaries.

Distinguishing between executorial and professional services

The problem

- 7.75 There are widespread concerns about executors 'double dipping' by charging both commission and professional fees for the same services.

67 Victorian Law Reform Commission, above n 33, 36.

68 Submissions 1 (Legal Services Commissioner); 8 (Patricia Strachan); 14 (Commercial Bar Association); 22 (Paul Bravender-Coyle); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 30a (Law Institute of Victoria); 39 (Carolyn Sparke SC).

69 Submission 19 (Association of Independent Retirees).

70 Advisory Committee (Meeting 1).

71 See discussion above at [7.61]–[7.66].

- 7.76 The problem of double dipping was illustrated in *Re the Will and Estate of McClung*,⁷² which concerned an application for commission by joint executors of a will: one a legal practitioner, and the other an accountant. The legal practitioner executor had drafted the will, which contained a widely expressed charging clause that permitted him to charge for executorial as well as legal services. He had provided most of the executorial services, and charged the estate accordingly. Not surprisingly, the Court rejected any claim for commission under section 65 of the Administration and Probate Act. The legal practitioner executor had effectively been paid for executorial services rendered by him. The accountant executor had provided little in the way of executorial services.

Reform proposals

Ability of legal practitioner executors to provide legal services to the estate

- 7.77 The Commission sought submissions on whether legal practitioner executors should be prohibited from providing legal services to the estates they administer.⁷³ The idea was they would be required to instruct another, unrelated, law practice to act for the estate. The other law practice would provide legal services and hold the estate money in its trust account. The proposal would address the problem of double dipping, as it would separate payments for executorial services by the executor from charges for legal services by the other law practice.
- 7.78 Some legal practitioners said during consultations that they thought it would be good practice,⁷⁴ or that they already do it.⁷⁵ However, overwhelming opposition was expressed in submissions for the following reasons:
- This is a matter for the will-maker.⁷⁶
 - It would cost the estate more.⁷⁷
 - It would draw out the process of administering the estate.⁷⁸
 - Trustee companies can provide professional services to the estates they administer.⁷⁹
- 7.79 The Commission is persuaded by these arguments and has concluded that it does not support the proposal.
- 7.80 While maintaining that legal practitioner executors should be able to continue to engage their own firms to provide legal services to the estate, some submissions made suggestions to increase transparency and accountability. These suggestions included:
- requiring the legal practitioner to demonstrate the bases on which the estate is being charged⁸⁰
 - preparing guidelines, including requirements to obtain the consent of the will-maker or beneficiaries to any particular rate of charging (as distinct from rates based on the Professional Remuneration Order or equivalent).⁸¹
- 7.81 Later in this chapter, the Commission makes recommendations about costs disclosure to beneficiaries and the preparation of guidelines that help legal practitioners distinguish between legal and executorial services.⁸²

72 [2006] VSC 209 (9 June 2011).

73 Victorian Law Reform Commission, above n 33, 33.

74 Consultations 4 (Legal practitioners from the Goulburn Valley and Loddon Campaspe Community Legal Centres); 6 (Law Institute of Victoria Succession Law Committee).

75 Consultation 6 (Law Institute of Victoria Succession Law Committee).

76 Submissions 8 (Patricia Strachan); 14 (Commercial Bar Association); 42a (Arnold Bloch Leibler).

77 Submissions 25 (Moores Legal); 26 (Rigby Cooke Lawyers).

78 Submission 26 (Rigby Cooke Lawyers).

79 Submission 30a (Law Institute of Victoria).

80 Submission 32 (The Institute of Legal Executives).

81 Submission 39 (Carolyn Sparke SC).

82 Costs disclosure is discussed at [7.95]–[7.103]. The need for new professional rules and guidelines is discussed at [7.189]–[7.192].

A policy of declining to act as executor

7.82 In *McClung*, Master Evans said:

Given the very real potential for a conflict arising between the interests of the client and the interests of the solicitor on such an occasion, it would be preferable that solicitors declined to act as executors.⁸³

7.83 Many practitioners told the Commission during consultations that the policy of their firm was not to agree to be appointed as executor other than in exceptional circumstances and that they consider this best practice in view of their fiduciary duties.⁸⁴ Retired legal practitioner Patricia Strachan observed in her submission:

I always told clients point blank that I preferred not to be appointed an executor and that I would not allow them to leave me anything in their will. Only once I agreed to accept a legacy (\$1,000) on the insistence of a client, a secretary of another solicitor at the firm.⁸⁵

7.84 It was also pointed out that there may be few options for referral.⁸⁶ One practitioner said that he would prefer to take on the role of executor for a client who had no other friends or family to nominate, rather than refer the client to an institutional executor such as State Trustees.⁸⁷ Another observed that a legal practitioner would be likely to charge a longstanding client a commission that is far less than the amount a trustee company would charge.⁸⁸ Other reasons put forward for not impeding the appointment of legal practitioners as executors included:

- they are more highly regulated than accountants and other professionals⁸⁹
- they are likely to be careful to draft a will that avoids problems when administering the estate later on⁹⁰
- will-makers want to use local lawyers who know their family and financial affairs⁹¹
- will-makers who have experienced or observed family provision claims tear families apart feel it is undesirable to appoint a relative as executor.⁹²

7.85 In its submission, the Law Institute of Victoria summarised the circumstances in which it is appropriate or desirable to appoint a legal practitioner as executor:

1. Where the legal practitioner has particular knowledge of the testator's family or business affairs gained over (many) years of dealing that would be demonstrably difficult for a third party to pick-up by reading of the estate papers. For example, this may be the case with disabled children or other dependants, with family owned farms and businesses and with assets held in several jurisdictions;
2. Where the estate is likely to be subject to Part IV (Family Provision) or other litigation and it would be inappropriate to set one part of the family up as defendants against the others as plaintiffs;

83 *Re the Will and Estate of McClung* [2006] VSC 209 (9 June 2011) [36] (Master Evans).

84 Consultations 3 (Legal practitioners in the Goulburn Valley region); 18 (Legal practitioners in Wodonga).

85 Submission 8 (Patricia Strachan).

86 Consultations 7 (Law Institute of Victoria Wills & Estates Discussion Group); 20 (Legal practitioners in Colac).

87 Consultation 3 (Legal practitioners in the Goulburn Valley region).

88 Consultation 7 (Law Institute of Victoria Wills & Estates Discussion Group). However, the Financial Services Council pointed out during informal discussions in 2012 that legal practitioner executors sometimes charge more than trustee companies.

89 Consultation 7 (Law Institute of Victoria Wills & Estates Discussion Group).

90 Consultation 20 (Legal practitioners in Colac).

91 *Ibid.*

92 Consultation 7 (Law Institute of Victoria Wills & Estates Discussion Group).

3. Where the terms of the trusts of the will are complex and require the skills of a legal practitioner competent in trust law and administration to be the executor;
4. Where the will-maker has no family or friends in Australia; and
5. Where a will-maker does not reside in Australia and makes a will in an Australian jurisdiction regarding assets in Australia.⁹³

7.86 Although not all of these situations present an equally compelling reason to appoint a legal practitioner as executor, the Commission agrees that there is a public interest in legal practitioners continuing to be able to provide executorial services for their clients. That said, it is all the more reason why the provision of executorial services should be squarely recognised as a function that law practices perform and brought within the regulatory framework of the legal profession. The need for regulatory reform is discussed later in this chapter.⁹⁴

The need for legal practitioner education

- 7.87 The Law Institute of Victoria's cost lawyers have observed that legal practitioner executors need to be better educated about when they can charge commission, and particularly the need to obtain informed consent. Instances where the practitioner simply misunderstands the requirements far outnumber those of fraudulent behaviour.⁹⁵
- 7.88 According to a legal practitioner, a particular problem with legal practitioners acting as executors is that many of those who take on the role are inexperienced. Many experienced practitioners will not do it.⁹⁶ Another problem is that, although drafting wills is one of the more difficult tasks that a lawyer undertakes, the legal profession reportedly has a general disregard for it and sees it as work to be given to less experienced and junior staff. This attitude and the resulting poor drafting lead to impractical and invalid wills. Promoting integrity in the drafting process prevents serious problems later.⁹⁷
- 7.89 These observations are consistent with comments made at a roundtable convened by the Legal Services Commissioner in 2010 in response to the high number of complaints being made about probate and estate matters.⁹⁸ Representatives of the judiciary, the legal profession, consumer advocacy groups and service organisations attended. It emerged from the discussion that there is a generally poor understanding among legal practitioners of:
- the costs they can legitimately charge when acting as executor
 - whether they can charge commission for their executorial duties
 - the fact that they cannot charge both legal fees and commission for the same work
 - the fact that a clause in a will that authorises them to charge for legal work does not give them an automatic right to claim commission for meeting their responsibilities as executor.⁹⁹

93 Submission 30a (Law Institute of Victoria).

94 See [7.163]–[7.192] below.

95 Discussion with Roger Walton, Law Institute of Victoria Cost Lawyer, 6 June 2013.

96 Consultation 3 (Legal practitioners in the Goulburn Valley region).

97 Consultation 4 (Legal practitioners from the Goulburn Valley and Loddon Campaspe Community Legal Centres).

98 In the 2010–11 and 2011–12 financial years, probate and estate matters represented 10% of all complaints received: submission 45 (Legal Services Commissioner).

99 Legal Services Commissioner, Summary of the 2010 Succession Law Round Table Convened by the Legal Services Commission of Victoria (22 August 2010) 17 <<http://www.lsc.vic.gov.au/forms-and-publications/reports/>>.

- 7.90 Following the roundtable, the Legal Services Commissioner identified and committed to a number of activities arising from the discussion that would either directly or indirectly improve the knowledge and skills of legal practitioners about executorial duties they may perform. They included educating the profession about:
- the issues which commonly arise in succession law matters that can have an impact on the lawyer-client relationship, for example client emotions, family disputes, client expectations and delays
 - the importance of providing clear and detailed information about legal costs
 - avoiding potential problem areas when drafting wills
 - working with professional associations to encourage lawyers involved in will-drafting to attend regular training in succession law
 - the problems and complexities involved in solicitors acting as executors of a will, and the rules and obligations associated with charging executorial fees and commission.¹⁰⁰
- 7.91 The Legal Services Commissioner directly engages approximately 1000 lawyers per year via seminars, presentations and workshops, and the insights gained at the roundtable have informed the Commissioner's education function generally.
- 7.92 Talks, consultations, seminars and workshops have addressed issues relating to probate, wills and estates, and staff of the office have informed practitioners and consumers about issues that commonly arise. Outreach and education visits have also raised issues identified by the roundtable. They have included visits to community legal centres, law practices and community organisations. In addition, information has been published on the Legal Services Commissioner's website.
- 7.93 Many firms do not provide executorial services or provide them only occasionally. It is therefore essential that legal practitioners have ready access to information about charging for executorial services and know the importance of consulting it in order to avoid breaching their duty to the beneficiaries. Educational activities in this area of the law should be continually available and widely promoted.
- 7.94 The Commission has no evidence to suggest that a change is needed to the approach being taken by the Legal Services Commissioner and would support this function being strengthened under the new uniform law.

Information given to beneficiaries

The problem

- 7.95 The Legal Services Commissioner has commented that, in many complaints about legal practitioner executors, there has been a lack of transparency and accountability to beneficiaries.¹⁰¹ *D'Alessandro* and other cases where an executor's claim for commission has been challenged also illustrate the need for good communication between executors and beneficiaries.¹⁰²
- 7.96 Beneficiaries are reliant on a person that they did not select for the position, so the executor cannot expect to be trusted or continue to be trusted without maintaining an effective flow of communication. A particular problem identified in consultations arises where the beneficiaries perceive overcharging.¹⁰³ The Commission was told that even if there is a charging or commission clause in the will, an absence of communication on the method of charging can create tensions with beneficiaries.¹⁰⁴

100

Ibid.

101 Submission 1 (Legal Services Commissioner).

102 For example: *Re Estate of Zsuzanna Gray* [2011] VSC 173 (30 April 2010); *Szmulewicz v Recht* [2011] VSC 368 (10 August 2011).

103 Consultation 20 (Legal practitioners in Colac).

104 Submission 22 (Paul Bravender-Coyle).

Reform proposals

Costs disclosure

- 7.97 Law practices are required by section 3.4.9 of the Legal Profession Act to disclose their costs to their clients, including—among other things—the basis on which they are calculated and either an estimate of the likely costs or the range of estimated costs. They must also inform clients about the avenues of dispute resolution available to them. Accordingly, a legal practitioner must disclose details of this type to an executor to whom they provide legal services.
- 7.98 When the legal practitioner is also the executor, the disclosure requirement is ineffective. There is no equivalent obligation to make full costs disclosure to beneficiaries before the administration of the estate is completed¹⁰⁵ or inform them about what they can do in the event of a dispute.
- 7.99 The Commission sought submissions on whether legal practitioner executors should be required to disclose to beneficiaries the basis on which they will charge the estate for their executorial and legal work.¹⁰⁶ All responses expressed support for the idea.¹⁰⁷
- 7.100 Reasons given for introducing costs disclosure included:
- It is a way of discouraging legal practitioner executors from claiming they are entitled by law to charge a commission of five per cent.¹⁰⁸
 - It creates transparency and takes the pressure off the executor. Beneficiaries will be less likely to suspect dishonest practice and applications for review will be less likely.¹⁰⁹
 - State Trustees and licensed trustees are subject to separate statutory regimes in respect of their remuneration.¹¹⁰
- 7.101 The Law Institute of Victoria considers it good practice for legal practitioners to provide cost disclosure to beneficiaries and would support reintroduction of a requirement to make costs disclosure under Part 3.4 of the Legal Profession Act.¹¹¹ It proposed in its submission that:
- Costs disclosure should be required to beneficiaries only where the legal practitioner is the sole executor. Where the legal practitioner is one of two or more executors, costs disclosure is likely to be required to the other executor in any event under the existing provisions.¹¹²
 - Costs disclosure should be required only to residuary beneficiaries, as they will be the only beneficiaries affected by legal costs. In some situations, the residuary beneficiaries will be minors or not legally competent for another reason and will be yet to be ascertained, in which case it will not be possible to provide costs disclosure.¹¹³
- 7.102 Moores Legal commented that it would assist to have a standard form.¹¹⁴
- 7.103 The Commission agrees with these suggestions and considers that many of the costs disclosure provisions in Division 3 of Part 3.4 of the Legal Profession Act concerning disclosure to clients could form the basis of new provisions for disclosure to beneficiaries.

105 On completion of administration, the executor/trustee will be subject to the normal duties imposed by equity, including the duty to account to beneficiaries for all receipts and disbursements.

106 Victorian Law Reform Commission, above n 33, 35.

107 Submissions 1 (Legal Services Commissioner); 8 (Patricia Strachan); 14 (Commercial Bar Association); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 30a (Law Institute of Victoria); 33 (State Trustees Limited); 40 (Janice Brownfoot); 42a (Arnold Bloch Leibler).

108 Submission 8 (Patricia Strachan).

109 Submission 26 (Rigby Cooke Lawyers).

110 Submission 33 (State Trustees Limited).

111 Submission 30a (Law Institute of Victoria).

112 This idea was also proposed by submission 42a (Arnold Bloch Leibler).

113 Submission 30a (Law Institute of Victoria).

114 Submission 25 (Moores Legal).

Recommendations

- 54 Legal practitioner executors should be required to disclose to beneficiaries details about their charges to the estate for executorial and legal services, and associated information, along the lines currently required by section 3.4.9 of the *Legal Profession Act 2004* (Vic) in respect of costs disclosure to clients. In particular:
- (a) Costs disclosure to beneficiaries should be required:
 - (i) as soon as practicable after the law practice or legal practitioner commences in the position of executor
 - (ii) as soon as practicable after the law practice or legal practitioner executor becomes aware of any substantial change to anything included in a disclosure already made to the beneficiary
 - (iii) in plain language, which may be in a language other than English if the beneficiary is more familiar with that language
 - (iv) by spoken word to a beneficiary of legal capacity who is unable to read.
 - (b) Costs disclosure to beneficiaries should not be required:
 - (i) if disclosure in accordance with the obligations currently set out at sections 3.4.9–3.4.18 is made to a co-executor who is not a legal practitioner
 - (ii) to a beneficiary who is not legally competent
 - (iii) to a beneficiary whose entitlement under the will is unaffected by payment from the estate for legal and executorial services.
 - (c) A failure by a law practice to comply with the disclosure requirements should be capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any legal practitioner involved in the failure, as currently applies in respect of disclosure to clients.
- 55 Costs disclosure to beneficiaries about their rights to receive information, seek costs review and make a complaint should be possible by providing a written statement. As is currently permitted in respect of cost disclosure to clients, the written statement should be prepared in accordance with the regulations, and supplemented by fact sheets and documents prepared by the Legal Services Commissioner in consultation with the profession.

Charging a fee rather than commission for executorial services

- 7.104 In response to a proposal by the Legal Services Commissioner,¹¹⁵ the Commission questioned whether legal practitioner executors should no longer have the right to a set percentage of the estate as commission. They would instead charge an hourly rate for executorial work, which may be lower than the rate for legal work. As a consequence, they would only be paid according to the amount of work performed rather than the value of the estate.
- 7.105 None of the responses favoured the idea, and nor does the Commission. It would deny legal practitioner executors a form of remuneration that is available to other executors, and disregard the freedom of will-makers to choose the manner in which they wish to compensate them. The Commission's other recommendations, if implemented, would provide clarity for beneficiaries about the basis on which the estate is charged by legal practitioner executors for executorial and legal services.
- 7.106 The Commission also explored whether legal practitioners should be able to elect to charge a fee for executorial services, rather than claiming commission to which they would otherwise be entitled. Most responses endorsed the idea and the following benefits were identified:
- Commission claimed on the basis of a percentage of the estate or its income can produce outcomes that are cost ineffective in the case of large estates.¹¹⁶
 - It will help to avoid 'double dipping' from the estate.¹¹⁷
 - It would resolve the problem of delineating between legal costs and commission.¹¹⁸
- 7.107 The submission from the Law Institute of Victoria supported the status quo.¹¹⁹ The Association of Independent Retirees agreed with the idea but noted that it would not necessarily reduce the amount claimed.¹²⁰
- 7.108 A number of legal practitioners said that they routinely charge fees for executorial services rather than commission.¹²¹ However, the basis on which the fees are calculated was not always clear. The charges were variously referred to as legal fees and professional fees, even though neither legal nor professional skills may be required in performing executorial tasks. Many executorial tasks are performed by clerical staff rather than by the appointed legal practitioner. Where the law practice for which the executor works also provides legal services, there is even less call on the executor's professional skills:
- Often, virtually all the work is done by the firm. The only work, apart from the minimal work relating to obtaining a grant and signing the transmission application, are attendances on the solicitors of their firm and to read letters from their firm, for which the firm has charged the estate.¹²²
- 7.109 The Commission was told that the *Practitioner Remuneration Order* provides sufficient guidance on how to calculate fees for executorial services.¹²³ The Practitioner Remuneration Order sets out the costs that law practices may charge for legal services other than in relation to litigious matters and is prepared in accordance with section 3.4.22 of the Legal Profession Act.

115 Submission 1 (Legal Services Commissioner).

116 Submission 14 (Commercial Bar Association).

117 Submissions 25 (Moores Legal); 42a (Arnold Bloch Leibler).

118 Consultation 6 (Law Institute of Victoria Succession Law Committee).

119 Submission 30a (Law Institute of Victoria).

120 Submission 19 (Association of Independent Retirees).

121 Consultations 3 (Legal practitioners in the Goulburn Valley region); 7 (Law Institute of Victoria Wills & Estates Discussion Group); 20 (Legal practitioners in Colac).

122 Submission 22 (Paul Bravender-Coyle).

123 Consultation 7 (Law Institute of Victoria Wills & Estates Discussion Group).

- 7.110 Some legal practitioners routinely have the file costed by the Law Institute of Victoria's Cost Lawyers Service, which is a useful way of checking that they have understood the distinction between executorial and legal work.¹²⁴ The Cost Lawyers Service has confirmed that there is adequate scope to charge for executorial activities under the Practitioner Remuneration Order, as the provisions for attendances distinguish between tasks that require the exercise of skill or legal knowledge and those that do not.¹²⁵
- 7.111 The Commission accepts that the Practitioner Remuneration Order can be applied to costing for executorial services but is not confident that it is interpreted consistently. The amount that a legal practitioner may charge in obtaining a grant of representation is prescribed by regulation¹²⁶ and it may be useful for other charges associated with executorial duties to be prescribed in the Practitioner Remuneration Order or in a special order for practitioner executors. Legal practitioners have certainly welcomed the idea of being able to charge a standard rate for executorial services.
- 7.112 On the other hand, the Law Institute of Victoria's Cost Lawyers Service would give priority to ensuring that legal practitioners are better educated about the circumstances in which they may charge for executorial services at all.¹²⁷
- 7.113 This is a matter that will need to be monitored if the Commission's recommendations on costs disclosure are implemented. The requirement to be transparent about costing practices may well create pressure to be clear and simple.
- 7.114 The Commission has concluded that it would be useful for legal practitioners and beneficiaries alike if there were a statutory provision that clearly permitted legal practitioner executors to elect to charge a fee for executorial services instead of claiming commission to which they are otherwise entitled. In formulating a recommendation, the Commission considered and rejected a model provision devised by the National Committee for Uniform Succession Laws to enable a personal representative to renounce commission.¹²⁸ The meaning of the provision is not clear on its face because of the terminology used and it is not easily adapted to Victorian legislation.

Recommendation

- 56 A new provision should be inserted into the *Administration and Probate Act 1958* (Vic) to the effect that, where a will contains a provision authorising a professional executor to charge commission, the professional executor may elect to charge fees for executorial work rather than relying on the provision in the will. The ability to make an election would be subject to conditions, including that the fees:
- (a) do not exceed in total the amount to which the executor would have been entitled if the executor had not made the election
 - (b) are calculated at a rate applicable for work that does not require the executor to use their specialist professional skills
 - (c) are distinguished from any fees charged by the professional executor for professional services
 - (d) where the professional executor is a legal practitioner, are treated as legal costs for the purposes of the rights of the beneficiaries to apply for costs review by the Costs Court and make a civil complaint to the Legal Services Commissioner.

124 Consultation 3 (Legal practitioners in the Goulburn Valley region).

125 Discussion with Roger Walton, Law Institute of Victoria Cost Lawyer, 6 June 2013.

126 Supreme Court (Administration and Probate) Rules 2004 (Vic) r 9.

127 Discussion with Roger Walton, Law Institute of Victoria Cost Lawyer, 6 June 2013.

128 Victorian Law Reform Commission, above n 33, 37.

Court review of costs and commission

Proposed reforms

National Committee for Uniform Succession Laws

- 7.115 The Commission has been asked to review and report on whether a court should have the power to review and vary costs and commission charged by executors. The National Committee for Uniform Succession Laws made a recommendation to this effect in response to concern about legal practitioners drafting wills that give them a more generous commission than a court would:

The issue is not so much a problem where the will provides for the charging of professional fees (and commission is simply allowed by the court), but where the will itself includes a provision setting a rate of commission that is higher than that which the court would be likely to allow in its discretion.¹²⁹

- 7.116 Excessive charging may not always be caused by greed. Estates can change significantly in value between the time a will is prepared and when the will-maker dies. The amount a will-maker expects the executor to receive may be far less (or far more) than the amount that the commission clause in the will eventually provides in practice. The reform proposed by the National Committee would allow review of a windfall gain to the executor that may not be justified by the work involved.¹³⁰

The National Committee's recommendation

- 7.117 The National Committee had initially proposed that an executor would be able to rely on a commission clause in a will only if the will had been approved by the court. The Public Trustee of New South Wales and the New South Wales Law Society responded that it was better to empower the court to review commission and other amounts charged, as provided by section 86A of the *Probate and Administration Act 1898* (NSW), than to require the court's approval in every case.¹³¹
- 7.118 The National Committee came around to this view and decided to include a similar provision in the model uniform legislation it was preparing.¹³² It recommended as follows:

The court's power to review the remuneration of personal representatives and trustees

27-5 Subject to the following modifications, the model legislation should include a provision to the effect of section 86A of the *Probate and Administration Act 1898* (NSW):

- (a) for consistency with Recommendation 27-1, the model provision should refer to 'payment of an amount for services', rather than to 'commission'; and
- (b) to ensure that the court may review and, if necessary, reduce the fees and charges of a public trustee or trustee company that acts as the personal representative or trustee of the estate of a deceased person, the model legislation should provide that the court's power to review may be exercised despite:
 - (i) any provision of a will authorising the charging of the amount; or
 - (ii) any statutory provision authorising the amount charged or proposed to be charged.¹³³

¹²⁹ National Committee for Uniform Succession Laws, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General: Volume 3*, Queensland Law Reform Commission Report No 65 (2009) 53 ('*Administration of Estates: Volume 3*').

¹³⁰ The Commission's recommendation to enable executors to elect to charge a fee rather than commission authorised by the will should make it easier for an appropriate amount to be charged.

¹³¹ National Committee for Uniform Succession Laws, *Administration of Estates: Volume 3*, above n 129, 54.

¹³² National Committee for Uniform Succession Laws, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General: Volume 4*, Queensland Law Reform Commission Report No 65 (2009) Draft Administration of Estates Bill 2009 ('*Administration of Estates: Volume 4*').

¹³³ National Committee for Uniform Succession Laws, *Administration of Estates: Volume 3*, above n 129, 69.

- 7.119 The provision that the National Committee recommended appears as clause 432 of the model legislation.¹³⁴ In accordance with the recommendation, clause 432 is a modification of section 86A of the NSW Probate and Administration Act.
- 7.120 The modifications import concepts and terminology that are not relevant to the Commission's current reference. Clause 432 uses terms that are defined in the model legislation but are different to those used in Victorian law, and it has been drafted to apply to trustee companies, which are now regulated by the Commonwealth.
- 7.121 As there is no need for it to consider the modifications conveyed in clause 432, the Commission has referred back to the original provision at section 86A of the NSW Probate and Administration Act when considering the National Committee's proposal.

Section 86A of the NSW Probate and Administration Act

- 7.122 Section 86A of the NSW Probate and Administration Act provides as follows:

86A Reduction of excessive commission etc

Where the Court is of the opinion that a commission or amount charged or proposed to be charged in respect of any estate, or any part of such commission or amount, is excessive, the Court may, of its own motion, or on the motion of any person interested in the estate, review the commission, amount or part and may, on that review, notwithstanding any provision contained in a will authorising the charging of commission, amount or part, reduce that commission, amount or part.

- 7.123 It has been in force since 1981 and no other jurisdiction has an equivalent provision. However, until recently, the trustee legislation in every state and territory other than Western Australia empowered the court to review commission or fees payable to trustee companies in relation to the administration of estates.¹³⁵

Other proposals

- 7.124 Within Victoria, the Supreme Court's Probate Users Committee and the Law Institute of Victoria have developed separate proposals in recent years to empower the Supreme Court to review and reduce amounts charged by an executor or administrator. Both proposals would insert a new section 65A into the Administration and Probate Act but differ from each other with regard to the scope of the Court's power.¹³⁶
- 7.125 The Commission's consultation paper on executors discussed these proposals and asked whether the Supreme Court of Victoria should have the power to review amounts charged by executors and, if so, what the scope and nature of the power should be.
- 7.126 All submissions received in response to the paper favoured the introduction of a review process, particularly as it would apply to all executors, but they put forward disparate views about the details. The Supreme Court's submission favours adopting the National Committee's model unless there is a demonstrated policy reason to depart from it.¹³⁷

The Commission's approach

- 7.127 The Commission supports in principle reforms that promote national consistency in succession law, and for this reason has given weight to the National Committee's recommendation when assessing reform options. Creating a scheme in Victoria that is distinctly different from the one operating in New South Wales, against the recommendation of the National Committee, would not promote national consistency.

134 National Committee for Uniform Succession Laws, *Administration of Estates: Volume 4*, above n 132, 82.
135 National Committee for Uniform Succession Laws, *Administration of Estates: Volume 3*, above n 129, 62.
136 The proposals are discussed in some detail in Victorian Law Reform Commission, above n 33, 28–31.
137 Submission 37 (Supreme Court of Victoria).

Scope and nature of the review power

Amounts that may be reviewed

- 7.128 Under section 86A of the NSW Probate and Administration Act, the Court can review any amount charged, or proposed to be charged, to an estate. The amount is not confined to commission. The Law Institute of Victoria put forward a proposal under which the Court would be able to review commission only.
- 7.129 Almost all of the submissions that commented on this issue said the Court should have a broad power to review the amounts charged to the estate, including commission, as permitted by section 86A of the NSW Probate and Administration Act.¹³⁸
- 7.130 An issue that arose was whether the Court should be able to review disbursements incurred or claimed by the executor. The Probate Users Committee's proposal expressly referred to disbursements. The reference in section 86A of the NSW Probate and Administration Act to review of 'a commission or amount charged or proposed to be charged' arguably includes amounts claimed against the estate in respect of disbursements. Four submissions expressed concern about the Court having the power to review disbursements. The points made included the following:
- Disbursements are often set by government bodies or third parties beyond the control of an executor and it would be difficult for the Court to determine the reasonableness of such expenses.¹³⁹
 - It could produce punitive outcomes where disbursements incurred in good faith are unable to be recouped from the estate.¹⁴⁰
 - Executors are already subject to a duty to account under section 28 of the Administration and Probate Act, and the Legal Services Commissioner can deal with complaints from beneficiaries about fees and costs charged to the estate.¹⁴¹
- 7.131 In the Commission's view, the Court should have the ability to review all charges to the estate, including disbursements, when determining whether the executor has overcharged for executorial services. It is feasible, for example, that the Court would find that generous disbursements have been paid to a company of which the executor is a director.
- 7.132 An associate judge of the Supreme Court observed during consultations that, when considering claims for commission, it is necessary to 'lift up the lid' on the estate and see what work has actually been carried out.¹⁴² The Commission considers that the same latitude is necessary in order to review whether amounts charged are excessive. Restricting the scope would inhibit review of fee-for-service charges for executorial services, inappropriate charges for legal costs and disbursements, and the identification of double-dipping.

Court-initiated review

- 7.133 A review under section 86A of the NSW Probate and Administration Act can be initiated by either a person interested in the estate or the Court itself. The proposals by the Law Institute of Victoria and the Probate Users Committee allowed a review to be initiated only by an interested person.

138 Submissions 8 (Patricia Strachan); 19 (Association of Independent Retirees); 22 (Paul Bravender-Cole); 25 (Moores Legal); 32 (The Institute of Legal Executives); 36 (Law Society of New South Wales); 37 (Supreme Court of Victoria); 39 (Carolyn Sparke); 40 (Janice Brownfoot).

139 Submission 26 (Rigby Cooke Lawyers).

140 Submission 33 (State Trustees Limited). Submission 14 (Commercial Bar Association) suggested that the Court's power be limited to commission in the first instance unless the applicant for review suggests special circumstances.

141 Submissions 26 (Rigby Cooke Lawyers); 30a (Law Institute of Victoria).

142 Consultation 16 (Supreme Court of Victoria—Associate Judges).

- 7.134 Most submissions on this issue favoured introducing a provision that enables the Court to conduct a review on its own initiative.¹⁴³ The arguments advanced for opposing court-initiated review were that the Court is reluctant to spend time and expertise in passing accounts¹⁴⁴ and that it should not take on the role of a watchdog.¹⁴⁵
- 7.135 The Commission agrees that the Court should not be given a monitoring role. It expects that the Court would initiate a review only where it becomes aware in the course of other, related, proceedings that there are irregularities in the charges made to the estate.
- 7.136 Executors have a duty to present accounts only when required by the Court.¹⁴⁶ Empowering the Court to initiate a review strengthens the effect of the provision as a deterrent against excessive charging. Legal practitioners have acknowledged that, if they know there is a chance they can be held to account by a Supreme Court judge, they might be more prudent in their charging practices.¹⁴⁷ Section 86A of the NSW Probate and Administration is considered to be a prime reason why the Probate Office of the Supreme Court of New South Wales rarely sees evidence of abuse of charging or commission clauses.¹⁴⁸
- 7.137 The Commission sees no harm in the Court having the power to initiate a review; indeed, in certain circumstances positive benefits would flow from the exercise of such jurisdiction. Accordingly, the Commission supports the conferral on the Court of power to review on its own motion.

Exemption

- 7.138 The Law Institute of Victoria proposed that the Court should be unable to conduct a review where either the will-maker obtained independent advice in relation to the executor's entitlement to commission under the will, or the executor is a legal practitioner who complied with rule 10 of the Professional Conduct and Practice Rules.
- 7.139 The suggested exemption aims to ensure that the informed consent of the deceased cannot be overridden by a court. It was endorsed by practitioners who cautioned against retrospectively unravelling arrangements properly made and under which work has been performed.¹⁴⁹ There is concern that legal practitioners will withdraw from providing executorial services because they cannot rely on the agreement made with the will-maker.¹⁵⁰
- 7.140 The Law Institute of Victoria is also concerned that the review provision could be used as a blunt instrument in a broad range of circumstances.¹⁵¹ Legal practitioner executors want to avoid the prospect of being taken to Court unnecessarily.¹⁵²
- 7.141 The Commission notes that section 86A of the NSW Probate and Administration Act is rarely used and expects that the experience in Victoria will be similar.¹⁵³ Although the review provision could weaken the certainty of agreements made between legal practitioners and their clients, the remedial purpose of the proposed reform—to protect beneficiaries when executors draw excessive amounts from the estate—should be overriding.

143 Submissions 8 (Patrician Strachan); 14 (Commercial Bar Association); 19 (Association of Independent Retirees); 22 (Paul Bravender-Coyle); 25 (Moore's Legal); 32 (The Institute of Legal Executives); 36 (Law Society of New South Wales); 37 (Supreme Court of Victoria); 40 (Janice Brownfoot).

144 Submission 30a (Law Institute of Victoria).

145 Submission 26 (Rigby Cooke Lawyers).

146 Administration and Probate Act 1958 (Vic) s 28(1).

147 Consultations 3 (Legal practitioners in the Goulburn Valley region); 18 (Legal practitioners in Wodonga).

148 Consultation 11 (Supreme Court of New South Wales).

149 Consultation 7 (Law Institute of Victoria Wills & Estates Discussion Group).

150 Consultations 7 (Law Institute of Victoria Wills & Estates Discussion Group); 20 (Legal practitioners in Colac). Advisory Committee (Meeting 4).

151 Consultation 6 (Law Institute of Victoria Succession Law Committee).

152 Advisory Committee (Meeting 4).

153 The Commission also notes that the exemption was not supported by the Elder Law and Succession Committee of the Law Society of New South Wales: submission 36.

- 7.142 The Commission considers that it is clearly in the community's interest that the legal profession provides legal and executorial services to estates and continues to do so. However, it has found no evidence of a decline in the provision of such services in New South Wales following the introduction of section 86A in 1981.
- 7.143 Providing an exemption where the will-maker obtained independent advice or the legal practitioner complied with rule 10 would weaken the review provision. As discussed earlier in this chapter, compliance with rule 10.1 does not necessarily mean that the will-maker gave informed consent.¹⁵⁴ Even where informed consent was given, the will-maker may not have anticipated the legal practitioner's subsequent conduct in the office or subsequent changes in circumstances making the agreed provision no longer appropriate.
- 7.144 Almost all submissions on this topic opposed the exemption¹⁵⁵ and the Commission does not support it.

Time limit

- 7.145 Section 86A of the NSW Probate and Administration Act does not impose a time limit. The Law Institute of Victoria proposed that an application under the review provision should be made within three months of the executor notifying the beneficiary of the relevant charges. This would:
- prevent delay in winding up estates
 - prevent a disgruntled beneficiary or group of beneficiaries from using the review provision as a means of delaying distribution of the estate to others, thereby securing concessions for themselves or achieving other ulterior purposes.¹⁵⁶
- 7.146 Submissions on this topic generally favoured the idea of imposing a time limit within which applications would need to be made, though they differed on what that period should be and the circumstances in which extensions of time should be given.¹⁵⁷
- 7.147 The difficulty in imposing a time limit is in determining when the prescribed period should begin. A review provision based on section 86A of the NSW Probate and Administration Act would apply to amounts already charged as well as those proposed to be charged. Those amounts may be commission but could be other charges. Where commission is authorised by the will, the executor need not notify beneficiaries in advance of the payment nor seek their consent, so the circumstances in which the beneficiary learns of the actual or proposed charges will vary. A beneficiary who lives overseas might not be able to monitor the administration of the estate as closely as a local resident and may need time to obtain advice and assistance from a third party.¹⁵⁸ The executor may be a testamentary trustee who charges as a trustee over a different period of time.¹⁵⁹
- 7.148 For the reasons advanced by the Law Institute of Victoria, the Commission considers that it would be sensible to have a time limit and that it should be three months from the time the applicant beneficiary first knew, or ought to have known, of all commission and charges exacted or claimed by the executor out of the estate. The time limit would be subject to any extension of time granted by the Court. Although imposing a time limit would be a departure from section 86A of the NSW Probate and Administration Act, it would not create an inconsistency that would be significant or problematic.

154 See above [7.53]–[7.60].

155 Submissions 8 (Patricia Strachan); 19 (Association of Independent Retirees); 22 (Paul Bravender-Coyle); 25 (Moore's Legal); 36 (Law Society of New South Wales); 37 (Supreme Court of Victoria); 39 (Carolyn Sparke SC); 40 (Janice Brownfoot).

156 Submission 30a (Law Institute of Victoria).

157 Submissions in support: 8 (Patricia Strachan); 14 (Commercial Bar Association); 22 (Paul Bravender-Coyle); 25 (Moore's Legal); 26 (Rigby Cooke Lawyers); 32 (The Institute of Legal Executives); 33 (State Trustees Limited); 36 (Law Society of New South Wales); 40 (Janice Brownfoot). Submission against: submission 19 (Association of Independent Retirees).

158 Submission 40 (Janice Brownfoot).

159 Submission 22 (Paul Bravender-Coyle).

Costs against the applicant

- 7.149 The Law Institute of Victoria proposed that the Court be empowered to order costs against the applicant where the application was made frivolously, vexatiously or with no reasonable prospect of success, as it may already do in family provision matters.¹⁶⁰ The idea was supported by a number of submissions.¹⁶¹
- 7.150 However, the Commission does not recommend any interference with the Court's discretion to order costs in these cases. Clearly, where an unsuccessful claim is brought without proper foundation, costs will follow the event—in other words, the unsuccessful party will pay the costs of the successful executor.

Costs against executor

- 7.151 The Commission considered whether the review provision should provide for the Court to order costs against the executor if the amount is reduced by more than 10 per cent. A similar provision already exists under the Corporations Act when a court reviews the fees charged by a licensed trustee company:
- (5) If the fees are reduced by more than 10%, the trustee company must, unless the Court in special circumstances otherwise orders, pay the costs of the review.
 - (6) Subject to subsection (5), all questions of costs of the review are in the discretion of the court.¹⁶²
- 7.152 There was some support for the idea that the Court should award costs against an executor who has charged an excessive amount.¹⁶³ Rigby Cooke Lawyers observed that:
- An order in the form of a penalty would serve as a reminder that executors must not breach their fiduciary duties for personal gain.¹⁶⁴
- 7.153 However, most of the submissions that expressed support did so on the basis that the Court would have a discretion. They did not envisage that the Court would be *required* to make a costs order against the executor in these circumstances.¹⁶⁵
- 7.154 The submissions that opposed the idea also indicated that the Court's discretion should not be limited.¹⁶⁶ Moores Legal pointed out that:
- Each application should be assessed on its own merits. The court, which will already be reviewing the matter anyway, is capable of making this specific assessment.¹⁶⁷
- 7.155 The Commission has concluded that the Court should retain the discretion to make a costs order on the facts. Although it is possible that requiring the Court to make an order against the executor in certain circumstances would have a deterrent effect, the Commission expects that the introduction of the review provision itself will have this effect.

Trustee companies

- 7.156 The National Committee for Uniform Succession Laws proposed that the court's power to review fees and charges for executorial services should apply to all executors, administrators and trustees.¹⁶⁸ The provision in the model legislation for court review of commission and other amounts was intended to extend to trustee companies as well.

160 *Administration and Probate Act 1958* (Vic) s 97(7).

161 Submissions 19 (Association of Independent Retirees); 25 (Moores Legal); 26 (Rigby Cooke Lawyers); 33 (State Trustees Limited).

162 *Corporations Act 2001* (Cth) ss 601TEA(5)–(6).

163 Submissions 19 (Association of Independent Retirees); 26 (Rigby Cooke Lawyers); 32 (The Institute of Legal Executives).

164 Submission 26 (Rigby Cooke Lawyers).

165 Submissions 26 (Rigby Cooke Lawyers); 32 (The Institute of Legal Executives). Submission 19 (Association of Independent Retirees) expressed support but made no further comment.

166 Submissions 8 (Patricia Strachan); 14 (Commercial Bar Association); 25 (Moores Legal); 30a (Law Institute of Victoria); 33 (State Trustees Limited).

167 Submission 25 (Moores Legal).

168 National Committee for Uniform Succession Laws, *Administration of Estates: Volume 3*, above n 129, 66.

- 7.157 Accordingly, the Commission considered whether a review provision introduced in Victoria in response to the National Committee's recommendation should apply to amounts charged by State Trustees.¹⁶⁹
- 7.158 The Supreme Court already has a power to review commission charged by State Trustees. Under section 21(3) of the *Trustee Companies Act 1984* (Vic) the Court was once able to review and reduce commission charged by any trustee company. Although section 21(3) and many other provisions of the Trustee Companies Act were repealed when trustee companies became subject to Commonwealth regulation, it continues to apply to State Trustees.¹⁷⁰
- 7.159 The Court's present power to review amounts charged by State Trustees is narrower than the power it would have under a provision based on section 86A of the NSW Probate and Administration Act. Under its present power, the Court cannot initiate a review of commission charged by State Trustees, and it cannot review other amounts.
- 7.160 Almost every submission on this topic said that the new provision for court review of commission and other amounts should also apply to amounts charged by State Trustees.¹⁷¹ The State Trustees submission argued that the rules which regulate the remuneration it receives for executorial services should be consistent with those that apply to private trustee companies.¹⁷²
- 7.161 Private trustee companies now operate under a far different regulatory regime and their charging practices are regulated by Part 5D.3 of the Corporations Act. State Trustees is seeking legislative reform that will put it on an equal footing with licensed trustee companies.
- 7.162 Meanwhile, State Trustees' entitlement to charge commission, and the Court's power to review it, is in legislation that for all other purposes is repealed. This is unsatisfactory. Clearly, the regulation of State Trustees needs to be comprehensively reassessed. Any decision to change the Supreme Court's current power to review commission charged by State Trustees should be made in the context of more detailed reform of the law governing State Trustees' position in the market. For this reason, the Commission does not recommend that the new provision for Court review of commission and other charges should apply to State Trustees.

Recommendation

- 57 The Supreme Court should have the power to review and vary commission, charges and disbursements claimed by executors and administrators out of estates. A new provision of the *Administration and Probate Act 1958* (Vic), based on section 86A of the *Probate and Administration Act 1898* (NSW), should provide that:
- (a) the court may review all or part of a commission or amount charged or proposed to be charged in respect of any estate
 - (b) if it finds it is excessive, the court may reduce it even if it was authorised by a provision in the will
 - (c) subject to any extension of time granted by the court, an application granted by this provision should be brought within three months after the time that the applicant beneficiary first knew, or ought to have known, of all commission, charges and disbursements charged or proposed to be charged out of the estate.

169 Victorian Law Reform Commission, above n 33, 32.

170 *State Trustees (State Owned Company) Act 1994* (Vic) s 20A.

171 Submissions 8 (Patricia Strachan); 14 (Commercial Bar Association); 19 (Association of Independent Retirees); 25 (Moores Legal); 30a (Law Institute of Victoria); 32 (The Institute of Legal Executives); 36 (Law Society of New South Wales); 40 (Janice Brownfoot).

172 Submission 33 (State Trustees Limited).

Other regulatory reform

Legal Services Commissioner

Disputes about amounts charged for executorial services

- 7.163 While the prospect of review by the Supreme Court may act as a deterrent for legal practitioners who might be tempted to charge excessive amounts of commission, the cost of the proceedings may deter beneficiaries of small estates from challenging an unreasonable charge or payment.
- 7.164 Beneficiaries presently hesitate in refusing requests by executors to be paid commission because of the cost to the estate if the executor instead applied to the Court. Retired legal practitioner Patricia Strachan gave the following example in her submission:
- I was consulted by a widowed pensioner, one of a large number of residuary beneficiaries in a large Victorian estate. The solicitor-executor had sent them all copies of his firm's bill of costs and a draft statement of administration and distribution, showing himself as receiving a 5% commission. In his covering letter, he stated that he was entitled by law to receive a commission of 5% and asked each to sign and return a form of consent. My client's share was less than the executor proposed to pay himself by way of commission, but she couldn't afford to apply to the Court. I felt like crying with her but instead I phoned the Law Institute's costs consultant, John Ahern, and we talked about costs. The upshot was that I beat the executor down to a commission of 1.5%.¹⁷³
- 7.165 It is reasonable to expect that, particularly when disputing how much has been charged to a small estate, the beneficiaries will often not be able to afford Supreme Court proceedings.
- 7.166 For this reason, the Commission considers that the Legal Services Commissioner should be empowered to resolve disputes about amounts charged for executorial services by legal practitioner executors, where the amount charged does not exceed \$25,000, in the same way that disputes in relation to legal costs not exceeding \$25,000 can be resolved.
- 7.167 In view of the high cost of housing in Victoria, the value of an estate comprising a family home and modest savings will increasingly be likely to reach one million dollars. The amount of \$25,000, or 2.5 per cent of an estate of that value, is a reasonable ceiling for disputes within the Legal Services Commissioner's jurisdiction.
- 7.168 The Commission proposes that a dispute about amounts charged for executorial services should be a civil dispute under the Legal Profession Act. A civil dispute includes a dispute about legal costs that do not exceed \$25,000. The parties to a costs dispute can be a law practice or legal practitioner and a beneficiary under a will.¹⁷⁴ If the Legal Services Commissioner is unable to resolve the dispute, the parties can apply to VCAT for arbitration. The same process would apply to disputes about amounts charged to an estate for executorial services.
- 7.169 The time limit within which a costs dispute may be made is 60 days after the legal costs were payable.¹⁷⁵ As a dispute about amounts charged for executorial services may form part of a dispute about legal costs, the time limits for both types of dispute should be similar. The Legal Services Commissioner has the discretion to accept complaints involving a costs dispute up to four months after the time limit has expired.¹⁷⁶ This discretion should extend to complaints involving a dispute about amounts charged for executorial services.
- 7.170 To avoid forum shopping, the option of making a complaint about an amount charged for executorial services to the Legal Services Commissioner should be offered as an alternative to seeking review by the Court.

173 Submission 8 (Patricia Strachan).

174 *Legal Profession Act 2004* (Vic) s 4.2.2(2)(ii).

175 *Ibid* s 4.2.7(2).

176 *Ibid* s 4.2.7(4).

Recommendation

- 58 The Legal Services Commissioner should be given jurisdiction to resolve a dispute between a legal practitioner and a beneficiary under a will about an amount charged to an estate for executorial services, where the disputed amount does not exceed \$25,000. The procedures for resolving such a dispute would be essentially the same as those that currently apply to civil disputes under Part 4.2 of the *Legal Profession Act 2004* (Vic) and would specify that:
- (a) a complaint that involves a dispute about an amount charged for executorial services must be made within 60 days after the time that the applicant beneficiary first knew, or ought to have known, of the amount charged or proposed to be charged
 - (b) the Legal Services Commissioner has discretion to provide more time as currently permitted by section 4.2.7(4) of the *Legal Profession Act 2004* (Vic) for complaints that involve a dispute about legal costs
 - (c) a beneficiary who makes a complaint to the Legal Services Commissioner that involves a dispute about an amount charged for executorial services may not apply for review by the court.

Disputes about the conduct of legal practitioner executors

- 7.171 Many complaints received by the Legal Services Commissioner relate to the conduct of a legal practitioner as an executor, as distinct from their conduct as a legal practitioner, and are effectively outside the Commissioner's jurisdiction. The demarcation is determined by the distinction that is made between the work of a legal practitioner and that of an executor.¹⁷⁷
- 7.172 A beneficiary may make a disciplinary complaint about a legal practitioner executor who contravenes the Professional Conduct and Practice Rules, or a civil complaint about a legal costs dispute. However, a beneficiary cannot otherwise make a complaint about the provision of executorial services by a legal practitioner.
- 7.173 Despite this, the Legal Services Commissioner does attempt to resolve some of the complaints that fall outside the Commissioner's jurisdiction:
- An example of such a complaint would involve the timing and sale of assets. Unless the conduct is sufficiently bad to amount to misconduct outside the practice of law, such as involving dishonesty or a serious conflict of interest, the [Legal Services Commissioner] would generally not be able to investigate it but would try to resolve any issue. If resolution fails the [Legal Services Commissioner] would recommend complainants seek further legal advice.¹⁷⁸
- 7.174 From the perspective of providing a regulatory framework that protects consumers and provides redress against legal practitioners who do not meet professional and ethical standards, the distinction is neither clear nor helpful. As noted above, it is not always apparent to the legal practitioner.¹⁷⁹ Clients and beneficiaries do not always perceive it either, or accept it as useful.¹⁸⁰
- 7.175 It is difficult to reconcile the fact that legal practitioners are appointed as executors because of their legal skills, and the fact that a dispute about their conduct as executors may not be able to be raised with the Legal Services Commissioner.

177 Submission 1 (Legal Services Commissioner).
 178 Legal Services Commissioner, above n 99, 15.
 179 See discussion above at [7.87]–[7.94].
 180 Submission 3 (Diarmuid Hannigan).

- 7.176 The Commission notes that beneficiaries can apply to the Supreme Court to have an executor removed if they refuse to act, are unfit to act, or are incapable of acting in the role.¹⁸¹ A legal practitioner executor whose conduct would cause removal by the Court may have contravened the Professional Conduct and Practice Rules.
- 7.177 It was observed at the Legal Services Commissioner's roundtable in 2010 that the emotional distress experienced by bereaved relatives can lead to and inflame conflicts with the legal practitioner acting for the estate.¹⁸² This is reason to provide an avenue for genuine disputes to be mediated before positions become entrenched and legal action is initiated. As the Legal Services Commissioner already attempts to do this, the extension of jurisdiction would underpin existing practice to some extent.
- 7.178 The Commission considers that beneficiaries should be able to make a civil complaint about a civil dispute concerning the provision of executorial services by a legal practitioner. The types of disputes, akin to those currently defined at sections 4.4.2(2)(b) and 4.4.2(2)(c), would include:
- a claim that the beneficiary has suffered pecuniary losses as a result of an act or omission by a legal practitioner in the provision of services to the estate in the position of executor
 - any other genuine dispute between a beneficiary and a legal practitioner arising out of, or in relation to, the provision of services to the estate by the practitioner in the position of executor.

Recommendation

- 59 The Legal Services Commissioner should be given jurisdiction to resolve a civil dispute between a legal practitioner and a beneficiary under a will or trust where the dispute relates to services provided by the legal practitioner to the estate in the capacity of executor or trustee. The procedures for resolving such a dispute would be the same as those which currently apply to civil disputes under Part 4.2 of the *Legal Profession Act 2004* (Vic).

Costs review by the Costs Court

- 7.179 Section 3.4.38 of the Legal Profession Act allows for clients of legal services to apply to the Costs Court for a review of legal costs. Thus, a layperson executor who disputes a practitioner's bill for services provided in connection with administering the estate can seek to have it reviewed.
- 7.180 When the executor is a legal practitioner who draws money from the estate for their legal costs, the client is the estate and there is no scope for review under section 3.4.38. A beneficiary cannot seek a review because they do not fall within the definition of 'client' for the purposes of the section.¹⁸³
- 7.181 This has not always been the case. Until 2007, the definition of client encompassed a beneficiary whose gift under a will is diminished by legal costs payable by an executor out of the estate. It included:
- a person interested in any property out of which a trustee, executor or administrator who is liable to pay legal costs has paid, or is entitled to pay, those costs.¹⁸⁴

181 *Administration and Probate Act 1958* (Vic) s 34(1)(c).
182 Legal Services Commissioner, above n 99, 7.
183 *Legal Profession Act 2004* (Vic) s 3.4.38(10).
184 *Legal Profession Act 2004* (Vic) s 3.4.38(6)(f), as passed.

- 7.182 The definition was changed when the Legal Profession Act was amended to align with national model rules for regulation of the legal profession and improve consumer access to avenues for resolving costs disputes.¹⁸⁵ Significantly, the amendments opened up the review process to ‘third party payers’ as well as to clients. A third party payer is someone who is liable to pay the legal costs but is not themselves a client of the law practice.¹⁸⁶ A beneficiary under a will is not a third party payer because they are not liable to pay the legal costs of the estate.
- 7.183 However, the modifications to the costs review provisions to allow third party payers to apply shortened the definition of client with the effect that it no longer includes beneficiaries.
- 7.184 The removal of the right of beneficiaries to apply for a review may have been an unintended consequence of aligning the Victorian legislation with the national model. It was not mentioned during parliamentary debate on the amending legislation nor in the explanatory memorandum. Comments on these provisions focused on the changes that would extend consumer protection to third party payers; there was no reference to limiting the existing definition of client.
- 7.185 Moreover, there has been no change to the right of beneficiaries to make a complaint to the Legal Services Commissioner about a costs dispute concerning legal services if the disputed amount is \$25,000 or less. If Parliament had intended to remove the ability of beneficiaries to seek redress over disputed legal costs paid from the estate, it is fair to assume that this avenue of complaint would have been closed as well.
- 7.186 Removal of their right to seek costs review also narrowed the scope for beneficiaries to draw the regulator’s attention to unprofessional behaviour. If the Costs Court considers during a costs review that the legal costs charged are excessive, or that there are other indications of unsatisfactory professional conduct or professional misconduct, it must refer the matter to the Legal Services Commissioner to consider whether disciplinary action should be taken.¹⁸⁷
- 7.187 The Legal Services Commissioner would not object to reinstating the former definition of client to the extent that it encompassed beneficiaries, for the purposes of the costs review provisions.¹⁸⁸
- 7.188 It is essential that beneficiaries are able to seek review of legal costs charged to the estate by legal practitioner executors. Legal practitioner executors should be answerable if there is reason to believe that their personal interests have taken precedence over their duty to the beneficiaries.

Recommendation

- 60** Review of legal costs by the Costs Court, as currently made available to clients and third party payers by section 3.4.38 of the *Legal Profession Act 2004* (Vic), should once again be made available to a person interested in any property out of which a legal practitioner executor, administrator or trustee may recover legal costs.

¹⁸⁵ *Legal Profession Amendment Act 2007* (Vic).

¹⁸⁶ *Legal Profession Act 2004* (Vic) s 3.4.38(10). The examples given by the Attorney-General when introducing the amending legislation to Parliament included borrowers who are required to pay the legal costs of the lender in the preparation of mortgage documents, and parents who pay the legal fees in a matter for which their child is the client of the law practice: Victoria, *Parliamentary Debates*, Legislative Assembly, 28 February 2007, 561 (Rob Hulls).

¹⁸⁷ *Legal Profession Act 2004* (Vic) s 3.4.46

¹⁸⁸ Consultation 21 (Legal Services Commissioner).

Professional rules and guidelines

- 7.189 As noted above, the Law Institute of Victoria's submission emphasises why it is necessary and desirable that legal practitioners are appointed as executors.¹⁸⁹ The knowledge and skills of a legal practitioner equip them well for executorial responsibilities. They are selected for the position because of these professional capabilities. It is therefore incongruous that executorial work is sidelined in the regulatory framework of the legal profession.
- 7.190 The Commission's recommendations to expand the Legal Services Commissioner's jurisdiction aim to recognise the importance to the community of the work undertaken by legal practitioner executors. This work should also be recognised in the conduct rules and guidelines made by the legal profession.
- 7.191 The Commission has recommended above that rule 10 of the current Professional Conduct and Practice rules should be revised to expressly require the legal practitioner to obtain the will-maker's informed consent.¹⁹⁰ A number of other suggestions for amending the Professional Conduct and Practice Rules were made in submissions, including for example:
- additional, more detailed rules for when a will-maker is being asked to consent to the payment of commission¹⁹¹
 - a rule that, unless expressly authorised to do so, a solicitor-executor cannot charge both legal costs and commission for the same work.¹⁹²
- 7.192 Rather than responding to such ideas in a piecemeal way, the legal profession's conduct rules should squarely address the conduct expected of legal practitioner executors and provide guidance on how to comply with their duties. These rules should be supported by guidelines that assist them in dealing with the challenges of the position.

Recommendation

- 61 The Law Institute of Victoria or other relevant body should make:
- (a) uniform rules under the new uniform law that clarify the duties of legal practitioners in providing executorial services and charging for those services
 - (b) in support of these rules, guidelines for legal practitioner executors on meeting their fiduciary responsibilities.

189 Submission 30a (Law Institute of Victoria), discussed at [7.85].
190 Recommendation 51, at [7.60].
191 Submissions 25 (Moore's Legal); 39 (Carolyn Sparke SC); 40 (Janice Brownfoot).
192 Submission 39 (Carolyn Sparke SC).

Community education

- 7.193 The National Committee for Uniform Succession Laws considered that the duties of executors, and the rights of beneficiaries to obtain information about the administration of the estate, should be set out in legislation.¹⁹³ The Committee noted that expressly setting out and clarifying the law would assist the many executors who are lay persons to comply with their obligations.¹⁹⁴
- 7.194 Although the Commission's terms of reference do not extend to examining whether to incorporate the National Committee's recommendations in this regard, the Commission acknowledges that the law needs to be clearer not only to legal practitioners who are inexperienced in succession law matters but also to members of the public.
- 7.195 Various materials on making wills and applying for probate are freely available to the public. Their focus and content depend on their intended audiences. Community legal centres have been at the forefront in producing and delivering information on wills and estates to the public through publications, seminars and their legal services. The Legal Services Commissioner has a pivotal role in educating the community about legal issues and has participated in a number of activities in this area, both separately and in collaboration with other organisations.
- 7.196 Other materials are directed to clients, customers or members of the organisation that has prepared them. For example, State Trustees and law practices publish information on their websites about their commercial and executorial services. The Probate Office of the Supreme Court provides information and over the counter advice in connection with its functions and, as discussed in Chapter 9, provides assistance in relation to probate applications for small estates.
- 7.197 While acknowledging the value of the information that currently exists the Commission has noticed gaps in the material information being generated. For example, little is written for non-professional executors or beneficiaries. This could contribute to the generally poor understanding in the community about wills and estates.
- 7.198 The Association of Independent Retirees found that 'public knowledge of succession laws was extremely limited or just did not exist'.¹⁹⁵ A member of the public questioned how executors who are appointed simply because they are family members can find out what their responsibilities and commitments are, and pointed out the particular difficulties for those who live overseas.¹⁹⁶ A legal practitioner said during the Commission's consultations in Shepparton that there are large numbers of people in the Goulburn Valley region who do not make wills because they do not fully understand their importance.¹⁹⁷
- 7.199 The Ethnic Communities' Council of Victoria drew the Commission's attention to the large number of Victorian seniors who are from non-English speaking backgrounds and have limited or no access to culturally appropriate information in languages other than English or in plain English.¹⁹⁸ A confidential submission described how people from culturally and linguistically diverse backgrounds are vulnerable to being misled and exploited when making a will. The meaning of terms such as 'testator' and 'executor' are confusing in English and easily misunderstood by those without proficiency in that language.

193 National Committee for Uniform Succession Laws, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General: Volume 1*, Queensland Law Reform Commission Report No 65 (2009), ch 11 ('Administration of Estates: Volume 1').

194 Ibid 369.

195 Submission 19 (Association of Independent Retirees).

196 Submission 40 (Janice Brownfoot).

197 Consultation 4 (Legal practitioners from the Goulburn Valley and Loddon Campaspe Community Legal Centres).

198 Submission 18 (Ethnic Communities' Council of Victoria).

- 7.200 A lack of readily available information can have an impact on the work of professional executors. State Trustees is being asked by non-professional executors for ad hoc assistance in performing the functions of the position.¹⁹⁹ The large number of complaints to the Legal Services Commissioner about probate issues could be due, at least in part, to poor public understanding of the complexity of the process. Legal practitioners told the Commission that beneficiaries of estates they are administering often place unreasonable pressure on them to release assets and to keep providing progress reports, as they do not understand the responsibilities of an executor and the costs to the estate of attending to their requests.²⁰⁰
- 7.201 These and other gaps in publicly available materials should be filled. The Commission considers that the Victoria Law Foundation is best placed to produce information that is practical, accessible and targeted to those who need it. It has the expertise in communicating information about the law and legal system simply and effectively. In addition, the Victoria Law Foundation works with other organisations in reaching the community and could develop materials on wills and estates in collaboration with community legal centres, the judiciary, the legal profession and representatives of culturally and linguistically diverse communities.

Recommendation

- 62 The Victoria Law Foundation should publish a guide, or series of guides, on making wills and the role of the executor. The information should encompass the following topics and be made available in community languages:
- (a) questions and issues to consider when making a will, focusing on helping will-makers avoid problems commonly identified in wills made without legal advice and providing guidance about selecting an executor
 - (b) practical information for non-professional executors about what they need to do in that position, focusing on resources that can help them in meeting their responsibilities and identifying where they may obtain professional assistance
 - (c) practical information for bereaved family and friends about what happens to the assets of a person after they die, focusing on what the executor needs to do before the estate can be distributed and the basis on which the estate might be charged for their services.

Payment of debts

174 Introduction

175 Solvent estates

183 Insolvent estates

8. Payment of debts

Introduction

- 8.1 The terms of reference direct the Commission to review and report on ‘how assets are designated to pay the debts of an estate and the effect that this has on the estate available for distribution to beneficiaries or to meet a successful family provision claim’.
- 8.2 Victoria’s current law in relation to the application of assets to estate debts is difficult both to locate and to understand.
- 8.3 It is difficult to locate as the substantive provisions are contained in a schedule to the *Administration and Probate Act 1958* (Vic) and, by incorporation, in the *Bankruptcy Act 1966* (Cth). It is difficult to understand largely because of inaccessible and complex drafting.

National Committee for Uniform Succession Laws

- 8.4 The National Committee for Uniform Succession Laws recognised the difficulties, common to most jurisdictions, in its four-volume report on the administration of estates of deceased persons. It made recommendations to overcome them and proposed model legislation.¹ A number of the National Committee’s recommendations would simplify and update the law in Victoria.
- 8.5 In the consultation paper on debts, the Commission identified the major differences between Victorian law and the reforms proposed by the National Committee.² Most of the submissions received in response to the questions raised in the paper supported the adoption of the National Committee’s recommendations in Victoria.

Areas in which the Commission recommends reform

- 8.6 This chapter sets out the aspects of Victoria’s estate debt payment scheme that, in the Commission’s view, should be reformed.
- 8.7 The Commission’s recommendations are intended to:
- modernise Victoria’s laws in relation to debt payment and bring the law up to date with other jurisdictions
 - clarify Victoria’s debt payment laws and provide certainty to those administering solvent and insolvent estates, and
 - simplify the administration of estates thereby increasing the ability of laypersons to administer.

1 National Committee for Uniform Succession Laws, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General: Volumes 1–4*, Queensland Law Reform Commission Report No 65 (2009)

2 Victorian Law Reform Commission, *Succession Laws: Debts*, Consultation Paper No 15 (2012) 23.

- 8.8 The Commission is not recommending significant changes to the law and the basic principles of the scheme would be unchanged. In order to achieve a clearer, simpler scheme, the Commission considers that relevant sections of the Administration and Probate Act should be redrafted and that the provisions relating to debt payment in the schedule to the Act should be revised and incorporated into the body of the Act.

Overview of the application of assets for payment of debts of deceased estates in Victoria

- 8.9 It is a fundamental duty of the personal representative to pay out of the estate the deceased person's debts and liabilities, including funeral, testamentary and administration expenses.³ The personal representative has the power to sell the estate's assets for this purpose.⁴ Assets should not be distributed to the beneficiaries under a will or upon intestacy until all outstanding debts are settled.
- 8.10 In Victoria, the payment of debts out of an estate is governed by the Administration and Probate Act. Part I, Division 5 of the Act sets out the personal representative's powers to deal with the estate's assets and specifies which assets are available to pay debts.
- 8.11 The Second Schedule to the Act deals with the payment of estate debts, and is divided into two parts:
- Part I applies to insolvent estates. It deals with the priority of debts—the order in which debts will be paid—and imports the rules of the Commonwealth Bankruptcy Act.
 - Part II applies to solvent estates. It deals with the *order of application* of the available assets—to what extent particular assets will actually bear the burden of a debt.
- 8.12 The existing scheme for solvent estates is discussed first below. Insolvent estates are discussed at [8.65]–[8.85].

Solvent estates

Order of application of assets

Current law

- 8.13 A solvent estate has sufficient assets to pay all debts and administrative expenses in full.⁵ After debts are paid, the balance of the estate is distributed to beneficiaries under the will or in accordance with the rules of intestacy, subject, in each case, to modification by any applicable family provision order.⁶
- 8.14 When paying debts, the personal representative may use any of the available assets in the estate.⁷ To ensure that creditors are paid expeditiously, the most easily sold assets may be used first.
- 8.15 This may result in some beneficiaries' entitlements being disproportionately depleted, compared to the entitlements of other beneficiaries, simply because the assets left to them were easier to sell. To arrive at a fairer outcome for all, the value of assets remaining after the debts are paid is adjusted before they are distributed to the beneficiaries.⁸

3 Funeral, testamentary and administration expenses take priority, in most cases, over the payment of other debts of the estate: *In Estate of Dean* (1885) 11 VLR 761, 764 (Molesworth ACJ); *Administration and Probate Act 1958* (Vic) sch 2 pt I cl 1, in relation to insolvent estates.

4 *Administration and Probate Act 1958* (Vic) ss 37, 44–5.

5 *Re Leng* [1895] 1 Ch 652, 658.

6 See further discussion of this at [8.62]. Family provision is discussed in detail in Chapter 6.

7 See *Administration and Probate Act 1958* (Vic) s 37. See also *Re Tong; Hilton v Bradbury* [1931] 1 Ch 202, 212 in *Joyce v Cam* [2004] NSWSC 621 (28 July 2004) [48].

8 This process is known as marshalling. Marshalling is an equitable doctrine applied in the context of the administration of deceased estates by which assets that remain after the estate's debts are paid are adjusted prior to distribution to ensure that distribution among the beneficiaries entitled accords with the order established under the will, statute or at law: Peter Butt and Peter Nygh (eds), *Butterworths Australian Legal Dictionary* (LexisNexis Butterworths, 2nd ed, 1997).

- 8.16 The extent to which each beneficiary's share is adjusted after the payment of debts is determined by:
- the order of application set out in Part II of the Second Schedule to the Act
 - any provision of the will showing a 'contrary intention', meaning an intention by the will-maker that the assets of the estate should be applied to the payment of estate debts in another way.⁹
- 8.17 The order of application sets out categories of asset in the order upon which they are to be drawn. The personal representative applies the assets in the first category to pay the debts, and will move to the second and subsequent categories only if the prior category is exhausted.
- 8.18 Under this system, a gift to a beneficiary that was initially used to pay debts can be reinstated in full or in part, and other beneficiaries' gifts may be reduced accordingly.
- 8.19 If all categories of asset are exhausted before the estate's debts are paid in full, the estate is insolvent, and the beneficiaries will not receive any benefits under the will.
- 8.20 The Victorian order of application¹⁰ contains a hierarchy of seven categories of property:
1. Property of the deceased undisposed of by will, subject to the retention thereof of a fund sufficient to meet any pecuniary legacies.
 2. Property of the deceased specifically appropriated or devised or bequeathed or directed to be sold (either by a specific or general description), for the payment of debts.
 3. Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts.
 4. Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.
 5. The fund, if any, retained to meet pecuniary legacies.
 6. Property specifically devised or bequeathed, rateably accordingly to value.¹¹
 7. Property appointed by will under a general power, including the statutory power to dispose of entailed interests, rateably according to value.

Contrary intention of the will-maker

- 8.21 The order of application applies subject to the terms of the will, and can be displaced by contrary intention shown by the will-maker. Part II of the Second Schedule to the Act provides that:
- The order of application may be varied by the will of the deceased.¹²
- 8.22 Contrary intention is determined by reference to the wording of the purported contrary intention and the circumstances of each case.¹³

⁹ *Administration and Probate Act 1958* (Vic) s 39(2), sch 2 pt II cl 8(a).

¹⁰ Derived from the *Administration of Estates Act 1925* (UK) c 23, sch I pt II. See discussion in Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death: Text and Cases* (LexisNexis Butterworths, 3rd ed, 2009) 758.

¹¹ The value of these assets is to be determined after accounting for the value of any charges over them. See *Administration and Probate Act 1958* (Vic) s 40. See *Re John; Jones v John* [1933] Ch 370, 372 (Farwell J).

¹² *Administration and Probate Act 1958* (Vic) s 39(2), sch II pt II cl 8(a). Contrary intention is discussed in more detail in Victorian Law Reform Commission, above n 2, *Succession Laws: Debts*, Consultation Paper No 15 (2012) 23.

¹³ See, eg, *Re Rodgers (dec'd)* [2001] 1 Qd R 542. Compare *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1, 44.

- 8.23 However, a will-maker may not necessarily displace the order by simply setting aside certain property to pay debts. As noted above, the order of application includes a specific category of 'property set aside by the will-maker for the purpose of paying debts'. This category is listed second, after property undisposed of by will. Third order of priority is given to property that is subject to a charge for the payment of debts.
- 8.24 A tension therefore arises between interpreting the setting aside of assets to pay debts as a manifestation of the will-maker's intention to oust the statutory order, or seeing it simply as the creation of a category of property that falls within the Victorian order at category 2 or 3.¹⁴

Reducing the number of categories of asset

- 8.25 The National Committee's recommendations, if adopted in Victoria, would change the order of application. Model legislation proposed by the National Committee and based on Queensland legislation contains only three categories of asset, four fewer than in Victorian law:¹⁵
1. Property specifically appropriated or given by will (either by a specific or general description) for the payment of debts; and property charged by will with, or given by will (either by a specific or general description) subject to a charge for, the payment of debts.
 2. Property comprising the residuary estate¹⁶ of the deceased person and property in relation to which a disposition in the deceased's will operates as the exercise of a general power of appointment.
 3. Property specifically given by will, including property specifically appointed under a general power of appointment, and any legacy charged on property given or appointed.¹⁷
- 8.26 The National Committee noted that a shorter, simpler list of categories of asset would make it easier to understand the effect of any direction in the will and that the resulting improvement in certainty may 'reduce opportunities for litigation'.¹⁸
- 8.27 A reduction in the number of categories in the Victorian order received universal support in submissions to the Commission and during consultations. Legal practitioners with expertise in administering deceased estates said that the change would make the law clearer and easier for personal representatives to apply.¹⁹
- 8.28 Reform would be particularly helpful for personal representatives who administer small estates. A small estate is more likely than a large estate to be administered by a non-professional executor and to present difficulty with the payment of debts.²⁰

Reordering the categories of asset

- 8.29 Adopting the model provision would not only reduce the number of Victorian categories from seven to three, it would reorder them to give the highest priority to property that the will-maker specifically set aside to pay debts. Property that is specifically set aside to pay debts (currently categories 2 and 3) would be applied to debts before, rather than after, property that has not effectively been disposed of by will (currently category 1).

14 National Committee for Uniform Succession Laws, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General: Volume 2*, Queensland Law Reform Commission Report No 65 (2009) 106 ('*Administration of Estates: Volume 2*').

15 *Succession Act 1981* (Qld) s 59(1).

16 Defined to include undisposed of property: see discussion below at [8.31].

17 National Committee for Uniform Succession Laws, *Administration of Estates: Volume 2*, above n 14 117.

18 *Ibid* 100.

19 Advisory Committee (Meeting 1).

20 Meeting with representatives of the Financial Services Council, 21 September 2012.

- 8.30 Category 1 property under the model is specifically created by the will when the will-maker sets aside assets for the payment of debts. It encompasses property that is currently allocated in Victoria to categories 2 and 3. As noted above, these categories include property specifically appropriated, devised or bequeathed for payment of debts, and property charged with payment of debts. The National Committee saw ‘no cogent reason’ to assume that the will-maker intended either of these two categories to have priority over the other.²¹
- 8.31 Category 2 of the model aligns with categories 1 and 4 of the Victorian order. It combines property which is the subject of a residuary disposition, and property undisposed of (or not effectively disposed of) by will. The amalgamation is achieved by broadening the definition of ‘residuary estate’ that applies to the model to include both types of property: residuary estate, of a deceased person, means—
- (a) if the deceased left a will, either or both of the following—
 - (i) property in the deceased’s estate that is not effectively disposed of by the deceased’s will;
 - (ii) property in the deceased’s estate that is not specifically given by the deceased’s will but is included in a residuary disposition, by either a specific or general description; or
 - (b) if the deceased did not leave a will, the whole of the deceased’s estate.²²
- 8.32 Category 3 of the model retains the protected position of property specifically given. As currently applies in Victoria, gifts made under the will remain the last to be drawn upon for the payment of debts.
- 8.33 There are a number of advantages in reordering the categories of asset in the manner recommended by the National Committee. Placing the primary burden for payment of debts upon assets that have been set aside for this purpose better recognises the will-maker’s overriding intention to pay debts from those assets. The National Committee supported its recommendation for change by citing a body of case law where it was held that funds specifically set aside by the will-maker’s directions should be the primary fund for debt payment.²³
- 8.34 Adopting this change would also resolve the difficulty in determining whether the setting aside of assets for the payment of debts should be taken as manifesting an intention to oust the statutory order, or as property which falls within the Victorian order at category 2 or 3.²⁴
- 8.35 In *Re Williams*,²⁵ the Supreme Court of Victoria explained that, as the schedule is subject to the provisions of the will,²⁶ there is no need to resort to it at all where a will-maker has turned their mind to the payment of debts. Justice Dean observed that:
- it is not necessary to attempt to solve the conundrum which has hitherto remained unsolved of what words can answer the description of our present para (2) and (3)²⁷ and not override or vary the Schedule order.²⁸

21 National Committee for Uniform Succession Laws, *Administration of Estates: Volume 2*, above n 14, 108.

22 National Committee for Uniform Succession Laws, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General: Volume 4*, Queensland Law Reform Commission Report No 65 (2009) 124, Draft Administration of Estates Bill 2009 sch 3 (definition of ‘residuary estate’) (*Administration of Estates: Volume 4*).

23 See generally National Committee for Uniform Succession Laws, *Administration of Estates: Volume 2*, above n 14, 106, including discussion of *Re Littlewood* [1931] 1 Ch 443, *Re James* [1947] Ch 256, *Re Williams* [1950] ALR 751, 757 (Dean J), *Permanent Trustee Co of NSW Ltd v Temple* (1956) 57 SR (NSW) 301, 305 (Hardie J).

24 National Committee for Uniform Succession Laws, *Administration of Estates: Volume 2*, above n 14, 106.

25 [1950] ALR 751, 757.

26 *Administration and Probate Act 1958* (Vic) s 39(2).

27 Under the current Act, these paragraphs represent property specifically appropriated to be sold for the payment of debts, or property

subject to a charge for such payment: *Administration and Probate Act 1958* (Vic) sch II pt II cls 2–3.

28 *Re Williams* [1950] ALR 751, 757 (Dean J).

- 8.36 The proposed reordering of the categories of asset enshrines the view expressed in *Re Williams* in legislation, and gives primacy to the will-maker's intent: where there is no property set aside for payment of debts, property not specifically given is exhausted first. This revision would resolve difficulties of judicial interpretation affecting the Victorian provisions.
- 8.37 Almost all submissions strongly supported revising the Victorian provisions in accordance with the National Committee's model order of application.²⁹ The Commission was not presented with a persuasive reason why it would be preferable to retain the current law rather than adopt the National Committee's model order.
- 8.38 The Commission accepts that the arguments in support of the proposed change to the order of application of assets for payment of debts in solvent estates are well-founded and that the Victorian order should be amended to reflect the National Committee's model.³⁰

Recommendation

- 63 The *Administration and Probate Act 1958* (Vic) should be amended to:
- (a) repeal Part II of the Second Schedule (order of application of assets where the estate is solvent)
 - (b) provide in section 39(2) of the Act the following order of application, as recommended by the National Committee for Uniform Succession Laws:
 1. Property specifically appropriated or given by will (either by a specific or general description) for the payment of debts; and property charged by will with, or given by will (either by a specific or general description) subject to a charge for, the payment of debts.
 2. Property comprising the residuary estate of the deceased person and property in relation to which a disposition in the deceased person's will operates as the exercise of a general power of appointment.
 3. Property specifically given by will, including property specifically appointed under a general power of appointment, and any legacy charged on property given or appointed.
 - (c) provide that the provisions in (b) should be subject to the manifestation of any contrary intention contained in the will.

29 Submissions 14 (Commercial Bar Association); 19 (Association of Independent Retirees); 30b (Law Institute of Victoria); 32 (The Institute of Legal Executives); 33 (State Trustees Limited). It was suggested in one submission that the order be left as it is: submission 8 (Patricia Strachan).

30 National Committee for Uniform Succession Laws, *Administration of Estates: Volume 4*, above n 22, 85.

Payment of pecuniary legacies

- 8.39 Part II of the Second Schedule to the Administration and Probate Act directs that funds be retained for the payment of pecuniary legacies from categories 1 (property undisposed of by will) and 4 (property not specifically given, but included as a residuary gift). The fund retained becomes category 5 of the current order of application, to be drawn upon fifth, before property specifically given.
- 8.40 The model order proposed by the National Committee does not provide for the payment of pecuniary legacies. Rather, it is provided for in a separate provision of the model legislation:

504 Payment

- (1) Pecuniary legacies must be paid out of available class 2 property.
 - (2) However, to the extent that available class 2 property is insufficient to pay the pecuniary legacies, the legacies must abate proportionately.
 - (3) Subsections (1) and (2) are subject to a contrary intention appearing in the deceased person's will.
 - (4) In this section—
available class 2 property means class 2 property or, if debts are to be discharged from the property, class 2 property after the discharge of the debts.³¹
- 8.41 This model provision stipulates that pecuniary legacies are to be paid from class 2 of the model order. As class 2 of the model order aligns with categories 1 and 4 of the Victorian order, the effect of adopting this model provision would be to retain the Victorian status quo in relation to the payment of pecuniary legacies.
- 8.42 It should also be noted that the definition of 'pecuniary legacy' in the Administration and Probate Act³² aligns with the National Committee's recommended definition.³³

Recommendation

- 64 A provision should be inserted into the *Administration and Probate Act 1958* (Vic) that stipulates that the payment of pecuniary legacies is to be made from the residuary estate.

Exception to the statutory order for charged or mortgaged property

Current law

- 8.43 Although most debts of solvent estates will be paid according to the order of application discussed above, section 40 of the Administration and Probate Act sets out an exception in relation to assets charged with the payment of a debt.
- 8.44 An asset that is charged with the payment of a debt—typically real estate subject to a mortgage, or to a lien for unpaid purchase money—will bear that debt, and entitled beneficiaries will take the asset subject to the debt. If more than one beneficiary is entitled to the asset, they will bear the debt in proportion to their share.³⁴

31 Ibid 88, Draft Administration of Estates Bill 2009 cl 504.

32 *Administration and Probate Act 1958* (Vic) s 5 (definition of 'pecuniary legacy').

33 Class 2 of the model order proposed by the National Committee: National Committee for Uniform Succession Laws, *Administration of Estates: Volume 4*, above n 22, Draft Administration of Estates Bill 2009 sch 3 (definition of 'pecuniary legacy').

34 *Administration and Probate Act 1958* (Vic) s 40(1).

- 8.45 When the asset is given by will, the debt remains attached to the asset, providing clear and simple recourse for secured creditors. The practical effect for beneficiaries is that the secured debt will not be pooled with other debts and paid out of assets in accordance with the order of application in the second schedule of the Act.
- 8.46 The will-maker can prevent the operation of this rule by expressing a contrary intention and explaining that they intend that debts be paid out of other property.³⁵
- 8.47 In Victoria, a contrary intention may be shown by 'will, deed or other document'.³⁶ This is the case in other Australian jurisdictions, except the Australian Capital Territory and Queensland, where the legislation specifies that contrary intention may be shown by will only.³⁷

Retaining the exception to the statutory order

- 8.48 The Commission's consultation paper on debts asked whether there were any significant difficulties with the operation of section 40 of the Administration and Probate Act and, if so, whether it should be repealed, as it has been in the Northern Territory.
- 8.49 Most submissions, and comments made during consultations, supported the retention of section 40. One submission advocated the abolition of the section, but did not provide reasons for this view.³⁸
- 8.50 All jurisdictions except the Northern Territory retain a rule to the effect of section 40.³⁹ Given the multi-jurisdictional nature of estate assets, including real property subject to mortgages and other charges, national consistency in this area is desirable.
- 8.51 The Commission considers that section 40 should be retained, agreeing with the National Committee's view that it provides a settled rule for payment of debts charged on specific property.⁴⁰

Connection between the debt and the charged property

- 8.52 The consultation paper also asked whether section 40 of the Administration and Probate Act should be modified to require a sufficient connection between the purpose of the debt and the property over which it is charged, before the exception comes into operation.⁴¹ Requiring the asset to bear the debt in all cases can lead to an unfair outcome, for example when a family home is mortgaged to finance a business. Under the current operation of the rule, the beneficiary who is given the family home will bear the mortgage debt, and the beneficiary given the business will not.
- 8.53 Three submissions discussed the idea of requiring a connection between the purpose for which the debt was raised and the property to bear the debt.⁴² Although the potential for section 40 to operate unfairly was raised, State Trustees noted that a requirement for a connection between the debt and the property could produce equally arbitrary results.⁴³ It was also noted that problems here may be resolved by careful will drafting.⁴⁴
- 8.54 The Commission does not believe that there is good reason to require a connection between the purpose for which the debt was raised and the property to bear the debt.

35 Ibid. See discussion of contrary intention in Victorian Law Reform Commission, above n 2, 30.

36 *Administration and Probate Act 1958* (Vic) s 40(1).

37 *Civil Law (Property) Act 2006* (ACT) s 500(2); *Succession Act 1981* (Qld) s 61(1).

38 Submission 32 (The Institute of Legal Executives).

39 The Northern Territory equivalent rule was abolished when the *Administration and Probate Act 1891* (SA) (previously in operation in the Northern Territory) was repealed by the *Administration and Probate Ordinance 1969* (NT).

40 National Committee for Uniform Succession Laws, *Administration of Estates: Volume 2*, above n 14, 132.

41 See discussion in Victorian Law Reform Commission, above n 2, 30.

42 Submissions 19 (Association of Independent Retirees); 33 (State Trustees Limited), 36 (Law Society of New South Wales).

43 Submission 33 (State Trustees Limited).

44 Submission 36 (Law Society of New South Wales).

Proposed change to location of contrary intention

- 8.55 The Commission is of the view that contrary intention in this context should only be manifested by will. This aligns with the National Committee's recommendation on this topic.⁴⁵
- 8.56 Allowing contrary intention to be found outside a will may present problems of proof, and potentially of fraud. The National Committee report cited the reasoning of the Law Reform Commission of Western Australia:
- There seems to be no good reason why such an expression of what is essentially a testamentary intention should remain outside the normal rules relating to the form in which testamentary wishes must be expressed.⁴⁶
- 8.57 This recommendation, theoretically limiting sources of evidence for contrary intention, was made having regard to the earlier recommendation of the National Committee for a general dispensing power and a broader interpretation provision for wills.⁴⁷
- 8.58 Adoption of this proposal would bring Victoria into line with the position in the Australian Capital Territory and Queensland, the two jurisdictions to have most recently amended their legislation in this area.⁴⁸
- 8.59 Similarly, the majority of submissions and consultations on this point agreed that any expression of contrary intention should be by will only.⁴⁹ State Trustees pointed out that a representative seeking to administer an estate has no way of knowing whether other documents containing contrary intention exist, potentially delaying finalisation of administration indefinitely.⁵⁰
- 8.60 Two submissions expressed the opinion that the current position—manifestation of contrary intention by will, deed or other document—should be retained. The reasons given were that wills are often poorly drafted,⁵¹ and that the will reflects the will-maker's intent only at a fixed point in time.⁵²
- 8.61 The Commission does not find either of these reasons persuasive, as any document may be poorly drafted; any expression of intention will reflect intent at a particular point in time. The practical concerns relating to effective administration made above by State Trustees and the Law Reform Commission of Western Australia are compelling. For these reasons, the Commission recommends that an expression of contrary intention should be by will only.

Recommendation

- 65 Section 40(1) of the *Administration and Probate Act 1958* (Vic) should be amended to provide that an expression of contrary intention may only be shown by will.**

45 National Committee for Uniform Succession Laws, *Administration of Estates: Volume 2*, above n 14, 141.

46 Law Reform Commission of Western Australia, *The Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies: Report*, Project No 34 Part VII (1988); National Committee for Uniform Succession Laws, *Administration of Estates: Volume 2*, above n 14, 145.

47 Queensland Law Reform Commission, *The Law of Wills*, Report No 52 (1997) 15.

48 *Civil Law (Property) Act 2006* (ACT) s 500(2); *Succession Act 1981* (Qld) s 61(1).

49 Submissions 19 (Association of Independent Retirees); 32 (The Institute of Legal Executives); 33 (State Trustees Limited); 36 (Law Society of New South Wales); Advisory Committee (Meeting 1).

50 Submission 33 (State Trustees Limited).

51 Submission 8 (Patricia Strachan).

52 Submission 14 (Commercial Bar Association).

Effect on successful family provision claims

- 8.62 The terms of reference direct the Commission to consider the effect of the application of assets to the payment of debts on the estate that is available for distribution to beneficiaries or to meet a successful family provision claim.
- 8.63 Paying the debts of an estate, and thereby determining its net value, will naturally reduce what is left in the estate for beneficiaries and, it follows, for family provision claimants. Applicants for family provision seek provision out of the net estate, as a family provision order will operate as either a codicil to the will,⁵³ or a variation of the statutory distribution on intestacy.⁵⁴
- 8.64 The order of application of assets to pay the debts of an estate is designed to adjust the burden of debts between the beneficiaries of that estate. As the size of the net estate is not affected by this exercise, the manner in which assets are applied to debt payment will have no impact on the estate available to meet a successful family provision claim.

Insolvent estates

Application of the Bankruptcy Act to payment of debts

- 8.65 Insolvent estates are administered either under the Administration and Probate Act, importing specified rules and priorities of the Commonwealth Bankruptcy Act, or directly under the Bankruptcy Act. All Australian jurisdictions have equivalent statutory provisions that apply the rules of bankruptcy to the administration of insolvent estates.⁵⁵

Indirect application under the Administration and Probate Act

- 8.66 Section 39 of the Administration and Probate Act directs that insolvent estates must be administered according to the rules set out in Part I of the Second Schedule to the Act.
- 8.67 Part I of the schedule provides that, subject to funeral, testamentary and administration expenses having priority, the rules of Commonwealth bankruptcy law will apply:
- Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as may be in force for the time being under any law of the Commonwealth relating to bankruptcy with respect to the assets of persons adjudged bankrupt.⁵⁶
- 8.68 While insolvent deceased estates are not automatically bankrupt, the practical effect of the above section is to apply the scheme designed for bankruptcy in cases of insolvent deceased estates. These estates are effectively administered under the Administration and Probate Act, by reference to the rules contained in the Bankruptcy Act.

⁵³ *Administration and Probate Act 1958* (Vic) s 97(4)(a).

⁵⁴ *Ibid* s 97(4)(b). Intestacy is discussed in Chapter 5 and family provision is discussed in Chapter 6.

⁵⁵ *Administration and Probate Act 1929* (ACT) s 41C(2), sch 4 pt 4.2; *Administration and Probate Act 1969* (NT) s 57(2), sch 4 pt II; *Probate and Administration Act 1898* (NSW) s 46C(1), sch 3 pt I; *Succession Act 1981* (Qld) s 57; *Administration and Probate Act 1919* (SA) ss 60–62; *Administration and Probate Act 1935* (Tas) s 34, sch II pt I; *Administration Act 1913* (WA) s10A, sch 5.

⁵⁶ *Administration and Probate Act 1958* (Vic) sch 2 pt I.

Direct application

- 8.69 A parallel option for the administration of insolvent estates is available when the estate is bankrupt.⁵⁷ In these cases, a petition for bankruptcy may be filed by a creditor or the personal representative of the estate.⁵⁸ Where a bankruptcy order has been obtained, the estate will be administered in bankruptcy—that is, administered under the provisions of the Bankruptcy Act.

Clarification of the interaction between the two systems

- 8.70 Retaining two systems, under which bankruptcy rules may apply indirectly through the Administration and Probate Act or directly where an estate is bankrupt, would maintain national consistency and the Commission does not consider that the dual systems should be replaced. However, some difficulties arise under the dual systems.
- 8.71 The Commission asked in the consultation paper on debts how the two systems can operate more efficiently and effectively together.⁵⁹ In its report on administration of estates, the National Committee for Uniform Succession Laws put forward a number of proposals for minor reform, discussed below.⁶⁰
- 8.72 Although consultation on these topics was limited, submissions broadly supported the changes proposed by the National Committee. No submissions identified any major difficulties with the operation of the dual systems as a whole,⁶¹ however those that dealt with this topic made some suggestions for general reform:
- The Administration and Probate Act should be amended to better refer to the applicable sections of the Bankruptcy Act.⁶²
 - The two systems should, as far as possible, ‘mirror each other’.⁶³
 - Terminology used in the Bankruptcy Act should be applicable to deceased estates.⁶⁴
 - The applicable bankruptcy law should be that in force at the time of death.⁶⁵
- 8.73 State Trustees supported a general uptake of the National Committee’s recommendations in this area.⁶⁶
- 8.74 While none of the recommended reforms below represents a substantial change in the law, the Commission considers that the interaction between the two systems of administration could be significantly improved by simpler drafting and clearer acknowledgment of the application of the provisions of the Bankruptcy Act. Clear reference to the applicability of specific legislation, to relevant provisions and to identifiable dates promotes clarity and comprehension of the law.
- 8.75 The Commission is of the view that the structure and format of the National Committee’s model legislation should be taken into account if the changes set out below in recommendation 66 are implemented. Ancillary and procedural aspects of this model legislation should also be considered.

57 *Bankruptcy Act 1966* (Cth): including where the deceased was bankrupt prior to death (s 250), or was served with a creditor’s petition prior to their death (s 245).

58 *Bankruptcy Act 1966* (Cth) ss 244(1), 247(1). A creditor must be owed a debt of not less than \$5000 in order to file a creditor’s petition. The term ‘personal representative’ in this context has been held to apply not only to the legal personal representative but to anyone who is, in fact, administering the estate: *Re Estate of Madden* (1969) 13 FLR 1, 2.

59 Victorian Law Reform Commission, above n 2, 34.

60 National Committee for Uniform Succession Laws, *Administration of Estates: Volume 2*, above n 14, 53–84.

61 Submissions 8 (Patricia Strachan); 33 (State Trustees Limited); 36 (Law Society of New South Wales).

62 Submissions 14 (Commercial Bar Association); 30b (Law Institute of Victoria).

63 Submission 19 (Association of Independent Retirees).

64 Submission 14 (Commercial Bar Association).

65 Submissions 14 (Commercial Bar Association); 19 (Association of Independent Retirees); 30b (Law Institute of Victoria); 33 (State Trustees Limited).

66 Submission 33 (State Trustees Limited).

- 8.76 In accordance with its general focus on clarity and accessibility, the Commission recommends that the provisions governing debt payment contained in the second schedule of the Act should be moved into the body of the Act. This applies to payment of debts in both solvent and insolvent estates.

Clarifying when the Administration and Probate Act rules⁶⁷ apply

- 8.77 Where an insolvent estate is being administered under the Bankruptcy Act, the provisions of the Administration and Probate Act, to the extent that they are inconsistent, do not apply.⁶⁸
- 8.78 However, Part I of the Second Schedule of the Administration and Probate Act does not make clear that an alternative method of administration is available. Further, Part I of the Second Schedule to the Act refers to the applicable rules as those 'in force for the time being under any law of the Commonwealth relating to bankruptcy...'.⁶⁹ It does not make express reference to the Bankruptcy Act.
- 8.79 The National Committee recommended that the model provision make a clear distinction between the two methods of administration of insolvent estates. The model provision achieves this by providing that the part relating to insolvent estates will only apply where a deceased person's estate is not being administered under the Bankruptcy Act.

Specifying that the applicable provisions of the Bankruptcy Act are those in force at the time of the deceased person's death

- 8.80 The Administration and Probate Act refers to the relevant rules of bankruptcy as those in force 'for the time being'.⁷⁰
- 8.81 The National Committee recommended that the model legislation refer to the applicable rules as those in force at the time of death of the deceased person.⁷¹
- 8.82 Submissions on this question were largely supportive of this change, with one group noting that this would be a practical way to ensure that the rules to be applied are clear.⁷² The Commercial Bar Association agreed that substantive laws should be those applicable at the time of death, but that 'procedural rules should not be limited in this way'.⁷³

Clearly listing the matters which the Administration and Probate Act imports from the Bankruptcy Act

- 8.83 Clause 2 of Part I of the Second Schedule to the Administration and Probate Act specifies the general application of Commonwealth bankruptcy law when an insolvent estate is administered under the Administration and Probate Act.
- 8.84 The Commission is of the view that the provision should be redrafted to clearly list the relevant areas covered by the bankruptcy legislation.

67 For current purposes, this refers to part I of the second schedule to the *Administration and Probate Act 1958* (Vic).
 68 *Australian Constitution* s 109.
 69 *Administration and Probate Act 1958* (Vic) sch 2 pt I.
 70 *Ibid* sch 2 pt I cl 2.
 71 National Committee for Uniform Succession Laws, *Administration of Estates: Volume 2*, above n 14, 59.
 72 Submissions 19 (Association of Independent Retirees), 30b (Law Institute of Victoria); 33 (State Trustees Limited).
 73 Submission 14 (Commercial Bar Association).

8.85 The National Committee proffered the following list:⁷⁴

Application of bankruptcy rules

- (1) The bankruptcy rules as in force at the date of the deceased person's death apply to the following—
 - (a) the rights of secured and unsecured creditors against the deceased's estate;
 - (b) the debts and liabilities provable against the deceased's estate;
 - (c) the valuation of annuities and future and contingent liabilities of the deceased's estate;
 - (d) the priorities of debts and liabilities of the deceased's estate.

Recommendation

- 66 The *Administration and Probate Act 1958* (Vic) should be amended to:
- (a) repeal Part I of the Second Schedule (rules as to payment of debts where the estate is not solvent)
 - (b) provide in section 39(1) that the provisions of the *Administration and Probate Act 1958* (Vic) will only apply where an insolvent estate is not being administered under the provisions of the *Bankruptcy Act 1966* (Cth)
 - (c) provide in section 39(1) that the relevant rules of bankruptcy are those in force at the time of death
 - (d) provide in section 39(1) a list of the provisions of the *Bankruptcy Act 1966* (Cth) that will apply when estates are being administered under the *Administration and Probate Act 1958* (Vic).

Small estates

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9. Small estates

Introduction

Assistance for small estates

- 9.1 The Commission has been asked to review and report on whether there are more efficient ways of dealing with small estates.
- 9.2 Small estates for which a grant of representation is sought have fewer assets from which to meet the costs of obtaining the grant and administering the estate. Consequently, the cost of professional representation or assistance may be a barrier to the proper administration of these estates.
- 9.3 However, although small estates are not always easy to administer, they are more likely to comprise simple assets that may be easily transferred and distributed. A non-professional personal representative may be able to apply for a grant of representation, or administer the estate without needing to apply for a grant.
- 9.4 There is no comprehensive suite of measures to assist in the administration of small estates, but Victorian law and practice provide a number of measures to assist personal representatives in either obtaining grants of representation at less cost or administering the estate informally.
- 9.5 Some measures support non-professional personal representatives who administer the estate themselves, including:
 - a small estates service, provided by the Probate Office of the Supreme Court, that assists individuals to apply for a grant of representation for a small estate that is valued at \$50,000 or less¹
 - legal protection for personal representatives of small estates who do not apply for a grant of representation but instead administer informally.²
- 9.6 There are also measures designed to encourage trustee companies to obtain grants of representation for small estates. These are:
 - expedited processes for trustee companies when obtaining grants of representation for small estates that are valued at \$50,000 or less
 - a government subsidy provided to State Trustees to administer small estates.

1 Or \$25,000 where the beneficiaries are not the 'child(ren), partner and/or sole surviving parent of the deceased person': *Administration and Probate Act 1958* (Vic) ss 3 (definition of 'small estate'), 71(1).
2 See, eg, *Administration and Probate Act 1958* (Vic) s 33.

- 9.7 The Commission has found that these measures operate without significant difficulty but are not well targeted, particularly those that apply only to estates that are valued at \$50,000 or less.

The Commission's approach

- 9.8 In this chapter, the Commission makes recommendations to redirect and strengthen the measures to facilitate the administration of small estates. The recommendations are intended to:
- promote cheaper methods of administration
 - promote simpler methods of administration
 - increase access to good information to complement existing methods of administration
 - maximise accountability by encouraging searchable records
 - facilitate simple transactions that might appropriately be conducted informally
 - clarify and simplify the role of informal administrators
 - promote consistency of process between various mechanisms
 - promote the regular update of determinative figures.
- 9.9 Generally speaking, the Commission wishes to encourage applications for grants of representation in respect of small estates. Grants of representation lessen risk, clarify the role of the personal representative, and protect the interests of third parties by creating records within the Probate Office.
- 9.10 However, the administration of small estates should not be unnecessarily complicated. Where, in defined circumstances, less formal routes of administration are appropriate, they should be acknowledged and supported.

National Committee for Uniform Succession Laws

- 9.11 Although statutory provisions for small estates are relatively similar across jurisdictions, there is considerable disparity in the degree to which the available mechanisms are used.
- 9.12 This was recognised by the National Committee for Uniform Succession Laws, which was concerned to recommend change primarily to the statutory framework rather than to administrative and procedural mechanisms.
- 9.13 The National Committee identified four guiding principles in developing its recommendations concerning the administration of deceased estates.³ Two of these are of particular relevance to smaller estates: a focus on simplification of processes, and recognition of the extent of informal administration. Although the National Committee's specific recommendations on small estates have been closely considered, it is these broader principles that have informed the Commission's recommendations in this chapter.

³ National Committee for Uniform Succession Laws, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General: Volume 1*, Queensland Law Reform Commission Report No 65 (2009) 7.

Assistance in seeking a grant of representation

Small estates service—Victorian Supreme Court Probate Office

- 9.14 Instead of engaging a lawyer or a trustee company to apply for a grant of representation, the person entitled to a grant for a small estate has the option of seeking assistance from the small estates officer of the Supreme Court Probate Office.
- 9.15 Applicants living outside the Melbourne metropolitan area may make an application through the Registrar of their nearest Magistrates' Court. Registrars of Magistrates' Courts will facilitate the transfer of documents and fees to the Supreme Court Probate Office.⁴
- 9.16 Distinct from general guidance that might otherwise be given to applicants by staff of the Probate Office, this is effectively a legal aid service. The small estates officer will actively prepare and file documents on behalf of the applicant.⁵
- 9.17 The Registrar is not required to provide this assistance to all eligible estates. Applicants are encouraged to seek independent legal advice where necessary, and will be unable to use the service where the estate is legally complex or too large.⁶
- 9.18 The Administration and Probate Act provides that a 'small estate' for the purposes of access to this service is one in which a deceased person leaves property:
- not exceeding \$25,000, or
 - not exceeding \$50,000, if the only people entitled to share in the distribution of property are the child(ren), partner and/or sole surviving parent of the deceased person.⁷
- The most recent amendment to these 'dual threshold' figures was in 1995.⁸
- 9.19 An administration fee of \$102.70 is charged for this service, as well as the standard grant application fee of \$281.90.⁹
- 9.20 The number of grants made under this assisted process has steadily decreased over the last ten years, with 108 grants made in the 2001–02 financial year, compared with 48 in the 2011–12 financial year.¹⁰

Retention of the service

- 9.21 The Registrar of Probates has expressed concern about the appropriateness of the Supreme Court Probate Office continuing to provide this service at all, particularly given potential conflict arising from the Probate Office effectively adjudicating on applications it has itself prepared.¹¹
- 9.22 However, the Commission believes that the role of the Probate Office in providing a formal small estates service is an extremely important one. The service provides an essential alternative route for those not wishing to engage a solicitor or trustee company, or those unable to navigate the grants process without assistance.
- 9.23 The service saves the applicant the time they would otherwise have spent preparing a grant application. It also saves them the money they might otherwise have spent engaging a solicitor to prepare the application. It encourages those in control of small estates to obtain a full grant rather than choosing informal administration, potentially avoiding some of the risks of liability that may arise with the informal process.¹²

4 *Administration and Probate Act 1958* (Vic) ss 71, 71(3) (inclusion of deputy registrars), 76 (defines 32km limit for those who may apply at the Supreme Court).

5 *Administration and Probate Act 1958* (Vic) s 71(2)(a).

6 See discussion in Victorian Law Reform Commission, *Succession Laws: Small Estates*, Consultation Paper No 16 (2012) 21.

7 *Administration and Probate Act 1958* (Vic) ss 3 (definition of 'small estate'), 71(1).

8 *Administration and Probate (Amendment) Act 1994* (Vic) s 12.

9 Probate Office, *Supreme Court—Probate Office Fees* (16 December 2012) Supreme Court of Victoria <<http://www.supremecourt.vic.gov.au/home/practice+and+procedure/probate+office/probate+office+fees>>.

10 Supreme Court of Victoria, *2011–12 Annual Report* (2012) 60.

11 Advisory Committee (Meeting 1).

12 See further discussion below at [9.69].

- 9.24 The vast majority of stakeholders consulted throughout the reference expressed a high degree of trust in, and satisfaction with, the assistance provided.¹³
- 9.25 Although the number of estates obtaining a grant through this service is low, this may be attributable to the fact that the dollar value limit on small estates is currently very low. Submissions noted that the low number of applications may also be attributable to a lack of knowledge of the service among members of the public.¹⁴
- 9.26 Given the high level of community support for the service, and the lack of an appropriate alternative for the specific clientele of the service, the small estates service provided by the Probate Office should be retained.

Raising the limit to \$100,000

- 9.27 As well as recognising the importance of the small estates service, the Commission believes that the utility of the service could be significantly improved by its expansion.
- 9.28 In the consultation paper on small estates, the Commission asked whether the current figure determining the size of a small estate¹⁵ should be raised.¹⁶
- 9.29 The current \$25,000/\$50,000 figure was considered in almost all submissions to be too low,¹⁷ with Moores Legal describing it as an ‘impractically low’ limit that in fact delineates ‘very small estates’.¹⁸ As noted above, the limit has not been increased since 1995.
- 9.30 According to State Trustees (the body dealing most frequently with smaller-value estates) estates valued at up to \$100,000 are unlikely to include real estate or be subject to a family provision claim, and therefore ‘rarely involve administrative complexity’.¹⁹
- 9.31 Suggestions in submissions for an appropriate alternative figure generally ranged from \$80,000²⁰ to \$150,000.²¹ The Law Institute of Victoria preferred retaining a figure of \$50,000.²²

Indexation of figure

- 9.32 It is reasonable to assume that, in setting this limit, the legislature judged estates under the \$25,000/\$50,000 limit to be those in which distribution of assets would be relatively simple, and legal fees disproportionately onerous.
- 9.33 Estates are certainly getting larger, while the defining figure remains static. \$50,000 in 1995 terms is equal to approximately \$77,711.54 in 2012 terms.²³ Estates valued at \$50,000 in 2012 represent those that were valued at \$32,170 in 1995. The disparity between the \$50,000 limit in the Act and the real size of ‘small’ estates will continue to grow, and the service will be available to a diminishing number of estates.
- 9.34 In order to maintain an appropriate figure over time, it was suggested that any revised figure be indexed to reflect changes in the Consumer Price Index (CPI), to ensure that its utility is not lost over time, and that an appropriate range of estates has access to the service.²⁴

13 Submissions 8 (Patricia Strachan); 32 (The Institute of Legal Executives); 30b (Law Institute of Victoria).

14 Submission 33 (State Trustees Limited).

15 In this context, for the purposes of assistance from the small estates service: *Administration and Probate Act 1958* (Vic) s 71(1).

16 Victorian Law Reform Commission, above n 6, 20.

17 Submissions 8 (Patricia Strachan); 14 (Commercial Bar Association); 19 (Association of Independent Retirees); 25 (Moores Legal); 33 (State Trustees Limited).

18 Submission 25 (Moores Legal).

19 Submission 33 (State Trustees Limited).

20 Submission 8 (Patricia Strachan).

21 Submission 14 (Commercial Bar Association).

22 Submission 30b (Law Institute of Victoria).

23 Calculated to 2012, as 2013 figures were not yet available through the Reserve Bank of Australia inflation calculator at time of writing. The inflation calculator is intended as a guide, and does not reflect official Reserve Bank calculations. Reserve Bank of Australia, *Inflation Calculator*, <<http://www.rba.gov.au/calculator/annualDecimal.html>>.

24 Submission 25 (Moores Legal).

- 9.35 As recommended in relation to the indexation of a deceased person's partner's statutory legacy on intestacy,²⁵ the CPI number used should be the All Groups Consumer Price Index number.²⁶ This number is indexed quarterly. The Commission considers that it would be of assistance to personal representatives if the quarterly CPI-adjusted eligibility threshold for estates able to access the small estates service were published on the Supreme Court of Victoria's website.

Abolishing the dual threshold

- 9.36 The consultation paper on small estates also asked whether the dual threshold of figures—up to \$25,000 generally or up to \$50,000 where the only beneficiaries are the child(ren), partner and/or sole surviving parent of the deceased person—should be retained.²⁷
- 9.37 Although there was support in some submissions for the concept of differentiating between family member beneficiaries and other, more remote beneficiaries,²⁸ there was broader support for discarding the dual threshold, including from the Registrar of Probates.²⁹
- 9.38 Victoria is the only jurisdiction with a dual threshold of this type. In the interests of clarity and national consistency, the Commission believes that the relevant amount delineating small estates should be a single figure.

Impact on the Probate Office

- 9.39 If the availability of the service were to be expanded, it is likely that the Probate Office would experience an increase in applications. This would potentially require the Supreme Court to channel more funding into the service in order to manage increased demand.
- 9.40 Given the importance of the service, the Commission believes that a reallocation of funds to ensure its continuance would be wholly appropriate.
- 9.41 Although catering for estates with higher values could mean that more complex estates would be eligible to use the service, the Registrar may well refer those estates into Court, or to a legal practitioner, as is currently the practice.³⁰
- 9.42 The National Committee for Uniform Succession Laws did not make recommendations in this area. The Committee was of the opinion that each jurisdiction's choice to provide such services would depend on resourcing and was not a matter for uniform legislation.³¹
- 9.43 The Commission is of the view that the figure that determines which estates are eligible to access the assistance of the Supreme Court Probate Office's small estates service should be significantly raised. The figure should be a single value, not based on the identities of beneficiaries, and should be adjusted quarterly to reflect changes in the All Groups Consumer Price Index.

25 See discussion at [5.61].

26 Being the weighted average of the eight capital cities, published by the Australian Bureau of Statistics three to four weeks before the end of each quarter: Australian Taxation Office, *Consumer Price Index (CPI) Rates* < <http://www.ato.gov.au/taxprofessionals/content.aspx?doc=/content/1566.htm>>.

27 Victorian Law Reform Commission, above n 6, 20.

28 Submission 25 (Moore's Legal).

29 Advisory Committee (Meeting 1); submissions 14 (Commercial Bar Association); 30b (Law Institute of Victoria).

30 *Administration and Probate Act 1958* (Vic) s 78.

31 National Committee for Uniform Succession Laws, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General: Volume 3*, Queensland Law Reform Commission Report No 65 (2009) 121 ('*Administration of Estates: Volume 3*').

Recommendations

- 67 Section 71(1) of the *Administration and Probate Act 1958* (Vic) should be replaced with a provision that:
- (a) permits a person entitled to probate of the will or letters of administration in respect of an estate not exceeding \$100,000 in value to apply to the registrar of probates or, where appropriate, a registrar of the Magistrates' Court, for aid in obtaining a grant of representation
 - (b) provides for the maximum value of the estate in respect of which the aid may be provided to be adjusted quarterly to reflect changes in the All Groups Consumer Price Index.
- 68 The Supreme Court of Victoria should publish on its website the quarterly Consumer Price Index adjusted maximum values of estates in respect of which the Probate Office may provide assistance in applying for a grant of representation.

Providing better information

- 9.44 It has become clear to the Commission throughout the course of the reference that there is a lack of clearly presented good information available to the public in the area of succession laws.
- 9.45 In Chapter 7, the Commission recommends that the Victoria Law Foundation prepare practical information to assist the community generally, and lay executors and beneficiaries in particular, to understand the role of executors and the operation of succession laws.
- 9.46 To assist lay persons to apply for a grant of representation, the Commission has also identified the need for the information that is currently available to them to be collated into a comprehensive package.
- 9.47 People should be supported, where possible, in making their own applications for grants. Certainly, where estates are legally complex, good legal advice is crucial. However, the application for a grant of representation—an important but essentially administrative process—should be cost-effective and time-efficient, and ideally be navigable without formal legal assistance.
- 9.48 The Commission is of the view that improved public information on the administration of estates would have a significant positive effect on the ability of people to navigate the grant-application process. This would be a valuable supplement to the formal assistance provided by the Probate Office, and may well reduce reliance on the small estates service.

Current sources of information

- 9.49 A number of stakeholders have identified the difficulties faced by those who wish to seek a grant of administration without the assistance of a legal practitioner, the small estates officer of the Probate Office or a trustee company. The likely starting points for seeking information for such people include the Law Institute of Victoria, Victoria Legal Aid, the Supreme Court Probate Office and website, and community legal centres.
- 9.50 The Law Institute of Victoria provides a referral service that links people with suitably qualified private legal practitioners listed with the Law Institute of Victoria. This service includes a thirty-minute inquiry interview that is free of charge.³²

- 9.51 Victoria Legal Aid operates a free legal advice phone service, but provides only very basic information on wills and probate. Victoria Legal Aid refers inquiries in this area either to the Law Institute of Victoria or to the Probate Office.³³
- 9.52 The Federation of Community Legal Centres has informed the Commission that Victorian community legal centres rarely assist clients to obtain grants of probate. Their resources tend to be directed to assisting clients with pressing criminal and civil matters.
- 9.53 That said, community legal centres have reported that they field a large number of inquiries, both in person and over the phone, for this type of assistance. Some clients seek a community legal centre solicitor to take them through the process, while others are looking for resources and information to complete the process themselves.
- 9.54 A number of community legal centres refer inquiries to a commercially-available probate kit, which can be accessed online. This kit is sold at one community legal centre. Although such kits are intended to help people navigate the grants process without formal advice, the information provided is static, and cannot take particular details of each estate into account.
- 9.55 The Probate Office itself is unsurprisingly the first port of call for the majority of inquiries relating to obtaining a grant of representation. The Registrar has told the Commission that by far the most common inquiry to the Probate Office involves a named executor asking 'what to do'.³⁴
- 9.56 The Probate Office staff and website provide the information necessary to apply for a grant, including relevant forms and legislation. Although the information on the Probate Office website is complete, it is presented in a way that is difficult to navigate, with large amounts of information contained in a variety of areas.
- 9.57 Information and legislation are cross-referenced, without a clear guiding procedure set out for those seeking to apply for a grant. A potential applicant could easily be unsure whether they had completed all steps and collected all necessary documents. Nevertheless, the Probate Office plays a central role in helping applicants to fill in the gaps, providing guidance where necessary.
- 9.58 There are a number of options available for those who wish to engage legal assistance in obtaining a grant of representation. However, for those who wish to complete the process themselves, there is a need for an accurate and complete source of information.

Probate pack collated by Probate Office

- 9.59 The consultation paper on small estates asked whether the formal assistance provided by the small estates officer of the Probate Office could be replaced by clearer, more comprehensive Court-generated information.³⁵
- 9.60 Submissions on this topic were in favour of the provision of better information by the Court, and noted that this should supplement the current formal assistance of the Probate Office, rather than replace it.³⁶
- 9.61 A clearly presented package of information—a 'probate pack'—is necessary. It should be a complete collection of information, insofar as this is possible when each estate will have individual characteristics, to reassure potential applicants that they have all the tools available to them to procure a grant. This includes information that indicates when legal advice should be sought, such as when the will is not clear or the estate is too complex for a non-professional representative to administer without assistance.

33 Victoria Legal Aid, *Get Help with Wills and Estates* (17 June 2013) <<http://www.legalaid.vic.gov.au/find-legal-answers/wills-and-estates/get-help>>.

34 Consultation 23 (Supreme Court of Victoria—Registrar of Probates).

35 Victorian Law Reform Commission, above n 6, 24.

36 Submission 14 (Commercial Bar Association).

- 9.62 The pack should be downloadable from the Supreme Court website in a simple format that includes factsheets, checklists, forms and extracts of legislation. It should also be linked to the websites of relevant legal and social assistance organisations.
- 9.63 It is important that the pack be created with the oversight of (if not actively managed by) the Supreme Court. The reasons for this are to ensure accuracy of information, and avoid over-simplification of the required process.
- 9.64 The Registrar and Probate Office staff are highly experienced in this field. Court control over a probate pack would ensure that changes to the law and practice are regularly updated in the pack, and common mistakes, misunderstandings and questions frequently asked of the Probate Office could be included.
- 9.65 Court control over this information would reduce the likelihood of mistakes in applications and the need for further advice and involvement by Probate Office staff. The provision of fixed, collated information may also relieve Probate Office staff of the potentially conflicting role arising from adjudicating on applications made by the small estates officer.³⁷
- 9.66 The Commission considers that the pack should be written and developed in consultation with Victoria Legal Aid, the Law Institute of Victoria, the Federation of Community Legal Centres, and other bodies with expertise in the area or in contact with members of the public to whom the information needs to be directed.
- 9.67 Design and production by an organisation with experience in presenting complex legal information clearly, such as the Victoria Law Foundation, would be desirable.³⁸
- 9.68 Given the shortcomings of current information, and the clear need to assist people applying for grants in person, the creation of a probate pack would be a valuable addition to the resources currently available for small estates.

Recommendation

- 69** The Supreme Court of Victoria, in consultation with Victoria Legal Aid, the Law Institute of Victoria and the Federation of Community Legal Centres, should develop and make available on its website in community languages a package of information for those wishing to seek a grant of representation without professional assistance.

Informal administration

- 9.69 There is no statutory requirement to obtain a grant of representation after a death.³⁹ In fact, where both a person's death and the resulting entitlement of any claimant can be proved by other means, and depending on the type and value of the estate assets, there may be no real need to obtain a grant.
- 9.70 The Commission understands that a large proportion of deceased estates are administered informally. Although it is difficult to obtain precise figures in this area, a comparison of the number of deaths with the number of grants obtained through the Probate Office leaves a significant number of estates where no formal representation has been obtained.⁴⁰

³⁷ See discussion above at [9.21].

³⁸ See also the discussion of the Victoria Law Foundation's role in providing community information at [7.200].

³⁹ However, the Supreme Court has the power to summon named executors who fail to seek a grant within six weeks of the death of the deceased person to show reason: *Administration and Probate Act 1958* (Vic) s 15.

⁴⁰ In Victoria in the 2012 calendar year, there were 36,238 registered deaths: Registry of Births, Deaths and Marriages, *Fast Facts* (11 February 2013) <www.bdm.vic.gov.au/utility/about+us/fast+facts>. For the financial year 2011–12, the Supreme Court made 18,746 grants. This means that, for this period, there were approximately 17,492 deaths for which there was no grant of representation, and the Supreme Court only made grants in relation to approximately 50% of all registered deaths. It should be noted that this figure does not take into account those estates administered by State Trustees under the *Administration and Probate Act 1958* (Vic) s 79.

- 9.71 The assets of estates administered informally are either those which can be accessed without recourse to a grant (for example, goods), or those for which the asset-holder will accept other forms of authority, such as a death certificate (for example, low-value bank accounts).⁴¹ Significant assets may have passed by survivorship (for example, jointly-owned real estate).⁴² Depending on the types of assets involved, any estate may potentially be informally administered in whole or in part.
- 9.72 As less valuable assets are easier to deal with informally, the availability and ease of use of informal processes is particularly significant for smaller estates. The simplification of process and the avoidance of fees and charges associated with formal grants will also be of value to smaller estates and their beneficiaries.
- 9.73 The National Committee for Uniform Succession Laws was concerned to recognise the extent of informal administration. Given that the chapter in which it discusses its recommendations on this topic is headed 'Mechanisms to facilitate administration and minimise the need to obtain a grant',⁴³ it is clear that the National Committee was generally working towards, rather than against, the protection and general support of informal administrators.
- 9.74 The Commission seeks to strike a balance between recognising the utility of informal administration in some situations and promoting formal administration by ensuring that a number of cheap and accessible options exist for obtaining a grant.
- 9.75 Submissions and consultations concerning current processes of informal administration did not identify significant problems. Consultees were generally of the view that most people would 'have a go' at administering informally, and would only seek a grant of representation where a bank or other asset-holder required one.⁴⁴
- 9.76 For this reason, the recommendations in this area represent a clarification and strengthening of the existing protections available to those administering informally. They do not introduce significantly broader or different protections.

Clarifying the role of an informal administrator

- 9.77 Informal administrators may not see themselves as administrators or representatives of the estate, rather just as people trying to deal with the estate generally. It is important to clarify the extent of their rights and responsibilities.
- 9.78 Currently, those acting under a formal grant of representation are afforded a general protection for acts done in good faith in the administration of the estate.⁴⁵
- 9.79 Informal administrators are, however, protected only to the extent that they *correctly* administer the estate. They are otherwise liable to be sued by any of the rightful personal representatives, creditors or beneficiaries for any property received by them or any loss to the estate arising from their actions.⁴⁶ Such a situation might typically arise where a later will is discovered after the estate has been informally distributed, or where the debts of the estate were not fully paid before distribution.⁴⁷
- 9.80 Although it is clear that there may be pragmatic reasons for an informal administrator to deal with estate assets, this can be problematic. For example, where an informal administrator seeks to pay debts of the estate by releasing funds from the estate to a creditor, an executor or administrator under a later grant of representation cannot recover that money from the creditor. The creditor is not required to enquire about the authority of the person purporting to act as the representative of the estate.⁴⁸

41 *Banking Act 1959* (Cth) s 69AA.

42 The survivor will apply under the *Transfer of Land Act 1958* (Vic) s 50 to become sole registered proprietor.

43 National Committee for Uniform Succession Laws, *Administration of Estates: Volume 3*, above n 31, ch 29.

44 For example, consultation 4 (Legal practitioners from Loddon Campaspe and Goulburn Valley Community Legal Centres).

45 *Administration and Probate Act 1958* (Vic) s 31.

46 *Ibid* s 33(1); *Carmichael v Carmichael* (1846) 41 ER 880.

47 National Committee for Uniform Succession Laws, *Administration of Estates: Volume 3*, above n 31, 147.

48 *Parker v Kett* (1701) 91 All ER 133 (Lord Holt).

- 9.81 Victoria is one of the few jurisdictions in which the legislation clearly deals with liability and protection of informal administrators. Section 33(1) of the Administration and Probate Act provides:

33 Liability of person fraudulently obtaining or retaining estate of deceased

- (1) If any person, to the defrauding of creditors or without full valuable consideration, obtains receives or holds the estate or any part of the estate of a deceased person or effects the release of any debt or liability due to the estate of the deceased, he shall be charged as executor in his own wrong to the extent of the estate received or coming to his hands, or the debt or liability released, after deducting any payment made by him which might properly be made by a personal representative.
- 9.82 The effect of this provision is to clarify the extent to which a person acting without a grant is liable to account for the estate assets that they have dealt with. It makes clear that they are effectively protected when they make payments which *would have been* legitimate had they had a grant of representation. As such, this provision provides significant protection to informal administrators.

National Committee for Uniform Succession Laws

- 9.83 The National Committee recommended a model provision that reads almost identically to the Victorian provision, section 33(1). As noted above, the Victorian section is headed 'Liability of person fraudulently obtaining or retaining estate of deceased', and sets out the liability an unauthorised person is exposed to in informally administering an estate.⁴⁹
- 9.84 However, this section also outlines limits to liability, and legitimises payments 'which might properly be made by a [legal] personal representative'. The National Committee recommended that the model section be headed 'persons acting informally', to reframe the focus of the provision and to recognise the increasingly common role played by informal administrators:

Persons acting informally

- (1) This section applies if a person who does not hold a grant of representation of a deceased person's estate—
- (a) obtains, receives or holds the estate other than for full and valuable consideration;
 - or
 - (b) effects the release of any debt payable to the estate.
- (2) The person is liable to account for estate assets to the extent of—
- (a) the estate obtained, received or held by the person; or
 - (b) the debt released.
- (3) However, the person's liability is reduced to the extent of any payment made by the person that might properly be made by a personal representative to whom a grant of representation of the estate is made.⁵⁰
- 9.85 The model provision is drafted more simply and with a more accessible layout than the Victorian equivalent. This is very important in a section that sets out to define for informal administrators, who may not have legal training, the limits of their liability.⁵¹

⁴⁹ Note that the heading does not form part of the Act. Section 33 of the *Administration and Probate Act 1958* (Vic) came into force prior to 1 January 2001 so this heading does not form part of the Act: *Interpretation of Legislation Act 1984* (Vic) s 36(2A).

⁵⁰ National Committee for Uniform Succession Laws, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General: Volume 4*, Queensland Law Reform Commission Report No 65 (2009) Draft Administration of Estates Bill 2009 cl 435 ('*Administration of Estates: Volume 4*').

⁵¹ *Ibid.*

9.86 The Commission's consultation paper on small estates asked whether this change would be appropriate.⁵² Moores Legal agreed that:

... although the overall effect of the amendment would perhaps be equivocal, it would assist by changing the focus away from a liability approach to a protection approach... the reworded section would allow informal administrators to feel that their role and actions are legitimised.⁵³

9.87 Other submissions called for a redrafted, simplified section, noting that this would allow informal administrators to readily understand their potential liability and its limits.⁵⁴ The Commission agrees and thus recommends that the provision outlining the liability of informal administrators be redrafted along the lines of the National Committee's model provision.

Recommendation

70 Section 33(1) of the *Administration and Probate Act 1958* (Vic) should be redrafted in the simpler form reflected in the National Committee's model provision dealing with persons acting informally.

Access to indemnities for parties releasing funds

9.88 While it is possible for a third party to transfer funds to which the deceased would have been entitled to someone informally administering the estate, there is an inherent risk in doing so. The third party could be exposed to liability where payments are made incorrectly or a grant of representation is later taken out by another person.

9.89 Accordingly, the third party normally requires evidence from the person requesting transfer of the asset that the request is legitimately made, and that the requester is entitled. Where the evidence is less than a full grant of representation, the third party will want to limit its exposure to risk by requiring from the requester a discharge of liability.

9.90 An executor or administrator acting under a grant of representation is able to give a discharge of liability by virtue of acting under the grant,⁵⁵ while someone administering informally is generally not able to do so.⁵⁶ However, some jurisdictions have enacted provisions that allow for discharge of liability in limited circumstances.⁵⁷

9.91 In Victoria, section 32(2) of the *Administration and Probate Act* provides that a receipt from the informal administrator will constitute a discharge of liability in the circumstances referred to:

A receipt signed by any person above the age of sixteen years to whom money or property is paid or transferred by an employer in the bona fide exercise of the powers conferred by this section shall be a complete discharge to the employer of all liability in respect of moneys or property so paid or transferred.

9.92 This automatic discharge of liability only operates where, without a grant of representation, an employer transfers wages that are owed to a deceased employee to the partner or child of the employee, or to another person entitled to the wages. Under the provision, the net estate cannot exceed \$25,000, and the payment made is limited to wages not exceeding \$12,500.⁵⁸

52 Victorian Law Reform Commission, above n 6, 39.

53 Submission 25 (Moores Legal).

54 Submissions 30b (Law Institute of Victoria); 32 (The Institute of Legal Executives).

55 *Administration and Probate Act 1958* (Vic) s 31.

56 Although the personal representative could potentially provide an indemnity in their personal capacity.

57 It is important to note that these provisions relate to money to which the deceased person was clearly entitled, not to the informal transfer of assets generally.

58 *Administration and Probate Act 1958* (Vic) s 32. The provision refers to moneys or other property held on account of the employee.

National Committee for Uniform Succession Laws

- 9.93 Although the Victorian provision assists employers in making informal payments, others who hold funds cannot use section 32 of the Administration and Probate Act and do not get the benefit of the protection it provides.
- 9.94 A submission to the National Committee for Uniform Succession Laws on this topic said that ‘it [is] a matter of particular concern that the current legislation forces what could be a satisfactory informal administration down the official path solely because the administrator cannot obtain an asset’.⁵⁹
- 9.95 The National Committee recommended that a broader provision of more general application, based on section 32 of the Administration and Probate Act, was desirable, and drafted the following model provision:⁶⁰

Protection for limited payments made without production of a grant of representation

- (1) This section applies if a person holds money or personal property for a deceased person of not more than \$15,000 in value.
- (2) The person may, without requiring production of a grant of representation, pay the money or transfer the property to any of the following persons having full legal capacity—
 - (a) the surviving spouse [or domestic partner] of the deceased person;
 - (b) a child of the deceased person; or
 - (c) another person who appears to be entitled to the money or personal property.⁶¹
- (3) A payment of money or transfer of personal property under subsection (2), if made in good faith, is a complete discharge to the person of all liability for the money and personal property.

Increasing limit on funds held and removing limit on the size of the estate

- 9.96 The South Australian equivalent to section 32 of the Victorian Administration and Probate Act extends to money of deceased patients held by public hospitals, but is limited to sums of under \$2000.⁶² South Australia and Western Australia also have specific provisions allowing banks to be discharged from liability for the payment of smaller amounts, under \$2000 and \$50,000 respectively.⁶³
- 9.97 The \$15,000 limit in the model provision reflected the National Committee’s view that most jurisdictions’ limits of around \$5000 were far too low.⁶⁴ Although Victoria’s section 32 is used as the model, the \$12,500 payment limit in the Victorian provision was described as a ‘significant restriction’ on the provision’s utility.⁶⁵
- 9.98 Section 69AA of the *Banking Act 1959* (Cth) provides for release of funds, without production of the will or a grant of representation, of up to \$15,000 in certain circumstances. It prescribes that no action lies against a bank for acting or failing to act under the section.⁶⁶

59 National Committee for Uniform Succession Laws, *Administration of Estates: Volume 3*, above n 31, 153.

60 National Committee for Uniform Succession Laws, *Administration of Estates: Volume 4*, above n 50, Draft Administration of Estates Bill 2009 cl 434.

61 Which would include a person named as executor in a will that had not been admitted to probate. See discussion in National Committee for Uniform Succession Laws, *Administration of Estates: Volume 3*, above n 31, 166.

62 *Administration and Probate Act 1919* (SA) s 71.

63 Ibid s 72; *Administration Act 1903* (WA) s 139(1). The legislation provides for a base of \$1200, or any such other amount as declared by proclamation: see Western Australia, *Western Australian Government Gazette*, No 15, 6 February 2009, 243.

64 Note that at the time of the National Committee’s report, the Western Australian limit was \$6000. See discussion in National Committee for Uniform Succession Laws, *Administration of Estates: Volume 3*, above n 31, 165.

65 National Committee for Uniform Succession Laws, *Administration of Estates: Volume 3*, above n 31, 161.

66 *Banking Act 1959* (Cth) s 69AA: The provision allows for payment of funeral expenses, debts, payment to the executor of the estate, or payment to anyone ‘who is, in the [bank’s] opinion, entitled to the amount, having regard to the laws of probate and accepted practice for the administration of deceased estates’.

- 9.99 Another difference between the existing provisions and the National Committee's proposal is that the model provision provides a cap on the amount held by each person, rather than the maximum payment that can be paid out, as is the case under the Victorian section. This change avoids much larger sums being paid out in a number of smaller instalments. It also means that these informal procedures are available to all estates, and are not necessarily limited to small estates.
- 9.100 The model provision would remove the current stipulation that the payer must be satisfied that the total estate did not exceed a specified limit, such as the \$25,000 limit in the Victorian provision. The National Committee was of the opinion that the value of the money actually held by the payer is a sufficient limitation, and that the payer should not need to ascertain the estate's value, as this may well discourage them from releasing the funds. Removing this requirement means that the focus is on ensuring simple transactions can take place smoothly, regardless of the size of the estate.
- 9.101 The National Committee report which recommended a \$15,000 limit was released in 2009. The Commission is of the view that this figure should be raised, in acknowledgement of the time between the National Committee's work and the potential implementation of the recommendations contained in this report.
- 9.102 The Commission is of the view that the \$15,000 limit could usefully be raised to funds or property up to the value of \$25,000.

Expansion of section 32 to anyone holding funds

- 9.103 As noted above, section 32 of the Administration and Probate Act deals only with employers holding money on behalf of deceased employees.
- 9.104 The National Committee rejected any arbitrary limitation on the categories of persons who might take advantage of the protections afforded by the provision, recommending that anyone holding money or personal property of the deceased person should be able to receive an indemnity upon its release.⁶⁷
- 9.105 Submissions in response to the Commission's consultation paper on small estates did not specifically address the extension of the provision to include payers other than employers, however the general support for expansion of the scope of the provision in line with the National Committee suggests that this too is supported.
- 9.106 Those holding funds or personal property could include financial institutions, hospitals, schools, employers and clubs, among others. Aside from banks, these bodies do not otherwise have clear legislative guidance for the release of these funds.
- 9.107 Importantly, neither the model provision nor the existing section 32 prevents anyone from making payments of any amount to informal administrators. However, anyone transferring more than the amount set out will not be able to obtain a discharge of liability under the section.
- 9.108 The majority of submissions supported the expansion of section 32 in line with the proposed model provision.⁶⁸ The form of the provision was described as 'clear, concise and helpful',⁶⁹ and there was support for raising the dollar value for funds that may be released.⁷⁰

67 The transaction itself effects the release, not the provision of a signed receipt as in the Victorian provision: *Administration and Probate Act 1958* (Vic) s 32.

68 Submissions 8 (Patricia Strachan); 14 (Commercial Bar Association); 19 (Association of Independent Retirees); 25 (Moores Legal); 30b (Law Institute of Victoria); 33 (State Trustees Limited).

69 Submission 25 (Moores Legal).

70 See, eg, submission 8 (Patricia Strachan).

Recommendations

- 71 Drawing on model legislation proposed by the National Committee for Uniform Succession Laws, section 32 of the *Administration and Probate Act 1958* (Vic) should be amended to:
- (a) provide a discharge of liability in respect of payments of \$25,000 or less
 - (b) provide that the \$25,000 limit will be adjusted quarterly to reflect changes in the All Groups Consumer Price Index
 - (c) provide that payments made in accordance with the section will serve as a complete discharge of liability
 - (d) remove the requirement that the party releasing the assets be satisfied that the value of the estate does not exceed a particular limit.
- 72 The Supreme Court of Victoria should publish on its website the quarterly Consumer Price Index adjusted limit for the purposes of section 32 of the *Administration and Probate Act 1958* (Vic).

Removing costs barriers to formal administration

Introducing a sliding scale for grant application fees

- 9.109 The application fee for a standard grant of representation is currently \$281.90.⁷¹ A reduced fee of \$110.30 is charged where estates are valued under \$1000. Although a significant reduction in dollar value, this figure still represents over 10 per cent of any such estate.
- 9.110 In contrast, New South Wales applies a sliding scale to the cost of the grant application, depending on the value of the estate. Estates under \$100,000 pay no fee, and those between \$100,000 and \$250,000 pay \$650. There are several increments, the highest being for those estates over \$5 million, which attract a \$5,000 fee.⁷²
- 9.111 The Commission's consultation paper on small estates asked whether the introduction of a sliding scale would encourage people to seek grants of representation for smaller estates.⁷³
- 9.112 Some stakeholders considered that a lack of community understanding of the importance of and protections provided by a grant, rather than the applicable fees, was more relevant to the decision whether or not to seek a grant.⁷⁴
- 9.113 It was noted that, for uncomplicated estates, representatives will first seek to administer informally, and will only apply for a grant where they are unable to negotiate the release of an asset without one.⁷⁵
- 9.114 However, while it may not necessarily be a decisive factor, the removal of any fee should encourage personal representatives of small estates to apply for a grant.
- 9.115 One submission expressed the view that a nil fee would be a strong incentive for people to seek grants, provided that they were aware of the benefits of so doing. It was also noted that the creation of court records is beneficial for third parties who wish to search for information about the estate's administration.⁷⁶

71 Probate Office, above n 9.

72 Supreme Court of New South Wales Registry, *Probate Filing Fees* (1 January 2012) Lawlink NSW <[http://www.supremecourt.lawlink.nsw.gov.au/agdbase/v7/wr/_assets/supremecourt/m6700011711802/filing%20fees%20\(from%201.1.13\).pdf](http://www.supremecourt.lawlink.nsw.gov.au/agdbase/v7/wr/_assets/supremecourt/m6700011711802/filing%20fees%20(from%201.1.13).pdf)>.

73 Victorian Law Reform Commission, above n 6, 24.

74 Submissions 25 (Moores Legal); 33 (State Trustees Limited).

75 Consultation 4 (Legal practitioners from Goulburn Valley and Loddon Campaspe Community Legal Centres); submission 14 (Commercial Bar Association).

76 Submission 25 (Moores Legal).

- 9.116 In his report to the Court at the end of his tenure, the former Registrar of Probates advocated the introduction of a sliding scale fee in Victoria.⁷⁷
- 9.117 The Commission is of the view that, in line with the discussion and recommendations on the value threshold for estates seeking assistance from the small estates service, it would be appropriate for the first (no fee) bracket to apply to those estates valued at \$100,000 or less.⁷⁸
- 9.118 The Commission notes that the power of the Governor in Council to make regulations stipulating fees includes the power to make provision for fees that vary ‘according to value or time or class of matter’, and that it is not necessary for the amount of any fee to be related to the cost of providing the service.⁷⁹
- 9.119 The introduction of a sliding fee scale in the Supreme Court Probate Office would provide consistency across a number of small estates-related mechanisms, as well as provide an incentive for seeking grants.

Recommendation

- 73 The applicable fee for obtaining a grant of probate or letters of administration in the Supreme Court Probate Office should be based on the estate’s value, in a sliding scale, with estates valued at no more than \$100,000 attracting a nil fee.**

Administration by statutory declaration

- 9.120 It was suggested to the Commission that an alternative process of administration by statutory declaration would be a worthwhile addition to the existing mechanisms designed to facilitate the administration of small estates.⁸⁰
- 9.121 In response to the consultation paper on small estates, some submissions supported the introduction of such a scheme on the basis that it may provide increased confidence for parties releasing funds and a level of certainty for the declarant.⁸¹
- 9.122 However, a number of submissions expressed the view that a new mechanism along these lines would add little to the options currently available, because there are enough forms of administration available and the probable uses of such a mechanism are already covered by informal administration, which works well in suitable estates.⁸² One submission expressed concern that administration of small estates should not be ‘made too easy’, as dishonesty could be encouraged.⁸³
- 9.123 The Commission does not favour the introduction of a process of administration by statutory declaration. The recommended sliding scale of fees will make obtaining a formal grant far more accessible.⁸⁴ In other cases, the expansion of protections associated with informal administration recommended by the Commission will make that process more accessible.⁸⁵

77 Registrar of Probates, Supreme Court of Victoria, *Final Report & Recommendations Regarding the Probate Jurisdiction Supreme Court of Victoria* (1993) 4.

78 See discussion above at [9.27]. Setting the figure at \$100,000 also has the benefit of creating consistency with those estates eligible to be administered under the section 79 expedited grant process, should the Commission’s recommendation to amend the criteria for that process, discussed later in this chapter, be implemented. It would create a clear general benchmark for determining what is a small estate.

79 *Supreme Court Act 1986* (Vic) s 129(2)(d). See the current regulations setting out the fees of the Probate Office: *Supreme Court (Fees) Regulations 2012* (Vic).

80 Submission 1 (Legal Services Commissioner); preliminary comments on terms of reference, provided by Equity Trustees Ltd at meeting with the Financial Services Council (21 September 2012). See discussion in Victorian Law Reform Commission, above n 6, 39.

81 Submission 14 (Commercial Bar Association).

82 Submission 30b (Law Institute of Victoria). The Law Institute submission was divided on this topic, and presented the views of two groups of members.

83 Submission 8 (Patricia Strachan).

84 See discussion and recommendations at [9.109].

85 See discussion and recommendations at [9.69].

Expedited grants

- 9.124 A trustee company that is appointed as the personal representative of a small estate has access to expedited grant processes that reduce the time and cost of obtaining a grant of representation. Two forms of expedited grant have been established by legislation:
- a process for election to administer, provided by section 11A of the *Trustee Companies Act 1984* (Vic), which is available both to private trustee companies and State Trustees
 - a process for administration without a grant, set out at section 79 of the *Administration and Probate Act*, which is available only to State Trustees.⁸⁶
- 9.125 The fee to file an election to administer is currently \$186.70, compared to the \$281.90 commencement filing fee for a standard grant of representation.⁸⁷ The cost of administering under the section 79 process is limited to the cost of the requisite advertisement, discussed below.

Elections to administer—section 11A of the Trustee Companies Act

- 9.126 The election to administer process allows a trustee company to obtain a grant of representation by filing an election in the prescribed form, the will, and an inventory of assets at the Probate Office and by advertising its intention to file the election to administer the estate.⁸⁸
- 9.127 Section 11A of the Trustee Companies Act also establishes the following pre-conditions to filing:
- the estimated gross value of the estate must not exceed \$50,000
 - the trustee company must otherwise be entitled to a grant of representation
 - there cannot be another grant, or any caveat in force against any application for a grant, in respect of the estate.⁸⁹
- 9.128 The company must publish notice of its intention to file an election to administer in a daily newspaper at least 14 days before filing. It must then publish notice of the election within one month after filing. This notice after filing is conclusive evidence that the company is entitled to administer the estate.⁹⁰
- 9.129 If the value of the estate is later found to exceed a threshold of \$60,000, which operates as a safety net beyond the \$50,000 limit, the company must revoke the election to administer and seek a standard grant of representation in relation to the estate.⁹¹
- 9.130 The Court may revoke an election to administer where it 'sees fit to grant an application by any other person', or where a will is subsequently found for a person who was believed to have died intestate.⁹²

Small estates administration without a grant—section 79 of the Administration and Probate Act

- 9.131 Under section 79 of the Administration and Probate Act, State Trustees may employ a simpler process in relation to estates designated as small estates—those below \$25,000 (or \$50,000 depending on the relationship of the beneficiaries to the deceased).⁹³

⁸⁶ See broader discussion in Victorian Law Reform Commission, above n 6, 24.

⁸⁷ Probate Office, above n 9.

⁸⁸ *Trustee Companies Act 1984* (Vic) ss 11A(1)–(3), (5)(c).

⁸⁹ *Ibid* ss 11A(1)–(2), (4)–(5).

⁹⁰ *Ibid* ss 11A(5)(b), (6)–(7).

⁹¹ *Ibid* ss 11A(8)–(11).

⁹² Also where the will relied upon has been revoked or is invalid: *ibid*.

⁹³ *Administration and Probate Act 1958* (Vic) ss 3(1), 71(1)(a). See discussion of this figure in relation to the Probate Office's small estates service, above at [9.18].

- 9.132 For the authority to administer to be validly obtained, State Trustees must otherwise be eligible to apply for a grant of representation⁹⁴ or to elect to administer under section 11A of the Trustee Companies Act.⁹⁵
- 9.133 Under this process, State Trustees is not required to file anything with the Court. However, it must give notice of its intention to administer by advertising in a daily newspaper. Fourteen days after the advertisement is published, State Trustees will be taken to have been granted representation. State Trustees may then proceed as if it had a grant of representation in relation to that estate.⁹⁶

Use of the mechanisms

- 9.134 Section 11A was introduced into the Trustee Companies Act to provide trustee companies with access to a similar mechanism to the small estates administration process available to State Trustees under section 79 of the Administration and Probate Act.
- 9.135 However, the election to administer process is rarely used. Despite the high number of estates that would fall within the threshold for election to administer, the Registrar of Probates has informed the Commission that there have been only two elections to administer filed since the provision's introduction.⁹⁷ Reasons for this are: Private trustee companies have no commercial interest in administering estates of such a small size.
- State Trustees prefers the simpler and cheaper process open to it under section 79 of the Administration and Probate Act.
- 9.136 Figures provided to the Commission by State Trustees suggest that the section 79 grants process is frequently used.⁹⁸

Procedural integrity

- 9.137 Both of these mechanisms have been criticised by the Registrar of Probates as lacking in procedural integrity. The Registrar's main criticisms of the process under section 79 of the Administration and Probate Act are:
- There is no requirement to file a will or inventory, meaning that there is no Probate Office scrutiny or record of which estates are being administered under this process.⁹⁹
 - There is no requirement to search for caveats, deposited wills or prior applications, which increases the risk that a will may be overlooked, or that a grant could be made twice in relation to one estate.
 - There is no record of the administration within the Probate Office, with the result that the completeness and integrity of the Court's online search system is brought into question.
- 9.138 These criticisms recognise that the public has an interest in comprehensive court records being generated in relation to estate administration, not only as potential beneficiaries or family provision claimants, but also as potential creditors or alternate personal representatives of the estate.

94 Under s 5 of the *State Trustees (State Owned Company) Act 1994* (Vic) or ss 9, 10, 11 or 11A of the *Trustee Companies Act 1984* (Vic): *Administration and Probate Act 1958* (Vic) s 71(1)(b).

95 See broader discussion in Victorian Law Reform Commission, above n 6, 29.

96 *Administration and Probate Act 1958* (Vic) ss 79(2)–(3).

97 Advisory Committee (Meeting 1).

98 Over the ten-year period between financial year 2001–02 and financial year 2011–12, State Trustees records show that it administered approximately 6335 estates with a value below \$25,000. Of these, 3444 were administered informally. As State Trustees has made it clear to the Commission that all other estates that fell within the threshold were subject to the section 79 process, at least 2891 were subject to that process over that period. Further, State Trustees does not keep separate records for estates falling between \$25,000 and \$50,000 in value, so it can be assumed that there were other estates dealt with under this mechanism for which no separate records were kept: statistics provided to the Commission by State Trustees (2 November 2012).

99 State Trustees has informed the Commission that, while not required to do so by the *Administration and Probate Act 1958* (Vic), it has in the past been its practice to file wills with the Court for estates that are at the higher end of the prescribed value spectrum: consultation 22 (State Trustees Limited).

- 9.139 While noting that the accompanying process for elections to administer under section 11A of the Trustee Companies Act is more robust than the process under section 79 of the Administration and Probate Act, the Registrar is of the view that any perceived benefits of the expedited grants processes are far outweighed by the above shortcomings.¹⁰⁰

The role of State Trustees

- 9.140 The value of the estates administered by State Trustees is often very low. State Trustees estimates that a quarter of the estates administered under section 79 of the Administration and Probate Act are valued at \$10,000 or less¹⁰¹ and that the cost of administering them is higher than the amount that could be collected in commission and fees. State Trustees receives a subsidy to ensure that a form of regulated administration remains available for smaller estates.
- 9.141 Under its community services agreement with the Department of Human Services, State Trustees receives funding from the government to ensure that members of the public have access to services relating to managing and administering their estates and property. This relates not only to deceased estates, but also to trust administration and guardianship services.¹⁰²
- 9.142 The Victorian Civil and Administrative Tribunal frequently appoints State Trustees as administrator of homeless, disadvantaged or otherwise marginalised people who are likely to have very small estates. It is important that there continues to be an organisation in Victoria that is prepared to administer the estates of these people on death, and to administer small estates generally.
- 9.143 The Commission is of the view that the current system can be improved by redesigning the expedited grants to take into account actual usage and the concerns of the major interested parties in this area—the Registrar of Probates and State Trustees.

Repeal of section 11A of the Trustee Companies Act

- 9.144 The Registrar has expressed the view that he would strongly prefer that all estates be administered under a full grant (where informal administration is not possible). Reform to the cost of obtaining a grant would promote access to this system, and has the Registrar's in-principle support.¹⁰³
- 9.145 State Trustees, on the other hand, has emphasised to the Commission the importance of the availability of an expedited mechanism for it to continue in its role as administrator of small estates. State Trustees is not attracted to the election to administer process as it entails the filing of documents and the payment of fees and is not as straightforward as the process under section 79 of the Administration and Probate Act. The latter process is, in effect, little more than an accounting exercise. State Trustees also indicated that it may not stay in the field of small estate administration were the section 79 process not available to it.
- 9.146 This being the case, and given that the election to administer process is not being used, the Commission is of the view that two mechanisms are not necessary. Retention of the section 79 process is important, for the reasons noted above, and some of the Registrar's concerns relating to procedural integrity can be attended to without making the process too onerous from State Trustees' point of view.
- 9.147 Accordingly, the Commission considers that section 11A of the Trustee Companies Act should be repealed and that the remaining form of expedited grant should be a variation of the process currently contained in section 79 of the Administration and Probate Act.

100 Letter from Michael Halpin, Registrar of Probates, to David Jones, Acting Chair of the Commission (3 July 2012).
 101 Consultation 22 (State Trustees Limited).
 102 State Trustees Limited, *Annual Report 2010–2011* (2011) 51.
 103 Consultation 23 (Supreme Court of Victoria—Registrar of Probates)

- 9.148 Repealing section 11A of the Trustee Companies Act will mean that trustee companies other than State Trustees will no longer have access to an expedited mechanism. Given that private trustee companies rarely use the current mechanism, this ought not to place them at any unreasonable disadvantage in the marketplace.

Recommendation

- 74 Section 11A of the *Trustee Companies Act 1984* (Vic) should be repealed.

Amendments to section 79 of the Administration and Probate Act

- 9.149 Section 79 of the Administration and Probate Act should be amended to improve the procedural integrity of the process and increase the value of the estates to which it applies. The amendments recommended by the Commission are discussed in the following sections and include:
- raising the threshold dollar value of estates that may be administered under the scheme to \$100,000
 - indexing this value to reflect changes in the Consumer Price Index, thereby ensuring that the figure remains up to date
 - inserting a second, safety net value, expressed as a percentage of the threshold figure, above which State Trustees would need to apply for a full grant, to accommodate any underestimation of the value of the estate at the time of filing
 - adding a requirement to file the will, if there is one, which would alert the Probate Office to the expedited grant
 - replacing the requirement to advertise in a newspaper with a requirement to advertise on the Court's website, thereby creating a searchable record.

Increased upper limit

- 9.150 The upper limit on the value of the estates that State Trustees may administer under section 79 of the Administration and Probate Act is determined by the value of the estates in respect of which the Probate Office may provide aid in obtaining a grant of representation under section 71(1). This is because an estate administered under section 79 must be a 'small estate', which is defined as 'an estate not exceeding the values specified in section 71(1)'.¹⁰⁴
- 9.151 The Commission has recommended above that section 71(1) of the Administration and Probate Act be amended to extend the assistance provided by the Probate Office to estates not exceeding \$100,000 in value, and that this figure should be adjusted quarterly to reflect changes in the Consumer Price Index.
- 9.152 The Commission is of the view that the value of estates in respect of which the Probate Office will provide assistance, and those which State Trustees may administer under section 79, should continue to be linked, subject to the safety net recommendation discussed below. For this reason, the dollar value of estates that State Trustees may administer under section 79 of the Administration and Probate Act should also increase to \$100,000 and be adjusted quarterly to reflect changes in the All Groups Consumer Price Index.
- 9.153 An increase is necessary in order to:
- better reflect the current value of the existing limit while still targeting estates that "are usually straightforward to administer

- reflect State Trustees' comments that 'estates under \$100,000 rarely involve administrative complexity', as they rarely involve real estate¹⁰⁵
- recognise that the addition of improved procedural integrity mechanisms (filing a will, online filing) lessens the risk to those with an interest in the estate
- provide congruity with the Commission's recommendation that there should be no filing fee for estates that are worth no more than \$100,000.

9.154 State Trustees supports this view. It maintained in its submission that estates which may be administered under section 79 should be matched to those eligible for assistance from the Probate Office's small estates service, and suggested that the relevant figure should be \$100,000.¹⁰⁶

Safety net value

- 9.155 The consultation paper on small estates noted that the election to administer process in the Trustee Companies Act provides for a safety net value slightly higher than the maximum value of estates that may be administered under that provision. This second threshold acknowledges that it may take a trustee company time to confirm the actual value of estate assets.¹⁰⁷ The second figure provides some flexibility so that, unless the actual value of the estate exceeds this figure, the trustee company will not have to seek a full grant.
- 9.156 The applicable figure for the section 79 process does not currently have such a safety net. In response to the consultation paper on small estates, State Trustees and the Law Institute of Victoria both specifically supported the introduction of a second figure,¹⁰⁸ while other submissions, in suggesting amounts for an appropriate figure, supported the introduction of a second figure by implication.¹⁰⁹
- 9.157 Most submissions supported expression of the upper figure as a percentage of the lower figure. A proportional amount was identified as the 'simplest way to keep this second threshold in line with an increasing base line [due to indexation]'.¹¹⁰
- 9.158 The Commission is of the view that a safety net figure of 120 per cent of the adjusted base figure is reasonable. State Trustees would be able to use the section 79 process in relation to an estate that it estimated was \$100,000 or less in value when it advertised its notice of intention to administer but which was subsequently valued at between \$100,000 and \$120,000.

Recommendation

- 75** Section 79 of the *Administration and Probate Act 1958* (Vic) should be amended to provide that, if in the course of administering a small estate under that section, State Trustees ascertains that the value of the estate exceeds 120 per cent of the adjusted upper value for small estates as set out in section 71(1), it must as soon as practicable apply in the same manner as any other person for a grant of representation.

105 State Trustees advised that estates under \$100,000 rarely involve administrative complexity as they rarely include real estate: consultation 22 (State Trustees Limited).

106 Submission 33 (State Trustees Limited).

107 *Trustee Companies Act 1984* (Vic) ss 11A(4), (10).

108 Submissions 30b (Law Institute of Victoria); 33 (State Trustees Limited).

109 Submissions 19 (Association of Independent Retirees); 25 (Moores Legal); 14 (Commercial Bar Association).

110 Submission 25 (Moores Legal).

Online advertising

- 9.159 As noted above, section 79 of the Administrative and Probate Act currently requires State Trustees to give notice of its intention to administer by advertising in a daily newspaper.¹¹¹
- 9.160 In the consultation paper on small estates, the Commission asked whether notices should be advertised online, as is required for full grants.¹¹² In most submissions and consultations, it was noted that advertising online would be less costly,¹¹³ as the cost of advertising on the Supreme Court website for full grants is significantly lower than the cost of advertising in a newspaper.¹¹⁴
- 9.161 General reliance on newspapers for this sort of information in rural and regional areas was noted.¹¹⁵ One submission suggested that the advertising requirement should prescribe notice in both a local newspaper and on the Supreme Court website.¹¹⁶ The Commission is of the view that advertising in both newspapers and online is unnecessarily onerous and would detract from the streamlined and cost-effective nature of the section 79 process.
- 9.162 Further, notices in newspapers, while potentially more likely to be read by some people, are not collected in a central repository. Notices on the Court's website would be more easily searched. Family members, friends and Probate Office staff would be able to assist in basic searches for those unfamiliar with using computers.
- 9.163 The creation of a searchable record of grants received under section 79 would provide the Probate Office with some level of oversight of State Trustees' small estates administration. Electronic advertising would link these automatic grants with the Probate Office. Such a record would also be valuable for legal practitioners working in the area of wills disputes.¹¹⁷
- 9.164 State Trustees, which would be the advertising party in this process, has told the Commission that advertising online would be preferable to advertising in newspapers.¹¹⁸ Importantly, the Registrar of Probates has informed the Commission that the Probate Office is seeking to move towards online filing generally.
- 9.165 Given the continuity, accessibility and integrity of searchable records, the Commission is of the view that advertising section 79 notices online is an important step in streamlining the process.

Recommendation

- 76 Section 79(2) of the *Administration and Probate Act 1958* (Vic) should be amended to require that notices of intention to administer an estate under this section should be advertised on the Supreme Court's website rather than in a daily newspaper.

111 *Administration and Probate Act 1958* (Vic) ss 79(2)–(3).

112 Victorian Law Reform Commission, above n 6, 28.

113 For example, submissions 25 (Moores Legal); 32 (The Institute of Legal Executives); 33 (State Trustees Limited).

114 Submission 25 (Moores Legal).

115 Submission 8 (Patricia Strachan).

116 Submission 19 (Association of Independent Retirees).

117 Submission 25 (Moores Legal).

118 Consultation 22 (State Trustees Limited).

Requirement to file the will

- 9.166 One of the primary criticisms of the section 79 process is the fact that it is effectively a ‘deemed’ grant process, with little or no external scrutiny of the estates that are administered pursuant to the process.¹¹⁹ As noted above, there is currently no requirement for State Trustees to file any documentation with the Supreme Court when it uses the section 79 process.
- 9.167 The Commission asked in the consultation paper on small estates whether there should be a requirement for wills to be filed online as part of the section 79 process.¹²⁰
- 9.168 State Trustees noted that it often files wills for section 79 grants as a matter of internal policy.¹²¹ Most submissions supported the introduction of this further procedural safeguard in section 79.¹²² One submission noted that filing a will, which creates a court record, is a crucial step given that anyone searching for information relating to an estate is likely to begin at the Probate Office.¹²³ Importantly, State Trustees informed the Commission that it advocated that wills be filed when the section 79 process was being developed.¹²⁴
- 9.169 The Commission recommends that section 79 should be amended to provide that State Trustees file the will with the Supreme Court Probate Office.

Recommendation

- 77** Section 79 of the *Administration and Probate Act 1958* (Vic) should be amended to require that the will be filed with the Supreme Court Probate Office.

Access to expedited grants for legal practitioners

- 9.170 While most jurisdictions, like Victoria, allow the public trustee and often other trustee companies the right to file elections to administer, the Northern Territory has empowered legal practitioners to do so as well.¹²⁵
- 9.171 The consultation paper on small estates asked whether legal practitioners should be able to file elections to administer, and whether they should be able to utilise the section 79 process.¹²⁶
- 9.172 A number of submissions supported expanding expedited grants to legal practitioners, relying largely on arguments of competitive fairness between State Trustees and private practitioners.¹²⁷
- 9.173 It was also noted that solicitors are more accessible to the general public, and that opening up the market would give executors more options.¹²⁸ One submission noted that there may be costs savings passed on to estates where the fees charged are not those of a trustee company.¹²⁹

119 Letter from Michael Halpin, Registrar of Probates, to David Jones, Acting Chair of the Commission (3 July 2012).

120 Victorian Law Reform Commission, above n 6, 28. This question was asked in the context of elections to administer, which already require that the will be filed: *Trustee Companies Act 1984* (Vic).

121 Submission 33 (State Trustees Limited); consultation 22 (State Trustees Limited).

122 Submission 8 (Patricia Strachan); 14 (Commercial Bar Association); 19 (Association of Independent Retirees); 25 (Moores Legal); 30b (Law Institute of Victoria).

123 Submission 14 (Commercial Bar Association).

124 Consultation 22 (State Trustees Limited).

125 This change was effected by broadening the definition of ‘professional personal representative’. *Administration and Probate Act 1969* (NT) s 6(1): definition of ‘professional personal representative’ includes public trustee, trustee companies and legal practitioners.

126 Victorian Law Reform Commission, above n 6, 27.

127 Note that these views are drawn from the responses relating both to elections to administer and to section 70 administration, where the submissions consider that both mechanisms should be available to legal practitioners: submissions 14 (Commercial Bar Association); 25 (Moores Legal); 32 (The Institute of Legal Executives); 33 (State Trustees Limited).

128 Submission 25 (Moores Legal).

129 Submission 14 (Commercial Bar Association).

- 9.174 State Trustees noted in its submission that:
- Allowing legal practitioners to file elections to administer and advertise for deemed grants would create greater flexibility for the Victorian public as to who can administer smaller value estates in a cost-effective and efficient manner.¹³⁰
- 9.175 However, both the Victorian Registrar of Probates and the New South Wales Registrar of Probates have made clear to the Commission that they are strongly opposed to allowing legal practitioners to use the above mechanisms.
- 9.176 The Commission does not recommend that legal practitioners be permitted to avail themselves of either expedited grant process. Where those seeking to have a small estate administered engage a solicitor to assist in the administration, it is likely that they can afford to file for a full grant. Further, should the recommendation relating to a sliding scale of fees be implemented,¹³¹ there would be no fee involved in filing an application for a full grant in respect of an estate of up to \$100,000 value.
- 9.177 The purpose of the section 79 process is to reduce costs to State Trustees and encourage administration of estates where providing this service would not otherwise be commercially viable. As indicated, State Trustees is given a government subsidy to provide this service.

Other amendments to Part II of the Administration and Probate Act

- 9.178 In reviewing sections within Part II of the Administration and Probate Act over the course of the reference, the Commission has noted two errors, and recommends that they be corrected.
- Section 71(2): ‘registrar of the Supreme Court’ should read ‘registrar of the Magistrates’ Court’.
 - Section 72: the reference in the heading to the County Court registrar should be removed.

Recommendation

- 78 The following corrections of errors in the *Administration and Probate Act 1958* (Vic) should be made:
- (a) Section 71(2): ‘registrar of the Supreme Court’ should read ‘registrar of the Magistrates’ Court’.
 - (b) Section 72: the reference in the heading to the County Court registrar should be removed.

Costs rules in succession proceedings

212 Introduction

212 Succession proceedings

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10. Costs rules in succession proceedings

Introduction

- 10.1 The Attorney-General has asked the Commission to review ‘the application of costs rules in succession proceedings, taking into account any developments in rules or practice notes made or proposed by the Supreme Court’.
- 10.2 In this chapter, costs rules in succession proceedings are considered at a general level. Costs orders in relation to statutory wills and family provision are considered in Chapters 3 and 6 respectively.

Succession proceedings

- 10.3 Succession proceedings may arise in either the probate jurisdiction or the general jurisdiction of the court.
- 10.4 The Supreme Court of Victoria has exclusive jurisdiction in the area of probate. The following are examples of succession proceedings in the probate jurisdiction:
- challenges to the validity of wills propounded for probate (for example, on the grounds of want of capacity, lack of knowledge and approval, undue influence or fraud)
 - questions concerning entitlement to a grant of letters of administration with the will annexed where the will does not effectively appoint an executor, or to a grant of letters of administration where the deceased dies intestate
 - applications for the revocation of an existing grant on the basis:
 - in the case of intestacy, that a valid will has been discovered
 - in the case of a grant of probate, that the will in question is invalid
 - applications for the removal and replacement of an executor or administrator on the grounds, for example, that they are unfit to act in the office.
- 10.5 The following are examples of succession proceedings that may arise in the general jurisdiction of the Court:
- proceedings for the interpretation or construction of a will
 - proceedings for a share of the estate (or a greater share of the estate) brought under family provision legislation.

- 10.6 Almost all succession proceedings are heard in the Supreme Court. Family provision applications may be heard in either the Supreme Court or the County Court.
- 10.7 The executor appointed by the will, or an administrator appointed by the Supreme Court, represents the estate in succession proceedings. They may have initiated the litigation (for example, to obtain a grant of probate in respect of a will the validity of which is in issue). Alternatively, they may defend litigation that someone else has instituted (for example, proceedings concerning the adequacy of provision made in the will for the applicant or available on intestacy to the applicant).

Costs orders

- 10.8 After deciding the outcome of succession litigation, the Court usually makes a costs order. A costs order directs what, if anything, each party is obliged to pay or is entitled to receive. The costs order will also direct whether the obligation to pay costs is personal (that is, to be paid out of the executor's or administrator's own pocket) or is to be paid out of the estate.
- 10.9 The costs order will indicate the extent of the costs to be paid. Costs are payable in one of the following ways:
- on a standard basis covering all costs reasonably incurred and of reasonable amount
 - on an indemnity basis covering all costs except insofar as they are of an unreasonable amount or have been unreasonably incurred
 - on such other basis as the Court may direct.¹
- 10.10 Whether a costs order is made, and what it directs to be done, is a matter for the Court guided by applicable rules of court and case law.

The Court's approach to the payment of costs in succession proceedings generally²

Executors and administrators

- 10.11 Executors and administrators may recover costs which they have incurred out of the estate when:
- those costs are not paid by another party to the proceeding; or
 - the executors or administrators are not ordered to pay their own costs personally.³
- 10.12 In practice, executors and administrators will recover their costs out of the estate on an indemnity basis. In this way, whether or not successful, executors and administrators will not be required to pay personally for representing the estate in litigation.⁴

¹ See *Supreme Court (Chapter I New Scale of Costs and other Costs Amendments) Rules 2012* (Vic); Supreme Court of Victoria, *Practice Note No 1 of 2013 — The New Scale of Costs and Counsel Fees*, 18 March 2013. See *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 63.28, as amended. For standard costs, see r 63.30; for indemnity costs, see r 63.30.1. The County Court has jurisdiction to hear and determine family provision applications, and costs rules in those proceedings are discussed in Chapter 6 of this report. Unlike the *Supreme Court (General Civil Procedure) Rules 2005* (Vic), the *County Court Civil Procedure Rules 2008* (Vic) still include references to party and party costs and solicitor and client costs: rr 63A.29–63A.30. However, at the time of writing, the County Court Rules Committee was considering whether references to party and party costs and solicitor and client costs in the rules should be amended.

² For a comprehensive review of the principles and authorities, see G E Dal Pont and K F Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) ch 23.

³ *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 63.26; *County Court Civil Procedure Rules 2008* (Vic) r 63A.26.

⁴ For recovery of costs by an unsuccessful executor see, eg, *Re Keane* [1909] VLR 231. For cases disallowing recovery by unsuccessful executors, see, eg, *Brown v Sandhurst Trustees Ltd (No 2)* [2009] VSC 406 (16 September 2009); *Twist v Tye* [1902] P 92.

Other parties to succession proceedings

- 10.13 The overriding principle is that costs are in the discretion of the court.⁵ Subject to the overriding principle, there exists a general rule that costs ‘follow the event’.⁶ In other words, a successful party will recover their costs out of the estate. An unsuccessful party will pay the costs of the successful executor or administrator. Although the overriding principle is applied in succession proceedings, there are important exceptions.
- 10.14 An unsuccessful plaintiff’s costs will usually be paid out of the estate in the so-called ‘testator’s fault’ cases—cases where the litigation finds its origin in the fault of the will-maker.⁷ The classic case is one involving the interpretation of the will. Here the cause of the litigation finds its origin in the will-maker’s choice of language in the formulation of the will. However, a broad approach has been taken to the identification of fault of the will-maker in this context and the court will inquire whether the will-maker by their mode of life, or irrational actions, or other dealings with relatives, or failures towards relatives, has caused the litigation to occur.⁸
- 10.15 If the circumstances led reasonably to an investigation concerning the will-maker’s will—that is, to an investigation of the execution of the will or the capacity of the will-maker, or the existence of undue influence or fraud—there will usually be no order for costs against the unsuccessful party. The unsuccessful party will, in these circumstances, be required to pay their own costs but will not be required to pay the estate’s costs.⁹
- 10.16 Where the unsuccessful party does not have the means to pay the estate’s costs, the court may decide not to make a costs order against the unsuccessful party on the ground that to do so would be futile or ‘wholly symbolic’.¹⁰
- 10.17 Even if a party is ultimately successful in challenging the validity of a will, if grounds of the challenge included undue influence or fraud and the party was unsuccessful in establishing undue influence or fraud (as the case may be), they will usually be ordered to pay the costs of the estate incurred in relation to these issues. A party alleging undue influence or fraud must prove it and otherwise will be at risk of having to pay costs.¹¹

5 See, eg, *Klement v Randles* (No 2) [2010] VSCA 336 (17 December 2010) [21].

6 Ibid.

7 Ibid.

8 *Gray v Hart* (No 2) [2012] NSWSC 156 (11 December 2012) [27], and the authorities discussed by Justice White. Beneficiaries whose conduct was largely responsible for the creation of suspicious circumstances which led to an investigation of the will-maker’s knowledge and approval of the will, may be required to meet the unsuccessful party’s costs out of their benefits: see *Nock v Austin* (1918) 25 CLR 519, 529; *Trust Co of Australia Ltd v Daulizio* (No 2) [2003] VSC 381 (10 October 2003), upheld on appeal in *Daulizio v Trust Co of Australia Ltd* [2005] VSCA 215 (1 September 2005) (Nettle JA, Chernov JA and Hollingworth AJA agreeing).

9 See again the discussion of the authorities by Justice White in *Gray v Hart* (No 2) [2012] NSWSC 156 (11 December 2012). See also *Klement v Randles* (No 2) [2010] VSCA 336 (17 December 2010) [21]; *Middlebrook v Middlebrook* (1962) 36 ALJR 216, 217 (Dixon CJ).

10 See *Klement v Randles* (No 2) [2010] VSCA 336 (17 December 2010) [23]–[25]. See also *Sherborne Estate* (No 2) (2005) 65 NSWLR 268; *Coombes v Ward* (No 2) [2002] VSC 84 (27 March 2002) [19]; *Re Bull; Bentley v Brennan* (No 2) [2006] VSC 226 (30 June 2006) [3]; *Re Carn; Moerth v Moerth* (No 2) [2011] VSC 275 (29 June 2011) [13], referring to *Re De Feu* [1964] VR 420, 428; *Webb v Ryan (Costs)* [2012] VSC 431 (20 September 2012) [37], [42].

11 See the discussion of these matters in *Gray v Hart* (No 2) [2012] NSWSC 1562 (11 December 2012) [32] ff (White J). The observations made in [10.17] must, however, be read subject to those contained in [10.14] and [10.15].

Protection of executors and administrators

- 10.18 An executor or administrator who is concerned about whether to prosecute or defend a claim on behalf of the estate, or appeal a decision of the court, may seek the advice of the court as to whether to do so.¹² Costs incurred in seeking this advice are paid out of the estate on an indemnity basis. Ordinarily, if an executor or administrator proceeds with litigation against the court's advice and is unsuccessful, they will not be entitled to payment of their costs out of the estate.¹³
- 10.19 In a number of situations, however, the executor or administrator will have no choice but to become involved in litigation. For example, an executor is required to act as defendant in family provision proceedings¹⁴ and is bound to initiate legal proceedings when seeking to prove the final will of a will-maker and obtain a grant of probate.¹⁵

Views and conclusions

- 10.20 At the general level dealt with in this chapter, the Commission considers that costs rules in their application to succession proceedings are working satisfactorily and do not require legislative amendment. The Commission has received no submission expressing a contrary view.
- 10.21 The judges are privy to the legal and factual details and nuances of each case that comes before them. They are best placed to apply the costs rules in the exercise of their discretion. They are also best placed to improve or clarify, as necessary, current costs rules or practices. A recent example of a significant rule change is found in the *Supreme Court (Chapter 1) New Scale of Costs and other Costs Amendments) Rules 2012* (Vic) to be read with *Supreme Court of Victoria Practice Note 1 of 2013—New Scale of Costs and Counsel Fees*.

12 See *Re Beddoe* [1893] 1 Ch 547, discussed by the High Court of Australia in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar* (2008) 237 CLR 66, 86–7, 93–4. For discussion of appeals by trustees, see *Australian Incentive Plan Pty Ltd v Attorney-General for Victoria* (No 2) [2012] VSCA 251 (28 September 2012).

13 For the position where a trustee acts contrary to the court's advice, including examples where the costs have still been met by the estate, see *Australian Incentive Plan Pty Ltd v Attorney-General for Victoria* (No 2) [2012] VSCA 251 (28 September 2012) [8]–[11].

14 *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* (Vic) r 16.04(1).

15 *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 2A.02.



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Appendices

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Appendix A: Advisory committee

The Commission formed a small committee of people recognised for their expertise in the operation of succession laws to assist in identifying and exploring issues arising from the terms of reference. Members were asked to contribute as individual experts and not as representatives of any organisation with which they worked or were affiliated.

The committee met four times, on 2 July 2012, 16 July 2012, 2 August 2012 and 2 May 2013. The following attended one or more meetings:

- Danny Barlow, director, Riordan Legal
- Richard Boaden, barrister
- Associate Professor Matthew Groves, Faculty of Law, Monash University
- Michael Halpin, Registrar of Probates
- Justin Hartnett, principal, Harwood Andrews
- Mark Maier, solicitor, McNab McNab & Starke
- Stewart McNab, barrister
- Richard Phillips, barrister
- Carol Stuart, community lawyer, Seniors Rights Victoria
- Michael Tsotsos, legal counsel, Perpetual
- Professor Prue Vines, Faculty of Law, University of New South Wales
- Kathy Wilson, special counsel, Aitken Partners

Appendix B: Submissions

1	Legal Services Commissioner
2	Geoffrey Grantham & Associates
3a, 3b	Diarmuid Hannigan
4	Name withheld
5	Samantha Renwick
6	Victorian Civil and Administrative Tribunal
7	Patricia Farnell
8	Patricia Strachan
9	Deirdre Lampard
10	Shane Newton
11	Arts Law Centre of Australia
12	Gary Kruger
13	David Shalders
14	Property and Probate Section, Commercial Bar Association
15	Alzheimer's Australia (Victoria)
16	Henry Dixon
17	Confidential
18	Ethnic Communities' Council of Victoria Inc
19	Association of Independent Retirees (A.I.R.) Limited Victoria Division
20	Include a Charity
21	Office of the Public Advocate
22	Paul Bravender-Coyle
23	Family Voice Australia
24	The Royal Society for the Prevention of Cruelty to Animals (Victoria)
25	Moores Legal
26	Rigby Cooke Lawyers
27	Graham Paton
28	Cancer Council Victoria

- 29 Name withheld
- 30a, 30b Law Institute of Victoria
- 31 Seniors Rights Victoria
- 32 The Institute of Legal Executives (Victoria)
- 33 State Trustees Limited
- 34 Confidential
- 35 Andrew Verspaandonk
- 36 Elder Law and Succession Committee, Law Society of New South Wales
- 37 Supreme Court of Victoria
- 38 Liz Burton
- 39 Carolyn Sparke SC
- 40 Janice Brownfoot
- 41 Victorian Farmers Federation
- 42a, 42b Arnold Bloch Leibler
- 43 Michael Grosvero
- 44 Confidential
- 45 Legal Services Commissioner
- 46 Robert Cornall AO

Appendix C: Consultations

Discussions about the questions raised in the consultation paper were held with the people and organisations listed below:

- 1 Roundtable on wills, with community based organisations, State Trustees Limited, legal practitioners, academics, members of the Victorian Civil and Administrative Tribunal and staff of the Supreme Court of Victoria
- 2 Include a Charity, Peter MacCallum Cancer Centre, Heart Foundation Victoria
- 3 Legal practitioners in the Goulburn Valley region
- 4 Legal practitioners from the Goulburn Valley and Loddon Campaspe Community Legal Centres
- 5 Open day
- 6 Law Institute of Victoria Succession Law Committee
- 7 Law Institute of Victoria Wills & Estates Discussion Group.
- 8 Dr Mark McMillan, Senior Lecturer, Melbourne Law School, University of Melbourne
- 9 NSW Trustee and Guardian
- 10 Arts Law Centre of Australia
- 11 Supreme Court of New South Wales
- 12 Law Society of New South Wales
- 13 Department of Attorney-General and Justice, New South Wales
- 14 Victorian Civil and Administrative Tribunal
- 15 County Court of Victoria
- 16 Supreme Court of Victoria—Associate Judges
- 17 Supreme Court of Victoria—Judges
- 18 Legal practitioners in Wodonga
- 19 Richard Neal, Partner, Teece Hodgson & Ward
- 20 Legal practitioners in Colac
- 21 Legal Services Commissioner
- 22 State Trustees Limited
- 23 Supreme Court of Victoria—Registrar of Probates



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