REVIEW OF SUCCESSION LAW IN VICTORIA

From: Moores Legal

To: Victorian Law Reform Commission

28 March 2013

Queries regarding this submission can be directed to:

Christopher Groszek

(03) 9843 2163

cgroszek@mooreslegal.com.au

Introduction

In March 2012, the Victorian Law Reform Commission ("the Commission") was asked by the Attorney-General, Robert Clark, to review Victoria's succession laws.

At the time of announcement, Mr Clark said that "[t]his review reflects the Government's commitments to seek to ease burdens on Victorian families, to cut red tape and to make justice more affordable and accessible".

Subsequently, the Commission expanded upon this stated objective, confirming that the focus of the review was to:

1. 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;

2. ensure that the processes to resolve disputes about the distribution of such property are efficient, effective and accessible; and

3. 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.

Moores Legal has a substantial practice in the area of succession law and welcomes the opportunity to provide submissions on the issues and proposals canvassed in the six discussion papers prepared by the Commission.

The primary areas of focus of our submissions are executors, family provision and wills, however we have also considered and prepared submissions in the areas of intestacy and small estates. Our submissions adopt the structure of the discussion papers issued by the Commission and are arranged as follows:

- Family Provision
- Wills
- Executors
- Small Estates
- Intestacy

We have chosen not to provide submissions in relation to the proposed reforms to rules regarding debts as we feel that our ability to comment on these issues is limited by our limited exposure to them.

Family Provision

Current Law

FP1 What factors affect a decision to settle a family provision application rather than proceeding to a court hearing?

Our experience suggests that as much as each matter turns on its own facts, the factors that will affect a decision to settle rather than proceeding to a court hearing are also often unique to the particular matter. However, some common factors include:

- Costs / cost benefit - the risks associated with proceeding and the substantial costs that are involved are almost invariably a factor that will cause a matter to settle. In our experience, the costs factor is often relied upon potential plaintiffs, particularly where a claim is speculative/weak, to attempt to obtain some kind of award even though a claim may be unlikely to be successful (or only moderately successful) if it proceeded to trial.
- Client attitudes and expectations – often a client's expectations or views about the "principle" of the matter will affect their decision about whether to proceed.
- Advice provided to clients – because matters are so fact-based, in many cases it is difficult to accurately predict the advice that an opponent will be given, which may affect their decision to proceed. Our experience has also shown that when opposed to a firm that does not have a strong practice in family provision, their attitude and approach to the claim will often be more difficult to predict.
- Early exchange of evidence / discovery – when evidence is exchanged early (for example, in the form of position papers), this may result in the matter settling before a formal proceeding is even commenced. Our firm often adopts this approach in relation to modest estates (as a guide, estates with a net value of up to $300,000).
- Time – there are often substantial delays between the time when a matter is first listed for directions and the date that it is set down for trial. In our experience, this can take from 9 months upwards, depending on the "procedural" steps taken between commencement and obtaining directions that the matter be listed for trial.
- Evidentiary issues – because the claim arises out of the death of the will-maker, a witness that would perhaps otherwise be a key witnesses is not available to give evidence. This can give rise to difficulty proving certain elements of the claim. Other issues surrounding evidence include:
  - fear of going to court / having to give evidence at all;
  - change in evidentiary position as a result of new material or a change in circumstances; and
  - risk that evidence will not be accepted, or a feeling that it is "unsavoury".
- Inherent risk in family provision claims – the fact that matters are decided case by case means that it is difficult to predict whether a claim will succeed at trial. Further, even where it appears likely that there will be a "success", the quantum of any award is dependent upon a value judgment being made by the judge.

- Relational matters – parties to a claim are often related (siblings, parents, children, etc) and the plaintiff may choose to prefer to maintain their relationships ahead of insisting on complete fulfilment of their legal "entitlements".

FP2 Is the current period within which an application for family provision can be made in Victoria: satisfactory; too short; or too long?

In our view, the limitation period is probably satisfactory, but in certain cases can be too long. We routinely advise executors against distributing estate assets within the limitation period on the basis that they will become personally liable if a claim is brought later. This often results in executors holding off distribution in case a claim is brought, which can cause frustration for beneficiaries and/or other affected parties.

We believe that executors and beneficiaries alike would welcome some kind of formal process that permitted estates to be distributed earlier – whether in all cases or in specific cases – if it appears unlikely that a claim would be brought. An example of how this might work would be where the executor has provided notification to all of the natural/obvious beneficiary/claimants (spouse, children, etc) that the estate is being administered and seeks their confirmation of their attitude to whether or not they intend to bring a claim. This could be in the form of a standard letter (such as the letters routinely sent to superannuation beneficiaries / the letter that is commonly sent to beneficiaries when a family provision claim is commenced). An appropriate arrangement may be 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.

It may also assist to have some kind of register of these letters in the Probate Registry so that when an applicant attempts to commence a claim, they are able to determine whether the process has been relied upon to distribute the estate early.

There may be difficulties with this system where a person who is not a "natural" beneficiary seeks to make a claim. However, this could perhaps be overcome by the executor taking out a policy of insurance (perhaps at the estate's expense) that could then be used to indemnify the executor in the event of a later claim.

Issues

FP3 To what extent does the current law allow applicants to make family provision claims that are opportunistic or non-genuine?

One of the primary factors giving rise to opportunistic claims is the nebulous class of potential applicants, in combination with the fact that there is a perception that the costs of an application will usually be borne by the estate. This can lead the defendants (executor(s) and/or beneficiar(y/ies)) to agree to compromise a claim despite the fact that its merit is in question. The result is the depletion of the estate available for distribution to the will-maker's chosen beneficiaries, as well as issues that result from the inherent delay in attempting to resolve a litigious dispute as part of the estate administration process.

FP4 Does section 97(7) of the *Administration and Probate Act 1958* (Vic), which permits the Court to order an unsuccessful applicant to pay their own costs and the costs of the defendant representative, deter opportunistic applicants from making family provision claims?

No – our experience shows that this just is not the case.

FP5 Does the power of the court to summarily dismiss claims deter opportunistic applicants from making family provision claims?

No – a review of the few summary dismissal applications made in this jurisdiction shows that in the vast majority, the Court has refused to rely on summary dismissal powers (even as now set out in the *Civil Procedure Act 2010* (Vic)). Comments made in summary dismissal applications indicate that there is a view that it is difficult to summarily dismiss claims that are so heavily centred on their own facts, as the question of whether the claim has "no real prospect of success" cannot often be answered without a detailed review of the evidence.

FP6 Are costs orders in family provision cases impacting unfairly on estates?

Costs arrangements commonly adopted in the resolution of family provision claims (at least where resolved by agreement) generally result in a large impost of legal costs on the estate and named beneficiaries. This tends to penalise small estates the most.

Because the predominance of matters never make it past mediation, the court does not often have the opportunity to examine the parties' costs and make an assessment about whether they are reasonable and proportional in the circumstances.

FP7 To what extent do people deal with their assets during their life in order to minimise the property that is in their estate and frustrate the operation of family provision laws? What are some examples of this?

It is difficult to say with certainty the extent to which this occurs, particularly as claims may be less likely to be brought (or need to be defended) in a case where the estate equity has been substantially reduced during the will-maker's lifetime.

Some ways of dealing with property to minimise assets available to meet a family provision claim include:

- transferring property to the will-maker's preferred recipient during the lifetime of the testator (whether real or personal property) – subject to paying any duties or other expenses associated with the transfer because it occurs during lifetime;
- holding assets in joint ownership arrangements;
- holding assets in a family trust; and
- equity reduction arrangements.

FP8 Should people be entitled to deal with their assets during their lifetime to minimise the property that is in their estate?

We identify the competing interests as:

- the right to deal with one's property as one wishes – inherent in the system of private property that exists in Australia (and fundamental to the concept of freedom of testation); and
- the social policy / morality / "welfare" argument that a person should not leave those to whom they owe an obligation to make provision for their proper maintenance and support without provision where their estate would be sufficient to make such provision (or to at least assist with advancing the person's position in life).

On the basis that property law in general allows the disposal or destruction of property by its owner, there seems to be no justification for departing from the basic principle that a person is entitled to dispose of all of their assets during their lifetime and frustrate any claims that may otherwise be brought against their estate.

It is difficult to determine the extent to which any intervention or overruling of this right is justified. It appears fairly arbitrary to place a time limit on transactions that are entered "with the intention of depriving someone of family provision", as such actions could be taken at any time before the testator eventually dies if they particularly wish to frustrate any family provision claim.

Family provision law already represents an invasion into the realm of private property (and probably a proper one), but we see difficulty in justifying the substantially greater step of unwinding the disposal of assets where it is perceived to have been done to minimise the property available in their estate to meet a family provision claim.

Options for reform

FP9 Should the purpose of family provision legislation be to protect dependants and prevent them from becoming dependent upon the state?

Although this is a social policy objective that the family provision scheme helps to achieve, it should not be the stated object of the scheme, or its root "purpose".

The various categories of claims that have been recognised in Victoria – where the law recognises any claim by a person who was owed a "responsibility" – shows that judges feel that a response is warranted in more cases than where there is an objective of preventing the applicant from becoming dependent upon the state. However, we acknowledge that to an extent, this is a circular argument, given that the purpose of this review is to determine how effective the current family provision regime is.

FP10 Are there wider purposes or aims that family provision laws should seek to achieve?

In our view, family provision laws should seek to achieve the following aims:

- To enable applicants who society would consider are properly owed an obligation to receive provision from an estate to bring that application, regardless of whether they would otherwise be "destitute" or become dependent upon the state, and allow proper provision to be made for such applications; and
- To deter opportunistic claims by applicants who are legally entitled to bring a claim (due to the broad scope of the family provision regime) but in relation to whom it is difficult to say that an obligation is owed.

FP11 Should Victoria implement the National Committee's proposed approach to eligibility to apply for family provision?

In our view, although the National Committee's approach is more flexible than some other regimes (such as the New South Wales approach), it is not really an advance on the current Victorian position, in the sense that:

- where a spouse/de facto partner/non-adult child has a valid claim for provision, their claim would fit within the last category in any event;

- it automatically entitles claims to be brought by persons who may properly not be entitled under the current Victorian scheme – for example, a person who is married to the deceased but whose relationship with the deceased had been determined at a much earlier time.

We anticipate that if this scheme was introduced, many claims would fall to be determined under the "owed a responsibility" category.

FP12 Should Victoria limit eligibility to make a family provision application in the same way that New South Wales has?

We recommend against adopting the regime in force in New South Wales for the following reasons:

- applicants in the specified categories already fall within the scope of the Victorian regime;
- the "generic" categories arbitrarily draw a line between people who are living with the deceased and those who are not. Victorian experience has shown that there are cases where claims can legitimately be brought and answered by an estate where the parties are not living together – for example, *Forsyth v Sinclair*; and
- in relation to the "generic" categories, the fact that the Court's determination also requires consideration of "factors warranting the making of the application" means that the class is more limited but the exercise is substantially the same as under the current Victorian legislation.

FP13 If Victoria were to adopt the New South Wales approach:

(a) are the categories recognised in NSW sufficient or should others be included?

See above.

(b) Should applications by certain categories of applicant be further limited? If so:

(i) what should the nature of such further limitation be? Should the limitation be a requirement to show "factors warranting the making of the application" or some other test, such as "exceptional circumstances" or "special circumstances"?

(ii) to which categories of applicant should the additional limitation apply?

See above.

FP14 Should Victoria retain its current "responsibility" criterion for eligibility to make a family provision application, but require applicants to have been dependent upon the deceased person? If so, should "dependence" be limited to financial dependence?

In our view, the introduction of a requirement of "dependence" (financial or otherwise) may artificially limit and exclude claims that are made on the basis of actual moral obligation (and would currently be considered "proper" claims).

An example where this would be the case is a claim by a "carer", where the applicant has effectively become a person to whom the deceased looked to obtain support and care – although there is likely to be a relationship of dependence in this case, the claimant would

be unsuccessful because the dependence is flowing in the wrong direction. A dependence requirement would be productive of unfair results for such people.

FP15 Would including a dependence requirement encourage dependence on the deceased person during their lifetime, in order to benefit after their death?

It is difficult to say, although it would seem illogical in a lot of cases – such as cases where the deceased person becomes dependent upon the applicant for support.

Our own experience does suggest that in certain cases, applicants have changed their attitude towards the deceased on the basis that they felt that as a result, they would receive provision from the deceased once they eventually died. However, these claims tend to be the exception and as we are submitting that a requirement of dependence should not be introduced, the incidence of these claims is unlikely to change disproportionately.

FP16 Should Victoria retain its current "responsibility" criterion for eligibility to make a family provision application, but require applicants to demonstrate financial need?

The "financial need" factor – which is already a factor in s91(4)(h) ("the financial resources and needs of the applicant") – is already considered to be one of the touchstone factors when advising clients and/or assessing a claim.

This is because it is relevant to both the questions of whether there is a moral obligation to make provision (because a person without financial need is less likely to be owed such an obligation) and the question of whether any provision made is adequate (because if the person has no financial need, then even no provision would probably be "adequate").

Because of this, it is our view that changing the way in which the factor is expressed in legislation is unlikely to have any significant effect on claims that are brought.

Amending costs rules and principles

FP17 Should there be a presumption that, in family provision proceedings, an unsuccessful applicant will not receive their costs out of the estate?

In our view, it is logical to have this presumption as a starting point.

However, it would be necessary to allow this presumption to be rebutted in (at a minimum) those cases identified in the costs discussion paper – being "testator's fault" cases, cases where the applicant has been reasonably led to make the application by a genuine belief in their claim and (if appropriate) cases where the applicant cannot pay.

FP18 Should the costs rule of "costs follow the event" or the costs rule of "no order as to costs" apply as a starting point when an applicant is unsuccessful?

The starting point should be that the applicant pays their own costs, but not that they pay all of the costs associated with the proceeding. Such proceedings are inherently uncertain – for example, there have been cases where a party has succeeded in showing that they are owed an obligation without being "successful" (because the obligation has already been satisfied or because the provision already made for them is determined to have been reasonable in the circumstances).

It is reasonable to expect that where a frivolous or vexatious case is brought and pursued to trial, the applicant should pay the costs of both parties, which should be paid on a solicitor/client basis, with discretion in the court to award costs on the indemnity basis where appropriate.

FP19 Are family provision proceedings generally less costly in the County Court than in the Supreme Court?

Our experience suggests that with the exception of some disbursements, the costs associated with bringing a claim in either court are basically equivalent. This is because in the majority of cases, the procedural steps – at least to the point of mediation – are effectively identical in both courts.

In our experience, costs in any particular matter tend to depend predominantly on the facts in question, the parties' attitudes to resolving the matter and the evidentiary material (type and amount).

FP20 What measures are working well to reduce costs in family provision proceedings in the Supreme and County Courts?

Some examples of initiatives that help to reduce costs include:

- Mediation on the basis of detailed statements of position (a single document rather than a large number of affidavits);
- Judicial mediation (in appropriate cases) – can help to assist the parties to focus their efforts in resolving the issues in dispute and also helps to cut down the "bluff" that is often relied upon in submissions at the "standard" mediation.
- Minimising the number of times the matter comes before the Court – for example by allowing directions issues to be determined on the papers.

FP21 Are there any additional measures that would assist in reducing costs in family provision proceedings?

We consider that some small practical steps may assist in reducing costs in family provision matters, including:

- Allowing litigation searches to be conducted without imposing a court fee (as now occurs on the County Court's website);
- Requiring a plaintiff's affidavit to be in a standard form and to address certain key issues;
- Limiting the length and/or number of affidavits – perhaps unless special leave is obtained, for example by employing a *voir dire* process and submitting the proposed affidavit for judicial scrutiny.

We have also considered some more fundamental amendments that may assist to reduce costs, while also assisting the management of cases and reducing the scope for opportunistic claims:

- A single commencement point for all applications (whether in the County Court or the Supreme Court). An assessment can be made at the time of filing which court is

more appropriate for resolving the matter, perhaps based on complexity and the relevant Court's case load at that time.

A related advantage of such a system would be that there is a single registry of claims that have been commenced, which will save time and money where it is necessary to conduct litigation searches. As noted above, such searches should be able to be conducted free of charge and (optimally) electronically.

- An initial evaluation of claims. It may be beneficial to introduce a process whereby the judicial officer is provided with an outline of the claim and has a power to require additional material to be produced to substantiate a claim in a more "novel" case.

  If this process was introduced, we expect that the material that should be provided at this stage would include (at a minimum) details of the applicant's relationship with the deceased (if any) and their financial and health circumstances, as well as details of the size of the estate and any provision that has already been made for the applicant. The best way to have this information presented consistently would be to require it to be included in a court form of 2-3 pages, with some space to provide details of "novel" factors.

  The process might allow for certain claims to proceed automatically where the parties consent or where the claim falls into a certain category, with the result that directions are made for the further stages of the proceeding (as already occurs at a directions hearing). Where matters are to be dealt with by consent, directions might be made "on the papers", further expediting the process and reducing costs associated with appearances.

  If the judicial officer was not satisfied that the claim was a "proper" claim, they could then effectively dismiss the claim or make orders to stay the claim until such time as the applicant is able to produce sufficient evidence in support of their claim.

- The introduction of a costs cap for matters, at least to the point of mediation. It is arguable that because of the perception that an applicant's costs will be paid from the estate, apart from the fact that the applicant may receive quizzical looks or a request that their costs be taxed, there is no real disincentive to incurring costs that may otherwise be considered excessive.

  However, if a costs cap is introduced, the following issues may arise:

  - It is possible that law firms may take advantage of the costs cap and charge costs at the cap regardless of whether their costs would otherwise have been that high;
  - A costs cap may act as a disincentive to early negotiation / mediation – the applicant will bear the risk that they will have to pay their own costs in relation to what might have been *bona fide* negotiations in an attempt to avoid commencing a proceeding;
  - Law firms may be deterred from acting in "complex" matters where enquiries are likely to go beyond the usual and may make running the matter seem uneconomical.

WILLS – Witnessing wills and undue influence

Requirements for witnessing a will

W1 Should there be special witnessing provisions in respect of certain will-makers? If so, who should those will-makers be and what should the special witnessing provisions require?

We see some difficulty in suggesting that special witnessing provisions should apply to certain will-makers, particularly if the distinction is based on their age.

Imposing a special witnessing requirement for "older" / "vulnerable" people:

- requires the making of an arbitrary decision about the age from which the special witnessing requirements will apply / when a person is considered to be "vulnerable";
- assumes that there will be issues relating to capacity or the possibility of undue pressure in relation to older / vulnerable will-makers;
- may make it more difficult for older / vulnerable will-makers to make wills – for example, if they made a "home made" will, it may be invalid if they have not met the special witnessing requirements (of which they may be unaware).

In our experience, when we meet with a will-maker to obtain instructions for the preparation of a will, the solicitor has an opportunity to make an assessment about whether influence is being exerted or the will-maker's capacity is in doubt. If the solicitor does not make this assessment properly – at least in cases where they should have detected an issue – and the result affects the interests of potential beneficiaries, there is likely to be a remedy against the solicitor in negligence.

It is acknowledged that imposing a special witnessing requirement, such as a requirement that one of the witnesses be a qualified person, may encourage more wills to be made by solicitors and/or "reviewed" prior to execution. However, there is no guarantee that the will-maker's interests will be any better protected – 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.

Additionally, if a requirement is introduced that all wills are witnessed by a solicitor, a question arises about the solicitor's obligations to the will-maker:

- If the will-maker is a client, the solicitor clearly owes them an obligation to assess the situation and provide advice.
- If the will-maker walks in off the street and asks the solicitor to act as a witness, what obligation is owed to the will-maker to assess their capacity / vulnerability /etc?

W2 Should witnesses to the execution of a will be required to understand that the document in question is a will?

In our experience:

- the majority of witnesses to wills (predominantly solicitors and support staff) do understand that they are witnessing a will; and

- most other people are likely to either ask for information about the document that they are witnessing or observe key features of the document that would indicate that it is a will – such as its title.

On this basis, it seems unlikely that adding such a requirement will provide any greater protection for the will-maker.

Under the current regime, a witness' role is not to determine whether the document that they are witnessing is valid – he or she is simply attesting to the fact that the document was executed by the will-maker in his or her presence.

If the Commission forms the view that restrictions such as those outlined in W1 (above) are justified, a requirement of this type will be of even less importance.

The witness-beneficiary rule

W3 Should Victoria reintroduce the witness-beneficiary rule in the form recommended by the National Committee?

In our view, Victoria should reintroduce the witness-beneficiary rule and the National Committee's proposal is a good starting point, although we are unsure when the first limb ("at least two witnesses are not beneficiaries") would be enlivened in practise.

Arguments for the introduction of the rule as proposed by the National Committee include:

- the default position will be that a gift to a beneficiary-witness will fail, meaning that other than in exceptional circumstances, there will be two independent people witnessing the will-maker's signature and more opportunity for independent scrutiny;
- in a case where a beneficiary witness is properly left a gift, the gift will survive – either by consent of the other beneficiaries or by court order;
- in practise, solicitors preparing wills already recommend that as "best practice", beneficiaries under the will do not witness the signing (and in most cases, the solicitors or their staff are witnesses to the will themselves); and
- the introduction of this rule will promote national consistency.

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

W4 Would introducing a professional requirement that solicitors obtain a medical capacity assessment for their clients prior to drafting a will for them be useful in preventing undue influence?

For the purposes of this response, we have assumed that this question is focussed on situations where a solicitor has reservations about whether the client has capacity or may be the subject of undue influence.

Although the utility of having a medical capacity assessment is not in question, in our view it is probably going too far to impose a requirement that solicitors obtain a medical capacity assessment before preparing a will for a client.

It is also unclear whether an assessment about capacity can be directly linked to questions of undue influence, as the question of whether there is influence (and if so, whether it is undue) may arise even in cases where a will-maker clearly has capacity. An example of

such a case is where the will-maker chooses to leave their property in a certain way on the basis of a promise (or perhaps a threat) that their care will be arranged in a certain way. Influence of this kind will not be detected by simply making an assessment about whether the person satisfies the *Banks v Goodfellow* test for testamentary capacity.

(a) if so, in what circumstances should the requirement apply (such as where a will-maker is over a certain age)?

See above.

(b) if not, what disadvantages would there be in such a requirement?

Some disadvantages of imposing a requirement that solicitors obtain a medical capacity assessment in borderline cases are:

- requiring a definition of what case justifies obtaining such an assessment (and therefore excluding cases that do not) – it would perhaps be more useful to give "best practice" guidance to solicitors and allow them to make individual judgments, in which case statutory recognition of that approach is probably unnecessary;
- the likelihood that there would be substantial delays and increases in the costs of preparing wills for people in the "borderline" class – particularly frustrating in cases where it may be clear to the solicitor that there is no real justification for requiring the assessment to be made;
- practical issues surrounding whether doctors will be prepared to give reports and if so, the costs associated with preparing them;
- the requirement will not be imposed in a situation where the will-maker does not see a solicitor to make their will – which is arguably the situation where their vulnerability to undue influence (etc) would already be most acute anyway.

W5 Would 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 be useful in preventing undue influence?

In answering this question, we presume that the Commission has in mind situations like that which occurred in *Nicholson v Knaggs* (where the Court found that a neighbour had unduly influenced a will-maker in making her last will).

We also note that on its face, this question could apply to situations such as the situation where a child (the existing client) advises the solicitor that their parent (the other person) will attend the solicitor's office to prepare a will that leaves their estate equally between their children. Accordingly, we have interpreted this question as relating to "significant benefits" that are not otherwise explicable by reference to the relationship between the existing client and other person.

However, regardless of how the question is interpreted, in our view the answer seems to be in ensuring that solicitors are properly able to answer the question, "who is my client?". Solicitors should already have an appreciation for why they should not take instructions for any matter (in particular, for the drawing of a will) from anybody other than their client. Imposing a specific requirement of this kind would seem unnecessary if solicitors already had that level of understanding.

W6 Should guidelines be provided for professionals who make wills in Victoria dealing with how to minimise the incidence of undue influence on older and vulnerable beneficiaries? If so, what should those guidelines contain?

It would be of great assistance to all practitioners (regardless of their level of experience) to be provided with formal published guidelines for taking instructions in cases where they are uncertain about a client's capacity or whether they are being influenced. If nothing else, these guidelines could be presented to an existing client / a person who is pressuring the solicitor to prepare a will on behalf of another person to clarify the solicitor's professional responsibility (etc) to their client and to that other person.

Such guidelines could address things such as:

- who should be present during the meeting (both taking instructions and signing);
- that the solicitor should make enquiries about whether the client has previous wills and where they are located and, if possible, should take steps to take custody of those documents;
- factors that suggest that a solicitor should decline to take instructions at all;
- indicia that might suggest that obtaining a medical assessment would be of assistance and in such cases, some guidance about who should be engaged / what questions should be asked of the medical practitioner (such as how long they have been consulting with the person, whether they have any specialist expertise, etc);
- that wherever possible, if a will is prepared by a solicitor, they should witness the document (rather than providing it to the client to arrange for signing elsewhere);
- indicia that might suggest that a medical practitioner should be present at the signing and/or should act as a witness the will;
- the appropriate method for storing wills instructions files to ensure that they can be produced later in the event that a will is challenged;
- other matters relevant to the drafting of wills and protection of the interests of people who may be subject to undue influence (etc).

W7 In what other ways could the process of preparing a will by a solicitor be improved to protect vulnerable will-makers from undue influence?

Introducing "best practice" guidelines like the ones outlined above would be very useful in ensuring that a client's interests (whether they are a "vulnerable" client or not) are protected in the will-making process.

It may also assist clients to provide them with a hand-out of matters that will be relevant to the will making process and basic facts about the effects of making a will and how the process should be conducted. This could be similar in form to fact sheets that are routinely provided to family law clients at the commencement of a matter.

Determining whether a will reflects the will-maker's true intentions

W8 Are any changes to the law relating to testamentary capacity necessary to improve protection for older and vulnerable will-makers?

Where the Supreme Court detects that capacity may be in question – for example, because the death certificate specifies that the deceased had dementia at the time the will was made – the Court already requires additional information to satisfy itself that the will-maker had capacity at the relevant time. However, this requires there to be something in the probate application that actually brings the issue to the Court's attention, and also usually requires an assessment of capacity to be made at a time when the will-maker has died.

Accordingly, although some (indirect) protection is provided to the will-maker, there are some other useful improvements that could be made to ensure that the will-maker's interests are protected at the time that the will is made:

- codification and modernisation of the capacity test as set out in *Banks v Goodfellow*, for example, to take into account development on the interpretation of the language of the test (such as what an "insane delusion" is);
- the introduction of guidelines like those outlined in W6 (above) – these will directly assist in cases where wills are drafted by solicitors, but more may be required to ensure that all will-makers in this situation are given the same protection.

W9 Are any changes to the law relating to knowledge and approval and suspicious circumstances necessary to improve protection for older and vulnerable will-makers?

Based on the list of decisions where knowledge and approval of the contents of a will have been in question provided in the Commission's discussion paper, it appears that these factors will often come up in situations where questions about capacity or undue influence would already arise.

Accordingly, it would seem that the response to those questions – such as the introduction of guidelines and codification of the law on capacity – would also assist with ensuring that a will-maker has knowledge of and approves the contents of their will.

It may assist to introduce a requirement that the witnesses to a will agree that the will-maker "appeared to have knowledge of and approve" the contents of their will – but it would be difficult to argue that the statement should go beyond that. Additionally, we note that without more guidance, authorised witnesses (whose authority is based on them holding a particular position rather than having certain skills for assessing capacity) are unlikely to go to great lengths to satisfy themselves about the contents of the will and/or that they would understand what it is for a will-maker to "know and approve of" a will's contents.

W10 Are any changes to the law concerning fraud or forgery necessary to improve protection for older and vulnerable will-makers?

No – the current position as confirmed by case law is sufficiently clear. However, if the Commission was so minded, it may assist to recommend the incorporation of the common law position in any new succession law legislation.

In this context, we note that the introduction of an "authorised witness" requirement may assist with preventing fraud and forgery in the preparation of wills.

W11 Should the equitable doctrine of undue influence for lifetime transactions be applied to wills?

The introduction of the equitable principle of undue influence would provide consistency between transactions that occur during a will-maker's lifetime and gifts under their will.

This would mean that:

- in cases where an undue influence relationship is presumed, the gift would automatically fail unless it can be proven that there was no undue influence;
- where the relationship is not one of presumed influence, it would still be necessary to show that a relationship or ascendency, power or domination / dependence and subjection existed, but it would then be for the person in the position of ascendency to disprove the influence that is alleged.

This will overcome the principal difficulty in undue influence cases, being the requirement (at least prior to *Nicholson v Knaggs*) to prove coercion.

We presume that these rules would only operate in cases where the validity of a will is challenged through a the caveat / revocation of grant processes.

We also note that there should be an exception to the principle in cases where a "regular" gift is made – for example, a requirement in cases where a will-maker has multiple children and leaves their estate equally between them that the person asserting undue influence should prove coercion by the beneficiar(y/ies) in question.

As noted above, we would recommend "best practice" guidelines for solicitors to assist them to detect situations where influence may arise.

W12 Are there changes that could usefully be made to the doctrine of undue influence as it currently operates in the probate context?

If the *Nicholson v Knaggs* approach was retained ahead of wholesale replacement with an equivalent of the equitable doctrine, then it would assist to have Vickery J's statement set out in legislation. This could (for example) be usefully incorporated in Division 7 of the *Administration and Probate Act 1958* (Vic), which addresses "practice procedure offences etc" and contains rules in relation to lodgment of caveats.

Another option might be to retain the current (*Nicholson v Knaggs*) rule but include some aspects of the equitable undue influence rule – such as a sub-class of those who would be seen as being in a relationship where undue influence is presumed – and provide that undue influence will be presumed in those cases.

WILLS – Statutory wills

Determining the intentions of the incapacitated person

W13 Should Victoria adopt the National Committee's recommended guiding principle for authorising a statutory will or retain the current principle?

It is our view that the existing Victoria regime, which allows the Court to authorise a will that reflects "what the intentions of the person would be likely to be or … might reasonably be expected to be" – although different from the regime in all other states – gives the Court the broadest, most objective and most useful power when determining whether to make a will for a person who lacks capacity.

Accordingly, we would recommend against altering the current rule.

Involvement of the incapacitated person in the hearing

W14 Should the provisions of the Wills Act 1997 (Vic) concerning statutory wills specify that the Court may order separate representation for the incapacitated person (rather than stating that the incapacitated person is entitled to appear on the application)?

There seems to be no reason why the *Wills Act* could not provide for both possibilities. This would enable the incapacitated person to participate personally to the extent that it is relevant and they are able, while also allowing their interests to be represented separately.

It may be useful to give the Court a discretion to suggest (or even require) that a party be independently represented if the judge feels that it would be in the best interests of the party – for example:

- if they examine the incapacitated person and are of the opinion that they are unable to provide any valuable insight or sufficiently protect their own interests; or
- if the incapacitated person is unable to appear (or evidence is led that they are unable to appear) and the judge feels that their interests require protection.

In this context, we note the fact that section 29(b) of the *Wills Act* already permits a lawyer to appear on behalf of the person on whose behalf the application is being made.

Accessibility of the statutory will process

W15 How can the statutory will procedure be made more accessible? In particular, would any of the following reforms be desirable?

(a) Remove reference to the two-stage application process for statutory wills from the Wills Act 1997 (Vic).

Yes. This would reflect the fact that both questions are almost invariably heard in a single hearing.

(b) Have applications for statutory wills heard in the Guardianship List of the Victorian Civil and Administrative Tribunal rather than in the Supreme Court.

It is acknowledged that delays and costs associated with the current procedure could be substantially reduced if a scheme of this type was introduced.

However, if such a scheme was introduced, it would be necessary to ensure that any such hearing was presided over by a sufficiently senior member (such as a deputy president) with expertise in the area of estate planning, as they would be likely to be dealing with complicated estate planning questions.

(c) Encourage judges to decide unopposed statutory will applications on the papers without a hearing in open court.

This is probably a better resolution to the issue than referring the power to determine all statutory wills matters to VCAT.

If this system was introduced, it would seem logical that the judge in charge of the Probate List would be making these determinations (as they currently do), with the result that their considerable expertise would be available and that the process of dealing with will and probate issues would remain centralised in the Supreme Court.

W16 Are any other changes desirable to the statutory will provisions of the Wills Act 1997 (Vic)?

A possible reform would be to give the Court power in appropriate cases to make a will that represents what a judicial officer considers to be a fair balancing of the interests put forward by the applicant and/or the person on whose behalf the will is to be made (or their representative)

In our view, this really is not calling for the judicial officer to go substantially beyond what already occurs in family provision matters, where judicial officers routinely weigh up the moral claims on a person's estate and form a view about how it would best be distributed.

If the process was simplified, whether by allowing VCAT to consider applications or allowing judges to consider matters without a hearing, this process may help to prevent the costs and other consequences that may otherwise result from a family provision application brought after the person's death in cases where the will was out of date, did not express the wishes of the testator at the date of their death or otherwise failed to adequately provide for a person's proper maintenance and support.

Determining who pays for the application

W17 Should the Wills Act 1997 (Vic) include costs provisions specific to statutory will applications? If so, what should the costs provisions provide? Should the legislation distinguish between interested and disinterested applicants?

It is our view that it is probably unnecessary to have costs provisions specific to statutory will applications, for the following broad reasons:

- only a small number of applications are ever made; and
- the Commission has determined that the Victorian approach to costs in those applications that have been heard is consistent with expectations and with the approach to costs in other jurisdictions;

- if statutory will applications are removed from the Supreme Court to VCAT, it would seem logical for the costs regime in that jurisdiction to extend to statutory will applications.

WILLS – Ademption

The ademption rule

W18 Should the ademption rule be changed to one based on the will-maker's intentions? If so, in what way? For example:

(a) Should the Wills Act 1997 (Vic) provide a presumption against ademption?

The basic premise that where an item of property that was at some stage owned by a will-maker is not available to satisfy a gift under their will, that gift should fail, is perhaps a reasonable one. However, in our view, a presumption against ademption, at least in cases where the proceeds of the adeemed gift can be traced without too much difficulty, is perhaps the better (more desirable) approach.

A presumption against ademption would remove the need to draft "around" the current ademption rule – for example, by adding in clauses that have to deal with ever remoter tracings of the sale proceeds of the adeemed property. By comparison, if there was a presumption against ademption, it could easily be rebutted by evidence contained in the will, such as by a clause like the following:

> "Provided that I own **[property]** at the date of my death, I leave it to **[beneficiary]** and it is my intention that in any other situation, this gift should fail".

An approach that presumes against ademption would be more beneficiary-friendly in cases where a will is "home made" (and the will-maker has not received advice about how the ademption principle operates).

In any event, the operation of the ademption principle should be set out in legislation, together with any factors that will cause the presumption to be enlivened / rebutted.

(b) Should the Wills Act 1997 (Vic) provide a presumption in favour of ademption that would allow a beneficiary of a specific gift to present evidence that the will-maker would not have intended ademption?

No – see W18(a) (above) – however, this would still be a better approach than the current position under the common law.

W19 What effect (if any) would changing the ademption rule to one based on the will-maker's intentions have on:

(a) the cost and time involved in administering an estate?

The ademption rule is based on a fairly sound principle that when a person makes a will and gives away property that they do not own at the date of their death, the will cannot effectively dispose of that property. However, it does not account for the fact that people will often make a will ignorant of the fact that if they make a specific gift of property and then sell that property, the operation of their will changes in such a substantial way.

Under the current regime, where the ademption rule operates, it is necessary to either:

- obtain consent of all of the beneficiaries to an arrangement where the disappointed beneficiary receives the otherwise adeemed gift; or
- in cases where the property has been improperly sold – apply to the Court on the basis of rules set out in 19th century decisions in the United Kingdom;
- in cases where the property has been sold by an attorney – make an application to the Court on the basis of first instance decisions that may yet be overturned;
- in other cases – accept that the gift has failed and cannot be revived.

This causes considerable uncertainty and risk, which also results in considerable cost and delay in bringing the administration to its conclusion.

If the question is resolved by the introduction of a presumed intention (enshrined in legislation) that a gift will not be adeemed, we expect that solicitors will be more likely to provide an explanation of the rule, providing certainty at the outset. If this is the case, then it is less likely that problems relating to ademption will arise in the first place, which should substantially reduce the costs and time involved in administering an estate where the ademption rule would historically have applied.

Resolving the question by the introduction of a presumed intention that a gift is adeemed (which can then be rebutted by evidence to the contrary) gives disappointed beneficiaries an avenue to pursue, but because it will necessarily require judicial intervention, is more likely to impose cost and delay upon the estate.

(b) the fairness of the outcome?

Because of the difficulty in predicting the result in matters dealt with under the current ademption rule, the "fairness" of the outcome will depend largely on the parties' attitudes to resolution (which introduces difficulties when not all of the affected parties are *sui juris*) and whether the matter can be resolved by agreement or in another timely manner.

As the costs associated with any application to overcome the results of the ademption principle are likely to be paid from the estate, there is a substantial impact on the fairness of the outcome for all beneficiaries whose shares are affected by those costs.

Acts by administrators appointed by VCAT

W20 Have you experienced any difficulties with the operation of section 53 of the Guardianship and Administration Act 1986 (Vic)?

We are unable to comment constructively on this question as we have not had any real occasion to rely upon the operation of section 53 in recent matters.

Acts by persons holding an enduring power of attorney

W21 Should an exception to the ademption rule be included in legislation for actions of persons holding an enduring power of attorney, as well as administrators? If so:

(a) Should a beneficiary of an otherwise adeemed gift be entitled to:

(i) the same interest they would have had in the property if it had not been sold (section 53 of the Guardianship and Administration Act 1986 (Vic)), or

(ii) an order to ensure that no beneficiary gains a disproportionate advantage or suffers a disproportionate disadvantage (SA and NSW approach), or

(iii) an appropriate order for compensation from the estate?

In our view, the best approach to saving a gift from ademption (if the ademption principle is retained in its current form) would be to adopt a two tiered approach:

- apply the section 53 rule to those cases where the will-maker has lost capacity and is unable to amend their will – so that the disappointed beneficiary receives the "same interest";
- allow the disappointed beneficiary to make an application to the Court for an order that the estate is not distributed in a way that would provide a disproportionate advantage (or disadvantage) to any beneficiary – leaving it in the discretion of the Court to say exactly what the result should be in the circumstances.

We do not really consider this to be a jurisdiction of "compensation", so the use of this terminology is slightly less appealing.

(b) Should the exception apply to any actions by the donee of the power, or only those actions taken after the donor of the power has lost capacity?

See the response to W21(a) (above).

(c) In the present context, what special accounting obligations should the donee of the power of attorney have in relation to proceeds of the transaction?

There should not necessarily be any specific or special accounting obligations imposed on the attorney in a case of a sale of property that is the subject of a specific gift. However, it would assist attorneys to have some guidance about how to treat the funds – for example, encouraging them to (so far as possible) keep those funds separate and account for income and expenditure from those funds separately.

The rule should also specify that the beneficiary is only entitled to so much of the proceeds of sale of the property that was the subject of the adeemed gift as are identifiable at the date of death of the will-maker.

It may appear unfair to other beneficiaries of the estate to suggest that in the event that sale proceeds and "residue" are available, the "residue" should be depleted first in payment of the will-maker's expenses during their lifetime. However, such an approach is consistent with the fact that those expenses would (if left unpaid) be paid from residue once the will-maker died.

We also consider that it would also be worth incorporating in legislation principles to protect beneficiaries in the event that an attorney's intentional actions (for example, if they are able to view the will – see W22 (below)) result in property that was the subject of a specific gift

being sold and the proceeds depleted in an effort to frustrate the gift to a particular beneficiary. The precise form that such principles should take is likely to require further consideration.

Access to a person's will for anti-ademption purposes

W22 Should a person acting under an enduring power of attorney be able to access a person's will in the same way as an administrator? If so, should access depend upon proof of the will-maker's lack of capacity?

In this context, we note that there is likely to be reform in this area of the law in any event (in light of the recommendations in the Guardianship Final Report tabled in April 2012).

If the ademption rule is retained in its current form and an exception like that in section 53 of the *Guardianship and Administration Act 1986* (Vic) is made available to attorneys, it would seem sensible to allow them access to the will to determine whether there is any gift that may be adeemed and therefore manage the proceeds separately.

Similarly, if the rule is maintained in its current form, then access to the will should be restricted only to those cases where the will-maker has lost capacity and the attorney's actions may have the effect of causing a specific gift under the will to be adeemed.

Executors

Court review of costs and commission charged by executors

E1 Should the Supreme Court have the power to review amounts charged by executors?

It is our view that the Supreme Court should have power to review amounts charged by executors, whether commission or other types of charges. We have expanded further using the Commission's sub-headings below.

(a) should the scope of the power be limited to commission, or should it extend to disbursements, fees and any other amounts?

The review powers should be broad and should allow the Court to review all aspects of the amount charged. We cannot see any justification for allowing review only of commission.

(b) should the Court be able to conduct a review on its own initiative, or should it be able to do so only on the application of a person interested in the estate?

The Court should be empowered to make enquiries in all cases, regardless of whether those enquiries are made by an interested party or initiated by the Court.

In practise, it may be only infrequently that the Court's power to initiate a review would be relied upon; however, we do not consider this a reason not to provide the power at all. Knowing that a judicially initiated review may take place might also have a deterrent effect.

(c) should there be an exemption from review if the will-maker was advised to seek independent advice or the legal practitioner who prepared the will complied with rule 10 of the PCPR 2005?

No. A reason for allowing the review is to ensure accountability – the ability to show that information requirements were met at the time of the will being drafted will assist in this process, but should not oust the Court's jurisdiction entirely.

(d) should there be a time limit within which an application for review should be made?

Yes – an application for review should be required to be made within a similar limitation period as a family provision application (presently 6 months).

(e) should the Court be able to order costs against the applicant if the application is frivolous, vexatious or has no prospect of success?

Yes.

(f) should the Court be required in normal circumstances to order the executor to pay the costs of the application if the amount is reduced by more than 10%?

In our view, there should not be a requirement as such, and each review application should be assessed on its own merits. We note that the Court (which will already be reviewing the matter anyway) is capable of making this specific assessment.

(g) should the same provisions apply to review of amounts charged by administrators, individual trustees and State Trustees?

Yes.

Special rules for legal practitioners who act as executors and also carry out legal work on behalf of the estate

E2 Should legal practitioner executors be required to instruct another law practice to act in relation to an estate?

We do not recommend a requirement that practitioner executors instruct another law practice to act in relation to the estate.

Solicitor/executors will often forego commission and instead charge only professional costs associated with administering an estate. To require another firm to act, presumably on the basis that legal fees will be paid to that firm, is likely to result in additional charges and double handling and may guarantee that the executor will claim commission.

E3 How could existing rules for ensuring that will-makers are fully informed about the possible costs to the estate of appointing a legal practitioner executor be improved? Should a will that appoints a legal practitioner executor have to be witnessed by an independent witness?

A proposal that may help to ensure that will-makers are fully informed about these issues would be a requirement that the solicitor provide the client with worked examples of what the costs might be, applying them to the then current value of the will-maker's estate.

The solicitor/executor should also explain that assets may need to be sold in the event that there are not sufficient liquid assets in the estate to meet these obligations – particularly where (for example) the principal asset is the will-maker's home and they are leaving it to their beneficiar(y/ies) to live in.

In our view, a requirement that a will appointing a solicitor as executor should be witnessed by an independent witness should not be introduced. This is because:

- if the will is simply witnessed by another member of the same firm, it is questionable how "independent" they will really be and whether the client would raise any queries with that other person;
- if the will is witnessed by a person outside the firm, then 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.

E4 Should rule 10 of the Professional Conduct and Practice Rules 2005 be incorporated into the Wills Act 1997 (Vic)?

Yes. This rule should be associated directly with the will drafting process and should not be contained in separate regulations which empirical evidence suggests are not known about by many members of the profession.

The fact that practitioners fail to comply with rule 10 shows that the rule itself is not sufficiently known and its force is not sufficiently felt. Although there remains a possibility that solicitor/executors may still be unaware of the rule even if it is incorporated into legislation, this will give it greater force and notoriety than the current practice rule.

E5 **Should legal practitioner executors be required to disclose to beneficiaries the basis on which they charge the estate for their executorial and legal work? If so, should the requirement be set out in legislation or in professional rules?**

It is our view that solicitor/executors should be required to provide disclosure similar to costs disclosure requirements under the *Legal Profession Act 2004* (Vic) in relation to client matters and should probably be incorporated into that Act.

It would assist to have a standard form dictating these disclosure requirements, which could then be completed and provided to each beneficiary when the solicitor commences acting as executor. At a minimum, the information disclosed should include an explanation of the basis of charging for their executorial and legal work and an indication of the review processes that are available to the beneficiary in the event that they wish to dispute the amounts charged.

E6 **Should 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 be set out in legislation?**

We are of the view that the *Walker v D'Alessandro* framework (or a similar one) should be set out in legislation.

E7 **Should legal practitioner executors be entitled to charge an hourly rate for executorial services, rather than being able to claim a percentage of the estate or its income, for commission? Should Victoria adopt the model provision proposed by the National Committee for Uniform Succession Law?**

There seems to be no objection to introducing a legislative provision enabling solicitor/executors to charge for their executorial responsibilities on an hourly rate basis, provided that the provision sufficiently confines this right – such as a provision which permits the executor to charge no more than they might expect to receive on an application for commission.

We do not agree with the suggestion that solicitor/executors should not have the right to set a percentage of commission, on the basis that this limits the freedom of will-makers to choose the manner in which they wish to compensate the executor. However, as noted in E1 (above), we are of the view that if a rate of commission is set and appears unreasonable in the circumstances, it should be open to the Supreme Court (upon application) to review the rate of commission.

The National Committee's model provision appears to provide a workable framework for cases where a solicitor/executor renounces their right to claim commission in a 12 month period.

Small Estates

Definition of a "small estate"

SE1 Should the current figures in the Administration and Probate Act 1958 (Vic) determining what is a small estate be raised? If so, what should they be raised to, and how should this be determined?

The figures are impractically low for many estates that would be regarded as "small" estates (these figures really relate to "very small" estates).

In our view, a reasonable threshold would probably be at least double the current amount – whether this means a dual threshold of $50,000 and $100,000 (doubling both figures) or doubling the upper limit but retaining the same gap to make a dual threshold of $75,000 / $100,000.

As there seems to be no consistency between the states on this issue, it is probably worthwhile to choose values that are reasonable in the context of Victorian experience.

Regardless of what value is set (or how), we would recommend that once a new value is set, that value is indexed in accordance with the Consumer Price Index or another widely published indexation mechanism.

SE2 In determining what is a small estate:

(a) should the dual threshold of values, based on the identity of the beneficiaries, be retained?

It is curious that Victoria is the only jurisdiction with a small estates dual threshold. However, we see the utility in the concept of allowing an estate that might otherwise be above the threshold to be treated as a "small" estate where the only beneficiaries are family members.

(b) should the value be set by the Administration and Probate Act 1958 (Vic) or moved to subordinate legislation?

In our view, if the value for small estates is set in legislation with an indexation mechanism, there does not seem to be any real need to move the value to subordinate legislation (to simplify the process of updating the value, etc).

If an update mechanism is not built in, it may be more useful to put the value in subordinate legislation and publish the value on the Supreme Court website – similarly to the way that the present value of a "penalty unit" can be located online.

SE3 Is there a better way to define which estates should have access to the simpler processes relating to small estates? For example, by reference to certain asset profiles?

We do not intend to make any submissions in relation to this question, as our experience with small estates is limited, perhaps because it is likely to be disproportionately expensive for an executor of a small estate to engage a private firm to obtain probate.

Assistance in obtaining a grant of representation

SE4 Should the Supreme Court Probate Registry retain responsibility for providing assistance in obtaining grants of representation in relation to small estates?

We believe that the "assisted grant" process could usefully be reduced to an information and "advice" service (noting that the Court will not be providing executors with legal advice).

The Commission's statistics show that the system is only being used very occasionally. Further, there are other avenues for executors of small estate matters (discussed in detail below) which may be more convenient than requiring the executor to attend the Supreme Court to make the application for probate.

SE5 Could formal assistance through the Supreme Court Probate Registry be replaced by the provision of clearer, more comprehensive, court-generated information?

The concept of a "smart form" which enables an executor to complete the majority of the application for probate themselves – such as the system in place in Western Australia – is likely to be of great assistance to executors of small estates.

However, in our view there must still be a mechanism available for anybody who does not wish to (or is unable to) use an online interactive service, such as a probate "terminal" in the Probate Registry. This would enable executors to use the service in the presence of Court staff and obtain advice in relation to the use of the system. Alternately, there could be a Court authorised probate pack which could be sent to executors upon request.

A system designed or ratified by the Court, as opposed to a commercial "probate kit" which may be inaccurate or out of date, would help to ensure that applications are able to be made in a timely and cost-effective manner.

SE6 Would the introduction of a sliding fee scale, perhaps with a nil fee for grants of representation for small estates, encourage people to seek grants of representation in small estates?

Yes – provided that there is knowledge that the system is available.

If an executor knows the benefits that they will receive if they obtain a grant of probate and he or she is able to obtain a grant without paying court fees (perhaps on an application commenced via the Court's online system), they are considerably more likely to obtain a formal grant. This also has the flow-on effect that the estate will be accounted for in the Probate Registry's list of estates, which will assist parties who may need to conduct probate searches at a later date to determine whether and when probate was obtained and the composition of the estate.

Elections to administer

SE7 What should be the value that determines the size of estates that can be administered under an election to administer?

In our view, the limit for elections to administer should be increased to at least $100,000 (in accordance with the National Committee's recommendation). This would encourage more trustee companies to take on the responsibility, particularly if the second threshold figure is increased.

It may be best to express this as an amount that is indexed in accordance with the Consumer Price Index (or some other index) to ensure that the utility of the revised provisions is not lost over time.

If the value is indexed, it also seems fairly natural/obvious that the threshold value relied upon in any particular administration should be the value as at date of death (as experience suggests that more often than not, an estate administration will span over more than one financial year/indexation period).

SE8 Should the second threshold, above which an application for a full grant must be made, be retained? How should such a figure be expressed (for example, as a percentage of the initial figure or as a static figure)?

If a second threshold is retained, the figure should be no less than the current proportional amount (i.e. 20%) higher. However, considering that even an estate of the size of the suggested threshold ($100,000) is still fairly modest, it should perhaps be greater – for example, 50% as proposed by the National Committee.

The simplest way to keep this second threshold in line with an increasing base line (assuming that the base threshold is indexed) would be to have it as a proportional amount. A mechanism that says that the estate value cannot be more than (for example) 50% greater than the lower threshold would be simple to understand and calculate even in a context where the base value is indexed.

It should be kept in mind that the executor acting in these cases is likely to be a trustee company, whose specific expertise relates to administering trusts and estates. For this reason, the major issue with allowing estates to be administered under this scheme becomes one related to notification.

SE9 Should the threshold figures for election to administer refer to the net or gross value of the estate?

It is our view that to be realistic and encourage trustee companies to take on these roles, the figures for election to administer should refer to the net value of the estate.

There should also be a simple and standardised mechanism that the executor can employ to enable creditors to "prove" their debts, ensuring both that the liabilities in question are valid and that the estate really does fall within the threshold.

SE10 Should legal practitioners be permitted to file elections to administer? What would be the advantages of such a change?

Provided that they have relevant experience, there seems no reason to prevent solicitors from filing elections to administer.

There could perhaps be a register of practitioners who have "qualified" to be able to file elections and/or specialised training to ensure that they know their minimum obligations as a trustee/executor. (We take the opportunity to comment that similar training all lawyers should probably receive equivalent training in any event, given that they may be directly appointed as executors in a will.)

Some of the advantages of allowing practitioners to make such applications would be:

- more 'formal' administrations – solicitors are more readily accessible to the public than trustee companies and it seems likely that more small estates could be administered in this way (rather than through informal administration processes);
- more choice – the marketplace will be greater and executors will have more options than under the current scheme, where either:
  - the estate may be charged a large amount in commission or trustee company fees; or
  - the matter may be turned down altogether because it is too small to justify the trustee company's involvement / pay its expenses.
- more resources and availability – if solicitors are able to take on these roles, this may enable estates to be resolved and wound up more rapidly. This is likely to be better for beneficiaries than is currently the case, given that State Trustees handles most small administrations of this type (albeit that they are likely to be handled under State Trustees' deemed grant powers).

SE11 Should elections to administer require the filing party to file the will with the Court?

Yes. This promotes accountability and also means that a copy of the will can be obtained from the Supreme Court in the event that it cannot be obtained directly from the trustee (trustee company or solicitor) for some reason.

SE12 Should advertisements giving notice of intention to file an election to administer be moved from newspapers onto the Supreme Court website?

Yes. This will promote consistency with other forms of grant and provide a centrally searchable register of such notices.

Moving advertisements to the online system is also likely to lower costs, as the advertising fee for the Supreme Court website is substantially lower than the cost of advertising in a newspaper.

SE13 Should notice requirements in relation to an election to administer be abandoned altogether?

No. An approach which allows for advertisement on the Supreme Court website will provide considerably more ease than the current system and will also assist solicitors working in the area of will disputes (such as the area of family provision) to obtain information about the estate and if necessary, take steps to intervene.

SE14 Should elections to administer be subject to stricter procedural safeguards? Are there other improvements that could be made?

It is our view that the introduction of a requirement to file the will with the Court and a move to online advertisements will both provide substantially improved procedural safeguards and make information about estates administered by election to administer more readily available.

When the Supreme Court receives notice that an estate is to be administered this way, it should also enter details about the estate in the register that currently records probate applications, caveats and the Supreme Court's wills registry.

As these requirements will all relate to small estates, consideration should also be given to the associated costs of compliance to minimise the impact of new procedural safeguards.

SE15 Do elections to administer, in their current form, serve a valuable function for small estates? If not, should elections to administer be abolished?

Although it may be questionable whether elections to administer are serving a 'valuable' purpose in their current form, it is our view that with modifications such as those outlined above, they could be quite useful.

Accordingly, if such improvements are made, we expect that they will be able to serve a renewed and valuable function and will be worth retaining.

Deemed grants

SE16 What should be the value that determines the size of estates that can be administered under a deemed grant?

See the response to question 7 above.

SE17 Should there be a second threshold above which an application for a full grant should be made, as with elections to administer? If so, how should such a figure be expressed (for example, as a percentage of the initial figure or as a static figure)?

See the response to question 8 above.

SE18 Should threshold figures for deemed grants refer to the net or gross value of the estate?

See the response to question 9 above.

SE19 Should legal practitioners be permitted to advertise for deemed grants? What benefits might this change produce?

If the framework for elections to administer is expanded as we have recommended above, this should provide a sufficient and simple mechanism for solicitors to take on such positions.

It would therefore seem redundant to have two effectively identical mechanisms for achieving the same result (although this observation is equally applicable to the deemed grants process in general).

SE20 Should deemed grants have more stringent procedural safeguards (for example, a requirement to file wills and inventories, and to search for caveats or prior grants)?

If the process is retained, then the introduction of these suggested procedural safeguards would be highly beneficial to ensure that estates administered under a deemed grant are subject to the same scrutiny (etc) that is applied to administration under a formal grant.

SE21 Do deemed grants, in their current form, serve a useful function?

The evidence that State Trustees' policy is to rely on the deemed grants process whenever an estate falls within the monetary thresholds suggests that the deemed grants process does serve a useful function.

However, if the election to administer process is expanded and similar procedural safeguards are applied to both, then unless there are other areas of difference, it will remain to be seen whether this process continues to have a practical use (given that the election to administer framework applies to a larger group of potential executors).

Informal administration

SE22 Should section 32 of the Administration and Probate Act 1958 (Vic) be expanded to a provision of more general application, in line with the recommendation of the National Committee?

Yes. In cases where a small estates grant process is still undesirable for any particular reason, it would assist to provide protection to bodies that are releasing assets to an informal administrator.

It is our view that the form proposed by the National Committee (extracted below) is clear, concise and useful.

Protection for limited payments made without production of a grant of representation

(1) [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.

(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 [or] personal property.

SE23 Should it be possible to transfer real property without a formal grant, as in Queensland? If so, in what circumstances?

We are of the view that it should be possible to transfer real property without a formal grant in limited circumstances and that the Queensland model provides a good starting point.

It may be helpful to allow transfers to occur in this manner where there are no other assets in the estate (meaning that a grant is not required for anything else) and the informal executor/administrator is able to provide evidence of this (such as a statutory declaration).

Another clear example would be where there is an apparently valid will, the property is in the name of one spouse and the will leaves the property (or the residue, which includes the property) to the surviving spouse.

Even if no grant is required, it may assist the Land Registry and the executor for the Supreme Court to still have some form of "small estates" process applying in this case. For example, the Registrar of Probates, upon the examination of materials filed by the executor/administrator (perhaps a 'cut down' probate application which can be prepared at less cost) might issue an order directing the transfer of the property from the deceased to a named beneficiary. This process might even be one that is able to be completed through an "assisted" probate process (for example, using an online form) and submitted for review directly by the Registry.

A process of this kind would enable the Supreme Court to have some level of scrutiny while also providing the executor/administrator with security (because their action has been ratified by the Supreme Court).

SE24 Should section 33 of the Administration and Probate Act 1958 (Vic) be amended in line with the recommendation of the National Committee?

Yes – 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.

Accordingly, rather than charging informal administrators for their “wrongs”, the reworded section would allow informal administrators to feel that their role and actions are legitimised.

SE25 Should the Victorian provision be modified to limit an informal administrator’s liability not only in relation to payments made, but also in relation to any other act that might properly have been done by a personal representative to whom a grant has been made?

If informal administrators are to receive protection for payments they have made, there seems to be no logical reason why they should not also receive protection where their actions are “proper” actions for a personal representative.

SE26 How else could the role of informal administrators be better clarified?

If the role of informal administrators is recognised by protection for payments and other actions done by them that might properly have been done by a personal representative who had received a grant, then it may not be necessary to further clarify their role, at least in cases where the informal administrator is appointed as executor under a will.

SE27 Would a process of administration by statutory declaration be a worthwhile addition to the mechanisms designed to facilitate the administration of small estates?

This may provide another means for executors to administer small estates beyond the “election to administer” and “deemed grant” processes. However, it may be unnecessary if the rules relating to those two formal processes are amended to make them more accessible (for example, by solicitors) and cost-effective.

An example of a situation where a process of this kind may be useful would be where there are minimal assets including a family home, the will provides for the transfer of assets to the deceased person’s spouse and the principal objective of the administration is to complete that transfer.

SE28 Are there further safeguards that would be necessary or desirable if this proposal were implemented?

It would seem that for consistency with the other procedures available, the minimum safeguards necessary would be:

- advertisement of the intention to apply for a grant via the statutory declaration process; and
- filing of the statutory declaration (and supporting documentation – probably including the will) with the court.

Intestacy

Defining and setting a limit on next of kin

I1 Should Victoria set a limit on next of kin at children of the deceased's person's aunts and uncles (the deceased person's first cousins), as recommended by the National Committee?

Yes – this is logical and consistent with the recommendation and the advantages referred to in the Commission's paper are sufficient and legitimate justifications for taking this step.

It is likely that setting such a limit will reduce the delay involved in attempting to track down next of kin in cases where (for example) the deceased is domiciled in Australia but has relatives overseas.

This would have the flow on effect of reducing the costs involved in that investigation.

Survivorship

I2 Should Victoria introduce a survivorship requirement of 30 days, for consistency with the National Committee's recommended approach, the law in New South Wales and Tasmania and the position under the Wills Act 1997 (Vic)?

Yes – this should be brought in line with the default position under the *Wills Act*.

If this rule is introduced, it should be subject to an exception where the rule would operate to have the effect that the deceased's property goes to the Crown *bona vacantia* (but that result would not otherwise occur).

Entitlements of the deceased person's partner or partners

I3 Should Victoria increase the partner's statutory legacy to $350,000, adjusted to reflect changes in the Consumer Price Index, as proposed by the National Committee?

It is our view that the statutory legacy should be increased substantially, but the question of whether or not it should be increased to $350,000 (indexed from 2006) is a separate issue.

A better approach would be perhaps to set the base amount of the legacy as at the date of enactment/operation of the new provisions.

We agree that incorporating a mechanism for adjustment of the statutory legacy without the need to amend the legislation would be useful and that the Consumer Price Index (or an equivalent index) would be useful for this purpose.

We also suggest that the amount of the statutory legacy – like the threshold amount for small estates – should be published on the Supreme Court website.

I4 Should Victoria increase the partner's share of the remainder of the estate from one third to one half, as proposed by the National Committee?

It is difficult to say whether this scheme would be any "better" than the current scheme for dealing with residue, particularly if the partner's statutory legacy is increased and/or if there are multiple partners each receiving a legacy of that order.

However, it may be appropriate to set aside half of the residue as being the "partner's share" in recognition that they have a higher priority than children (at least in the general sense of where society considers obligations to provide support lie) and to promote consistency between the states.

I5 Where the deceased person is survived by multiple partners, but no children (or other issue) who are entitled to a share on intestacy, should Victoria adopt provisions recommended by the National Committee, which allow the estate to be distributed:

(a) by a distribution agreement

We agree that legislative provisions permitting partners to enter a formal agreement for the distribution of the intestate's estate would be a positive step.

The current regime is "one size fits all" and makes assumptions about how an intestate person would have intended to leave their estate. In our view, it makes sense to allow parties who have more knowledge of the intestate's circumstances to agree to distribute the estate in some other manner.

We also consider that there should also be a requirement to lodge a copy of the agreement with the Probate Registry, perhaps with the mutual benefit that if an agreement is lodged and approved, it then operates like a will (for the purposes of stamp duty, etc.)

(b) by a distribution order; or

Similarly to I5(a), we agree that giving permission to the Court to adjust the distribution that is to take place is an appropriate mechanism. In this context, we refer to the Court's powers to intervene in family provision applications.

(c) equally between the parties?

Provided that a model like that in Section 36 of the *Succession Act 1981* (Qld) is adopted, the default position that the partners' share should be divided equally between them if they do not agree is likely to be of assistance to the administrator, while also giving the partners some impetus to actually take steps to either reach agreement or apply for a "distribution order".

I6 Where the deceased person is survived by multiple partners and children (or other issue) who are entitled to a share on intestacy, should both partners be entitled to their own statutory legacy, as well as a share of the remainder?

On the face of it, allowing individual statutory legacies to each spouse/partner (rather than an arrangement where the legacy is shared between spouses) may result in unfairness for the remainder beneficiaries. Unless the deceased's estate is sufficiently large to pay the legacies and still have something left to divide as residue, the intestate person's children (or other issue) are likely to miss out entirely.

It is not entirely infeasible that a deceased would leave multiple partners, neither of whom is related to the deceased's issue, with the result that if the estate is exhausted by paying statutory legacies, none of their estate will end up going to their children.

We believe that this discussion could be better informed – for example, by gathering some empirical evidence about the number of multiple partner applications and the size of the estates in those cases.

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

I7 Should the right of the deceased person's partner to elect to acquire an interest in the shared home be extended to other property in the estate, as proposed by the National Committee?

An extended right for the partner to acquire other property (outside the family home) would probably be sensible in most cases. This could be tempered by also allowing for:

- a child or children to elect to take the property ahead of it being sold by the personal representative (who is likely to be the deceased's partner in any event);
- a dispute resolution mechanism (such as the ability to apply to the Court) where either of the above approaches produces an unfair outcome.

Entitlements of the deceased person's children or issue

I8 Should Victoria adopt the approach to entitlements of the deceased person's children on intestacy recommended by the National Committee?

The National Committee's recommendation, which effectively provides that children should not be entitled on intestacy where:

- the parent survives and is entitled to a share; and
- all surviving children of the deceased are children of the same parent or another partner of the deceased who is entitled on intestacy

is probably productive of the least interference and complexity.

Again, it may be helpful to allow an application to be made by (or on behalf of) children where the default scheme would produce an unfair outcome – for example, if the estate was split equally between two partners and all of the children were children of one partner.

Per stirpes or per capita distribution

I9 Should Victoria:

(a) retain per capita distribution and extend its operation so that it applies at each generation to both lineal and collateral relatives when all members of the preceding generation are deceased?

No. See I9(b) (below).

(b) abolish* per *capita distribution and apply* per stirpes *distribution in all cases?

Yes. Some advantages of this change would be:

- it would reduce the inconsistency inherent in having a *per stirpes* in some cases, *per capita* in others approach;
- it is more consistent with the way that estate planning is commonly undertaken – in most cases, wills are prepared and leave the estate using a *per stirpes* mechanism;
- this would be more consistent with the way that Courts and lawyers tend to view obligations in the context of Part IV applications;
- it would be more consistent with legislation in other parts of Australia;
- as either rule is fairly arbitrary, a rule that is consistent with practise more broadly is preferable.

Taking benefits into account

I10 Should Victoria abolish the hotchpot rule, as recommended by the National Committee?

Yes – the rule makes an arbitrary assumption about how the deceased wanted to treat amounts advanced to their children during their lifetime (i.e. that they wanted their children to be treated equally – which is often not the case).

In any event, there is no real justification for the rule only applying to children – if a decision is made to retain the rule, it should apply equally to (eg) grandchildren who take a benefit under the will and have been given an advancement during the deceased's lifetime.

I11 Alternatively, should Victoria retain and amend its hotchpot provision …?

No. See I10.

I12 If Victoria were to abolish the requirement to take benefits received during the deceased person's life into account (hotchpot), should it also abolish the requirement to take into account benefits received under a will on partial intestacy?

Yes – it is our view that both this rule and the hotchpot rule should be abolished.

The rule denies the testator the ability to provide unequally for their children, at least to the extent of a partial intestacy – the "intestacy" share of the child (or children) who has (or have) taken a benefit under the effective part of the will is forcibly adjusted by the value of the gift.

It would also be useful to abolish this rule for the purpose of bringing Victorian law into line with the law in other states.

I13 If hotchpot is retained and extended beyond children of the deceased person, should the current requirement to take into account benefits received under the deceased person's will on partial intestacy also be extended beyond children of the deceased person?

As noted above, it is our view that these rules should both be abolished.

Indigenous intestate estates

I14 Are any statistics available about intestacy of Indigenous people in Victoria?

We are unable to comment on this question as we have not had any experience with the estates of intestate indigenous people.

I15 Are more flexible provisions needed in Victoria for the distribution of Indigenous intestate estates? If so, what form should these provisions take?

We are unable to comment on this question as we have not had any experience with the estates of intestate indigenous people.