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15 April 2013

Victorian Law Reform Commission
By email: law.reform@lawreform.vic.gov.au

Dear Sirs,

Re: Succession Laws review

The Institute thanks the Victorian Law Reform Commission for inviting it to make a submission in respect to the above review.

The Institute's comments, made in response to the review questions in the order they appear, are as follows. It is noted that not all review questions have been addressed, and that the Institute's comments do not necessarily reflect the views of all members.

Wills

Witnessing Wills, the witness-beneficiary rule, undue influence

Should there be special witnessing provisions in certain circumstances/relating to certain Willmakers?

[W1] Special witnessing provisions in certain circumstances would be of benefit to minimise the occurrence of undue influence etc. However, compliance may be very difficult in some cases – see for example as noted on page 4.

Should witnesses be required to understand that the document is a Will?

[W2] We believe not; whilst noting that witnesses are possibly more likely to recall witnessing a Will (and the circumstances) rather than 'just a document' perhaps viewed as being of relative unimportance. In any event, the witnesses, if called upon later, should not be required to have any knowledge of the document itself but only to verify the witnessing of the document and any relevant contemporaneous circumstances (which in the case of a lay witness would be, for example, that the Willmaker appeared to the witness(es) to 'know what

s/he was doing' and 'want to sign the document'; and whether or not any other persons were present). A simple certification similar to that contained in an Enduring Power of Attorney (Medical Treatment) may be of use to address the witness(es)' mind to these issues.

Prevention of undue influence

Should legal practitioners be obliged to decline to act/oblige the client to obtain independent advice when an existing client asks them to draft a Will for another person conferring significant benefits on the existing client?

[W5] Legal practitioners already have a duty to avoid conflict between clients, and in many such cases legal practitioners might decline to act. However, this issue would depend upon the circumstances – for example, presupposing that there is no indication of incapacity or undue influence, and the 'new' client directly interacts with the legal practitioner before the Will is executed, if an existing client advises that s/he has recently married and accordingly wishes to make a new Will and at the same time provides initial instructions on behalf of the new spouse, there may not be a cogent reason for declining to act or obliging the client to obtain independent advice. We suggest that additional guidelines for legal practitioners would be of more practical use than the imposition of an overarching obligation.

Should guidelines be provided concerning minimisation of the incidence of undue influence on older and vulnerable Willmakers?

[W6,W7] Yes, we believe so. Practically these might take the form of a checklist of 'triggers' which might indicate undue influence and/or indicate the necessity for further enquiry.

Please see below for additional comments.

Determining whether a Will reflects the Willmaker's true intentions – capacity and undue influence

It is difficult to determine what, if any, changes could be made legislatively in regard to providing protection for older and/or vulnerable Willmakers or those who may lack 'full' capacity. In saying this, we consider:

Capacity (including intention)

A. Members of the legal profession are not in a position to assess capacity in the same manner as members of the medical profession but would, for the most part, rely upon *Banks v Goodfellow*[1] principles. In some cases legal practitioners would not be aware that any issue regarding capacity existed until the Willmaker had passed away and the Death Certificate indicated a condition existing at the time of making the Will which would need to be addressed when making an application for a Grant of Probate. Additionally, it is possible for such a condition to be erroneously included in a Death Certificate, necessitating rebutting evidence being obtained from the deceased's (regular) treating medical practitioner.

B. Incapacity indicators apparent to members of the medical profession would not necessarily be obvious to legal practitioners, and various materials such as those available at www.alzheimers.org.au[2], and case law such as *Perpetual Trustee Co Ltd. v Fairlie-Cunninghame*[3] and *Bailey v Bailey*[4], make it clear that diminished

[1] *(1870) LR 5 QB 549*
[2] see also *Capacity to make a Will and Enduring Power of Attorney: Issues new and old* by Barbara Hamilton and Tina Cockburn *QLS Journal* December 2008
[3] *(1993) 32 NSWLR 377*

capacity or old age does not necessarily mean that a person cannot make a valid Will (or any other legal document).

C. [W8] Further, having regard to the Victorian Parliament Law Reform Committee Inquiry into powers of attorney: Final Report August 2010[5] and the Victorian Law Reform Commission's Review of Victoria's Guardianship and Administration laws: Final Report April 2012[6] ('Powers of Attorney review'), an emphasis is placed upon a *presumption of capacity* and a person being entitled to make their own decisions notwithstanding that their capacity may in some way be impaired or that others may view their decision as being 'unwise'. Should the recommendation in the Powers of Attorney review that capacity be defined be followed, then we suggest that that definition could be adopted, or at least modified, for the purpose of making a Will. Consistency in respect to all such matters would be of benefit.

D. [W4] Implementing a professional requirement that legal practitioners obtain a medical capacity assessment prior to drafting a Will *might* be useful in preventing undue influence; however, even a person with full capacity can be unduly influenced or their free will subverted in certain circumstances and a medical capacity assessment will not necessarily prevent this. The suggestion that a medical capacity assessment be required in certain circumstances such as where a Willmaker is over a certain age appears to be in contradiction to the presumption of capacity (above). Further, some clients may unduly delay making their Wills on the basis that it is 'all too difficult' to first obtain a medical capacity assessment. In addition, if there were an assessment prerequisite in place, the 'life' of the assessment would then need to be determined; and it would also need to be determined whether the 'life' of the assessment differed depending upon the Willmaker's particular situation. In our experience, it is not particularly unusual for a legal practitioner to recommend that an assessment be obtained – this is not necessarily because the legal practitioner personally doubts the capacity of the Willmaker, but because the legal practitioner anticipates that there might later be a question raised by an objective arbiter because of advanced age or some trauma which could be deemed relevant.

   We also note that intending Willmakers may be reluctant to incur an additional cost relevant to making their Will, and consideration ought to be given to the time needed to obtain such an assessment. At the very least, assuming there is no incapacity apparent to the legal practitioner, we suggest such a requirement should sit between instructions and finalisation to enable what sometimes involves extensive drafting and re-drafting before a Will is finalised to be accomplished in the interim. Further, if such a requirement *is* introduced, it is suggested this could be communicated to the public by way of a Government 'Fact Sheet' which a legal practitioner could provide to his or her client upon receiving initial instructions.

E. [W5,W6,W7,W9] A set of general guidelines, or a 'checklist', in addition to a definition of capacity, would be of assistance, particularly to those legal practitioners who do not prepare Wills on a regular basis.

Undue influence (including interested witnesses)

A. There are a number of situations in which a suggestion of undue influence may arise, such as:

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[4] *(1924) 32 CLR 55*
[5] Parliamentary Paper No. 352, Session 2006-2010
[6] Parliamentary Paper No. 101, Session 2010-12

(a) Family members providing instructions and/or 'correcting' any points put forward by the Willmaker, which is usually an indicator to the legal practitioner that something is amiss – however, other factors could be relevant, such as the Willmaker leading a sheltered life and not being confident in directly instructing a legal practitioner, whilst being confident that the family member 'spokesperson' is properly communicating their instructions; or language difficulties; or, to make matters more difficult, in a situation where "a person should not be treated as unable to make a decision if it is possible for him or her to make that decision with appropriate support" in terms of the Powers of Attorney review[7]. The legal practitioner will need to assess, on a case-by-case basis, what action must be taken to ensure there is no undue influence affecting the Willmaker's instructions.

(b) [W6,W7,W9] 'Death bed' Wills, where the legal practitioner is under immense pressure to give effect to the Willmaker's instructions – it may be very difficult for the legal practitioner, particularly if s/he has not previously acted for the Willmaker, to determine (in addition to capacity) that the Willmaker's wish to make a Will at this time stems from the immediacy of their forthcoming death and not because of undue influence by hopeful beneficiaries[8].

There is also the difficulty in these circumstances that members of the medical profession may be reluctant to discuss their medical assessment of the patient/Willmaker with the legal practitioner, notwithstanding an authorisation from the patient/Willmaker; and they can often be reluctant to act as witnesses to Wills, whereas the fact that a treating medical practitioner[9] was prepared to act as a witness[10] would assist in verifying that the Willmaker's instructions were not coerced, and that the Willmaker had the capacity to make his or her Will. These are matters to be raised with those representing the medical profession.

(c) [W3,W9] Wills being witnessed by beneficiaries rather than by independent persons is not always 'suspicious', but can occur where the Willmaker does not regularly interact with others outside his or her immediate family and may strongly object to 'outsiders' being aware of his or her personal matters. In such a case there may be evidence rebutting a presumption of undue influence, such as a prior Will containing similar dispositions, although this evidence may not always be available. Proscribing Wills made in these circumstances may disentitle those otherwise having a proper interest in the estate, through no fault of their own, and in contradiction to the wishes and intentions of the Willmaker.

(d) [Other] We consider that if the recommendation in the Powers of Attorney review in regard to qualified witnesses is adopted and/or extended to the execution of Wills, Fellows of this Institute should specifically be recognised in all jurisdictions as they are in section 123C(1)(ge) *Evidence (Miscellaneous Provisions) Act 1958*[11].

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[7] see also *Capacity to make a Will and Enduring Power of Attorney: Issues new and old* (supra)
[8] i.e. *Re Hodges Dec'd; Shorter v Hodges (1988) 14 NSWLR 698; Maestrale v Aspite [2012] NSWSC 1420*
[9] with whom the patient/Willmaker may have discussed their affairs
[10] and note the witnessing recommendation in the Powers of Attorney review
[11] as well as Fellows of the Institute of Legal Executives (Australia) Limited not currently so recognised

B. [W6] Members of the legal profession preparing Wills on a regular basis will be alert to the possibility of undue influence, although they will not always be able to detect it. Again, a set of general guidelines would be of assistance.

C. [W11,W12] We cannot suggest any useful changes to the doctrine of undue influence in this context (other than comments noted above).

Ultimately, legal practitioners must be able to act in the client's best interests 'without fear or favour'.

Statutory Wills

[W13] We believe that the National Committee's recommended guiding principle for authorising a Statutory Will should be adopted, and

(a) [W14] the Act should provide that the Court *may* order separate representation for the incapacitated person at the discretion of the Court;

(b) [W15] the two-stage application process should be removed from the Act;

(c) [W15] applications should be heard in the Supreme Court; but unopposed applications should be able to be determined on the papers without a hearing, thereby minimising costs;

(d) [W17] the Court should have the discretion of determining the issue of application costs, including in respect to interested and disinterested applicants, as there may be many different issues to take into account on a case by case basis;

(e) [W16] we do not suggest any other changes other than to note that, given the nature of the application, funds may not always be readily available to meet the application costs, particularly in the case of a disinterested applicant, and in such a case provision could be made for payment out of the estate if not satisfied beforehand.

Ademption

Should the ademption rule be changed to one based on the Willmaker's intentions?

[W18] We do not believe the *Wills Act 1997* should provide a presumption *against* ademption, as in some cases this might be in opposition to the Willmaker's intended *inter vivos* actions after making the Will. Rather we believe that the Act should provide for a presumption in favour of ademption but which would allow the named beneficiary of a specific gift to present evidence to rebut that presumption (such as where an Attorney has sold the subject of the specific gift, and there is no evidence to suggest that the Willmaker, whilst competent, intended the gift to fail).

[W19] We are unable to say what effect the above would have upon cost and time issues, although providing examples of evidence a beneficiary might produce to rebut the presumption we believe would be of assistance in allowing the parties to possibly reach settlement before resorting to litigation. As to the fairness of the outcome should the matter proceed to litigation, this is a matter for the Court.

Acts by Administrators and Attorneys

[W20,W21] As noted above, the sale of the subject of a specific gift by an Administrator or Attorney may present a ground for rebuttal of the presumption in favour of ademption. However, we suggest that:

(a) this should be a ground for rebuttal only where the Willmaker (Person under Administration/Donor of the Power) lacked capacity at and/or after the time of the said sale; otherwise the Willmaker would have the means to make arrangements by way of a new Will for the specific beneficiary to receive the gift's equivalent, should that be what the Willmaker wished to occur;

(b) where the presumption has been rebutted, the specific beneficiary should be entitled to the equivalent of the gift; provided that where the estate has been reduced (for example due to the cost of care of an incapacitated Willmaker), the Court may make proportionate orders at its discretion.

In regard to the Donee of any Power and accounting obligations, we refer to the Powers of Attorney review.

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

[W22] We suggest that the Donee of the Power of a Willmaker lacking capacity should be able to access the Willmaker's Will in the same way as an Administrator. However, this should only be upon proof of incapacity that in the opinion of a medical practitioner is expected to continue (as opposed to a short term trauma situation). Notwithstanding this suggestion, it may be difficult for the Donee to obtain a medical opinion due to privacy and confidentiality issues, and this may be an additional matter related to the Powers of Attorney review to consider whether a medical practitioner may provide a report to the Donee of a Power, without adverse repercussions, should that medical practitioner consider that the Willmaker lacks capacity.

Other

Consideration could be given to the Court's powers where only part of the Will is affected by a delusion (or other disentitling factor)[12].

Intestacy

Setting a limit on next of kin

[I1] We agree with the recommendation that a limit be set on the next of kin, provided that it remains possible for remote next of kin to make a claim on unclaimed property from the relevant Minister in addition to family provision claims. There should be no fetter on a person electing to make a family provision claim in respect to unclaimed property directly with the relevant Minister and/or through the Courts.

Further, the inclusion of a simple table in the Act demonstrating the distribution rules would, we think, be of benefit to members of the public searching for basic information on intestacy entitlements.

[12] e.g. *Estate of Bohrmann [1938] 1 All ER 271* contra *Woodhead v Perpetual Trustee Co Ltd. (1987) 11 NSWLR 267*

Entitlements of the deceased person's partner or partners

Partner's share

[I3, I4] We believe the partner's statutory legacy of $100,000 should be increased to $350,000, and the partner's share of the remainder increased from one third to one half. In many cases this would reflect the deceased's intentions had they made a Will, and avoid expensive but necessary claims where the partner is entitled to an amount insufficient to continue their existing lifestyle/care for children, minors or not, or other dependants, with immediate needs.

Further, anecdotal information suggests that many currently believe the deceased's partner inherits the 'bulk' of the deceased's estate on intestacy, which may of itself be a reason that a number of persons do not make a Will.

Multiple partners

[I5, I6] The issue of multiple partners is extremely difficult, particularly so where the married or registered partner is unaware of the existence of the other and suddenly finds him or herself not only bereft of a partner, but also possibly the means to continue his or her existing lifestyle. We believe the Court should retain the ultimate discretion to make orders, with indicators included as currently contained in section 51A(1) in the *Administration and Probate Act 1958* and also section 91(4).

If a distribution agreement is adopted, there should be no adverse duty implications.

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

[I7] This should be extended to all property in the estate, not only the shared home.

Indigenous intestate estates

[I15] We believe that it would be difficult to include a specific framework, noting the academic critique of the Northern Territory model. Alternatively, it could be recognised that the application of Aboriginal customary law may result in differing conclusions as to who is entitled on intestacy. Further, and particularly where the deceased has lived in accordance with his or her cultural traditions, it ought to be possible to allow an Associate Judge to make an order in respect to that person's estate on the papers (noting section 71B *Administration and Probate Act 1969* (NT)).

Executors

Court review of costs and commission charged by executors

[E1] The Supreme Court should have the power to review amounts charged by executors, particularly commission. We suggest that the Court may on its own motion require details of disbursements, fees and any other amounts to be submitted where, for example, it appears there may be a possibility of 'double dipping'.

We believe reviews should be conducted on the application of a person interested in the estate, and there should be a limit on the period during which review may be sought (possibly in respect to 'professional executors' a similar review period as that pertaining to a bill of costs). Reviews should be applicable to all executors/administrators/trustees.

Costs should be able to be awarded against a person bringing a frivolous or vexatious application; and, on the other hand, costs should be able to be awarded against the executor if the amount is reduced by more than 10%; both at the discretion of the Court on the facts.

In respect to a 'legal practitioner executor', we suggest a factor to be taken into account as to the question of whether an application is frivolous or vexatious, is whether the legal practitioner has previously demonstrated to the applicant that rule 10 of the *Professional Conduct and Practice Rules 2005* (or rule 12.4.1 of the *Australian Solicitors Conduct Rules 2011* when implemented) has been complied with and has provided a proper accounting to the applicant (and/or such person entitled to receive an accounting). Whilst there have been some recent cases where the conduct of legal practitioner executors has been found to be seriously objectionable and inappropriate, and we have no statistical data demonstrating how many legal practitioners regularly act as executors, we believe the majority of legal practitioner executors would take their role very seriously and carry out that role to the highest standard – the outcome of this review should not provide an additional burden upon legal practitioners.

Special rules for legal practitioner executors

[E2-E7] There is no reason a legal practitioner executor should instruct another firm, but that legal practitioner executor should clearly demonstrate to the beneficiaries the bases upon which the estate is being charged.

We believe it would be cumbersome and unnecessary to additionally set out the professional rules in the *Wills Act 1997*. Rather, the existing rules (and/or *Australian Solicitors Conduct Rules*) may be expanded.

A Will with a charging clause should perhaps be executed by two independent witnesses, which would likely be preferred by legal practitioners; however, there may be occasions on which this is not possible (see 'undue influence' above).

Debts

Solvent estates and charged or mortgaged property

[D1, D4 – D5] The current Victorian order of application of assets for payment of debts in solvent estates should be simplified, with abolition of section 40 *Administration and Probate Act 1958*. We believe 'contrary intention' in terms of section 40 (if retained) should be by Will only, and an indication of what would constitute a contrary intention would be useful.

Insolvent estates

[D7-D8] The *Administration and Probate Act 1958* should define 'insolvent', and should be expressed to bind the Crown.

Small Estates

Small Estates and assistance in obtaining a Grant

[SE1, SE4-6] The current amount determining a small estate[13] should be raised – the Supreme Court Probate Registry may have an indication of an appropriate level based upon enquiries.

[13] not exceeding $25,000, or $50,000 with entitled persons being children, partner and/or sole surviving parent of the deceased

We think it appropriate that assistance via the Supreme Court Probate Registry be retained, with a sliding fee scale to encourage persons to avail themselves of this facility. Notwithstanding the prevalence of 'Probate kits', the assistance provided by the Registry may ultimately be similar in terms of time spent in direct small estate matters. However, we suggest that the fee should only be 'nil' in circumstances where the estate is very small[14], otherwise other estates may bear the burden in terms of increased fees.

Notwithstanding the concern of the Probate Registry that it must be careful to avoid providing legal advice, and we have no information readily available in respect to small estate applications, the Probate Registry is well known for its readiness to provide useful practical information (as opposed to legal advice) to enquirers from legal offices to better facilitate matters conducted through the Registry, and no doubt that would be the case with members of the public. We believe the Probate Registry provides an extremely valuable service.

Elections to administer/Deemed grants

[SE12, SE20] It would be useful if *all* advertisements were filed on the Supreme Court website.

[SE15, SE21] Notwithstanding the small number of elections to administer, the facility should be retained as should deemed grants.

[SE10, SE19] There is no reason why legal practitioners should not be permitted to so act.

Informal administrators

[SE24-25] The Victorian provision should 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 had been made. A re-drafted, simplified, section would be beneficial so that informal lay administrators readily understand their (obligations and) liability and limits on that liability.

[SE27] Whilst not negating the potential benefits of the suggested process of administration by statutory declaration, we note this would involve actions similar to those involved in the formal obtaining of a Grant, and may appear to proposed informal administrators to be of no additional benefit. As noted above, we believe *all* advertisements should be placed on the Supreme Court website – this in itself would be of benefit.

Family provision/Testators family maintenance

Eligibility to make an application

[FP1] Although our familiarity is more with case law than cases settling prior to trial, we would suggest that, apart from issues of reasonableness and the possibility that there may not be any case law directly on point, factors affecting a decision to settle might be:

(a) lack of particular evidence due to effluxion of time;
(b) the possibility of adverse costs consequences;
(c) the potential for the matter to 'drag on', involving much time and emotional effort;
(d) the possibility that family relations might be continued if the matter is settled reasonably amicably.

[14] e.g. the amount in the estate is minor but a Grant is required for the disposition of real estate

Time limits and extension of time

[FP2] One could argue that a period of six months from the date of the Grant to bring a claim is insufficient in that there may be persons who 'lose time' by being unaware of the application for a Grant. However, if those persons intend to claim on the basis that the deceased had a responsibility to (better) provide for them, they would ordinarily be well aware of the date of death of the deceased and events which would usually follow. If the time period was extended, then consideration needs to be given to the fact that executors and administrators, acting in accordance with legal advice, will not (fully) distribute within this extended time period, leaving unhappy (named/entitled) beneficiaries. Notwithstanding this comment, we believe the Court's discretion to extend the claim time period in appropriate circumstances must be retained.

[FP3-5] We believe costs discretion should be retained by the Court which is in the best position to assess if a claim has been genuinely brought to the Court, whether successful or not, or is without merit and opportunistic.

Case law suggests that there are persons who bring opportunistic claims, but these appear to be far outweighed by those with claims of (some and/or substantial) merit.

[FP6] Costs orders may impact unfairly on estates, however persons who genuinely believe they have a proper claim should not be deterred from bringing the same.

Notional estate provisions

[FP7-8] It is difficult without supporting statistics to state a view as to whether or not Victorian family provisions should include notional estate. If this is introduced, we would suggest that the provisions need to be carefully drafted with specific time limits, otherwise the freedom of a person to deal with their assets as they wish during their lifetime, and the certainty of recipients of those assets, could be unfairly eroded.

[FP9-10] Case law clearly indicates that family provision is a moral responsibility as well as a legal responsibility, and this relates to the persons directly concerned with the purpose being to achieve a fair and equitable outcome between them. Concern as to whether or not a person is thrown upon State resources (although that impacts upon all of us) should not form part of this argument.

Limiting eligibility to make a claim

Eligible applicants

[FP11-12] Adopting the National Committee's proposal to limit claimants to spouse/partner, non-adult child, or a person to whom the deceased owed a responsibility may limit the number of opportunistic claims, noting that a number of recent successful claims in the Court might be viewed as 'opportunistic' by some. However, we would suggest that adopting this proposal may well deter persons with genuine claims and the extended New South Wales approach is to be preferred. We would also suggest that a child of the deceased of whatever age should be specified.

The current list of matters considered by the Court in section 91(4) *Administration and Probate Act 1958* should be retained.

If an additional limitation to the New South Wales approach were introduced, this should be in respect to a person who is not or has not been a relative of the deceased, is not or has not been a member of the deceased's household, is not or has not been a person with whom the

deceased had a close personal relationship, or someone who has received a fee or reward for support or care[15].

We further suggest that, for transparency purposes, the relationship between applicants and the *Relationships Act 2008* and *Family Law Act 1975* be defined.

Limiting eligibility to dependence and financial need

[FP14-16] Dependence and financial need should not be a prerequisite to bringing a claim. Other than opportunistic claims, there would be many genuine claims, particularly by close family members, where the applicant lives an independent life but has a reasonable expectation that they will be 'looked after' to an extent by the deceased. We believe making dependence and financial need prerequisites may well discourage some persons from developing independent lives.

In all cases, the discretion of the Court should not be fettered.

Costs Rules

How, if at all, could the general application of costs rules in succession proceedings be improved?

[FP17-18] We do not suggest any improvements. We believe that the Court is best placed to decide whether or not:

(a) 'good faith' principles apply to one or all of the parties[16];
(b) costs on a party and party, solicitor and client or indemnity basis are appropriate in the circumstances of the case;
(c) it is appropriate that the estate should bear part or all of the cost of the proceeding in the circumstances;

and that the Court's discretion should not be unduly fettered.

Yours faithfully,

(Miss) Roz Curnow
Chief Executive Officer
On behalf of the Council of the Institute

[15] as opposed to someone who has been promised a fee or reward or some benefit but who has not received the same
[16] i.e. *Hayes v Hayes [2008] QSC 6*