Submission to the Victorian Law Reform Commission on the desirability of legislative or other reform in relation to succession law matters

Background

The Legal Services Commissioner (LSC) has an obligation under the *Legal Profession Act* 2004 (the Act) to ensure complaints against Australian legal practitioners are dealt with in a timely and effective manner, to educate the legal profession about issues of concern to the profession and consumers of legal services and to educate the community about legal issues and the rights and obligations that flow from the client-practitioner relationship.

In the 2009-2010 and 2010-2011 financial years Probate and Estate matters represented 10 per cent of the complaints received by the LSC. As this represents a high number of complaints the LSC held a Round Table[1] conference on succession law in June 2010 to identify some of the areas of concern. One of the concerns that was identified in the Round Table was that succession law can generate high emotions as it involves dealing with grieving families and often internal family conflicts which can lead to problems during the estate settlement process.

This LSC response to the terms of reference established by the Victorian Law Reform Commission (VLRC) in relation to succession law is drawn from the information gathered at the Round Table, the LSC's experience in dealing with complaints made against legal practitioners under the Act and claims made to the Legal Services Board (LSB) against the Fidelity Fund.

Responses to terms of reference

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

At the Round Table concern was reported in two main areas related to the making of wills. Firstly, an apparent increase in the incidence of elder abuse whereby family members tried to unduly influence wills made by elderly people. Secondly, concerns about the capacity for an elderly person to instruct in drafting or changing a will. The LSC suggests the following range of reforms may assist to overcome these issues:

- require legal practitioners to document testator intent and capacity when taking instructions from elderly clients, which may include the following:
  - detailed file notes of how instructions were taken and how the testator understood what they were doing
  - the use of open-ended questions and recorded answers, and not asking leading questions
  - the use of a detailed medical report from a medical practitioner detailing how the medical practitioner satisfied themselves that the person had capacity
  - taking instructions from testators on their own and not when beneficiaries are present who may place undue influence and pressures on the testator.

- introduce a client capacity test model to ensure testators have capacity when giving instructions for the will and prevent challenges to a will based on lack of capacity after the testator has died; for examples see:
  - sections 2-4 assessment of capacity and best interests decision-making of the *Mental Capacity Act* 2005 (UK) which applies in England and Wales

[1] Succession Laws Summary – Summary from the Probate and Estate Round Table available at http://www.lsc.vic.gov.au/cms.php?user=legalservicesvic;doc=Home;page=;pageID=188

- *Guidelines for Solicitors Preparing an Enduring Power of Attorney,* Law Society of NSW, December 2003.

- require wills to have a witnessing clause that addresses capacity similar to that used in the preparation of enduring powers of attorney (see sections 123-125A of the *Instruments Act* 1958 (Vic)).

2. Whether the current provisions that allow the Supreme Court to authorise wills for persons who do not have testamentary capacity should be revised

In the LSC's experience the ability of the Court to authorise wills in these circumstances is not well known. The LSC suggests that there should be more education for the public about the capacity for the Supreme Court to authorise wills for persons lacking testamentary capacity.

3. The need to clarify when testamentary property disposed of during the will-maker's lifetime will be adeemend and when it will be protected from ademption

The LSC has no comment on this item.

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

In the complaints that come before the LSC, some family provision applications appear to be unmeritorious claims that have been settled without the veracity of the claim being tested. Beneficiaries frequently feel compelled to settle claims so the estate is not decreased even if the claim is without merit. One reason for this is that the costs of litigation are awarded out of the estate. The problems evident in these cases are first, the apparent ease with which a person may make a claim under the family provisions and access money from the deceased's estate to fund the claim without any restrictions, and secondly the decision to settle claims that are without merit in order to reduce the costs out of the estate.

The LSC considers that the legislation should be amended with the intention to reduce the incidence of people making unmeritorious claims against an estate. This could be achieved by limiting the class of persons that can make a family provision application. As an example s.57 of the *Succession Act* 2006 (NSW) sets out the persons eligible to apply for a family provision order in respect of the estate of a deceased person and requires applicants in three of those categories to establish 'factors warranting the making of the application'.

Further, the LSC considers that legislation should be amended with the intention to curb the incidence of estates being reduced by unmeritorious litigation. This may prevent the early settling of spurious claims in order to avoid litigation costs. This could be achieved in a number of ways including:

- introduction of a more restrictive approach to the recovery of costs. As an example section 78 of the *Succession Act* 2006 (NSW) precludes the Court from ordering that costs be paid from notional estates unless the Court has also made a family provision order in favour of the applicant

- requiring all matters go to mediation before a hearing unless there are special reasons why the matter should not be mediated. As an example, see section 98 of the *Succession Act* 2006 (NSW). The provision of access to mediation at an early point in applications may also assist to reduce costs.

5. Whether Division 6 of Part 1 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

The LSC has no comment on this item.

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

Legal practitioner executor requirements

An executor owes a fiduciary duty to beneficiaries. The LSC considers that it is not advisable for legal practitioners to act as executors of their client's will, as by charging professional fees and/or receiving payment of commission, they are profiting from that fiduciary duty. If a legal practitioner does act as executor of a client's will, it is only acceptable for them to profit from their fiduciary duty when the client (in this case the testator) has given fully informed consent. Rule 10 of the *Professional Conduct and Practice Rules* 2005[2], sets out the requirements for fully informed consent. These rules apply to all legal practitioners in Victoria.

In considering claims against the Fidelity Fund, the LSB has noted that a legal practitioner executor when acting personally will often instruct the executor's law practice to act for the estate, with the disbursements from the estate generally coming from the trust account of the same practice. This creates the potential for conflict, especially for sole practitioners and small law firms because of the multiple roles exercised by the one person.

The LSC suggests a range of reforms as listed below that may assist to reduce the number of problems that can arise when a legal practitioner is appointed as an executor under a will:

- rule 10 of the *Professional Conduct and Practice Rules* 2005 should be mirrored in the *Wills Act* 1997 (Vic) or its regulations
- if a possible conflict exists between the practitioner in the capacity of executor and in the capacity of legal practitioner, that conflict cannot be overcome without the beneficiaries' fully informed consent
- a new requirement should be introduced that an independent witness external to the legal practice witness the signing of a will where a legal practitioner is to be executor of a client's will.

An alternative reform would be to require that where a legal practitioner is acting as the executor of a client's will, that legal practitioner must instruct another law practice to act in relation to the estate. Further, the estate money should be deposited into the trust account of the law practice instructed to act in relation to the estate, and not the trust account of the law practice where the executor is an associate.

Charging costs and commission

When a legal practitioner has been appointed as an executor, consideration is required regarding what fees and commission the executor is entitled to charge/claim. At the Round Table it emerged there was generally a poor understanding of the following issues:

- the costs a legal practitioners can legitimately charge if they are acting as executor
- whether legal practitioners can charge for commission if they are acting as executor

[2]Rule 10 of the *Professional Conduct and Practice Rules* 2005 available at http://www.liv.asn.au/PDF/Practising/Professional-Standards/Acts/2005ConductRules.aspx

- that a legal practitioner cannot charge twice for the same work, that is, charging both legal fees and a commission (referred to as double dipping)
- that a charging clause in the will does not give a legal practitioner an automatic right to claim commission; the legal practitioner must justify a claim for commission by reference to the 'pains and trouble' in their role as executor.

The LSC has received complaints about solicitors charging both legal fees and a commission. This can give rise to prosecutions by the LSC for misconduct. For an example of a successful prosecution by the LSC at the Victorian Civil and Administrative Tribunal (VCAT), see *Legal Services Commissioner v Hession [2010] VCAT.*

In many complaints about executors there was an evident lack of transparency and accountability by the legal practitioner executor to the beneficiaries under the will. As an example, there is no obligation for a legal practitioner executor to make a costs disclosure to the beneficiaries as the estate is the client and not the beneficiaries. However, given that beneficiaries are entitled to dispute the legal costs charged to an estate (see s. 4.2.2(2)(b) of the Act) it would be prudent for a legal practitioner to communicate the legal costs with the beneficiaries in an effort to provide full, clear and regular communication and reduce the risk of a complaint being made against the legal practitioner.

Recent cases have also highlighted that executors need to justify a claim for commission to the beneficiaries of the estate and that in making a claim for commission beneficiaries should not be pressured to agree to a commission at a certain percentage to ensure an earlier distribution of the estate and to avoid further legal costs to the estate as a result of an application to the Supreme Court for commission. For example, see *Walker & Ors v D'Alessandro [2010] VSC 15* and *Re Estate of Zsuzanna Gray [2010] VSC 173.*

To overcome these issues the LSC considers that:

- legal practitioner executors should not have the right to a set percentage of the estate (capita, gross or net, or income) as commission, but should set out an hourly rate for executorial work, which may be lower than the rate for legal work

- legal practitioner executors should be required to disclose the basis of charging legal costs and commission to the beneficiaries of the estate

- additional commission for particular pains and troubles can be approved by agreement of all the beneficiaries of the will or the Court

- where a legal practitioner executor is seeking beneficiaries' consent to charge commission, they should be required to comply with the following matters as set out by T Forrest J in *Walker & Ors v D'Alessandro [2010] VSC 15 at [30]:*
  - an itemised account of the work that has been done to justify commission
  - if invoicing the estate for legal fees and disbursements, these should be itemised, allowing a beneficiary to assess the 'pains and trouble' of the executor beyond the legal fees and disbursements
  - a full explanation informing the beneficiaries they are entitled to have the Supreme Court assess the commission pursuant to section 65 of the *Administration and Probate Act* 1958 (Vic)
  - advise the beneficiaries to seek independent legal advice before consenting to enter into a commission agreement.

<u>Complaints</u>

A number of complaints received by the LSC relate to legal practitioners acting as executors of an estate. Because many of these complaints relate to conduct as an executor (not conduct as a legal practitioner) and because there is a distinction between the work of a legal practitioner and that of an executor, many such complaints are effectively outside the jurisdiction of the LSC.

It is noted that when legal practitioners occupy both roles there is an inherent risk of conflict of interest when the legal practitioner instructs him or herself to carry out the legal work for the estate. In many complaints about legal practitioner executors there is a lack of transparency and accountability to beneficiaries.

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

The LSC has no comment on this item.

8. Whether a court should have the power to review and vary costs and commission charged by executors

The LSC considers that the Court should have the power to review and vary costs and commission charged by executors. The LSC notes cases where the court has exercised its jurisdiction to refuse commission (*In the Will of Oddie [1976] 1 NSLWR 371)* and to reduce the commission (*Peter Henry Atkins as Executor of the Estate of Robert Charles Godfrey v Godfrey & Ors [2006] WASC 83)* on the basis of the personal representative's conduct in administering the estate. The LSC considers that this is an important and essential role to be performed by the Court.

9. Whether there are more efficient ways of dealing with small estates

The LSC notes that legal personal representatives often have difficulties dealing with banks and other institutions where probate has not been obtained. Possible reform in this area would be to provide greater clarification about the role of a legal representative without probate.

The LSC notes that sections 71-79 of the *Administration and Probate Act* 1958 (Vic) makes provision for small estates to be administered by the Register of Probates in certain circumstances.

A possible reform in this area is that a modified and simplified form of probate should be available for small estates. As an example, the Uniform Probate Code (UPC 1991) which has been enacted in 18 states in America provides for an informal (non-judicial) probate and independent administration of estates (no continuing court supervision). Informal probate can be granted within seven days after death and within seven days after all interested persons have been notified in writing. It can be used to settle estates without court supervision and when all the beneficiaries are in agreement and no disputes exist. The UPC provides that the court process will continue to be available when there is a dispute, or on the petition of any interested party, or at the direction of the court.

10. The costs and principles applied in succession proceedings, taking into account any developments in rules or practice notes made or proposed by the Supreme Court

The LSC considers efforts should be made to:

- introduce costs penalties that would be available for unreasonable disputants and baseless claims
- require that parties' costs are only paid out of estate in justifiable circumstances – having regard to reasonable efforts to settle the claim.
- increase access to mediation and arbitration.

An example of applying principles to reduce disproportionate costs, reduce unmeritorious litigation and increase settlements of meritorious claims before matters go to hearing is Practice Note No. SC Eq 7 – Family Provision of the Supreme Court of New South Wales[3] which provides:

- unless otherwise ordered all proceedings involving family provision applications must be mediated
- unless otherwise ordered strict proof requirements are not necessary and the following evidence is acceptable as proof of certain matters: kerbside appraisal by a real estate agent; and valuations by a beneficiary or plaintiff of items they wish to acquire
- where an affidavit includes irrelevant material, a party may be responsible for their own costs in preparing the affidavit and the costs of the other parties for the time spent dealing with the affidavit in court
- costs recoverable by a party may be capped where the value of the estate is less than $500,000.

11. Any other means of improving efficiency and reducing costs in succession law matters

To improve efficiency and reduce costs the following changes should be considered:

- availability of lower cost jurisdictions, particularly VCAT, for dealing with disputes between executors and beneficiaries, and between joint and several executors
- access to meditation to be provided freely and early in the litigation process.

[3] Practice Note No. SC Eq 7 – Family Provision of the Supreme Court of New South Wales available at http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/030b45f9d59ac6f8ca2575b7001fa724?OpenDocument