Inquiry into Succession Laws

To: Victorian Law Reform Commission

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Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to make this submission to the Victorian Law Reform Commission (the Commission) Inquiry into Succession Laws (the Inquiry).

This submission responds to three of the Commission's consultation papers, namely:

- Executors
- Family Provision
- Wills

This submission has been prepared based on input from the Succession Law Committee of the LIV, which consists of experienced legal practitioners who practise in succession law, many of whom are accredited specialists. Views were also obtained from the broader membership of the Succession Law Section (the Section) through an email survey in relation aspects of the Family Provision consultation paper, responses to which have informed our comments below regarding questions FP 7 - 21.[1]

The LIV intends to provide a further submission in response to the remaining three consultation papers relevant to the Inquiry.

Executors

When considering recommendations on executors, the LIV notes that there are many situations where it is appropriate or desirable for a legal practitioner to be appointed as executor, including:

1. Where the legal practitioner has particular knowledge of the testator's family or business affairs gained over (many) years of dealing that would be demonstrably difficult for a third party to pick-up by reading of the estate papers. For example, this may be the case with disabled children or other dependents, with family owned farms and businesses and with assets held in several jurisdictions;
2. Where the estate is likely to be subject to Part IV (Family Provision) or other litigation and it would be inappropriate to set one part of the family up as defendants against the others as plaintiffs;
3. Where the terms of the trusts of the will are complex and require the skills of a legal practitioner competent in trust law and administration to be the executor;
4. Where the will-maker has no family or friends in Australia; and
5. Where a will-maker does not reside in Australia and makes a will in an Australian jurisdiction regarding assets in Australia.

In a submission to the Victorian Attorney-General of 17 May 2006, the LIV also suggested that:

1. *The supply of skilled executorial and estate trustee services to the community should not be discouraged. Such skills are particularly relevant to solicitors (as opposed to barristers) and are used by the community when family or friends are not appropriate (usually due to difficulties with the personality or capacity of beneficiaries or difficulties with complex assets such as farms or small businesses). The only other skilled alternative is a statutory trustee company or State Trustees, both of which have an automatic right to fees that do not have to*

[1] The survey was emailed to the 702 members of the Succession Law Section and was open for one week. 50 members of the Section provided responses to the survey.

be explained to their testators, who are less likely to have an understanding of the testator's background and affairs and who increasingly tend to recommend their own investment products.

2. *It is the experience of solicitors that their clients expect to pay for executorial services and prefer to have the rate of payment both explained to them and set out in the will. Provided the explanation of commission is given by a person independent of the person to receive commission, the testator should be free to agree to grant the commission without the prospect of it being disturbed by others. Rule 10 of the current Professional Conduct and Practice (Amendment) Rules addresses this situation for solicitors but no similar rule applies to accountants and other members of the public who in some professional capacity administer estates. Our proposed section 65A(b) addresses this in a manner that is fair to all executors who observe its terms.*

3. *The business of administering estates has become far more complex and demanding than it was when the principles that trustees should act on an honorary basis were established. At that time an investment could simply be left in a bank or invested in bonds. While acting on an honorary basis is an important starting point and should not be abandoned, it must be acknowledged that both the Courts and Parliament have increased the responsibilities of executors and trustees many times with the attendant risk of action against the executor/trustee for damages. Some of the obvious new concerns are:*

    (a) *Part IV Applications under the Act. With the widening of the range of applicants it is impossible to be certain that no claim will be made on any estate. This forces all executors to wait until the six month time limit for claims expires before distribution can be made in any estate. Such claims are now frequent and when they arise involve acrimony, delay, mediation and the preserving of assets until finality.*
    (b) *Capital Gains Tax (CGT). Introduced in 1985, CGT now affects most estates. The executor/trustee must satisfy the Australian Taxation Office in the date of death return that the deceased has complied as required. In many cases records are inadequate and have to be reconstructed. In the case of minors, life interests and other postponed distributions, detailed records need to be maintained.*
    (c) *The Prudent Person Principle. Since 1 January 1996 Part I of the Trustee Act 1958 has required executors and trustees to exercise the skills of a prudent person in managing the assets of others (para 6(1)(b)) and where the assets cannot be distributed within a year to have at least an annual review (sub-sec 6(3)). The annual review requires the consideration of the 15 matters set out in sub-sec 8(1) of that Act. The skill level required of an experienced trustee is even higher.*

Court review of costs and commission charged by executors

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

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

The court should be able to review commission only, according to the new s65A as proposed by the LIV and set out at paragraph 2.89 of the Commission's Executor's consultation paper.

We note that executors are already subject to a duty to account under s28 of the *Administration and Probate Act* 1958 (Vic), which would include disbursements.

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?

Yes, the court should be able to review on its own initiative.

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 Professional Conduct and Practice Rules 2005?

Yes, there should be an exemption from review if the will-maker obtained independent legal advice in relation to the executor's entitlement to commission under the will prior to its execution or if the executor is a legal practitioner, where the legal practitioner who prepared the will complied with rule 10 of the *Professional Conduct and Practice Rules* 2005. Rule 10 is designed to ensure that testators provide informed consent to any charging clause. As discussed in the Commission's consultation paper, the courts have held that informed consent avoids breach of a legal practitioner's fiduciary duties.[2] In *Szmulewicz v Recht*,[3] the court held that informed consent means more than agreeing to a charging clause, but also knowing the implications of the clause.

The courts should be able to review amounts charged by a legal practitioner-executor who has not complied with Rule 10. We note that in this situation, the legal practitioner-executor may also be subject to professional disciplinary proceedings.

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

Yes, an application for review should be required within three months from the date of notification of commission by the executor to the beneficiary, as per LIV's draft s65A set out in the consultation paper.

A three month period for initiating a claim would prevent delay in winding-up estates and would prevent a disgruntled beneficiary or group of beneficiaries using the provision simply as a means of delaying distribution of the estate to others, thereby securing concessions for themselves or for other ulterior purposes.

[2] *Re Shannon* [1977] 1 NSWLR 210.
[3] [2011] VSC 368.

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, the Court should be able to order costs against the applicant if the application is frivolous, vexatious or has no prospect of success, consistent with s97 (7) of the *Administration and Probate Act* for family provision claims.

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 per cent?

No, the LIV does not support a costs rule based on an arbitrary amount by which commission is ordered to be reduced. Costs should be within the discretion of the court.

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

Yes, the same review provisions should apply to all executors, administrators and trustees who charge for their services pursuant to a clause in the will.

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?

Members who accept appointments as executor report that often they are appointed by a testator in the expectation that his or her law firm will also undertake the legal work in relation to administering his or her estate. This is likely to arise where a legal practitioner has a long-standing involvement in the client's affairs, and might involve complex trusts and other legal structures. Legal practitioners who act as executors and instruct their own firm to undertake legal work arising from the administration of an estate must comply with the *Professional Conduct and Practice Rules* 2005, and in particular Rule 10, so that the testator must have given informed consent or received independent legal advice about any charging clause in relation to both legal costs and any commission. Where Rule 10 has been complied with, legal practitioners should not be required to instruct another law practice to act in relation to an estate.

We note that trustee companies and State Trustees are able, but not required, to instruct an external law practice to act in relation to an estate.

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?

The LIV considers that compliance with Rule 10 is sufficient to ensure that will-makers are fully informed about the possible costs to the estate of appointing a legal practitioner. If the interested witness rule is re-introduced, as proposed by the Commission, a legal practitioner appointed as executor who includes a charging clause in the will would not be entitled to witness the will. The LIV considers that it is good practice for legal practitioners appointed as executor to ensure that the will is witnessed by an independent witness. We note, however, that there is no requirement for an independent witness to know that the document they are signing is a will, so that this might be a limited safeguard in any event.

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

The LIV considers that Rule 10 should not be incorporated into the *Wills Act*, as rules can be more easily changed where new problems are identified. It is appropriate for non-compliance to be dealt with as a disciplinary matter by the Legal Services Commissioner.

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?

On 9 May 2007, s3.4.38 of the *Legal Profession Act* 2004 (Vic) (LPA) was amended to remove the right of beneficiaries to apply for a costs review where a legal practitioner executor performs legal work for the estate. The LIV considers, however, that it is good practice for legal practitioner executors to provide cost disclosure to beneficiaries and would support introduction of a requirement to make costs disclosure under Part 3.4 of the LPA.

Costs disclosure should be required to beneficiaries only where the legal practitioner executor is the sole executor, as where the legal practitioner is one of two or more executors, costs disclosure is likely to be required to the other executor in any event. Further, costs disclosure should be required only to residuary beneficiaries, as they will be the only beneficiaries affected by legal costs. We note that in some situations, the residuary beneficiaries will not be sui juris and will be yet to be ascertained, in which case it will not be possible to provide costs disclosure.

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?

Yes, the common law concerning the minimum information that should be disclosed to beneficiaries when they are being asked to consent to the payment of commission should be set out in legislation. An amendment along these lines should apply to all executors and not be limited to legal practitioner executors.

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 Laws?

Legal practitioners should continue to be entitled to charge an hourly rate or charge commission for executorial services, depending on the terms of will and as agreed with the will-maker. Will-makers should continue to have the option to negotiate the method of calculating payment, as the best option might vary depending on the size and complexity of the estate. Where a legal practitioner charges for executorial services, there must be informed consent to the particular charging clause, which ensures that choice is maintained for consumers of legal services.

Family Provision

Factors affecting settlement of family provision claims

FP1What factors affect a decision to settle a family provision application rather than proceeding to court hearing?

The LIV suggests that the main contributing factors affecting any decision to settle include:

- Costs of going to trial;
- The knowledge (by both parties) that the plaintiff will likely receive their costs from the estate;
- The merits of the claim;
- Trauma of going through the process and a public hearing;
- Time and delay;
- Attitude of the beneficiaries;
- Uncertainty of the outcome at trial;
- Further harm to family relationships; and
- The quality of the mediator.

Of the factors set out above, the costs of going to trial and the knowledge by the parties that the plaintiff's costs will likely be ordered to be paid out of the estate are major factors affecting the decision whether to settle the claim.

Time limits and extension of time

FP2 Is the current period within which an application for family provision can be made in Victoria (six months from the grant of representation):

(a) satisfactory?
(b)too short?
(c)too long?

The LIV believes that the six month period is satisfactory and confirms that any time period must begin from the date of probate/representation and not the date of death.

Opportunistic claims

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

The LIV believes that the current law allows opportunistic and non-genuine family provision claims to a significant extent.

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 personal representative, deter opportunistic applicants from making family provision claims?

The LIV considers that s97(7) does not deter opportunistic applicants, for the reasons outlined in paragraphs 2.46 – 2.54 of the consultation paper and in particular, because it is rarely enforced by the courts. The LIV queries whether this provision is well known and

understood. The LIV reiterates that stronger enforcement of this provision would act as a deterrent to opportunistic claimants.

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

The LIV considers that the power to summarily dismiss claims does not deter opportunistic claimants. The power is difficult to exercise because the current law does not limit the class of potential claimants, so that consideration of whether an applicant meets the legislative criteria requires consideration of all relevant facts. Without considering all relevant facts, it is difficult to determine whether an application has no real prospect of success, which would require a full hearing on the issues.

The LIV notes the recent decisions to summarily dismiss claims in *Jackson v Newns*[4] and *Napolitano v State Trustees*,[5] although it is unclear whether these judgments signal a greater willingness on the part of the courts to exercise its inherent power of summary dismissal.

Excessive costs

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

The LIV notes that the level of costs generally awarded in family provision matters can be disproportionate to the value of the estate, particularly where the matter relates to smaller estates. This occurs largely because of the evidentiary requirements of the law, which requires preparation of often extensive affidavits.

The LIV notes that the prospect of costs orders can sometimes result in unmeritorious claims being settled at mediation in order to avoid the risk of an adverse costs order. Generally, however, plaintiffs can expect solicitor-client costs from the estate despite being unsuccessful at trial, which has a chilling effect on mediations and encourages executors to settle even unmeritorious claims.

Transactions during the deceased person's lifetime that reduce the size of their estate

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?

Most members are of the view that only occasionally 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. This can be distinguished from estate planning for tax planning and other purposes.

However, some members are aware of several examples of people dealing with their assets during their life in order to minimise the property that is in their estate, including the following matters:

1. Real estate owned by an elderly widow was transferred into the joint names of herself and one of her two daughters, with the intention that the property would revert to that daughter on the widow's death and to

[4] [2011] VSC 32.
[5] [2012] VSC 345.

avoid the possibility of the other daughter lodging a family provision claim.

2. Substantial farming property plus substantial shareholdings (over $7m) was transferred to one son in exchange for an agreement by the son to care for his parents who were in their 80's. That son subsequently put his parents into a nursing home. There was little left in the estate for the other son and daughter to challenge.
3. Widow in her 80's with diminishing capacity transferred farm property for the benefit of one of her two children leaving little in her own name.

Examples cited by members suggest that property is more likely to be dealt with to minimise property in the estate where a family farm is a major asset and in the context of carer agreements: (i.e. where a person agrees to care for another person for life in consideration for transfer of a property or transfer into joint tenancy). Members practising in regional areas have suggested that it is very common for family farms to be transferred inter vivos.

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

The LIV generally agrees that people should be entitled to deal with their property in any manner as they see fit during their lifetime. However, some members have indicated that they do not believe that people should be able to avoid their responsibilities to provide for certain dependents by dealing unconscionably with their property during their lifetime. Further, other members are concerned about abuse of older people and pressure sometimes exerted by family members or others caring for an ageing testator to transfer property to them inter vivos.

Some members have commented that for some people, superannuation is the major asset and that injustice can sometimes arise because these funds do not form part of a deceased's estate. This is an issue that will grow in importance as more of the ageing population comprises people who have contributed to superannuation throughout their careers.

When surveyed about whether Victoria should introduce notional estate provisions based on ss 78(1), 63(5) and 99 of the *Succession Act* 2006(NSW), the majority of respondents (60 per cent) answered that Victoria should not introduce notional estate provisions. Reasons include that the provision would introduce further uncertainty and complexity in the law, and further interfere with freedom of testation. Other members have suggested that the NSW provisions go too far, by designating as notional estate assets that were never part of the deceased's estate, for example, where a deceased failed to sever a joint tenancy, failed to make a superannuation binding nomination or failed to exercise a power of appointment.

Some members, however, including 40 per cent of survey respondents, would support notional estate provisions. Among members supporting notional estate provisions, it has been suggested that the focus should be on unconscionable dealings late in life which aim to defeat family provision claims. Many have suggested that if introduced, notional estate should be narrower than the NSW provisions, although others also note that this would be contrary to the aims of uniform succession laws, to reduce inconsistency between jurisdictions.

Reviewing the purpose of family provision laws

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

Yes.

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

No, the LIV believes the purpose of the family provision laws should be limited to the purpose outlined in FP9.

Limiting eligibility to make a family provision application

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

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

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

(a) Are the categories recognised in New South Wales sufficient or should others be included?

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

If so:

-- What should the nature of such further limitation be? For example, should the limitation be a requirement to show 'factors warranting the making of the application', as in New South Wales, or some other test, such as 'exceptional circumstances' or 'special circumstances'?

-- To which categories of applicant should the additional limitation apply?

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

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

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

The LIV has chosen to respond to questions 11 –16 together.

Opportunistic claims could be limited in two ways: by limiting the class of eligible claimants and/or through reforming costs rules. The LIV has not reached consensus on the best approach to limiting opportunistic claims.

While there is strong support for reform of costs rules (see further below), there are mixed views among members about the best approach to eligibility to apply for family provision.

A clear majority of survey respondents (75 per cent) support reform of eligibility criteria. Among members supporting changes to eligibility, there is a difference of opinion, however, about whether the National Committee or NSW model is preferable, or whether to introduce a threshold requirement of dependence and financial need to Victoria's 'responsibility' test.

There was a divergence of views among survey respondents about how eligibility should be reformed to limit eligible claimants to those the testator should be expected to provide for and how to accommodate the modern concept of family (for example, 'blended families' with step children). Of respondents supporting reform of eligibility criteria, most thought there was a need to retain discretion for the courts to make sure that deserving applicants do not miss out.

Some members would prefer to see more certainty in the law. Clear categories of claimants would make it clearer who has real prospects of success (and mean that summary dismissal powers might be more effective to cut off unmeritorious claims).

Other members are concerned that limiting the class of eligible applicants might disadvantage some meritorious claims and create injustice, contrary to the objectives of family provisions laws. There is a tension between creating greater certainty and retaining flexibility that is difficult to resolve.

Some members favour the NSW model, which creates the concept of the deceased's 'household' and 'dependency' as a way of explaining the moral duty of a testator. However, other members are concerned that there is no general provision to allow for other situations where a testator had a moral responsibility to provide for a person.

Amending costs rules and principles

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

The LIV would support a legislative presumption that, in family provision proceedings, an unsuccessful applicant will not receive their costs out of the estate. A legislative presumption would clarify that most unsuccessful applicants, and not merely those falling within s97(7) of the *Administration and Probate Act,* are not entitled to recover their legal costs from the estate, unless in the Court's opinion, it would be just for the plaintiff to receive their costs from the estate. Our members have suggested that introduction of a legislative presumption is likely to have an impact on settlement of claims at mediation and to deter opportunistic claims.

FP18 - Should one of the following costs rules apply, as a starting point, when an applicant is unsuccessful in family provision proceedings?

(a) 'Loser pays, costs follow the event'—that is, both parties' costs are borne by the unsuccessful applicant as in other civil proceedings.

(b) 'No order as to costs'—the applicant bears the burden of their own costs.

The majority of LIV members would prefer that costs rules in family provision proceedings be dealt with as in other civil proceedings, so that the starting point is 'loser pays, costs follow the event'.

Many members have suggested, however, that it is important for the court to retain discretion, for cases where there are special circumstances warranting payment of costs from the estate (for example, where a plaintiff was able to satisfy the court that the deceased had a responsibility to provide for the applicant and they were left without adequate

provision, but it was not possible or appropriate to make an order for reasons outside of their control, such as a family farm that cannot be split up).

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

Members who have conducted family provision proceedings in the County Court have reported that costs have been contained primarily where the matter has been resolved quickly, for example through an expedited hearing. One member has suggested that the County Court is also more prepared to make orders on the papers. Members understand that proposed new costs rules provide that a penalty will be applied if practitioners issue in the wrong court.

Members who use time based billing methods have suggested that as a result, there is no significant difference in costs between the County and Supreme Court.

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

Members have reported generally that both courts have been implementing measures well to reduce costs, including at the Supreme Court, using Associate Justices, court ordered mediations and deciding more cases on the papers. Members are also supportive of initiatives in small estates to require a 4 page position paper. Members are positive about the impact of the Directions List on the efficient running of cases.

Some practitioners have suggested that recent decisions in successful strike out applications have been helpful to settle the law on summary dismissal and note that Associate Justices have been at the forefront of these shifts in practice.

Members report that general procedural rules work well in both courts, although there has been mixed feedback about judicial case conferences, with a number of members observing that private mediations are more likely to bring about resolution in a case because the mediator is often more directive and proactive in the conduct of the mediation.

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

The LIV provides the following suggestions for additional measures that would assist in streamlining Supreme Court family provision proceedings and thereby reduce costs:

- A summons could no longer be required when an originating motion is filed. Instead, an administrative mention notice could be issued by the Court when an appearance is filed, setting out by which date consent orders must be filed, or the matter would automatically be listed for a directions hearing. Members have noted that this might enable applicants to file an originating motion and delay service (for up to 12 months) and queried if this was desirable. In some cases it will be desirable, for example, where an applicant agrees to hold off on service while negotiations take place.
- Affidavits could be required to be filed at the same time as the originating motion or within 30 days of filing (to allow flexibility where applicants seek legal advice late in the six month period for claims, to ensure that an originating motion can be filed to protect the rights of the applicant, but requiring timely filing of affidavits to progress the claim more quickly).

- There could be more structured requirements for affidavits to shorten them and ensure their relevance to the legislative criteria. Requirements could set out headings to be addressed based on the factors set out in s91 of the *Administration and Probate Act*. There could be a costs disincentive where affidavits include significant amounts of irrelevant material.

Wills

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?

Freedom of testation and the right to make a will is an important civil liberty. The LIV notes growing community concern about abuse of older people and the risk that vulnerable will-makers are being unduly influenced to make a will that is contrary to their wishes, or where they do not have capacity to make the will, to make a will benefiting an abuser. We are not clear, however, about the extent of the problem. We note that any law reform measure should be proportionate to the extent of the problem and should balance the need to protect vulnerable will-makers with the need to ensure that members of the community are not inhibited from making wills by complicated provisions that will add to the cost of making and enforcing wills.

At present, the formal requirements for making a will under the *Wills Act* 1997 (Vic) are not designed specifically to protect against influence over a will-maker. Rather, laws relating to undue influence and testamentary capacity are designed to ensure that only the true wishes of a competent testator are given force through issuing of probate. However, because these matters are tested after the death of a testator, it becomes a question of evidence and in our members' experience, it can be very difficult to prove that a will-maker was unduly influenced or lacked testamentary capacity. This is especially so where there was no lawyer involved in the making of the will.

As a single measure, the LIV believes that special witnessing provisions are unlikely to solve issues relating to undue influence and vulnerable will-makers.

If special witnessing provisions are introduced, the LIV does not support special witnessing provisions that target only older people, as we believe that any age requirement would be arbitrary and discriminatory and not necessarily based on questions of mental capacity. As set out by the Commission, succession law requires *all* will-makers to understand the nature and effect of a will, understand the nature and extent of their property, comprehend and appreciate the claims to which they ought to give effect and be suffering from no disorder of the mind or insane delusion that would result in an unwanted disposition.[6]

The LIV believes that if special witnessing requirements are introduced, they should be consistent with the requirements for the witnessing of Enduring Powers of Attorney, (currently being those persons also able to witness Statutory Declarations per s 107A of the Evidence Act 1958). The LIV notes s 125A of the *Instruments Act* 1958 (Vic) in relation to Enduring Powers of Attorney (financial), which requires that a certificate be included which states that the donor signed freely and voluntarily in the presence of the witnesses and that the donor appeared to have the capacity necessary to make the enduring power of attorney.

[6] *Banks v Goodfellow* (1870) LR 5 QB 549, 565.

Some members have suggested that the requirements for enduring powers of attorney have beneficially changed the culture and practice around witnessing of powers of attorney, so that on the whole, authorised witnesses are more cautious about the importance and effect of signing the document. Members also note, however, that there is still confusion about the level of capacity required and that this makes it difficult for any witness to certify that the person appeared to have capacity, an important and very difficult assessment with respect to wills.

We note that where a person has obtained legal assistance to prepare a will, there are already greater safeguards against abuse because a legal practitioner's professional responsibility requirements mean that they must satisfy themselves about the client's testamentary capacity and that the person is not being unduly influenced. Further, lawyers are required to keep adequate records about their inquiries into capacity, so that there is more likely to be contemporaneous evidence about the circumstances in which a will was made.[7]

The LIV emphasises that stricter witnessing requirements might limit freedom of testation and that this might lead to an increase in the number of informal wills (and expense in proving those wills). While we see benefits in requiring testators to obtain independent legal advice when making a will, we also appreciate this could be cost prohibitive for some will-makers and we would not support a requirement that discouraged people from making wills.

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

The LIV believes that, on the whole, a person would be aware they were witnessing a will, however this is not the same as being aware of the content and provisions within the will. A person would need to go to extraordinary lengths to avoid a witness seeing the document they were witnessing and in our members' experience, these circumstances are rare.

The witness-beneficiary rule

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

The LIV is generally supportive of the reintroduction of the witness-beneficiary rule, with some conditions. The general presumption should be that the witness-beneficiary rule applies, although the legislation should allow for the opportunity to apply to the court to explain why the rule should not apply in certain circumstances to avoid instances of injustice.

The LIV notes that under s 125 of the *Instruments Act* 1958 (Vic), only one of the witnesses to an enduring power of attorney (financial) can be a relative of the donor of the power or of the person appointed as attorney. The requirements of this section could be equally applied to witnesses of wills, although we note that this formulation might not extend to domestic partners. If the interested witness rule is reintroduced, it must include domestic partners.

[7] See eg *Legal Services Commissioner v Ford* [2008] LPT 12, *Legal Services Commissioner v Comino* [2011] QCAT 387, *Legal Services Commissioner v de Brenni* [2011] QCAT 340.

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?

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

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

The LIV queries why the proposal for medical capacity assessments is limited to those people seeking the assistance of a legal practitioner to make a will. In our experience, a legal practitioner is more likely to obtain a medical capacity assessment where they have doubts about a client's capacity, to protect the will against future challenge. We suggest that capacity is more likely to be an issue where legal advice is not obtained.

The LIV considers that a general requirement for a medical capacity assessment would be unduly costly for clients, where there is no question or doubt about capacity. In the LIV's view, if a legal practitioner has doubts about a client's capacity, they should obtain a medical capacity assessment prior to preparing or finalising the will. However, that requires the client to consent and give authority to the legal practitioner to obtain an assessment.

We are currently preparing guidelines for legal practitioners about taking instructions when a client's capacity is in doubt, to assist l legal practitioners to understand their obligations in this regard.

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?

A legal practitioner should take instructions only from the testator when drafting a will for that person. The legal practitioner-client relationship will be between the legal practitioner and the testator and not with any other existing client who also happens to be a beneficiary under the will. The legal practitioner should always see the client alone to confirm their instructions and to enable the legal practitioner to assess whether the client has the requisite testamentary capacity and to satisfy him or herself that there has been no undue influence. We suggest that the *Professional Conduct and Practice Rules* 2005 already require lawyers to avoid conflict of interest between clients. This matter will also be dealt with in LIV guidelines being prepared and referred to above (W4).

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 will-makers? If so, what should those guidelines contain?

As identified above (W4), the LIV is preparing guidelines for legal practitioners on taking instructions when a client's capacity is in doubt. These guidelines will address the question of when a practitioner should obtain a formal capacity assessment of a client.

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?

The LIV believes that legal practitioners are, on the whole, more likely to be attuned to issues of undue influence and therefore rules specifically in relation to their role and

obligations are not particularly useful. The LIV also notes that there are ethical obligations placed upon legal practitioners and that these issues are already covered. We are more concerned about wills made without legal advice.

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?

No, the LIV does not consider that any changes to the law are necessary regarding testamentary capacity.

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?

The LIV considers that the current law relating to knowledge and approval and suspicious circumstances generally works well and is not in need of significant reform.

However, the LIV is aware of a recent matter in which standing could be an issue, to bring forward or challenge a will in suspicious circumstances where there are no known next of kin. The LIV recommends that the Commission consider whether the Crown or another person should have standing to challenge a will where there are suspicious circumstances surrounding the role of an executor and sole beneficiary in soliciting a will.

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

No, the LIV does not consider that changes are required to the law concerning fraud or forgery as we are not aware of significant problems arising in this area. Rather, changes should be made to the law of undue influence as discussed below (W11).

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

Yes, the equitable doctrine of undue influence should be applied to wills. The current law is this area is ineffective, demonstrated by the paucity of Australian cases. The Consultation paper outlines well why the current law is difficult to prove, in particular because it requires coercion and involves a high standard of proof (at para 2.67), even following the case of *Nicholson v Knaggs*.[8] In particular, the LIV would support the reversed onus that would arise where a relationship of power or dominance is proven, so that the dominant beneficiary must then prove there was no undue influence. We agree that people should be encouraged to seek independent legal advice when making a will and that this would help guard against undue influence.

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 equitable doctrine of undue influence is not extended to wills, the doctrine of undue influence in a probate context should be relaxed, as currently the bar is so high as to be almost impossible to prove.

[8] [2009] VSC 64.

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?

No, Victoria should not adopt the National Committee's recommended guiding principle for authorising a statutory will. We note that the law on statutory wills was reformed in Victoria in 2007 to ensure that statutory wills could be made for people who have never had capacity, which remedied a previous difficulty with the legislation.[9] Members report that s26 of the *Wills Act* 1997 (Vic) appears to work well.

Involvement of the incapacitated person in the hearing

W14 - Should 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)?

Yes, the *Wills Act* should specify that the court may order separate representation for the incapacitated person. Consistent with the *Convention on the Rights of Persons with Disabilities,* the incapacitated person should be given the opportunity to participate in proceedings where possible.

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, the two stage application process should be reduced to one. The LIV agrees that costs rules are sufficient to deter unmeritorious, frivolous and vexatious applications.

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

While the LIV recognises that VCAT has a regional presence, and therefore might increase accessibility for applications for statutory wills, the LIV does not support transfer of this jurisdiction to VCAT. Generally, the LIV considers that many VCAT members lack the legal expertise to assess statutory will applications and further, we are concerned that the rules of evidence do not apply, so that evidence may not be properly tested.

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

The LIV agrees that costs could be minimised if uncontested applications were decided on the papers. Contested applications could be heard by Associate Justices, who have taken on additional functions in recent years.

[9] *Wills Amendment Act* 2007 (Vic), s 3.

Q16 - Are any other changes desirable to the statutory will provisions of the *Wills Act 1997* (Vic)?

No.

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?

The LIV considers that costs should remain in the discretion of the court in these matters.

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?

(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?

The ademption rule should be clarified by legislaton in relation to acts by a substitute decision-maker that would adeem a specific gift under current law, whether by an administrator or enduring attorney. The ademption rule should not otherwise be changed because the law already contains exceptions to ameliorate the impact of the rule (as set out at paragraph 4.16 of the Wills consultation paper).

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?

(b) the fairness of the outcome?

Clarification of the ademption rule for substitute decision-makers would provide more certainty about the impact of sale of property on administration of an estate and thereby reduce costs. It would also better protect the will-maker's intentions regarding specific gifts.

Acts by administrators appointed to the Victorian Civil and Administrative Tribunal

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

Members have not reported any specific examples in relation to this question.

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?

Yes.

If so:

> **(a) Should a beneficiary of an otherwise adeemed gift be entitled to: 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 an order to ensure that no beneficiary gains a disproportionate advantage or suffers a disproportionate disadvantage (South Australia and New South Wales), or an appropriate order for compensation from the estate (Queensland)?**

The LIV would support a provision based on the NSW provision, to ensure that justice is done between the beneficiaries. Administrators and attorneys should be subject to similar provisions and we therefore suggest that s53 of the *Guardianship and Administration Act 1986* (Vic) should also be amended in similar terms.

> **(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?**

The exception should apply only to actions taken after the donor has lost capacity, because the donor has not authorised the sale and is no longer able to remedy the action by changing their will in this situation.

> **(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?**

An attorney should be required to retain funds in a separate account, for tracing purposes. The fund should be used as a last resort for payments required in the best interests of the represented person, consistent with Schedule 2 of the *Administration and Probate Act 1958* (Vic).

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?

Where a donor has lost capacity, an enduring attorney should be able to apply to VCAT to ascertain whether any provisions of a person's will are relevant to their handling of the person's affairs. The attorney would be required to provide evidence about why they require information about specific gifts under the will. If the will is not in VCAT's possession, VCAT should be empowered to compel production of the will and read its contents to ascertain if the attorney should be provided with a redacted or full copy of the will or advised about specific provisions.

An alternative would be for the legal practitioner holding the will, on production of satisfactory evidence of incapacity, to provide a redacted copy of the will where a validly appointed enduring attorney requests information about specific bequests.