SUBMISSION TO THE VICTORIAN LAW REFORM COMMISSSION

GENERAL COMMENTS AND POINTS ON VICTORIAN SUCCESSION LAWS

By
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April 2013

The six areas of succession law, each covered by an individual consultation paper, are:

Debts; Executors; Family Provision; Intestacy; Small Estates and Wills.

INTRODUCTION

As an Australian national, with a university education (Monash, Victoria, 1965-1969, BA (Hons) and a Diploma of Education), who lives in the UK, I have a personal and family interest in succession laws. My comments on the papers produced as part of the review of Victoria's succession laws, in conjunction with the Australian uniform succession laws project, are from two major perspectives:

1 my experiences, as an Australian living overseas, with aspects of probate and administration of an estate during late 2009 and in 2010, particularly the problems encountered with a firm of solicitors, an outline of which is in a separate paper.

2 the issues raised for Australians resident overseas (of which there are increasing numbers), and who may/will have to deal with succession laws, wills and probate in Australia, and vice versa for those in Australia who have family, joint executors, and/or beneficiaries living overseas.

I have concentrated on commenting on the consultation papers concerning Executors and Wills in particular and less so on those covering Debts, intestacy and Small Estates. However, I have read all six papers, some far more comprehensively than others. In endeavouring to understand the current law, the background to the Victorian review, and the six separate papers, I have consulted the four volumes of the Queensland Law Reform Commission Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General, April 2009. It was suggested that I do so in an email communication dated 5 December 2010 from Professor Neil Rees, then Victorian Chairperson. I have scanned all four volumes, but have only read in more detail those areas of most interest and relevance to me. In particular these are Chapter 4 in Volume 1: Appointment of personal representatives and the summary of recommendations for these in Chapter 4, Volume 4.

After reading these documents and the recommendations for reform, queries remain as to the way the law operates/will operate and the potential situation for executors, due to a lack of clarity and simplicity. Regarding this, on Pg 45 of the above named Report it states that 'the model provision should be framed in more modern language', with an example in relation to testator and executor (4.21). In fact the new Uniform Succession Laws and model provision

should be written in modern, simple language throughout. This is also important for translating into other languages for ethnic minority groups.

One over riding point is that, for ordinary citizens, especially when appointed and acting as executors, all aspects of succession law need to be as simple, direct and easy to understand as possible. One example of likely problems is that of understanding the granting of probate to one executor and reserving leave to an-other/s to apply, especially if residing 'outside of the jurisdiction' (Qld LRC, *Admin of Estates of Deceased Persons....*, Report No 65, April 2009, Vol 1, Chap 4, p.40). It is also stated that the court may 'reserve leave' to the other executor/s 'to apply at a future time' so they can 'make application subsequently', and outlines existing legislative provisions. (Ibid, pp.40-41) However, it is not explained at what future time, within what time period, in what capacity or circumstances, nor why they would want to do this. Who is responsible for facilitating/prompting the process and how?

In the writer's own experience on expressing a request to take out the grant, as 'double probate', the solicitor concerned stated that there was no point because the distribution of assets was about to be completed and the estate finalised. On pg 42 it states that the National Committee 'considers that the inclusion of such a provision [about reserving leave] may be of assistance to lay executors' (emphasis added) and hence should be included in the model legislation. This is important and sensible. However, it must all be explained to lay executors in clear, understandable terms, including the queries above about timing, time periods and the reasons for applying for probate at a later time. How will/can the law ensure that this is done? Is 'leave reserved' fully explained in all respects any where in any of the documents concerning reform of the succession laws?

Furthermore, it should be mandatory for all legal practitioners to explain any and all aspects of succession law that are relevant to will makers, executors and beneficiaries, without them having to ask or needing to know to ask eg about the implications of only one executor out of two or more applying for probate. Since some solicitors may/will possibly try to hide behind the law, it is laudable that the VLRC, similar commissions in other states/territories, and the National Committee are undertaking this review and standardisation of the succession laws. How can it be ensured that all legal practitioners advise clients fully and appropriately?

Section 18 of the Administration and Probate Act, Victoria, 1958

A prime area of concern is that of Section 18 of the 1958 Act, including its rules regarding executors applying for probate. The implications of these for joint executors can be adverse and potentially very serious unless they, and the rules, are brought to the attention of, and fully explained, to all executors. (see example of experiences and implications in separate paper).

At the very least it is suggested that Section 18 be clearly explained on the Supreme Court website (if it isn't already). Surely also its terms of reference should be reconsidered and revised? So many Australians now live abroad and those who have relocated permanently are having to deal with probate, estate administration and bereavement issues from an often considerable distance. If this is in conjunction with counterparts/executors/beneficiaries in Australia, many problems can arise under the terms of Section 18.

It is very important that any Australian appointed as an executor, whether living in Australia or overseas, is made fully aware of Section 18, its counterpart in other states and territories, and of any new such Section when Uniform Succession Laws are incorporated. Otherwise rights as an executor can be unwittingly negated or lost. How can the legal process and legal representatives ensure that awareness and understanding are achieved?

Solicitors and legal representatives

How do Australians seeking to make a will or appointed as executors and/or beneficiaries, especially if living overseas, obtain advice about probate and administration? How do they choose a solicitor? How can they know whether a solicitor/legal firm in Australia is reliable, honest and trustworthy? How can they be assured that they will be fully and properly informed of all the rules and regulations about writing a will (to do with property, possessions, assets and so on, in Australia and/or elsewhere), or being an executor and obtaining probate from afar?

What Code of Practice and Regulations are there for solicitors et al? How, and in what ways, do these make clear the information and details that should be brought to the attention of all clients in their roles as executors? Do they also act as benchmarks against which the advice, actions and achievements of solicitors can be judged and measured? How does any potential client know that a solicitor will follow, and/or abide by, any Code of Practice? Is the Code in its current form sufficiently strong? If it does not act as a benchmark, should it? Is it required, good practice for a copy to be given to clients at the beginning of a probate process? Presumably all legal representatives also have a duty of care to all clients? How can clients be made aware of this? What can a client do if s/he believes the duty of care has not been followed? And especially without having to take (potentially) costly action against the legal representative?

How does an Australian living overseas, appointed as an executor and/or beneficiary of an Australian (family) will, obtain specialist legal advice about probate and all related aspects of succession law? How does someone know how to select and instruct a legal representative? What guidance is available? Then how do they know if they have been fully and properly informed and advised of all the aspects and implications of being an executor and of applying for probate? These are knowledge and logistical issues that are likely to increase.

If a client experiences major problems with a solicitor and firm (as the writer did) the outcomes can be legally, financially and personally considerable. How can redress and justice be obtained? How will the Commissioners ensure that succession and probate law in Victoria, and for consistency throughout Australia, requires solicitors to follow proper procedures in fully advising and assisting all clients to apply for probate and to distribute an estate, while faithfully achieving the terms of a will and the intentions of the will maker? If clients have problems in a professional relationship with legal representatives will it be mandatory for them to be informed of what to do and how to make a complaint? Eg to the Law Commissioner?

To give an example: the problems personally encountered primarily concerned the advice that was and was not given by a solicitor and the outcomes thus resulting. The problems with the firm and the solicitor related to a major clause to do with executors in the will concerned being negated under the terms of Section 18 of the Probate Act, Victoria 1958. Once this

became clear, it was necessary to undertake research from the UK, initially through the Probate Office in Melbourne, and subsequently by finding a specialist solicitor to advise and assist further.

On hearing about the problems, a senior probate officer commented: 'you have been ill advised'. The advice was also incomplete and/or inappropriate. (see summary in separate paper). The solicitor and firm concerned were basically responsible for the problems and the unacceptable outcomes, which they endeavoured to deny, including claiming that the client was to blame.

Subsequent advice about taking action and seeking redress against those involved suggested two main channels:

1 seeking compensation for a breach of duty (negligence) or a breach of retainer - which has potentially significant cost consequences, is only concerned with loss, and is unlikely to be claimable for negative effects on personal relationships.

2 making a formal complaint to the Legal Services Commissioner - without costs.

No client, especially when already dealing with bereavement, apart from the responsibilities of being an executor, should find themselves in such a position due to the solicitors instructed. In what ways will the reform of Succession, Probate and Wills Law in Victoria, and of making such law similar and consistent nationally, either prevent, and/or assist and guide clients in the event of, such experiences?

How can a client check that the advice being given is sensible, appropriate and in their best interests? For instance, if a Code of Practice requires a legal representative to minimise costs to the estate - eg by having only one executor apply for probate with leave reserved to another living overseas, for purposes of efficiency, speed and lower charges - how can the requirements of a will maker that all executors be joint and equal, be achieved? If the advice given to the writer regarding 'leave reserved' aimed to avoid increasing costs to the estate, then it was an inappropriate interpretation and failed in terms of full disclosure. What governs the client/solicitor relationship?

In his email, Professor Rees said that one other suggestion had been received during 2010 'relating to the difficulties associated with decision making when there are joint executors' and thanked the writer 'for raising this important issue with us.' Since executors are such a fundamentally important factor in succession law, then all will makers need to be informed of this and of the implications of deciding who and how many to appoint, especially if they choose family members and/or someone living overseas. Will makers also need to be advised about the importance of including in their wills everything that they want to be distributed in certain ways and to certain people and/or organisations eg as gifts or items, to help prevent or at least limit arguments and disagreements between executors and/or beneficiaries. Legal representatives facilitating wills should be trained to drive home the point to will makers that nothing should be left to chance or ambiguous interpretation. This will assist in preventing unnecessary problems in executing the will.

Since it is a challenge to get many people to write a will at all, clearly a basic will is better than none. However, with improved education about the importance of a will, simple guidelines on how to write them, appropriate support and advice from responsible legal

representatives for Australians at home and overseas, together with the necessary reforms now being undertaken, then writing detailed, successful wills that satisfy the will maker and everyone else involved, should be more achievable.

Victorian Law Reform Commission, VLRC
Succession Laws
Consultation Papers

WILLS - comments and answers by Janice N Brownfoot, April 2013

General

By questions - since many of these as posed in yes/no format, comments have been added to some

WITNESSING WILLS AND UNDUE INFLUENCE

Requirements for witnessing a will

W1
Special provisions? Yes.
Which will makers? Anyone who might require them. Definitely those over 80 if they have any physical and/or mental decline. However, this should be properly assessed as many over 80s are still highly compos mentis and won't need special provisions. Others might be people with dementia, of any age - eg early onset. Similarly special provisions should also be available for any others of any age who might be vulnerable or incapacitated in some way eg accident victims, people admitted to hospital because of illness, who are not expected to live but are able to communicate, and those with potentially terminal illnesses such as cancer. Younger people increasingly have significant assets, but many are developing cancer and may need help against undue influence in will making.

What special provisions? Those outlined under points 2.15 to 2.17. Regarding the disadvantages noted: why don't all Australian jurisdictions introduce the same reforms? The provisions will need to be drawn up in such a way that they also accommodate home made wills. If there is an Australian charity similar to the Citizens Advice Bureau, CAB, in the UK, it could provide advice and guidance in will making and perhaps have trained volunteers who could be witnesses, for a small charge payable to the charity. Community Information and Support Victoria apparently does not play a CAB role, but acts as a member group for various agencies.

Education is needed for any one who needs to make a will. Perhaps this could start in schools. Presumably Australian charities concerned with senior citizens, people with dread diseases, and other vulnerable people could provide guidance about making wills and the importance of this. Many people don't make wills because of ignorance about how to do so and/or because they are superstitious that if they make a will they will then die, and/or because they have no idea how draconian the rules of intestacy can be. Many would undoubtedly be shocked at how these legal, statutory and legislative rules have the power to decide what happens to their assets and possessions, as well as the opportunities intestacy gives to 'heir hunter' companies.

W2
Witnesses understanding that the document is a will? Yes. It is a serious matter and everyone should understand this, and why, including people with poor or little English. At least one witness should be someone authorised and/or an independent notary or solicitor. What about witnesses and undue influence in home made wills?

How would all these points apply to Australians living overseas, but with assets of various kinds in Australia, who need to draw up a will in whichever country they reside in?

The witness beneficiary rule

W3
Should Victoria reintroduce it? This is clearly a complex issue with clear pros and cons. On balance, from the evidence presented, I would agree with the recommendation of the National Committee.
The question also arises: how can innocent witnesses be protected to ensure that they receive what the will maker intended them to as beneficiaries? Eg especially where family members are both witnesses and beneficiaries?

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

W4
Medical capacity assessment? Yes, generally, but perhaps not in all cases. It partly depends who is exerting any undue influence and in what other ways this can be countered.

a) what circumstances? where there is any possibility that a client's intellectual capacity is compromised eg early onset dementia; effects of a stroke. Age might be a useful indicator but could also be a blunt tool. Also points made in W1 above. Presumably this all has to be tied up with 'testamentary capacity'? What about those making their wills at home?

b) any disadvantages? Extra costs. If a client was found to be medically incapacitated, who would then decide about drafting their will, its contents and instructions?

W5
Yes, definitely. It would partly depend on the relationship between the persons involved.

W6
Guidelines for professionals as will makers: Yes, definitely, as in other jurisdictions, by both law societies/institutes and seniors rights organisations.

What the guidelines should contain? This partly depends on where the undue influence is coming from eg family members? Professional carers? The legal representative? It

should be made clear what 'undue influence' might involve, with examples. The guidelines should contain all the points outlined in 2.40 and 2.41.

W7
Other ways to protect from undue influence in will making?

- educate all non legal advisers to will makers about this.
- have at least one independent person eg an advocate from a suitable charity, and a family member with the will maker when the will is being drafted.
- have the legal body overseeing the professional conduct solicitors work with the Law Society, Seniors Rights Victoria, etc in drawing up the guidelines and test them before finalizing.
- have the Law Society articulate measures to ensure that professionals making wills have no pecuniary interest in the client's estate and/or affairs. All wills should be checked for this independently. If they do, then it should be doubly checked with the will maker and an independent advocate/adviser that it is the will maker's intention.
- set up an appropriate Ombudsman.

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

W8
Changes to testamentary capacity laws necessary? Yes. With the proviso as to how can it ever be known whether a new will fully and truthfully reflects the will maker's true wishes? Some times it will be a case of the nearest possible.
If the common law test on a person resulted in them being considered not to have the requisite soundness of mind, especially by a specialist or general medical practitioner, would this mean that they could not make a will? Would the person then have to die intestate?

If a person's right to make a will should be upheld whenever possible, then the 'lucid interval' approach needs to be extended, including to accident victims in hospital and the effects on the mind of treatment for cancer eg 'chemo brain' and radiotherapy.
Also many people will not have a 'proper understanding' of the value of assets.

Accordingly, various practitioners should definitely work together. Interdisciplinary education should be emphasized, not just encouraged. The law needs to take into account all the issues and points made in 2.53 (p26) and be far more nuanced regarding true intentions, testamentary capacity, and who are vulnerable as will makers.

W9
Changes needed re approval, etc? Yes - to cover all the circumstances given in 2.58, as well as any others (of which no doubt there are examples).

W10
Changes needed re fraud and/or forgery? Yes - same comments as above and various requirements could be introduced to limit or even prevent such things.

W11
Apply equitable doctrine of 'undue influence'? Yes, it would seem so. However, if there have been so few proven cases of 'undue influence' since the 1800s, why is there such concern about it? Or has such influence been growing and the law is now out of step with the current situation?

A presumption of undue influence from particular relationships may be totally unfair and inapplicable. So it would be key that the relationship was proven to be one of dominance and dependence. However, some people are quite comfortable with being dominated. The doctrine would need applying carefully and sensitively. But on balance it is probably preferable to the current legal situation.

W12
Yes, along the lines suggested about changing the definition of 'undue influence'.

STATUTORY WILLS

Determining the intentions of the incapacitated person

W13
Adopting the National Committee's recommendation? Having carefully considered the information provided and points made, No. Victoria's current approach is definitely preferable. So why can't the National Committee adopt Victoria's? Why does Victoria have to adopt the National Committee's? Who in the Court context would interpret a person's intentions, including in nil capacity cases, and on what basis? Although difficulties have not yet arisen in Qld or NT, they might in the future.

Any provision which enables a person to be able to have some sort of will, as close as possible to their likely intentions, is to be encouraged (pp my comments earlier about incapacitated people). It would also help to limit the problems around intestacy, including for family members especially. It further raises the issue about the role/s of 'heir hunters' in situations of intestacy and in identifying who the legal heirs are/should be, although these may not be who the deceased person would have wanted to inherit.

Involvement of the incapacitated person in the hearing

W14
Separate representation? Yes. The NSW and ACT legislation is clearly preferable. And the rights it gives justify any increased costs and time. However, why can't the provision be both, rather than either/or?

Accessibility of the statutory will process

W15
Re the Statutory Will procedure: Educate people about it.

If it is known that every year the scheme is not being used by thousands of people in Victoria, then what are the reasons for this - from the point of view of the people lacking capacity and/or their carers? Has any research been done into this?
Why is it so costly to apply for a statutory will, especially if the process is not particularly difficult, and what can be done to reduce costs?

Whether for statutory wills, or any other, what information and guidance is there for will makers in Victoria and especially that which is simple to follow and easy to obtain? Do libraries and/or relevant charities have such details?

If many members of the legal and/or any other relevant profession are not informed about statutory wills, then how would/can clients know what is possible or the best approach? Clients rely on solicitors or other legal representatives to have all the necessary facts, knowledge and suggestions, to provide such information, and to discuss it.

Re the two stage process: whether costs will put someone off or not depends on why they are applying in the first place, and what they want to gain eg an artwork, a significant family heirloom, or some important family/other papers. A person may have plenty of money to be able to pay.

What is significant about VCAT members not having expertise in succession law? How might this affect their ability to decide applications?

a) Yes
b) Yes
c) Yes

W16
Other changes desirable? Probably. Are there any examples which have worked well in other jurisdictions? See various points above.

Determining who pays for the application

W17
Costs provisions? Yes. Costs provisions should be as shown in the points in 3.61, which seem to be quite fair. Some flexibility and discretion are required.
Yes, the legislation should distinguish.
Although no other Australian jurisdiction has costs provisions, might they not continue to develop consistently?

ADEMPTION

The Ademption Rule

W18
The will maker's intentions is the better alternative. Having rebuttable presumptions is sensible. Do they have to be one or the other?

a) Yes
b) Yes - with provisos or caveats

Are a) and b) one or the other? Or can both operate at once? If a choice has to be made, then b) is preferable.

Query: are people aware of the pros and cons of making wills themselves without a solicitor or legal specialist? If legal costs are a concern, does Victoria and/or any other Australian jurisdiction have the kind of 'Wills Weeks' that legal firms run in the UK, where solicitors donate to a charity the cost of making a will for a client?

With the identity approach: if donations are made to charities and the gift, or part of it, is adeemed, how can the charity be prevented from contesting a will? Or what if a gift in a will was to a charity as an item, and someone has sold it without the will maker understanding this because they had eg developed dementia?

Even sentimental items may have economic value, and possibly even be very valuable eg letters written by, or photographs of, a significant historical person.

W19
Effects of changes re a) cost and time? probably increase both
b) better reflect what the will maker intended or wanted.

Acts by administrators appointed by the Victorian Civil and Administrative Tribunal

W20
Not applicable to the writer

Acts by persons holding an enduring power of attorney

W21
Exception to the ademption rule be in legislation? Yes

a) the second alternative 'an order'....
b) Should apply to 'any actions'
c) Accounting obligations - should be as outlined in 4.50 re Victoria

Query: where attorneys and beneficiaries are the children of the will maker, how would ademption work and what protection of rights would there be where one child was

living overseas, and was named as an executor and beneficiary, but only the child in Australia/Victoria had power of attorney?

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

W22
Possibly - it partly depends who they are. However, given people's expectation that wills be private documents until death, the alternative in 4.58 seems preferable.
If any access is allowed, it should depend on proof of lack of capacity.
Query: if the attorney did not preserve the donor's specific testamentary wishes (pt 4.56), what implications would there be for the attorney and what comeback for the beneficiaries?
What if two children who both have enduring power of attorney live in different countries and disagree on eg which assets to sell?

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SMALL ESTATES - comments and answers by Janice N Brownfoot, April 2013

General queries and points

By questions - since many of these as posed in yes/no format, comments have been added where relevant/useful

DEFINITION OF A SMALL ESTATE

SE1
Raise the figures for a small estate? Yes, definitely
To what? Since the ownership and value of property, assets, etc have changed dramatically since 1958, then obviously the increase should be pro rata. It is difficult to put a value in figures.
How determined? By considering the known percentage increase in the cost of buying say a three bedroom house in a designated Melbourne suburb in1958 and today

SE2
Determining a SE

a) retain dual threshold? Yes
b) value to be set by 1958 Act or subord. Legislation? Which will be the most flexible? - to allow for increases in the value of assets, inflation, etc.

SE3
Better way to define which estates...? Is it clear to everyone, including lay people, what assets are/can be and what asset profiles are?

ASSISTANCE IN OBTAINING A GRANT OF REPRESENTATION

SE4
The Supreme Court Probate Registry should share responsibility....

SE5
Replace the Registry assistance with court-generated information? No. Have both, not either/or.

SE6
Sliding fee scale re encouraging seeking grants of representation? Yes.

ELECTIONS TO ADMINISTER

SE7
Value? At least $100,000, pp pt 2.68

SE8
Retain the second threshold? Yes and express as a percentage.

SE9
Net or gross value? Net

SE10
Legal practitioners to file? Yes
Advantages? Greater competition; lower costs to the estate; possibly a more personal, less intimidating type of service; better efficiency in succession law and administration of deceased estates; legislative simplicity.

SE11
Requirement to file will with the Court? Yes

SE12
Should advertisements about intention to file be moved from newspapers to Court website? They should be on both. Not everyone has a computer or understands how to use the Web or finds web sites a preferential (or easy) way of obtaining information, especially many older people. However, Australians living overseas need to be able to access information through the web.

SE13
Abandon notice requirements altogether? No

SE14
Stricter procedural safeguards? Yes
Other improvements? Yes

SE15
Elections... valuable in current form? Yes. Therefore they should NOT be abolished.

DEEMED GRANTS

SE16
Value ... under deemed grant? Possibly $75,00-$100,000.

SE17
Second threshold... ? Yes. And be expressed by percentage.

SE18
Threshold figures - net or gross? Net

SE19
Legal practitioners and advertising? Yes.
Possible benefits? A greater choice for people and possibly clearer, simpler explanations of the law.

SE20
More stringent .....safeguards? Yes

SE21
Deemed grants ... valuable function? Possibly, but limited.

INFORMAL ADMINISTRATION

SE22
Expand section 32 of ...1958 Act? Yes

SE23
Transfer real property without a formal grant pp Qld? Yes. Especially where the executors and beneficiaries are the same and there is no disharmony between them
Eg brother and sister.

SE24
Amend Section 33 of ... 1958 Act pp recommendations? Yes

SE25
Should Victorian provision be modified... .? Yes

SE26
How to better clarify informal administrators role? Although the model provision is considerably preferable to the existing Section 33, perhaps it still needs to be explained more clearly, with background information (unless this is included elsewhere).
The format and English used could also be even simpler, with shorter sentences and more punctuation - so a lay person can more easily understand it all.

Where in the model provision are the roles and responsibilities of informal administrators laid out and explained, together with their liabilities and any risks?

SE27
Add a process of administration ... .? Yes, definitely. However, it needs to be clear whether this would be for small estates which are also less complex, or whether it could be for an uncomplicated estate of any size. Point 2.46 states: 'small and less complex estates', but Point 2.148 states: 'uncomplicated or low value estates'.

In the writer's experience the estate concerned was uncomplicated and not complex in any way, but its value was significantly larger than the upper threshold at present and suggested.

SE28

Further safeguards necessary or desirable? Yes. All those listed at 2.150.

The following might also be useful:

1 published guidelines for declarants
2 information advising declarants what to do and/or who to consult if problems arose or there were matters they were unsure about or beyond their skills
3 advise declarants how to assess any creditors and/or other claimants as genuine
4 a pro forma check list showing how to estimate the value of an estate, including the kinds of assets to look for eg shares, bank accounts, jewelry, art work, etc - especially useful for any declarant living overseas.
5 having notice requirements advertised on the Supreme Court website, in a newspaper, and in the Victorian Government Gazette.

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INTESTACY - comments and answers by Janice N Brownfoot, April 2013

General queries and points

By questions - since many of these as posed in yes/no format, comments have been added where relevant

DEFINING AND SETTING A LIMIT ON NEXT OF KIN

I1
Re setting a limit on next of kin....? No. I can't see the justification for this - unless the state is trying to get more money for itself? Wouldn't this potentially cause considerable anger amongst relatives of the deceased person, if an heir hunter/probate research company found that great relatives would be in line to inherit but for the law?
For whose benefit are the justifications given in 2.29? Legal practitioners? With the whole area of succession, inheritance and beneficiaries becoming increasingly global, surely more remote relatives are important considerations?

SURVIVORSHIP

I2
Introduce a survivorship requirement of 30 days....? Probably, especially in relation to the aspect of fairness alluded to in pt 2.33.

ENTITLEMENTS OF THE DECEASED PERSON'S PARTNER OR PARTNERS

I3
Increase statutory legacy to $350,000 ... ? Yes - if there is sufficient in the estate. How would this apply if there are multiple partners/spouses? Eg Moslem or Mormon wives?

I4
Increase partner's share ...to one half....? Yes - but same provisos as noted in I3.

I5
Multiple partners and three alternatives for distribution? With suggestion a), who would decide and on what basis? How would the distribution be agreed? With suggestion c) - if distribution was equally, then there could be an unfair windfall in some cases. So perhaps suggestion b) is the most appropriate. Or if the intention is that

there be a choice between the three alternatives - that is more sensible. But who decides which one would be applied?

I6
This question seems to have a contradiction in it as it mentions 'multiple partners' and then 'both partners'. Hence it is unclear what the question is asking about entitlement. But if the aim is to be fairer, then the recommendations should be followed.
However, some queries arise. How could entitlement be decided equitably? What other factors should determine the legacy for each partner? Is this sufficiently nuanced?
What if there are four Moslem wives?

THE PARTNER'S RIGHT TO ELECT TO ACQUIRE AN INTEREST IN A CERTAIN PROPERTY

I7
Electing to acquire property interests.... ? Yes, with caveats, and especially taking into account the concerns raised in 2.72

ENTITLEMENTS OF THE DECEASED PERSON'S CHILDREN OR ISSUE

I8
Adopt entitlements of children on intestacy? Yes, primarily because of the issue of fairness to all children of the deceased.

***PER STIRPES* OR *PER CAPITA* DISTRIBUTION**

I9
Choice between a) per capita distribution and b) per stirpes distribution....? If a) can't be made national, then preferable to go with b), which seems much fairer and will be consistent.

TAKING BENEFITS INTO ACCOUNT

I10
Should Victoria abolish hotchpot rule? Probably yes, although it is debateable. But will S Australia, NT and ACT do the same?

I11
Or should Victoria retain .... Hotchpot...? Possibly - if abolishing the rule can't be made nationally consistent for all jurisdictions. If kept:
a) this definitely needs doing
b) yes - to all next of kin for fairness and equity.

Why can't the four states which don't have it, all adopt it too?

I12
Abolish re benefits on partial intestacy, etc.... ? Yes - all or nothing.

I13
Extending beyond children of the deceased person, etc .... ? Yes - all or nothing.

INDIGENOUS INTESTATE ESTATES

I14
Statistics re intestacy and indigenous people? No knowledge about this!

I15
More flexible provisions needed pp indigenous, intestate estates? Yes - if they don't yet go as far as those in the NT. Even then they should take into account the points made in 2.121 and 2.122.

Victorian Law Reform Commission, VLRC
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EXECUTORS - comments and answers by Janice N Brownfoot, April 2013

General queries and points

How do people in Australia draw up their own wills without any legal assistance? - are there forms available at eg post offices? How informative and illuminating are these about how to make a will, appoint executors and leave things to beneficiaries?

Does Victoria or any other Australian jurisdiction, have 'Wills Weeks' whereby solicitors draw up wills for clients and give the fees to a charity eg a hospice? This takes away any profit motive in making the will, but typically means the firm takes on new clients for future work.

The full importance of any clause in the Administration and Probate Act should be explained to all executors and/or beneficiaries where they are not likely to have a legal understanding of the Act eg many family members or friends.

How can/do executors find out what their responsibilities and commitments are? And especially if a will maker simply appoints them eg as a family member?
How can/do executors find out what the implications are of them 'renouncing the right to be granted probate before probate is granted.' (p17, 2.3; footnotes 2 and 3)
Pt 2.5, p18 - if solicitors apply on behalf of executors, how can executors be sure they are being advised fully and appropriately?
Pt 2.10 and fn 6, p18 - what happens when an executor who is also a beneficiary, is advised to accept 'leave reserved' status, a solicitor then fails/refuses to advise them how to apply for this, and the executor (and beneficiary) who is awarded the grant of probate then refuses to meet the legitimate costs (and act in the best interests) of the other while they were both acting in an executor capacity (eg 'intermeddling)?
Where in the legislation does it clarify what is meant by 'leave reserved' and how is this to be explained to all executors if not legally trained? Who advises them, when and how?
Pt 2.20, p20 - what if there is a conflict between solicitors, the advice they give to executors, and if they 'failed to fully disclose all relevant facts' to the executors?
Eg surely a solicitor should explain all the pros and cons about all executors applying for probate, or not, and '"cannot assume that the client [as executor] understands all of the ramifications".'

Beneficiaries - to give informed consent - also need to have everything explained to them in full, especially if they are ignorant of the law (however sophisticated and educated they may be), and particularly if they are also executors. How can this be ensured? What if a solicitor fails to give essential information or to suggest taking independent advice? (pts 2.22 to 2.25)

Professional fees, pts 2.43-2.46, p23 - can a solicitor charge fees for dealing with correspondence from a beneficiary (who was advised to accept 'leave reserved' as an executor) which asks for clarification about numerous actions(or lack of them) by the legal firm concerned?

What can a client of a solicitor, especially an executor, do if they experience negligent service, delays, costs/charges far in excess of a quote, and/or any other professional conduct matters?

What can an executor appointed in a will do if they become aware that a legal practitioner has not been transparent and accountable regarding costs, and has also been non-compliant with regard to professional rules? Eg explaining Section 18.

What can a client, who is a named executor, do if s/he instructs a solicitor, is reduced to being a beneficiary only, and the solicitor then refuses to properly advise and assist?

Should all solicitors be duty bound to advise clients about the Legal Services Commissioner? Is this a requirement in the Legal Profession Act 2004?

By questions - since many of these as posed in yes/no format, comments have been added to some

COURT REVIEW OF COSTS AND COMMISSON CHARGED BY EXECUTORS

E1
Yes.

a) it should extend to 'disbursements....any other amounts.'

b) Both, as per the NSW Act, depending on the circumstances. How would it apply if someone dies intestate, and a beneficiary is found who disagrees with the executor/s charges? What is the benchmark for deciding that charges are 'excessive'?

c) No - being advised to do so doesn't mean the will maker will obtain independent advice. How would it be known if they have obtained it? And even if they do so, will they understand what they are told? What if they didn't obtain it and/or understand it? So there should be some other fallback, alternative, or complementary position. It should not be either/or.
How will it be confirmed that the legal practitioner has complied with rule 10?

d) A time limit? - only if it is generous and takes account of various circumstances. Eg beneficiaries living overseas. How would they obtain the information and evidence they would need? What if they were unable, or found it difficult, to obtain full information and details?

e) Possibly. How would these possibilities be decided? Would the grounds be laid down for doing so? But how could an application be any of these if appropriate circumstances and proper conditions are set down clearly?

f) Unsure about this and about 10%. What about executors living overseas?

g) Yes. Isn't a level playing field needed? Shouldn't similar rules apply to all?

SPECIAL RULES FOR LEGAL PRACTITIONERS WHO ACT AS EXECUTORS AND ALSO CARRY OUT LEGAL WORK ON BEHALF OF THE ESTATE

E2
Possibly - so clients can be given a choice. This depends on many aspects and circumstances. How much would it cost? The estate must not be weighed down with numerous costs, especially where there is a simple will.

E3
Improving existing rules re fully informing will makers about possible costs?
Have a check list (as happens in hospitals for surgery and operations), drawn up by the appropriate legal body. Every practitioner/organisation assisting someone to make a will would have a mandatory duty to get the check list filled in, signed and kept on record, with a copy to the will maker, and possibly sent to the relevant legal body also.
Initiate considerable fines if legal practitioners cannot prove that they have fully informed will makers about charges, etc.

Having an independent witness? Yes. But a witness should probably have certain qualifications and skills, and would need to be informed of witness responsibilities.
Would a witness be able to charge for being so?

E4
Yes, almost certainly. But how does this compare with other jurisdictions and how can standardisation be achieved if there are various differences?
The points relating to this question and ensuring informed consent, suggest that the will maker and/or beneficiary might potentially be involved in a considerable amount of work, just to understand the rules.

E5
Re disclosure: yes, definitely. Why would anyone want to employ them under the present rules? Openness and transparency are essential and should be mandatory.
In legislation or professional rules?
The basis - legislation or professional rules? Why can't it be both? Which will ensure greatest transparency and assistance to the will maker in giving informed consent?

E6
Re beneficiaries, commission and legislation: Yes - so that it is mandatory on those responsible for informing beneficiaries. How else would/could the legislation be brought to the attention of beneficiaries? Insisting that beneficiaries seek independent legal advice will cost them more. Whether educated and sophisticated or

unsophisticated, many people find such laws/legislation complex and confusing. Aren't there any alternatives for ensuring minimum information is disclosed and/or making it simpler? Similar comments apply to executors - including family members.

E7
Re charging hourly rates instead of percentages: Yes, almost certainly.
But it depends how these compare. Inevitably, there will be some practitioners who, if they think they will be paid less by having to charge hourly, will claim that they have undertaken more hours than were really necessary. How would/could the hours claimed be checked and confirmed? How would/could the hours be limited to an appropriate number, depending on the size and complexity or simplicity of an estate?

What is most simple and transparent for beneficiaries to understand, as well as for executors if they are family members, and not legally trained?

Re pt 2.111 - how can there be a 'professional scale' for non-professional work?

Should Victoria adopt the model provision proposed: possibly. But it needs to be made simpler to understand for the lay person.

Victorian Law Reform Commission, VLRC
Succession Laws
Consultation Papers

DEBTS - comments and answers by Janice N Brownfoot, April 2013

General queries and points

By questions - since many of these as posed in yes/no format, comments have been added where relevant

SOLVENT ESTATES

D1
Re simplifying order .. of assets? Yes. This seems the most sensible and helps the aim of simplification as in 2.52, p24.

D2
Provision re assets applying assets rateably? Yes, as per the National Committee's recommendations.

CHARGED OR MORTGAGED PROPERTY

D3
Any significant difficulties with Section 40? Apparently there are some, but not enough to warrant abolishing it.

a) abolish as per NT? No
b) be modified? Yes

D4
Should Section 40 set out what will and what will not be? No, as per point 2.97.

D5
Contrary intention by will only? Yes, if it ensures continuity and similarity across jurisdictions.
Have there been any major problems in Victoria or with any of the other states that have alternatives? If not, then what evidence is there that it is controversial?

INSOLVENT ESTATES

D6
Two schemes operating ...? Unsure because I have insufficient specialist knowledge. However, anything which simplifies and clarifies the system and its operation is to be supported and commended, especiallyto assist the lay person.

D7
Define 'insolvent' in 1958 Act? Yes.

D8
Should 1958 Act bind Crown or abolish priority of Crown debts? It should be as recommended by the National Committee in 2.118.

D9
Should 1958 Act .... Import rules of bankruptcy...? Yes, especially as this appears to be the position of the majority of jurisdictions.