Office of the Public Advocate

Submission to **Victorian Law Reform Review of Succession Laws: Wills Roundtable**

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Wills Roundtable

Submissions

The Public Advocate makes the following submissions to the Review of Succession Laws, further to the roundtable discussion on 28 February 2013. The submissions address certain questions set out in the Consultation Paper and are numbered accordingly.

Witnessing Wills and Undue Influence

W1: The legislation should not distinguish between different will-makers or create different classes of will-makers. Questions of a will-maker's vulnerability should be for the court to determine in the event of any challenge to the will.

W2: Witnesses should be required to understand that the document is a will. Witness certification similar to that required of witnesses to an enduring power of attorney (financial) could be considered but is not specifically recommended.

W3: In the interests of deterring undue influence, the witness beneficiary rule should be reintroduced in the form recommended by the National Committee for Uniform Succession Laws.

W4: While recognising that it is considered good practice for solicitors to obtain a medical capacity assessment for their clients prior to drafting a will for them where a question of capacity arises, as it may where the client is very elderly and/or presents with signs of incapacity, such assessments should not be mandatory because this appears to undermine the presumption of capacity and has the potential to act as a disincentive to a will being made or invalidate an otherwise valid will.

W5: Yes, introducing a professional requirement that solicitors must either decline to act or seek independent advice when an existing client asks them to draft a will for another person that would confer significant benefits on the existing client would be useful in preventing undue influence.

W6: Yes. Guidelines for professionals who make wills should be provided and should, as a minimum:

- emphasise that the starting-point is a presumption of capacity;
- state that the professional should see the will-maker without anyone who may have an interest in the will being present;
- note that the solicitor will need to allow the will-maker sufficient time and opportunity to express his or her testamentary wishes in the appropriate level of detail;
- recommend that an independent assessment of testamentary capacity be obtained where the will-maker is older and/or appears to lack capacity or be vulnerable to undue influence;
- set out the common law test for testamentary capacity (as described on pp 25-6 of the Consultation Paper) and state that it should be provided to any medical or other professional who is asked to assess capacity.

W7: The process of preparing a will by a solicitor could be improved to protect vulnerable will-makers from undue influence by a requirement for the will-maker to be asked about previous solicitors and any earlier testamentary dispositions. Authority and details could be sought so that previous wills could be obtained and significant changes discussed at a subsequent appointment.

W8-W12: No formal submissions are made on these questions, however the Public Advocate notes the useful contribution to the understanding of financial abuse issues made by the Seniors Rights Victoria booklet – "Assets for Care: A guide for lawyers to assist older clients at risk of financial abuse".

Statutory Wills

W13: The Victorian principle for authorising a statutory will is preferred due to concerns about the breadth of the wording of the National Committee principle, particularly in relation to persons who have never had legal capacity.

W14: The provisions of the *Wills Act 1997* (Vic) concerning statutory wills should specify that the court may order separate representation for the incapacitated person as well as stating that the incapacitated person is entitled to appear on the application. Including both provisions supports the rights of persons with disabilities to control their own financial affairs and participate in legal

processes in accordance with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the United Nations *Convention on the Rights of Persons with Disabilities*.

W15: The statutory will procedure could be made more accessible by the following changes being made:

(a) A two-stage process should be retained to prevent vexatious or unmeritorious applications. See (b) below for an outline of a proposed Tribunal process.

(b) The initial stage of applications for statutory wills should be heard in the Guardianship List at the Victorian Civil and Administrative Tribunal rather than in the Supreme Court to reduce costs and promote accessibility. OPA guardians are sometimes made aware of concerns about wills that should in some instances be tested during the life of the represented person. A more accessible statutory will process might prevent or reduce manoeuvring by potential beneficiaries, to the benefit of the person with a disability. Members in the Guardianship List have experience in considering matters concerning the estates of living persons with disabilities, and the inquisitorial nature of the Guardianship List's jurisdiction makes it an appropriate forum for a proposed new initial stage for statutory will applications. An application should face an initial screening process to exclude smaller estates and determine:

   i. the capacity to engage with the statutory will process of the person for whom the will is proposed;
   ii. the need for a statutory will (for example, to prevent an unjust outcome that would arise on intestacy or under an existing will); and
   iii. the testamentary capacity of the person for whom the will is proposed.
   iv. Where the person lacks testamentary capacity, their involvement in the process.

   Expert evidence as to capacity should ideally be obtained by the Tribunal rather than the parties, however this raises the question of who pays.
   The second stage, which is likely to be conducted in a more adversarial manner, should include consideration of the proposed will, with an emphasis on the wishes of the represented person.

   The Public Advocate acknowledges that questions raised by the proposed scheme include:

   i. Should the second stage remain in the Supreme Court?
   i. Who, if anyone, should be informed of the contents of the statutory will?

ii. Is the statutory will reviewable?

iii. Should there be provision for the return of capacity?

(c) It may be appropriate for unopposed statutory will applications to be determined on the papers however this should not occur unless the person for whom the will is proposed to be made is legally represented and the option of a hearing is available to him or her. The focus at all stages should be the wishes of the person for whom the will is proposed, to the extent that their wishes can be ascertained.

W16: No submissions.

W17: The *Wills Act* should distinguish between those who benefit under the proposed will and those who do not. An interested party should bear the costs of the application. A disinterested party's costs should be paid out of the estate. An exception should be available whereby a costs order could be made against a party who is disinterested but conducts an application in a way that results in unnecessary or excessive costs.

Ademption

W18: A presumption against ademption in the *Wills Act* is not supported.

W19-W20: No submissions.

W21: The Public Advocate considers that:

(a) The exception to the ademption rule in s 53 of the *Guardianship and Administration Act 1986* should be extended to persons holding an enduring power of attorney (financial).

(b) The exception should only apply to actions taken after the donor has lost capacity.

W22: A person acting under an enduring power of attorney (financial) should be able to access a person's will for anti-ademption purposes to avoid unfortunate consequences (not intended by the will-maker) that could have been prevented by an application for a statutory will. Access should depend on proof of the will-maker's lack of capacity.