SUBMISSION TO THE LAW REFORM COMMISSION

Carolyn Sparke S.C[1].

I wish to make the following submissions to the Law Reform Commission. This is a personal submission but I have been able to canvass the views of a number of members of the Victorian Bar practicing in the area[2].

FAMILY PROVISION CONSULTATION PAPER

Family provision

FP1. Is the current period for applications satisfactory.

In my view, yes.
I do not believe the timeframe requires change, but if it did, I would support an alteration that required claims to be made within a fixed period of time from the date of death, rather than form the date of probate.

The time for application needs to create a balance between allowing enough time for family members to become aware of the death of the person and obtained legal advice, with holding up the administration for too long.
Typically, the time for obtaining probate, plus 6 months, allows people time in the order of 8 months in which to apply. That appears to be adequate for the vast majority of cases. The numbers of applications for time extensions are relatively small.

In the cases involving applications for extension of time, there are a few which are 'just' out of time, but that will be the case no matter what timeframe is imposed. I therefore do not think there is a strong reason for change.

Submission
There is no need for change.

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[1] About me:
I am a member of Senior Counsel at the Victorian Bar. I am one of the co-authors of the Lexis Nexis 'Wills Probate and Administration Service Victoria', a loose-leaf service widely used by practitioners and the Judiciary. I practice extensively in the deceased estate jurisdiction, primarily in the Supreme Court of Victoria. I have been doing so for approximately 19 years. I am regularly asked to present seminars to solicitors group and educational organisations on various aspects of the law in the deceased estate jurisdiction. I am on the editorial committee of the 'Wills and Probate Bulletin' published by Leo Cussen.

I am also been a mediator since 1996, now accredited under the National Accreditation Scheme. I regularly act as mediator for a variety of matters, primarily involving deceased estates.

[2] I have actively canvassed the views of members of the Victorian Bar in relation to the reference. I convened a meeting of barrister practitioners in the area so as to try and ascertain the view of a number of members of the Bar, and also spoken separately with various members of the Bar. The views put in this submission are my own, but where appropriate I am able to indicate whether those views have more widespread personal support. I do not purport to be speaking on behalf of the Bar.

I am conscious that the Bar will make a submission of its own. I am unaware of the extent of consultation involved in making that submission

If there is to be a change, I support the idea of a timeframe fixed from the date of death, as it creates certainty. In my view, 12 months is too long. In my view it ought to be 9 months from the date of death. My reasoning is that most of the estates I see are able to be administered within 6 months from probate and naturally refrain from distribution until the '6 month' claim window is over. To extend that time to 12 months would require beneficiaries to wait too long.

As a guide, the 'executors year' – the time which an executor is permitted to have to administer an estate - is 12 months from the date of death[3]. After 12 months beneficiaries can agitate to have an estate distributed – and they do. They see 12 months as being well long enough and (rightly) criticise those who delay longer. It would be inappropriate for all estates to effectively have to wait the full period of time after which executors can be criticised for failing to complete the administration. Having a claim timeframe of 9 months means that executors can feel free and clear to complete the administration earlier than the 12 months if they wish.

This is not a matter about which members of the Bar had strong views.

Criteria for eligibility

There are three (in my view) allied questions:

FP3.To what extent does the current law allow applicants to make claims that are not genuine?

FP11 Should eligibility be limited

FP 14 to FP 16 should the TFM factors require 'dependence'? Should there be a requirement to demonstrate financial need?

(these comments also overlap questions FP9 and FP10.)

This is a matter about which I, and the colleagues to which I spoke, have strong views.

General observation

In my view the jurisdiction ought not be confined. The costs principles ought to be used to try and control the making of opportunist claims, rather than by confining the jurisdiction. The jurisdiction generally works well, and people in genuine, unusual relationships ought not be denied just to get rid of the' opportunistic' ones.

We live in a pluralistic world, where families are split and blended, where many people do not have children and become reliant upon, or help out, others who do not have children.

Anecdotally, the vast majority of claims which are made are made by people about whom it is relatively straightforward to say that they have a 'proper' claim. Those which are 'marginal' are relatively few in number, but appear to cause a disproportionate amount of talk. The media is particularly interested in the 'headline' cases where some perceived or actual 'opportunistic' claim is held up as demonstrating that the jurisdiction is 'outrageous'. That ignores the fact that the bulk of the claims are made by children, spouses and by others in 'family' type relationships. It also ignores the fact that the bulk of the 'unusual' claims which have run to judgement have been successful – a Court has found the relevant 'obligation'.

[3] S 49 Administration and Probate act

Many jurisdictions have a body of claimants who are thought of as 'undeserving' (my colleagues in personal injury, family law and commercial matters all face the same problem from time to time) . The family provision jurisdiction is no different. The problem lies not with the jurisdiction itself but more likely with particular legal representatives who take a 'gung ho' approach to litigation. Such practitioners are present in all jurisdictions. It is at the level of costs they are likely to be controlled.

My own experience as an adviser is that, if I advise that a claim is 'marginal', there are few who are willing to take the risk of litigation. The claims which are 'marginal' , where a client decides to proceed, are relatively few.

There have been a number of cases since the amendments brought in by the *Wills Act 1997* where the Courts have granted claims which fall outside the previous 'spouse/child' confines and which fall outside the requirement of 'dependence' as required by some other states[4]. The Courts are, as is appropriate, acting as the filter – allowing some claims and refusing others. The fact that the Court has said (at least in relation to grandchildren) that no claim can be 'ruled in or ruled out' [5] and has in fact allowed claims in 'unusual' relationships makes it hard to say that there is a definite line beyond which a claim is 'opportunistic'.

The jurisdiction has operated well. The jurisdiction has operated for long enough now to see a pattern in the type of successful cases. As a broad principle, the Courts have allowed claims where people are in relationships 'akin' to the family. That is not a universal statement, but there is no pattern of the courts allowing 'crazy' claims.

'Dependence' or 'need' as a threshold
My submission is that such a threshold requirement ought NOT be introduced.

It well accepted in Victoria that the process of determining a claim is one of 'instinctive synthesis'[6] in which all of the factors relevant to the nature of the claim are balanced in the exercise of the discretion. Those factors were made explicit in the 1997 amendments, but they simply reflect what was implicit previously.

It has never been required by the courts in Victoria (nor, to my knowledge, in the other equivalent jurisdictions) that there be a general requirement of 'dependence'. (whilst in NSW 'dependence' is required of certain relationships, such a grandchildren, the fact that the Victorian Court has accepted a grandchild[7] claim in the absence of' dependence' reflects that a limitation of that sort would cut out genuine claims). There are many cases where an adult

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[4] A number of adult step-children have been successful, in a line of cases after *McKenzie v Topp [2004] VSC 90*; a supportive neighbour in Unger *v Sanchez* (albeit succeeded on appeal, but on the basis of procedural irregularities rather than as a matter of substance); A niece who years before had been cared for by the deceased in *Iwasivka v State Trustees [2005] VSC 323*. Many claims by adult children do not have any component of dependence.

[5] *Petrucci v Fields [2004] VSC 425*

[6] *Grey v Harrison (1997) 2 VR 359* per Callaway J

[7] *Petrucci v Fields*, supra. *Scarlett v Scarlett [2012] VSC 51*5. The artificiality of a 'dependence' requirement is demonstrated by *Stephens v Perpetual Trustee Co Ltd (2009) 76 NSWLR 15* where a grandmother who had cared for her disabled grandchild since a very early age, at a cost to her, was held to be 'dependent' upon the TAC benefits she was paid to care for the child. 'Community standards' would likely say that her role and the cost to her should be enough, without the need to find an additional element of 'dependence'. What if she had cared for the child without payment - the 'moral obligation' would instinctively be obvious, but without 'dependence' she would not be entitled.

child is quite independent of their parent but nonetheless had a proper relationship which attracts the 'moral obligation'[8].

As an aside, I note the concern expressed that creating such a test may of itself encourage people to become 'dependent'. In my experience, those who are dependant on another, are dependent by reason of their circumstances or personality type. It would be rare to see a situation where a person has become dependant for some motive of improving their claim. Anecdotally, family members occasionally accuse a sibling of deliberately becoming dependent, but when discussed, they usually recognise that it has not been deliberate.

The question of what is required to demonstrate 'financial need' is part of the 'instinctive synthesis'. Put simply, a strong moral claim may found a claim with a relatively low level of need. A high level of need may not require as strong a 'moral claim'. To impose a 'threshold' requirement of 'need' or 'dependence' would not permit a court to properly carry out its task of assessing all relevant factors.

It is for that reason that the jurisdiction is different to those where a threshold applies, such as the need for a 'serious injury' to be certified. The process of certifying an injury (for example) requires the Court to look at one particular issue, as distinct from the judicial task of balancing the various factors in a family provision claim[9].

Submission
I am strongly of the view that the present 'responsibility' criteria appropriately allows the court to carry out its task for the full variety of human relationships.
Imposing any limitation on the criteria, or a threshold test (whether 'need' or 'dependence' or of any other sort) artificially restrains the court from carrying out its task.

FP5 Do the summary dismissal provisions deter opportunistic applicants from making claims

In short, no.
The Summary dismissal provisions do not deter opportunistic claims to any degree. There have been few granted. The discretionary nature of the jurisdiction appears to make it difficult for the Judiciary to be able to make a decision on a preliminary basis.

It is difficult to see any real change which can be made.

As with all jurisdictions, the summary judgement process should only be exercised in clear cases, and it hard to see any way of altering that without confining the discretionary task of the court.

Submission
The Summary dismissal provisions should be retained, but it is hard to see how they could be altered.

[8] I use the phrase 'moral obligation' or 'moral claim' not in the sense of any 'moral judgement' but to encapsulate the language often used to refer to the Court's task of weighing up the various factors, and which used to be used for that task before the amendments made those factors explicit..
[9] Justice Mandie made similar comment in *Petrucci v Fields*, supra, commenting that it was not possible from simply looking at the list of criteria , to say that the criteria 'were satisfied' or 'not satisfied'. (at para [57])

Costs

There are three allied questions:

FP4 do the present cost principles deter opportunistic applicants from making claims
FP 17 and 18 should the costs provisions be amended to include a presumption that an unsuccessful applicant will not receive their costs; the unsuccessful applicant should pay both parties costs; no order as to costs

The present cost principles do not deter 'opportunistic' claims. Whilst there are occasions on which costs have been ordered against unsuccessful plaintiffs[10] they have been rarely used. Anecdotally, in cases which are run to hearing, costs are increasingly being agitated rather than left to previously held 'assumptions' about costs 'coming from the estate' . However, costs arguments and decision are rarely reported or published.

My view, and it is commonly held at the Bar, is that judicial courage is required to make strong costs orders. Further, when costs orders are made, that they be published[11]. Orders which limit parties' costs would stand as a useful deterrence to 'opportunistic' claims and to disproportionate costs claims.

In my view there is a role for altering the provisions of section 97(7) of the *Administration and Probate act*.

With respect to plaintiff's costs, one approach is to introduce a legislative presumption that an unsuccessful plaintiff does not receive their costs from the estate. That reflects a reasonably common outcome at present. It properly reflects the 'usual' order for costs that costs follow the event. Such a presumption should be permitted to be displaced where a Judge otherwise orders.

As for the defendant's costs, the position is not as clear. My own view is that the jurisdiction is so discretionary that it would be unnecessarily harsh to impose a presumption that the losing plaintiff pay the defendant's costs.

However, the present requirement that costs orders be made only where a case is 'frivolous or vexatious' imposes too high a bar. It limits the occasions on which a court can order that 'costs follow the event'.

In my view section 97 should be amended to remove the reference to 'frivolous vexatious or no reasonable prospect of success'. Costs of the defendant ought to be left in the discretion of the Court.

Submission

Section 97 (7) could be amended so as to introduce a statutory presumption that a losing plaintiff does not get their costs paid (subject to other order of the Court).
It ought to be amended to otherwise remove the restraint on costs orders, leaving it as a matter for the discretion of the Court.

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[10] *Estate of Carn; Moerth v Moerth*, as identified in the Consultation paper.

[11] It would help the profession and provide guidance to parties to have Judges publish their costs orders and publish their reasons for costs orders. In NSW the costs outcome (even without reasons) is commonly noted in the Judgement. Our Court could be encouraged to adopt the same model.

There is reasonable support among my colleagues for the first submission and mixed support for the second. There is a variety of views about costs.

FP7 and FP8 : - Should 'Notional estate' provisions be introduced

In my view there should not be a 'notional estate' regime introduced.

The law as it relates to private property is such that we are free to deal with our assets as we wish during our lifetimes. Individuals should continue to retain the right to make gifts, reward children or friends, acknowledge relationships and feel the satisfaction of knowing that their assets are in the hands of those they wish them to be. Our right to control our property is a fundamental tenet of the law and our society.

As a society, our will-making has been based around the 'freedom of testation'. Not only is it said by the Courts to be a fundamental will-making right, but the nature of our succession laws is one in which the testators ability and desire to make a will according to his or her desires, is at the heart. We have chosen as a society not to adopt the 'forced heirship' regimes of various European countries or as applies under certain religious societies. Our society has opted for freedom of testation as the tenet.

The restraint upon that freedom is imposed only in the event of a breach of the moral obligation of the testator to those to whom s/he is responsible. Thus, once the assets are no longer required by the testator, if there are unmet obligations, they will be required to be met. It is a limited restraint on the general right to dispose of property as we wish.

It is said that on occasion individuals dispose of their assets so as to defeat their obligations. Giving the Court the ability to undo that assumes that there is some obligation upon people to act 'fairly' towards others whilst alive. Such a general obligation, or ability to intervene in what is otherwise quite lawful behaviour, does not exist.

It must be remembered that all of the transactions which are being considered are voluntary. (if there are contractual or equitable rights which arise, or unlawful compulsion, they will be dealt with differently). To put it bluntly, no beneficiary or expectant beneficiary, is paying anything, so it is difficult to see how they should be entitled to intervene in a transaction that have not paid for.

Thus, on a social basis I oppose the introduction of a 'notional estate'.

However, there is a practical position as well.

I note from the reading of NSW cases , that the 'notional estate' provisions are rarely used. It does not seem to be a useful tool in NSW. No doubt it would create other problems as well, in that the recipient of property may arrange their affairs assuming that they own that property absolutely, to the extent that they may suffer some prejudice in having their ownership of property taken away from them some years or months later in a family provision claim.

By and large, members of the Bar I spoke with shared my view. There is some support for notional estates, although only small.

Submission
'Notional estate' provisions should not be introduced

Quantum of costs
Allied questions:
FP16 are cost orders in TFM cases impacting unfairly on estates
FP19 are family provision proceedings generally less costly in the County Court in the Supreme Court?
FP20 What measures are working well to reduce costs in TFM proceedings?
FP21 additional measures to reduce costs?

Costs as a burden on estates and measures to reduce costs

The first question is whether the costs of bringing Family Provision litigation is in fact disproportionally higher than other equivalent litigation.

Whilst I do not often manage commercial cases my experience in commercial jurisdictions has been that the costs are similar to those in Family provision claims.
The noticeable differential in costs comes from the identity of the solicitors acting. It is my experience that certain solicitors firms charge excessively for the work done, and that is the case in both commercial and family provision matters.
There is a concern that the problem is larger in Family provision claims because it is assumed that 'costs are paid by the estate' and high costs are therefore a big impost.

That creates a false distinction with other litigious matters – in all litigation, if a party wishes to achieve a settlement, they will pay a price which takes into account the burden of the other side's costs in some fashion. Thus, an overcharging firm will create a burden on the parties to commercial litigation in the same way as in Family Provision claims.

It is true to note that costs can be disproportionate where an estate is small. It is same where a commercial dispute is complex, but involves a small amount. The decision still needs to be made by parties whether it is worth commencing a claim, in light of the likely return, and for defendants, the cost of defending/settling compared with the likely return.

The costs of the parties only partly affects the overall costs burden. Many cases are mediated to an outcome where parties 'bear own costs' as part of an 'all in' settlement.

A private comment was made to me recently by an Associate Justice who is familiar with the Family Provision Jurisdiction as well as the corporations and other jurisdictions handled by the Associate Justices. That Associate Justice commented that, as far as was observed, the costs in Family Provision proceedings suffer the same vices as other jurisdictions. There are members of the profession who charge too much and there are members of the profession who charge appropriately. The view expressed was that there was no reason to confine or cap costs in Family Provision claims any more than other jurisdictions.

Conversely, there are times when clients are made aware of the fact that they are paying 'over the market' and they nonetheless choose to do so. There are firms which charge a premium

for the 'no win no fee' risk, and others who openly tell their clients that they are 'above market'. I have witnessed practitioners in both camps openly and appropriately warning their clients of the fact that there will be an unrecoverable portion of their costs.

Where practitioners are alert to the fact that a practitioner on the other side is 'overcharging', it can be remedied to some degree by making written offers on a 'plus costs to be taxed' basis.

In my view, the control of costs (in this and other jurisdictions) lies at the level of 'taxation' of costs.

Submission
There is no reason to control costs in this jurisdiction differently to others. There ought to be a more accessible costs taxing system

Taxation of costs
The mechanism by which costs would be confined ought to be at the level of taxation of costs. If there were a streamlined process by which the costs of legal representatives could be quickly and cheaply taxed, more parties would require that costs be so taxed – for their own representatives and those on the other side.

This would also have the result of controlling those legal practitioners whose disproportionate costs come from unnecessarily verbose affidavits, or other levels of 'over servicing' a file.

A difficulty lies in the legal practitioners having a vested interest in defending their level of charging. A practitioner who charges too much is unlikely to admit that. The problem lies more (not universally, but to a great degree) at the feet of solicitors than counsel, which gives counsel some opportunity to counsel a client to seek a review of costs, or to advise that the other side should be forced to taxation of their costs. However, the opportunities are limited. It is difficult to know how to manage that (short of forcing all practitioners to have their costs taxed).

One answer lies in educating clients. Whilst the requirements now contained in retainer letters should have an educative effect, their effect is actually quite limited. Clients have no way of judging whether the fees they are being told about are appropriate compared with fees charged by other firms. Perhaps there is some virtue in clients being educated to 'shop around for quotes' in the same way they would for other services being provided.

Submission
A more efficient taxation system, together with client education, is an appropriate way to manage costs.

County Court
In my experience, litigation is little cheaper in the County Court. Whilst my experience is relatively limited in the County Court, and I acknowledge that solicitors are more-well placed to comment on costs, I can call on my experience as a mediator and hearing the figures quoted at mediations for costs. In my experience the costs expended are little different in Supreme and County court litigation.

The bulk of the work done is in the instruction-taking, advising and drafting of affidavits, and conduct of hearings. For each of those things the actual (solicitor-client costs) to the parties are the same in County and Supreme Court. There are slightly lower costs in the County court by reasons of the slightly higher administrative efficiency and slightly lower filing fees. However, those are relatively small parts of the overall costs.

Party-party costs will be generally lower in the County Court. However, there are sound legal reasons why solicitor-clients costs are the 'norm'. Defendant/executors are, as a matter of course, entitled to have their solicitor-client or indemnity costs from the fund of the estate they are defending. A successful plaintiff, on the basis that the proceeding was to rectify a fault of the deceased person, is often justified in having solicitor-client costs.

For those reasons the costs are little different between the jurisdictions.

Practitioners choose between the jurisdictions based on the speed with which cases are heard, the level of complexity of the case and other matters. They are appropriate considerations in making that choice. The present choice of courts does not need adjusting.

It does not seem to be proposed in the Consultation paper that cases be heard elsewhere than Supreme and County Courts. However, if it were contemplated, it is to be strongly resisted. There is a body of expertise which has been built upon the Supreme Court and increasingly in the County Court. Whilst many cases are straightforward, many involve a consideration of principles of property law and equity. To ensure consistency and proper consideration, the hearing of family provision claims ought to remain in the Supreme and County Courts.

The same considerations apply to any other jurisdiction. It has been rumoured that VCAT has some interest in taking on the TFM jurisdiction. I would oppose such a change.

Submission
The present access to the County and Supreme Court should continue. Other courts should not be given jurisdiction.

Other steps to limit costs

Directions
In my experience, the 'streamlining' of the directions process reduces costs to some degree. The use of Associate Justices for hearings also tends to ensure that cases are more likely to be heard on their scheduled date.

Position papers/affidavits
The use of 'position papers' rather than affidavits does little to reduce costs. In order to properly present a case at mediation based on a position paper, the same work is usually done to take instructions and to set out the facts in a position paper.

In most cases the parties will not be ready to mediate unless they have an appreciation of the other side's position. (and often, not until they had their say as to their own view of the family dynamics). Thus the costs incurred in preparing a position paper usually requires a similar amount of work as affidavits.

Most of my colleagues share that view.

Limiting length of affidavits
As for the length of affidavits, whilst it is true that there are some practitioners who draft unnecessarily verbose affidavits and may well charge accordingly, it is hard to see how that can be controlled. Firstly, there are many cases which require a lot of information to be ventilated and a control simply by restricting length is unlikely to properly allow claims to be explored. Secondly , the process of taking instructions and sifting through relevant material is an time consuming one and the costs of doing a short affidavit will be no less than doing a long one in those circumstances.

There may be some role for a requirement for an affidavit at a fixed number of pages, with the cost of an affidavit longer than that to be disallowed unless the court orders otherwise.

Control of costs is best achieved by having educated practitioners. My experience is that practitioners who understand the jurisdiction will draft proper affidavits and will do so efficiently.

Judicial mediators
The use of Associate Justices as mediators does not save costs, in my experience.

I strongly hold the view that Associate Justices ought not to be acting as mediators at all. The 'judicial settlement conference' system has the same failings. Most of my colleagues share that view, albeit there are some with a different view.

My view is that the skills involved in being a mediator are quite different than the skills required on the bench. They may not have been trained and may not have the same requirement that nationally Accredited mediators do, of having to be involved in professional development, with encouragement to do co-mediation and mentoring. Further, the Judicial officers involved in mediation do not 'get involved'. They appear to not want to be seen inserting their 'judicial' persona into the process for fear of seeming to 'persuade' the parties. In particular they do not play the 'devils advocate' role which is essential in a good mediator.

The costs saved on paying the mediator are small compared to the value of achieving a settlement with a mediator willing to 'get involved'.

Submission

> The use of Judicial mediators and 'position papers' in lieu of affidavits and private mediators does not reduce costs to any appreciable degree.
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> There may be a role in controlling costs by imposing a default length on affidavits, with a presumption that costs of longer affidavits will not be allowed subject to the order of the court.

Costs capping
Reading the cases in NSW, it does not appear that the costs cap discourages 'opportunistic' litigation – there are plenty of what might be called 'marginal' cases which are dealt with in NSW. I also note the observation (referred to at paragraph 2.64 of the Wills consultation paper) by Professor Vines that there are more disproportional costs problems in NSW than in Victoria.

The costs are always in the discretion of the Court and the ability of the Court to make orders such as those in *Cangia*[12], where the Judge ordered the costs of the parties to be limited, given the level of mixed success in the case, should properly be where the control of costs in the jurisdiction is exercised.

Submission
I would resist the introduction of a 'costs cap'.

[12] *Cangia v Cangia [2008] VSC 455* and ruling *[2008] VSC 556*

WILLS CONSULTATION PAPER

I was able to express my views to the 'Roundtable' conference.

I will simply summarise my position here.

Witnessing provisions, undue influence (related questions W1, W2, W3, W4 to W7, W11, W12)

My view is that, in the tension between facilitating all people to be able to make wills in the most convenient way possible, and the risk of that creating opportunities for abuse, the law should tend towards creating freedom for testamentary views to be expressed. When considering the statistics expressed by the registrar of Probates – that of the 19,000 application for representation which are filed, 85% of which involve a will, there are about 100 to 130 caveats filed, the level of misuse of the system is clearly low.

The comparison is sometimes made with the strict requirements surrounding execution of Powers of attorney. They are quite different documents, with different potential for abuse. Conferring the ability on another to deal with assets whilst a person is alive should be strictly controlled. The damage which can be done is self-evident. A testamentary act has quite a different character – a person will give their assets away to someone, and the question is whether the choice of that 'someone' is properly attained. That ability to give one's assets away when they are no longer needed should not be surrounded by such formality as to make the testamentary act a difficult one.

The question is expressly asked as to whether the *inter vivos* test for undue influence should be imposed on testamentary dispositions. I would oppose such a change. Again, the effect of influence on a vulnerable person whilst they are alive, so as to strip them of their assets, should be carefully guarded against. Controls in the nature of 'presumed' influence by people in a close or dependent relationship, are quite appropriate if a transaction involving them results in the vulnerable person being stripped of assets. The testamentary act is a different one, where the person is going to give away their assets in any event. They are fraught with allegations against other family members, many of which are born of perceptions of unfairness and hostility. In reality the person on which the deceased was dependent (and who might have a 'presumption' raised against them in relation to an *inter vivos* transaction) might be the very person who has provided care and support and to whom the deceased very properly wishes to give their assets. To overturn the deceased's testamentary intentions should not be done lightly and certainly should not be done on the basis of any 'presumptions'.

Submission

My submissions, in summary are:-.

- There is limited value in reinstating the 'interested witness' requirements. The potential protection against abuse is likely outweighed by the difficulty created where very ordinary families simply wish to have a family member assist them with making a will.

- I am strongly opposed to the introduction of a 'certification' or 'formal witness' regime
- I am strongly opposed to any requirement that witnesses certify capacity or voluntariness[13].
- There is some value in requiring that witnesses know that the document is a will. That should not in any way extend to the contents of the will. However, it at least provides a base level of verification that the testator is executing a document which is actually a will and not some other form of document. However, the verification ought be presumed to be contained in a standard execution clause, which describes the document as a 'will'. No additional certification should be required.
- The ease with which wills can be undone if 'influenced' has increased in recent years, so that the Court can more readily intervene[14].
- the *inter vivos* doctrine of undue influence should not be applied to testamentary gifts. As I have observed above, there is quite a different role played to protect against abuse in *inter vivos* transactions.

In my view there is a strong need for education of legal practitioners, doctors, and more broadly of members of the community , as to the requirements surrounding will making.

There was mixed response expressed by members of the Bar for the re-introduction of an 'interested witness' regime. With the exception of one individual, there was no support for the introduction of a 'formal witness' regime.

Testamentary capacity and Suspicious circumstances (questions W8 and W9)
Insofar as these questions overlaps with the questions set out above, I refer to my comments above.

Beyond that, I agree with the observation made in the consultation paper (para 2.55) that both medical and legal concepts are involved in the analysis and there is a real need for education, especially of general Practitioners, about the nature of the task.

There are no changes required of the law itself, as testamentary capacity is measured on a well-established and long standing set-of tests, which have demonstrated (as noted in para 2.51) their ability to recognise changes in social and medical advances.

Similarly the question of what is a 'suspicious circumstance' and the task for the court when it raised, is also well-established. I see no need for a change in the law in this area.

The members of the bar I spoke with did not express any particular views about these matters.

Fraud or forgery (question W10)

[13] I am indebted to Mr Verspaandonk of the Victorian bar, who allowed me to read a draft of his submission on this point. I agree entirely with his observations.
[14] I am indebted to Mr Verspaandonk of the Victorian bar, who allowed me to read a draft of his submission on this point. I agree entirely with his observations.

These matters were not directly dealt with in the roundtable conference.

As to forgery, an allegation of forgery is a serious one, with criminal consequences. There is no change which is required to the present regime.

As to fraud, it is difficult to see any change which is appropriate.
The question posed is whether there are changes which better protect vulnerable will-makers. The answer to that must be 'no' with respect to forgery – there are already laws which prohibit forgery.

There may be some change with respect to 'fraud' although any change would be radical. There is no general law which prohibits people telling lies to another. If the lies produce a response – acting in reliance on a misrepresentation, a fraudulently obtained contract – or a fraudulently obtained will, it is the response which completes the legal wrong. With respect to the fraudulently obtained will, that cause of action is complete upon death. There is already a body of law (albeit rarely used) which vitiates such a fraudulently obtained will.

If the question is aimed at protecting the vulnerable will-maker in lifetime, the only change would be one which allows a will to be 'opened' during lifetime, and examined, whilst the testator is alive, as to whether they have made the will because of the misrepresentation of another. That would in some cases provide direct evidence of whether the testator actually made the will in response to the deceit (which is one of the required elements and may only be able to be established inferentially after death)- Whilst there may be circumstances in which that is appropriate, it would require intervention in the testamentary process, during lifetime, to an extraordinary degree. If a person has sufficient capacity to give evidence about what has persuaded them to make their will, they presumably have sufficient capacity to take on board what they are told is the 'truth' of the situation and choose to remake their will. Such intervention should not be encouraged.
If they no longer have such capacity, save the fight until after they have passed on.

In looking at the operation of the doctrine after death, cases are rare. The question is whether they are genuinely rare, or whether there is something in the way in which the area is applied which prevents it being relied upon. The cases referred to in the consultation paper include the most useful analysis of the law in this area.[15] The burden of proof is not a simple one, but its history is referred to by Tadgell J in *Robertson v Smith*, and he accepts that it can be established on a circumstantial basis. With such an allegation, it would seem appropriate that the court has to be positively persuaded of the representation, although that persuasion can happen on a circumstantial basis. Thus, it would seem that the difficult high standard which had previously applied to 'undue influence' has not been the bar to cases involving testamentary 'fraud'.
The cases may be rare because the circumstances in which it can be shown that the deceased was 'lied to' by someone in such a way as to induce a false will, may be rare. They may also be rare because the same circumstances in which someone is vulnerable to believing such lies may mean that they suffer a want of capacity or some other vitiating factor.

Submission
It is difficult to see why the doctrine is not applied more often. The standard of proof seems appropriate. No change seems to be required.

[15] *Robertson v Smith* [1984] 4 VR 165.

The members of the bar I spoke with did not express any particular views about this matter.

STATUTORY WILLS.

Should the present test be amended? (question W13)

This area was also extensively dealt with at the roundtable conference. I make only a few observations here.

The comments below relate to the process by which statutory wills are dealt with. What needs to be kept in mind with any legislative change is the purpose of statutory wills. They presently exist so as to create a mechanism by which an incapable person can have their own likely testamentary intentions put in place. To extend the test to one in which the testator 'might' have put a will in place, creates two problems that I see-

- there may be a number of things that a testator 'might' do – how is a court to be satisfied that the proposed course is the one which should apply
- What is the question of what a testator 'might' do intended to take into account? Is it 'what they might do if they were told what they were doing was not fair?' , 'what they might do if given certain advice'

Such a test opens a court up to speculation. The regime is presently intended to be one in which the actual likely intentions of the testator are given form . That is a different regime than the question of 'obligation'. It definitely does not encompass a notion of 'fairness'. It is not intended to be a regime which allows post-death social re-engineering.

I make these comments because there was a flavour to some of the comments made at the roundtable which appeared to contemplate a broad based ability to make application to change a will to remedy injustice and so on. If that is how the regime is intended to apply, that is a different social application than the way the regime presently is, or is intended, to apply.

Submission
The present test as adopted in Victoria is appropriate and should not generally be broadened to encompass what 'might' be intended.

The situation not catered for by the present case, as pointed out, is the 'never had capacity' case.
The second limb of the present Victorian test "might reasonably be expected to be" caters for such a case. The Courts have had no apparent difficulty adopting the idea that the putative will-maker has a moment of clarity, in which time they are assumed to have the 'normal decent standards of morality'[16]. Such was acknowledged in the thorough judgement of Palmer J in *Re Fenwick*[17] and the comments are equally apposite to Victoria.

In my experience, the wording of the test is not preventing people from making application for a statutory will for people who have never been capable.

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[16] *Re C (a patient) [1991] 3 All ER 866*
[17] *Re Fenwick* (2009) 76 NSWLR 22 applying similar wording as Victoria insofar as it was dealing with the 'reasonably likely' intentions of the putative willmaker.

Other comment about possible changes
The suggestion made by Mr Wells, permitting application to be made after death, has merit.

Representation of and by the putative will-maker/represented person (Question W14)
Where a represented person is unable to participate in the decision, they ought not be required to be represented. It creates an additional cost for no purpose. In my experience, the bulk of applications relate to people who have lost all mental abilities. The only purpose for representation in that circumstance is to protect their estate from being unnecessarily depleted by costs.
(but see my comment below)

Where a represented person is able to express views, they ought to be given the opportunity to participate, where possible. That should not require separate representation, unless it is appropriate. It will rarely be appropriate, given that an essential part of the jurisdiction is that the putative will-maker has lost the ability to make their own will.

It seems to me appropriate that the Court should have evidence before it that the person is:-

(a) incapable (either by way of medical certificate to that effect, or statement by the person's legal representative) ; or
(b) able to express views, with those views being provided to the court by an affidavit by that person's legal representative (if that person is not otherwise interested in the case) or by a disinterested person with some 'formal' status – solicitor, JP, doctor, carer, OPA (for example).

The weight to be given to those views would be the subject of evidence and argument in the proceeding.

Whilst this adds a layer of complexity, it is a serious power which should be exercised with the represented person's views in mind. If a party wishes to argue to the court that the putative will-maker does/not hold certain views, that person should be able to place those views before the court.

Submission
I am strongly opposed to any requirement that the putative will-maker be represented.
I support the person's views being an essential part of the evidence which must be before the court (where it is possible).

Accessibility of the process (question W15, W16)
I support the general discussion expressed at the roundtable conference that the two-stage process is unwieldy and unnecessary.

I had views expressed to me by members of the Bar that the 'two-stage process' could be managed by having the initial stage done 'on the papers' to try and prevent egregious claims. However, the abolition of the two-stage process is, in my view, the better option. It is difficult to see how the assessment of the various factors can take place 'on the papers'. The reality of most applications now is that the Court does not engage is a 'two-stage' process - If the court is assessing the factors, it does both the leave and the application together.

I also support the view that greater use of the jurisdiction lies partly with education of practitioners and the public generally.

There was some discussion at the roundtable conference about whether it is appropriate for the jurisdiction to be exercised by VCAT. I would not support such a change.
Given that there is an overlap with the role of the Supreme Court as holding the supervisory jurisdiction over wills, it is appropriate that the Supreme Court retain the statutory wills jurisdiction.

The Supreme Court has a body of experience in assessing questions of testamentary capacity and in the application of statutory standards. The tests to be applied are quite different to the more broad based assessment of 'best interests' which is at the heart of decision -making at VCAT. The skill of VCAT is quite different – in the Guardianship jurisdiction the requirement is for members to decide 'yes or no' to appointment of a guardian or administrator. Whilst they may have make findings of fact along the way, they are not called on to find a particular outcome. In other lists at VCAT where members do make findings of a particular outcome, they involve small amounts of debt or other transactions.

It is true in some ways that VCAT is more accessible than the Court. However, the nature of VCAT, with a variety of members, the volume of work and without the requirement to publish decisions, the jurisprudence is less developed and less consistent. Holding hearings in VCAT also does not cure what are some of the main problems identified – a need for education; a reluctance for the involved family member to bring proceedings; the reluctance of people generally to be involved in litigation in any jurisdiction.
As for any costs advantage in going to VCAT, the reality is that applications will be run by lawyers, who will charge their usual fees. There will be no real costs saving in running matters in VCAT. As for the burden of costs there is some merit in having a 'default' costs position apply in the court. (see below)

Costs (question W 17)

The cost of the process is probably a disincentive to applications being made. Whether it is more of a disincentive than in any other jurisdiction (where any potential litigant has to balance the cost of bringing/defending proceedings against the potential outcome) is impossible to say.

There is a genuine concern that a putative will-maker's estate ought not be used for the payment of lawyers whilst they are still alive. (quite apart from the merits of the application) There is a tension between that position, and the encouragement of proper applications to , essentially, seek to remedy the putative will-maker's testamentary affairs.
A proper applicant ought not be discouraged from bringing an application by the thought that they will bear the costs even if successful (as would be the case with a presumed 'each party bear own costs ' or 'no costs orders' jurisdiction). Similarly, a person who is defending their present entitlement under the will ought not be discouraged from doing so by the same thought.

If people feel that their costs are more likely to be covered by the estate, albeit after the person's death, they may be more encouraged to us the jurisdiction and make an application.

My submission is that, subject to other order, there should be a statutory presumption that costs of applications should be paid from the estate, but after the putative will-maker has passed on.

Where application has been made by a 'disinterested' applicant (such as an administrator) they should be entitled to their costs in the usual way (subject to other order). Such an applicant should not be discouraged from making a proper application, by cost.

There ought to be a statutory presumption that a respondent beneficiary or executor have their costs from the estate (after the will-maker has passed on) subject to other order. That person was, after all, the will-maker's choice of beneficiary and whilst they are inevitably defending their own position, they are in that position due to the will-maker's choice. Such a presumption should, logically, not apply in the event of intestacy.

Otherwise, costs remain in the discretion of the court – an unsuccessful applicant will either pay costs, bear their own costs or have their costs from the estate (after death, subject to other order) depending on the appropriateness of the application.
Where an estate is large enough to bear costs orders during lifetime, the Court can make such orders. There may be circumstances where a defendant beneficiary has behaved in such a way, or defended such a hopeless claim, that they ought not have their costs. Those are matters for the discretion of the court.

I would *not* suggest the adoption of any other statutory test (such as the 'frivolous and vexatious' test which applies elsewhere).

Submission
There ought to be statutory presumptions introduced that:-
- Parties have their costs from the estate of the putative will-maker, after the persons' death;
- Independent applicants have their costs from the estate in the usual way
- A defendant beneficiary/executor have their costs from the estate (after the person's death)
All subject to other order of the court.

ADEMPTION –

This topic was widely discussed at the roundtable and I was able to express my views there.

Below I essentially consider three levels of analysis:-

- 'anti-ademption' application able to be made either where there has been ademption by reason of 'involuntary' conversion – in the sense that the character of the asset has changed without conscious choice by the testator; OR where the will or direct instructions demonstrate a desire by the will maker for the beneficiary to retain proceeds.
- 'anti-ademption' where an asset is disposed of by an attorney for a donor without capacity – to preserve the proceeds of the 'adeemed' asset
- 'adjustment' where an asset is disposed of by an attorney for a donor without capacity and there has been a disproportionate unjust disadvantage to a beneficiary under the will.

Should there be a presumption for/against ademption and should the will-makers intentions be taken into account? (Question W18, W19)

General comment
The paper invites comment as to whether there ought to be permitted variation to wills based on imputed intentions of a testator, or to reverse 'injustice' in the event of ademption. There is a real need for law reform so as to ensure certainty. I support limited law reform in this area, along the lines expressed by Justice Hargrave in *Simpson v Cunning*[18], confined to instances where a donor has lost capacity .

My preliminary comment is that there has been a long-standing body of English law relating to ademption, which (as I express it) presumes that a testator who disposes of an asset has disposed of it for all purposes. There ought to be a limit to the extent to which there can be speculation about what a testator might have intended to be the result of that disposal, where not expressed in writing.

It ventures far into the realms of speculation to try and determine the testator's likely intention 'in case the asset is sold in my lifetime'. As a general principle, direct evidence of a testator's intention is not permissible in construing what they have said in their will[19]. That is a well-established and long standing principle. In my mind, it is based on the fact that testators may say any number of things to interested family members about what their wills contain, but those statements may not be true.

In my submission, it would create an inconsistency with the general rules of construction, and invite speculative litigation over the content of a testator's mind, to permit variation to the usual legal effect of a will based on what the will-maker would have intended upon disposing of an asset.

If a will is written in such a way that it can be construed so that the testator did not intend a gift to be adeemed, it is likely to attract the existing body of rules of construction. If there is to be any change in this area of the law, it should be limited to making clear that application can be made to the Court to reverse the effect of the ademption, based on very limited evidence. That evidence should be the contents of the will itself, and arguably the testators direct instructions to their solicitor.

Limited circumstances of 'involuntary' disposal of assets
Where there has been an ' involuntary' disposal or change in an asset – for example, where a house is sold and not yet settled, or proceeds received in such a short time before death as to make a new will impracticable, or an asset has been destroyed and replaced by insurance proceeds - there ought to be a presumption against ademption.
The basis for such a situation would be that the disposal or change was not through the choice of the testator.

The introduction of an ability to apply to relieve the burden of an ademption would on occasion increase the cost of administration of an estate. That should not be a disqualifying factor. The question of the "fairness" of the outcome should not be considered in any way.

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[18] *Simpson v Cunning* *[2011] VSC 466*

[19] there is a substantial body of cases (eg *Fell v Fell*) referring to this principle.

Submission
I strongly oppose the introduction of a general statutory presumption against ademption.

I moderately support the introduction of a general statutory presumption against ademption where an asset has been disposed of or converted in an 'involuntary' fashion.

I would moderately support the introduction of a limited ability to apply to the court to reverse the effect of an ademption, where it can be demonstrated from the body of the will or the testator's direct instructions to a solicitor, that they did not intend the ademption to apply.

Are there problems with the current anti-ademption provisions for administrators? (Question W20)

The only problem of which I am aware is the question of whether the actual or notional growth in the capital value of an asset ought to be part of the asset or part of the residual estate.
I have not otherwise seen evidence of such problems (I acknowledge these will not generally be matters encountered by counsel).

Fort what it is worth, in my view the actual value of the gift, if there has been actual growth/loss, should pass with the gift. However, the asset is for use of the testator during lifetime, so that if the asset has been converted in lifetime so that there is either no capital growth , or a reduction in value as funds are used for the testator whilst alive, only the actual remaining value of the assert (albeit diminished) should fall into the gift.

Should an exemption to ademption exist for property disposed of by a person acting under a power of attorney? If so, should it only apply once the donor has lost capacity. (Question W21)

I see this as a separate issue to the issue dealt with at Questions W18 and W19.

I strongly hold the view that an exemption to ademption ought to exist, where a testator has lost capacity at the time the asset is dealt with.

The members of the bar that I spoke with, similarly held the same strong view.

Section 53 of the *Guardianship and Administration act ('G & A Act')* is an extremely useful tool for a person managing a represented person's affairs. It permits them to dispose of assets knowing that whatever the testators will-making intentions are, they will be preserved as best they can be. That same opportunity should be available to attorneys.

The issue was the subject of comment by Justice Hargrave in *Simpson v Cunning* (*supra*), dealing with the disposal of an asset after a testator had lost capacity. In that case he declared against ademption, and stated that [at para 46]

> "The issue requires urgent legislative intervention to resolve any doubt. In the meantime, I would follow *Re Viertel* and recognise a further exception to the ademption principle whenever there is an authorised sale by an attorney in circumstances where:

(1) the deceased lacked testamentary capacity;

(2) the Court is satisfied that the deceased, if possessed of testamentary capacity, would have intended the donee of the asset in the will to have the remaining proceeds of sale; and

(3) the remaining proceeds of sale can be identified with sufficient certainty. "

As I set out below, I am in favour of such a change, although with some modification.

Incapacity
The primary issue which arises is the question of the donor/testator's capacity.

I strongly hold the view that the protection against ademption should only apply where the donor/testator has lost capacity. If an attorney is acting at a time when the person retains capacity, they are presumably either acting on instructions or at least at a time when the testator is able to amend the will. (Whilst there will be a few instances which fall outside those, to permit applications more broadly would introduce a wholesale undermining of the current law with relation to ademption)

In my view, any such application ought be entitled to rely upon a finding of incapacity either established during the person's lifetime, or by evidence on the application after death.

Such an application could be able to be made either to VCAT or the Supreme Court. Whilst many applications will be straightforward and readily able to be dealt with in be "guardianship" context, there will be others were difficult questions of capacity and intention are raised, which ought to be dealt with in the Supreme Court.

An application to protect against the effect of ademption ought to be permissible in a number of ways:-

- application to VCAT or the Supreme Court by an attorney for a 'non-ademption' declaration (if they are aware of the contents of the will) during the life of the testator, prior to disposing of an asset;
- application to VCAT or the Supreme Court by an attorney for a declaration of incapacity with respect to the disposal of the particular asset (which, I note, may be a different assessment than their general capacity to look after their own affairs or the capacity to make a will) prior to disposing of the asset;
- application to Supreme Court after the testator's death for a declaration reversing the effect of the ademption.

I would expect that such an application would ordinarily need to be served upon the residuary beneficiary under the will (where the contents are known; where application is made after death; or relying upon the right of VCAT to 'open' the testator's will. It would be appropriate to confer a similar power upon the Supreme Court to 'open' a will for the purposes of such an application.) as that person's rights or potential rights are affected. (whilst there is no requirement for service in relation to s 53 *G & A Act* , that power takes effect upon the appointment of an administrator, there being a finding that the person has lost capacity. The question of capacity, and the imputed intention of the testator. may be a contested issue in an 'anti-ademption' application.)

Service upon other parties should ultimately be in the discretion of the tribunal/Court.

The means by which the tribunal takes evidence of the incapacity of the 'testator' will be a matter for the parties on each application.

Intention of testator
Where assets are disposed of by an attorney in circumstances of incapacity, there should be a presumption that the testator intended the donee of the asset in the will to have the remaining proceeds of sale.
It ought to be a presumption which is able to be displaced , either by the will or by evidence of the testator's intention or conduct.

It also ought to be able to be displaced, where a testator has recovered capacity after the disposal, and done nothing to alter their will. The relevant evidence will be a matter for each case.

Whilst this seems contrary to the view I have expressed earlier about there being no 'presumption against ademption' I see the transactions for an incapable Person as having quite a different character than 'capable' transactions.

Proceeds of sale identifiable
Where the proceeds of sale have been held in a separate account, or are readily identifiable, there should be a declaration against ademption for the balance of the proceeds (subject to comment I make elsewhere about actual capital growth, or diminution, flowing with the proceeds).
It should extend to those situations where there is an identifiable interest in a converted asset (eg: insurance proceeds) , or the proceeds of sale have been applied in an identifiable way (eg: house sale proceeds used for nursing home bond) or where the proceeds are held in an account which is being used for the testator's benefit (eg: balance of house sale proceeds, after being used for payment of testator's bills).

There should be some accounting obligations imposed upon the attorney, although recognising that attorneys already have accounting obligations.
Where an application is made dealing with the sale of an asset prior to its sale, the accounting obligations will likely be obvious and can be imposed at that time.

However, if an attorney does not know that an asset being disposed of is possibly the subject of an 'ademption' argument, given my view that an application could be made afterwards, those obligations are impossible to impose retrospectively.
The only way I see of dealing with this is requiring an amendment to the *Instruments Act* governing attorney's accounts, that at any time after the donor loses capacity, an asset is disposed of, a separate account needs to be kept recording the use of the proceeds. It is hard to require that the asset's proceeds be placed into a separate account, as that may interfere with the use of the funds for the benefit of the testator. Perhaps a formulation that requires that the proceeds be dealt with separately 'where possible' but otherwise an account be kept of the use of the proceeds.

However, there will be times when the attorney, without knowing the contents of the will, uses the funds for the deceased's benefit in a way which affects the proportionality of the gifts in the will. In those instances, another application should be available, for an adjustment to the gifts in the will, as set out in my further response to Question W21 below.

Should a beneficiary be able to apply to a court to relieve the burden of ademption where there has been "an unjust disproportionate disadvantage" (Question W21)

Generally
I would strongly resist the introduction of a general ability to make such an application, just because an asset has been disposed of during lifetime. It should be limited to 'without capacity' cases.
The general application of the law of wills is focused on the testator and their intentions. Ordinarily, the effect on a beneficiary, who is after all receiving a voluntary benefit, is not a factor taken into account when assessing the validity, effect or construction of a will.
The law should be resistant to open up opportunities for beneficiaries who feel that the outcome of the will is "unfair" to make applications to the court on that basis.

Involuntary/incapable transaction
The exception to that should be when an asset has been disposed of 'without capacity' (as above).
In those instances, the proceeds of the 'converted ' assets may have been used for the benefit of the testator and that may have had a disproportionate effect on the operation of the will gifts. In those instances there should be a right to apply to the Court for orders which adjust the gifts to take into account any 'unjust disproportionate disadvantage' which has flowed to that beneficiary. The Court should have a general discretion in those cases to adjust the distribution of assets between beneficiaries.
Of the various statutory formulations in other states, I favour the South Australian model.

In my view, this is a jurisdiction which should be confined to the Court. The Supreme Court is the Court of supervisory jurisdiction and any order which adjusts the actual operation of a will should be carried out in the jurisdiction which otherwise supervises the operation of wills.
Whilst this may seem contrary to my view stated under the first part of Question W21 above (that an 'anti-ademption' application can be made, with respect to a particular asset to either VCAT or Supreme Court), it is a different type of application. Any application made in relation to the destination of proceeds, after the testator's death ought to be made to the Supreme Court. An 'anti-ademption' application (the first part of W21) will affect the destination of the proceeds of the particular 'adeemed' asset. An application for adjustment of the effect of the gifts on the basis of 'unjust disadvantage' may have the effect of diminishing the gifts which would otherwise flow to the other beneficiaries, quite separate from the 'adeemed' gift. These are potentially weighty decisions and ought to be kept in the court with supervisory jurisdiction over wills.

I agree with the comment in the Consultation Paper that the same power should apply where an asset is converted by an administrator as an attorney.

I agree with the comment in the Consultation Paper that such a power will better ensure that attorneys and administrators use the assets of the testator as they are best used, rather than choosing between assets in a way which preserves their own gift under a will.

Submission
An exception should apply to acts of attorneys, as well as administrators, where the donor is incapable.

(a) A beneficiary (where an asset has been disposed of 'without capacity') should have:-
   - protection of a similar type as s 53 *Guardianship and Administration* Act.
   - The ability to apply to the court for an 'anti-ademption' declaration as to the proceeds of the 'disposed-of' asset
   - The ability to apply to the court for orders adjusting the distribution under the will or to prevent 'unjust disproportionate disadvantage'

(b) The exception should apply where the act was done where the done had no capacity

(c) There should be basic accounting required of the attorney

Should an attorney be able to access a testator's will to avoid ademption.(Question W22)

I strongly oppose the ability of an attorney to access that person's will. And attorney should be driven only by making decisions in the donor's best interests. They should not be, nor seen to be, influenced by the passing of assets under the will.

The members of the bar that I spoke to held the same strong view.

EXECUTORS CONSULTATION PAPER
Executors

Question E1 - should the Supreme Court have the power to review amounts charged by executors? If so should it extend beyond commission to disbursements, fees or other amounts. On what basis can a review be commenced (e.g. by the court)? Time limit for review? Costs of such a review if the applicant has applied vexatiously? Costs of executor if they are found to have overcharged? Should review provisions extend to professional trustees/trustee companies

I have also experienced cases where solicitor –executors appear to have overcharged or been unaccountable to beneficiaries for their conduct and their charges.
My general experience is that most experienced practitioners in this jurisdiction are competent and do not overcharge. However, it is not uncommon for there to be problems.

In my view, I agree with the proposed amendment to insert a new s 65A *Administration and Probate Act* , referred to at paragraph 2.83 of the consultation paper.

Question E2 - Should solicitor executors be required to instruct another law practice to act?

In my view, no, but there should be guidelines surrounding them acting.

There are many good and competent solicitors who are willing to act as executors, engage their own firms and charge either PRO or 'normal market' rates. Those solicitors, who were obviously known to the testator who chose them, ought to be permitted to do what the testator likely expected them to do, and to carry out the administration using their own firm[20].

However, the solicitor-executor is in a position of conflict regarding their own fees. They are both practitioner and client, and beneficiaries do not presently have the realistic ability to have the solicitor-executor's fees independently assessed.

Whilst the consent of the testator for the solicitor to act and obtain commission solves some problems, it overlooks the fact that executors are really administering for the benefit of the living rather than the dead. It is the consent of the beneficiaries which ought to matter.

In my view a solicitor – executor who elects to engage his or her own firm should be required to do so:-

- at the PRO; or
- on some equivalent set basis (such as where it can be shown that the fees charged are competitive with similar firms); or

[20] In the matter of *Scmulewicz v Recht*, the testator anticipated that there would be disharmony and appointed his longstanding solicitor, and longstanding account, both of whom had carried out work for him over a period of years, as executors. One assumes he was familiar with their charge out rates and their style, and agreed to both. The solicitor was not able to produce a rule 10 certificate and was deprived of his commission (although he later made application to the court for commission, which application was settled with the beneficiaries). A testator who has familiarity with, and chooses, their long-standing solicitor, should not be deprived of being able to make that choice, so long as it is on a fully informed basis.

- the specific consent of the deceased was obtained to a particular rate of charging (which must be accompanied by a form of independent legal advice, as I comment below); or
- the consent of the beneficiaries is obtained to a specific level of charging (with a requirement that the beneficiaries are told they ought to have their own legal advice, it being a matter for them whether they choose to do so)

One of the issues which arises is whether the solicitor-executor has engaged their own firm at an hourly rate 'over the market' (and over 'scale'). Thus, a taxation on (what was called) a solicitor-client basis or an indemnity basis (the usual rule for a trustee being paid from a fund), may not moderate the 'over-market' bill. Therefore, although the right to a taxation ought to be available to beneficiaries, it is not alone the solution.

Taxation/review
In my view, a residuary beneficiary of an estate ought to have the right to require that the solicitor's /firm's bills be assessed or taxed, on the same basis as if they were the client.

Information to testator/beneficiary

The existing Rule 10 certificate should be maintained. I have no real view as to its inclusion in the *Wills Act* (Question E4) as I believe the problems are more in the realms of education than enforcement.
In my view the Rule 10 certificate should contain an additional clause which states that, unless expressly authorised to do so, a solicitor-executor cannot charge both legal costs and commission for the same work, and that the Supreme Court would not ordinarily allow it. In my view that serves as information for both the testator and the solicitor-executor.

(**Question E6**) Beneficiary being asked to consent to commission - I agree with the view that, in order to obtain 'informed consent' from any beneficiary to the payment of commission, information should be provide of the type referred to in *Walker v D'Allesandro* (para 2.107 Consultation paper).
This should not be confined to solicitor- executors
It should not go so far as to require a beneficiary to obtain independent legal advice. However, a beneficiary should be given information and told that it is their right to obtain advice. Many family and other situations will have executors and beneficiaries working co-operatively and a requirement that beneficiaries must see a lawyer of their own will impose an additional and often unnecessary costs, and potentially create discomfort between them

(**Question E3**) Testator being asked to consent to solicitor-executor charging costs and/or commission – where the testator is being asked to consent to the solicitor executor charging costs on anything other than the PRO, they should be given information which:-
- sets out the difference between the intended costs charge and the PRO
- tells the testator they have the right to obtain independent advice
- tells the testator (as per Rule 10) that they have the right to appoint a non solicitor-executor or to require another firm to act.

Where the testator is being asked to consent to commission, Rule 10 should continue to apply.

Where the testator is being asked to consent to commission at a particular rate, they should be given information which:-

- sets out the available range (eg: 'up to 5%');
- sets out the 'realistic' range (eg: in the administration of a 'normal' estate it would not be common to get more than something in the range of 1 to 2.5%, which would normally be offset by any legal fees charged" **noting that such a statement would be very difficult to craft accurately or in a way which gave the testator a real idea of the possible range of outcomes.);
- says that the court would ordinarily require the consent of beneficiaries or the approval of the court to any particular rate of commission;
- says that costs and commission are not ordinarily allowed for the same work
- says that
- Tells the testator that the Court may well override it in any event;
- Tells the testator that they should get independent legal advice.

The power of the Court under any potential 'section 65A' should not be ousted by the existence of the testator's consent. Circumstances may change or the solicitor-executor may conduct themselves in a way not anticipated by the testator. It is arguable that a presumption should apply that where the solicitor-executor has obtained the informed consent of the testator, the beneficiaries bear the onus of showing that the costs/commission charged are not proper.

Again, it should not be necessary for legal advice to actually be obtained. Obviously a wise solicitor who wanted to protect against challenge, would require independent legal advice.

Other matters

The same rules as submitted above ought to apply to accountants or other professionals

There is a need to clarify whether the allowable commission rates should take into account the payment of GST.

INTESTACY CONSULTATION PAPER

I do not have strong views about most of the topics under this heading.
I have had general views , but no particular concerns, expressed to me by other members of the Bar.

Question I1: Limit on next of kin
I do not see any reason to confine the list of statutory next of kin. It is, and should remain, a rare occasion that there are no family members found, resulting in funds passing *bona vacantia*.

I do not hold a strong view about this matter.

Question I2: Sh**ould there be a survivorship requirement of 30 days**
It would be appropriate to have such a requirement. Whilst I do not have a strong view, it would best ensure that the deceased's person assets remain in their own bloodline, and avoid the 'quirk' of passing to a family member and in quick succession then passing to that person's family member.
The 'quirk' would be most notable in circumstances where a person leaves a spouse or domestic partner who is not the parent of their own children. That spouse's family would benefit, rather that the deceased's own blood line.
It is entirely consistent with s 39 of the *Wills Act*. That section is not often called into operation, but on the few occasions I have seen it referred to, it appears to work appropriately.

Question I3, I4: The partner's legacy

Statutory legacy
The partner's statutory legacy should be increased. The present sum is inadequate.
It is not uncommon that Family Provision proceedings are issued by a surviving spouse solely for the purpose of ensuring secure accommodation, where the children are too young to provide their consent. A spouse ought to be entitled to secure home as a matter of priority in an estate.

The statutory legacy should be increased to the amount required to modestly house oneself.

It would appear to be appropriate to link it with the CPI , or perhaps a similar measure relating to the cost of housing.
Alternately, the statutory legacy should be indexed, or reviewed every year or second year.

The proposed figure of $350,000 appears to be an appropriate level, if one assumes that the spouse is able to pay a modest mortgage. Having said that, the choice of any figure is arbitrary without some consideration of the average value of a house.

These views were generally supported by the members of the Bar with whom I spoke.

Share of residue
Whether the partner's share of the remainder should be increased to one half (or some other share) is tied to the size of the partner's legacy. The more that the partner is looked after, the smaller their need for provision from the residue.

It would be difficult to answer this question without having some idea of the 'average' size of an estate as to whether the 'average' estate could provide a balance between the needs and obligations of the spouse and the children.

I recognise that any 'default' scheme is never going to perfectly meet the needs and obligations to family members.

Question I5, I6: Multiple partners and whether they should all receive a statutory legacy

I do not have strong views and I recognise this is a matter which would arise extremely rarely.

Having said that, the 'sliding scale' would appear to have some merit as a matter of logic.

The most common situation I see arising is that of a person with a marriage spouse, where cohabitation has ended, perhaps some time ago, but they have never formally divorced. This is certainly the most common cause that I see of 'unexpected' distributions on intestacy. By and large, a person in that situation would most likely not intend for their estate to pass to the estranged spouse. They may have even come to some arrangement of their financial affairs at the time.

In such a situation, providing both 'spouse' and 'domestic partner' with a statutory legacy would likely work an injustice.

The 'sliding scale' at least provides that the 'partner' at the date of death is entitled, and entitled to an increasing share according to the length of the relationship. I recognise that a short terms relationship should have a 'lower value' (putting it crudely and somewhat apologetically)

I can only speak anecdotally, and I recognise the concern expressed that the 'sliding scale' overly favours the unregistered domestic partner. I have had almost no encounters with families where there is a simultaneous spouse and domestic partner or two domestic partners, both in active relationships with the deceased. By and large the former relationship has finished by the time of the 'final' relationship.

Permitting the parties to enter into a distribution agreement or distribution order appears to have some merit.

Question I7: Right to acquire other assets

It would be appropriate for the partner's right to elect to acquire assets to be extended to other assets.

Question I8: Entitlement of deceased's children

This question must be considered together with the size of the 'partner's legacy'. If the partner's legacy is sufficiently large, the family home will not need to be sold, obviating the obvious criticism of the present situation.
I have no strong views about this matter.

Question I9: 'per stirpes' or 'per capita' distribution.

I do have a reasonably strong view about this matter.

The premise of the suggested change appears to be that the community would broadly support a change to ‘per capita’. I do not agree. I can only speak anecdotally, but in my observation the family members who consult me for advice would be equally divided in their views..

There are equally strong emotions expressed when a grandchild feels that they haven’t received their parent’s share (“I only get the same as my cousins but its not my fault that there are five in their family and only one in mine”) as when they feel that they should all get the same.

My personal view is that the *per stirpes* distribution best reflects our general notion of the way private property is passed down – that it primarily tends to pass down the family branches. Whilst the days of the ‘fee tail’ are long gone, the general desire that property passes to the child and onward to their children, has a long history in property law.

Submission
The present system of *per stirpes* distribution is appropriate and does not need change.

Question I10 and I11. Should hotchpot be abolished or amended

I do not have strong views about this question.

Such views as I have are these:-

- Hotchpot should be retained and modernised in its language
- It should extend beyond children and representatives
- if hotchpot is retained and extended, the requirement to take into account benefits received under a will on partial intestacy should be similarly extended

A further matter not raised in the reference, but which occasionally causes litigation -

- at what point in time should be hotpot benefits be valued. An ‘advance‘ made many years ago will have quite a different value in real terms than one made a short time ago. There are differences of view about the point in time a ‘hotchpot’ is valued, and on what basis. A solution is to expressly provide that advances made in years gone past be valued at the date of death according to their actual value at the date of death.

Question I14, I15 - I have no views about the distribution of indigenous estates.

DEBTS CONSULTATION PAPER

I have no submission relating to these matters

SMALL ESTATES CONSULTATION PAPER

I have no submission relating to these matters.

I wish to note that my clients who have had assistance from the Office of the Registrar of Probates have universally praised the assistance given to them.

OTHER MATTERS

One matter not covered by the Consultation papers is the question of Forfeiture.

Forfeiture takes place where a beneficiary kills the testator. There is a reasonably well-settled body of law surrounding this issue. In short, where a beneficiary has caused the death of the testator, the share of that person (and, as a result, any person who claims though them) is forfeited. That occurs whether the person is found guilty of murder, or not guilty by reason of insanity.
There is debate, however, as to whether there are times when forfeiture works an injustice, when the killing was committed by someone of unsound mind, or in some other way by a person found guilty not of murder but of manslaughter.

Judicial comment was made by Justice Gillard in 1997 when hearing the application in *re Soukup*[21] that the Attorney general should give some thought to introducing an Act along the lines of the UK *Forfeiture Act.*

In NSW a *Forfeiture Act* has been introduced, with the intent of ensuring injustice does not arise.

I acknowledge that this is a matter about which there may be some community feeling. However, it would seem appropriate to vest discretion in the Court to permit a court to override the forfeiture for the person of unsound mind, or for otherwise innocent family members who may miss their inheritance by reason of the acts of another.

I am happy to discuss any of these matters or have any further input the Commission may wish.

Carolyn Sparke S.C.
Owen Dixon Chambers West
22 April 2013

[21] *In the estate of Soukup; application by State Trustees Ltd [1997] upreported, VSC per Gillard J, BC9705280*