Inquiry into Succession Laws

Intestacy, Small Estates & Debts

To: The 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 is our second submission into this Inquiry and responds to three of the Commission's consultation papers, namely:

- Intestacy
- Small Estates
- Debts

This submission has been prepared based on contributions 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 LIV Succession Law Section.

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 person's aunts and uncles (the deceased person's first cousins), as recommended by the National Committee?

No. The LIV is opposed the National Committee's recommendation. Members generally agreed that the general public would expect family to inherit irrespective of whether the family member enjoyed a close or distant relationship to the deceased. The LIV also queried whether there was scope to expand on the extent of the Minister's discretionary powers in this regard.

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. The LIV supports the National Committee's recommendation and provisions for uniformity and consistency between the States.

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?

The LIV agrees that the partner's statutory legacy should be increased above $100,000, with $350,000 as a minimum to be adjusted by the CPI on the 1st of January every year. We submit that it would be ideal if the statutory legacy is adjusted by regulation every year, so as to remove the need for practitioners to refer to the CPI.

However, it is the experience of our members that when preparing a will, first relationship couples tend to leave everything to their surviving spouse, whether they have children or not. The LIV submits that a surviving partner of a first relationship should receive 100% of the estate regardless of whether or not there are children of that relationship, but if there are subsequent partners as well as children of the deceased, then the statutory legacy situation should apply.

We agree with the option to make an application to the Court in those circumstances where the application of the rule is considered unfair..

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?

The LIV considers that the partner's share of the remainder of the estate should be increased.

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, or

(b) by a distribution order, or

(c) equally between the parties?

The LIV agrees that the recommended provisions of the National Committee would be better than the current position.

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?

The LIV submits that both partners should be entitled to their own statutory legacy, as well as a share of the remainder.

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?

The LIV submits that it would be appropriate to extend the rights of the deceased person's partner to elect to acquire an interest in any asset of the estate, including motor vehicles..

The LIV submits that, where there are multiple partners, whichever domestic partner is actually residing in the house at the date of death should be entitled to elect to purchase the property.

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?

Yes. It is the experience of LIV members that, when preparing a will, first relationship couples tend to leave their entire estate to their surviving spouse, whether they have children or not.

The LIV also suggests that the government launch a campaign encouraging members of the public to prepare wills and obtain legal advice when doing so.

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, or

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

The LIV refers to examples at 2.90 of the Discussion Paper (page 35), querying the basis for the National Committee's finding that the Victorian provisions are illogical.

LIV members have expressed some concern about the distribution set out in figure 3. It was generally agreed that nieces and nephews should enjoy the same entitlements as grandchildren. We note that per capita distribution would be more appropriate for the scenario depicted in figure 3.

The LIV submits that neither (a) or (b) should be implemented. Instead, we submit that where all children are deceased, distribution should be made on a *per capita* basis, and that where only one child is deceased, distribution should be made on a *per stirpes* basis. It was agreed that where all children pre-decease, then all grandchildren should inherit equally.

Despite expressing the above position, the LIV agrees that a national approach to distribution would be preferable and would be supportive to a uniform approach.

Taking benefits into account

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

Yes. LIV members generally agreed with the abolition of the hotchpot rule as recommended by the National Committee. However, some members preferred that the rule be retained and extended to any beneficiary.

I11. Alternatively, should Victoria retain and amend its hotchpot provision:

(a) to replace references to advancement and settlement with more modern, simplified terminology?

(b) to extend it beyond the deceased person's children and their representatives?

If hotchpot were extended beyond children of the deceased person, should it apply to the deceased person's partner and/or all next of kin?

Refer to Question 10

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?

The LIV agrees with the abolition of the requirement to take into account benefits received under a will on partial intestacy, noting again the more favourable value of uniformity between 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?

LIV members generally agreed with the recommendation for abolition of the hotchpot rule. In the case that the hotchpot rule is retained, some members were opposed to the proposed extension of the requirement beyond children of the deceased person and others supported the extension..

Indigenous intestate estates

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

Members of the LIV are currently unaware of any such statistics.

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

The LIV supports the National Committee's recommendation in 2.115 of the Discussion Paper., Some members suggest that an application to the Court for an order for distribution be required within 6 months of the grant of administration (rather than 12 months, as recommended by the National committee). Some members prefer the twelve month period which would allow the statutory period for family provision claims to expire before an order is made. The LIV also suggests that the proposals be developed further to warrant clarity. It was agreed that whilst more information is required, similar schemes appear to have effected very positive outcomes.

The LIV also supports the need to define limitations as to who can apply as a 'tribal next of kin' (rather than a 'blood next of kin').

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 they be determined?

The LIV submits that this provision would depend on whether or not individuals would have application completed for them by the Probate office. We suggest that small estates would be appropriately classified as below or equal to $50,000 across the board. We agree with the recommendation that there should not be a dual threshold.

SE2. In determining what is a 'small estate':

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

No. The LIV does not support the recommendation that the dual threshold of values, based on the identity of beneficiaries be retained.

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

The LIV submits that the value should be set in the regulations rather than subordinate legislation.

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?

No. The LIV submits that the status quo be retained and does not believe there is a better way to define which estates should have simpler processes relating to small estates.

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?

Yes. The LIV considers that the Supreme Court Registry provides a valuable service to the public in this area. LIV members consider that the Probate Office staff has considerable knowledge and expertise in this area and that any funding to provide assistance to the public be given to the Probate Office to expand the service that the Supreme Court Probate Registry retains responsibility for providing assistance in obtaining grants of representation in relation to small estates.

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

No. The LIV does not consider it necessary that formal assistance through the Supreme Court Probate Registry be replaced by the provision of court-generated information.

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?

No. The LIV does not believe that the introduction of a sliding fee scale would encourage people to seek grants of representation in small estates.

Elections to administer

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

The LIV notes that trustee companies can elect to obtain a grant of representation, which is treated as the equivalent of a grant of representation with a lower fee. We submit that the existing threshold of $50,000 is appropriate and should be maintained.

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)?

Yes. The LIV supports the retention of the second threshold. We submit that the threshold should be left at $60,000, to be adjusted by supporting regulations.

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

The LIV submits that the threshold figures for elections to administer should refer to net value of the estate (ie less liabilities as at the date of death).

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

The LIV submits that legal practitioners should be permitted to file elections to administer. Members note that executors will often desire the assistance of their solicitor in dealing with other legal documents relating to the estate (such as Survivorship Applications). Permitting solicitors to file elections will eliminate the need for executors to consult with multiple advisors..

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

Yes. The LIV supports the view that elections to administer require the filing party to file the will with the Court.

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

Yes. The LIV supports the recommendation that advertisements giving notice of intention to file an election to administer be moved from newspapers onto the Supreme Court website.

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

No. The LIV submits that the notice requirements should not be abandoned as they involve a relatively small fee.

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

Presently there is no requirement to file a death certificate. Some members are concerned that, in the absence of a requirement that a death certificate be filed, an election could be made with respect to the estate of a living person. The LIV otherwise submits that existing safeguards are adequate.

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

the general view of our members is that elections serve a valuable function and should be retained in their current form. The LIV does not support the abolition of elections to administer.

Deemed grants

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

The LIV submits that the status quo should be retained.

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)?

The LIV submits that a second threshold be implemented above which an application for a full grant should be made. The LIV proposes a threshold of $60,000. [Refer to Question SE8]

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

The LIV submits that threshold figures for deemed grants should refer to the net value of the estate. However, some members expressed concern that referring to the net value of the estate may result in estates with a large gross value and large debts (which may be disputed) being administered on a deemed grant. This may leave the executor exposed to risk.

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

Yes. The LIV submits that it is the experience of our members that their clients are more likely to be satisfied as it allows them to limit the number of people they have to consult with.

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

Yes. The LIV agrees that deemed grants should have more stringent procedural safeguards. However, we submit that national uniformity in terms of processes would be beneficial and more efficient.

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

Yes. The LIV agrees that deemed grants in the current form, serve a valuable function.

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. The LIV agrees that section 32 of the *Administration and Probate Act* 1958 (Vic) should be expanded in line with the recommendations of the National Committee.

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

The LIV notes that, in Queensland, real property below the value of $300,000 may be transferred without a formal grant. Whilst our members acknowledge that this position is convenient to clients in some circumstances, the following points were also made:

- The removal of the requirement of a formal grant prevents the testator's family maintenance claims from being made;

- The removal of the requirement of a formal grant results in a loss of protection for Part IV applicants and for creditors.;

- The process of obtaining a grant of probate marks a clear delineation of control of the deceased estate passing over onto the executor and ultimately onto the beneficiary. There is a benefit of having certainty as to that status, as it provides greater security to the estate;

- Any cost saving outcomes resulting from the removal of the requirement would be tempered by the costs associated with complying with the Registrar's requirements, which would therefore be likely to cost several hundred dollars.

On this basis, The LIV submits that it should not be possible to transfer real property without a formal grant.

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

Yes. The LIV supports the proposed amendment, noting that the recommended s33 of *the Administration and Probate Act* 1958 (Vic) is clearer and unambiguous.

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?

Yes. The LIV agrees with the National Committee's recommendation that 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.

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

Yes. The LIV supports the National Committee's recommendation on the role of informal administrators.

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

Members of the LIV were unable to arrive at an agreed position on this question. Two views were expressed::

1) No, some members considered it would overcomplicate the process by adding another form of administrative procedure. There are enough forms of administration available. Although those members were not opposed to the informal practice of banks and share registries releasing assets on the provision of statutory declarations, the system presently used by most share registries and banks with the use of indemnities, works satisfactorily.

2) Yes, some members are in favour of an alternative process that provides protection to institutions in the informal scenario. Those members considered that such an amendment would mirror the current practice; however it would provide protection for institutions that do not require a grant of probate. This would avoid the anomaly where banks will release funds, but a retirement home will not release accommodation funds. However, the protection should not apply to executors who should continue to be accountable (as per the proposal at 2.145.)

3) Members noted that if there is a choice to elect to administer then there would not be a need to introduce another process. Legal practitioners could file an election to administer.

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

No. The LIV does not consider that further safeguards are necessary.

Debts

Solvent estates

D1. Should the current Victorian order of application of assets for payment of debts in solvent estates be simplified according to the National Committee proposal?

Yes. The LIV agrees that the current Victorian law is unnecessarily complicated and simplification would be beneficial. The LIV agrees that the order of application of assets for payment of debts in solvent estates be simplified according to the National Committee proposal.

D2. Should a provision be introduced into the Administration and Probate Act 1958 (Vic) that specifies that all assets are to be applied rateably?

No. The LIV submits that this provision is unnecessary.

Charged or mortgaged property

D3. Are there any significant difficulties with the operation of section 40 of the Administration and Probate Act 1958 (Vic)?

If so:

> ***(a) should the provision be abolished as in the Northern Territory?***
>
> ***(b) should the provision be modified to require a sufficient connection between the debt and the property upon which it is charged?***

No. The LIV does not consider that there are significant difficulties with the operation of section 40 of the *Administration and Probate Act* 1958 (Vic).

D4. Should section 40 of the Administration and Probate Act 1958 (Vic) set out what will be, as well as what will not be, sufficient to constitute contrary intention?

The LIV does not consider that there are significant difficulties with the operation of section 40 of the *Administration and Probate Act* 1958 (Vic).

Insolvent estates

D6. How could the two current schemes of administration— part I of the second schedule to the Administration and Probate Act 1958 (Vic) and the Bankruptcy Act 1966 (Cth)— operate more efficiently and effectively?

The LIV submits that in the experience of its members, the two schemes of administration are ambiguous and confusing. The LIV suggests that the second schedule to the *Administration and Probate Act* 1958 (Vic) be amended to reflect the provisions under Bankruptcy Act 1966 (Cth).

D7. Should the Administration and Probate Act 1958 (Vic) define 'insolvent'?

Yes. The LIV agrees that the *Administration and Probate Act* 1958 (Vic) define 'insolvent' in accordance with the National Committee's recommendation in 2.114.

D8. Should the Administration and Probate Act 1958 (Vic) be expressed to bind the Crown, or alternatively, should there be express abolition of the priority of Crown debts?

The LIV submits that the *Administration and Probate Act* 1958 (Vic) follow the *Bankruptcy Act* 1966 (Cth) in terms of Crown debts. The LIV supports national uniform consistency.

D9. Should clause 2 of part I of the second schedule to the Administration and Probate Act 1958 (Vic) be amended to import the rules of bankruptcy in force 'at the time of death'?

Yes. The LIV agrees that clause 2 of part I of the second schedule to the *Administration and Probate Act* 1958 (Vic) be amended to import the rules of bankruptcy in force 'at the time of death'.