

**Submission from Arnold Bloch Leibler
to the Victorian Law Reform Commission**

Succession Laws Consultation Paper - Executors

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Lawyers and Advisers



1 Introduction

- 1.1 This submission has been prepared by Arnold Bloch Leibler in response to the “Succession Laws: Consultation Paper - Executors” released by the Victorian Law Reform Commission in December 2012 (“**Consultation Paper**”).
- 1.2 We commend the Victorian Law Reform Commission on its commitment to reviewing the current Victorian succession laws.
- 1.3 As part of its terms of reference, the Victorian Law Reform Commission has been asked to review and report on whether there should be special rules for legal practitioners who act as executors and also carry out legal work on behalf of the estate, including rules for the charging of costs and commission. This submission focuses solely on this issue.

2 Background

- 2.1 The Consultation Paper identifies a potential conflict of interest when a professional is appointed as executor of an estate, because they have a right to apply to the Court to be paid an executor commission for that role. The potential for conflict may increase when the professional is a legal practitioner and seeks to be paid for legal as well as executorial services performed.
- 2.2 Executors are not automatically entitled to charge for their time and effort in administering a deceased estate. However, executors commonly receive remuneration for their “pain and troubles” in the form of commission, whether by a commission clause validly included in the deceased’s Will, the beneficiaries under the Will consenting to the payment of commission or the executor seeking authorisation for the payment of commission from the Supreme Court.
- 2.3 In addition, executors who are legal practitioners and provide legal services to the estate may charge professional fees for such services.
- 2.4 However, legal practitioner executors may not charge a professional fee and receive commission for the same work. Services undertaken as an executor must be separated from the legal services provided to the estate.
- 2.5 The Consultation Paper raises the issues of excessive and unauthorised charges, real or apparent double dipping (charging both commission and professional fees for

the same services) and failures to comply with professional rules, and suggests that legal practitioners who act as executors should be subject to additional rules to manage any potential conflict of interest.

- 2.6 The Consultation Paper raises, as a possible solution to this problem, the requirement for legal practitioners who act as executors to be prohibited from providing legal services to the estates they are administering. This would result in the separation of payments for executorial services from charges for legal services.

3 Area of concern

- 3.1 We do not agree that legal practitioners who act as executors should be prohibited from providing legal services to the estates they are administering.

- 3.2 Most estates of any size require legal services. We consider that it is not only time and cost effective, but also often in the client's best interests, that if a client chooses a legal practitioner to act as their executor, that legal practitioner (or a member of their firm) be able to carry out legal work on behalf of the client's estate.

Inefficiencies

- 3.3 The concept of prohibiting legal practitioners who act as executors from providing legal services to the estates they are administering creates a number of inefficiencies. Namely, it is neither time nor cost effective.

- 3.4 An estate will bear unnecessary legal fees on the newly engaged law practice becoming familiar with the estate (whilst also paying the legal practitioner executor for their executorial duties). In contrast, if the legal practitioner who is acting as executor and is already familiar with the estate provides these services, legal costs will be reduced.

- 3.5 In addition, by engaging another law practice, the time taken to administer the estate will likely increase as there are more parties involved, which will further increase costs.

Client's choice

- 3.6 However, more importantly, we consider that it should be the client's choice whether the legal practitioner who is appointed as an executor of their estate should also be permitted to carry on the legal work on behalf of that estate.

- 3.7 From our practical experience, we have found that many clients request their legal practitioners to act as executors and further, expect that those legal practitioners (or legal firms of which he or she is a member) will be responsible for the estate's legal work. In addition, they expect that the legal practitioner (or his or her firm) should be remunerated for taking on these responsibilities.
- 3.8 From the client's perspective, having a legal practitioner act not only as an executor, but also carry out legal work on behalf of the estate can be beneficial for the following reasons:
- (a) The legal practitioner who acts as executor "knows" the client, whereas the newly engaged law practice may not. From a practical perspective, the newly engaged law practice may not have the same understanding of the client's assets and the complexity of their estate as the legal practitioner who is acting as executor. Often, even the family members of the deceased do not appreciate the complexities of the estate.
 - (b) In addition, often the legal practitioner executor will be providing legal services to related entities and businesses which are technically not part of the estate, and will understand how the assets and liabilities of the estate interact with these entities and businesses.
 - (c) Many clients do not have an easy decision when faced with choosing an executor. They may have been divorced, have second marriages and families or other complex family situations, and there is no clear choice as to which family member or friend to appoint as executor. In these situations, leaving the estate to be dealt with by family members or friends where conflict may arise is inappropriate. Legal practitioners are often best placed to be neutral and independent, however, through their discussions with the client, they understand the sensitivity of these issues and the particular family dynamics.
 - (d) Often clients either do not want to burden family members or friends with the role of executor, or want the legal practitioner to act alongside the family members or friends as executor, providing necessary support and guidance. Often, the legal practitioner who acts as executor may know these family members or friends, and the family members or friends will be more comfortable cooperating with a legal practitioner that they know the deceased trusted.

- 3.9 Generally, the client has chosen the legal practitioner as executor not only because they understand the assets and intentions of the client, but because they have the legal knowledge, skills and experience to give effect to these intentions and the trust of the client. The client expects and intends that, by appointing them as executor, the legal practitioner will be the one who carries out the legal work on behalf of the estate.
- 3.10 We consider that clients should not be deprived of the advantage of having the lawyer of their choice perform legal work on behalf of their estate simply because a sub-set of practitioners are not complying with their fiduciary duties to their client. We consider that there are preferable solutions to such an issue.

4 Options for reform

- 4.1 As outlined above, the Consultation Paper cites excessive and unauthorised charges, real or apparent double dipping and failures to comply with professional rules as complaints received concerning legal practitioner executors. We consider that these issues can be addressed as follows.

Disclose basis for charging

- 4.2 A conflict may arise where a legal practitioner executor is the sole executor of an estate and engages their law firm to provide legal services to that estate. As a consequence, we consider that sole legal practitioner executors should be required to disclose to beneficiaries the basis of charging the estate for their executorial and legal work. Such a requirement could be inserted into the *Professional Conduct and Practice Rules 2005* (Vic) and be enforceable by the Legal Services Commissioner. This obligation would provide transparency to the charges imposed on the estate by the legal practitioner executor and would go some way towards reducing excessive and unauthorised charges and double dipping. This requirement would also be preferable for clients, as the Legal Services Commissioner is a more efficient option for enforcing the obligations of legal practitioners than an application to the Supreme Court.

Subject to review by the Legal Services Commissioner

- 4.3 Furthermore, we consider that all complaints regarding legal practitioner executors should be capable of being resolved by the Legal Services Commissioner, as this would save clients the time and money involved in taking a matter to the Supreme Court.

- 4.4 As a result of complaints against legal practitioner executors being able to be dealt with more efficiently, legal practitioner executors will be encouraged to comply with their obligations to prevent complaints about their conduct being made.

Charging of commission

- 4.5 As a firm, we would not object to a prohibition on legal practitioner executors being able to claim commission at all. As a matter of course, legal practitioner executors at our firm charge for the legal work undertaken on behalf of the estate, charging our usual professional fees. However, no legal practitioner executor at Arnold Bloch Leibler has (so far as we can recall) ever made a claim for commission.
- 4.6 Such a proposal would address many of the issues raised in the Consultation Paper. There would be no need to distinguish between executorial and legal work and as a result, there would be no double dipping and less opportunity for excessive charges. This would also eliminate the problem of legal practitioner executors failing to inform clients of a charging clause which permits them to claim commission.
- 4.7 However, we understand that a prohibition on legal practitioner executors claiming commission may not be a practical or fair solution for smaller firms or estates where legal practitioner executors are required to spend significant time and effort administering the non-legal aspects of the estate. As a consequence, we consider there to be benefits in the proposal suggested to the Victorian Law Reform Commission that legal practitioner executors should not have the right to apply for a set percentage of the assets of the estate as commission, but should rather only be able to charge an hourly rate for executorial work, in addition to charging for legal work. We consider that this hourly rate for executorial work should be less than the rate charged for legal work. The *Professional Conduct and Practice Rules 2005* (Vic) should require this to be explained to clients at the time the Will is drafted. In conjunction with a requirement to disclose to beneficiaries the basis of charging the estate for executorial and legal work, this would enable payments for executorial services to be clearly separated from payments for legal services. As a result, the practice of double dipping would be reduced, and the risk of excessive charges should also decrease.

Compliance with Rule 10.1

- 4.8 We understand the importance of legal practitioners complying with Rule 10.1 of the *Professional Conduct and Practice Rules 2005* (Vic) ("**Rule**") whenever a legal

practitioner appoints themselves as executor of a Will and includes a clause permitting the charging of commission. We consider that the threat of being found to have engaged in unsatisfactory professional conduct or professional misconduct and the subsequent disciplinary action is a sufficient incentive to comply with this Rule, and that the Rule does not need to be enacted into legislation. However, we consider that, given the apparent lack of awareness among legal practitioners of their obligations to inform will-makers about commission and charging clauses, further promotion of this Rule to legal practitioners may be of some benefit and may result in an increased compliance with the Rule.

- 4.9 We also consider there to be benefits in a similar rule applying to other professionals who act as executors and who charge for professional services carried out on behalf of the estate.

5 Conclusion

- 5.1 Whilst we agree that, in some cases, more transparency is needed in relation to fees charged to estates, the proposal to prohibit legal practitioner executors from providing legal services to the estates they are administering ignores the efficiencies created by such a situation, and in particular, deprives the deceased client of the advantage of having the lawyer of their choice perform legal work on behalf of their estate. We do not consider that such a proposal is in the interests of the legal profession or its clients. Rather, we consider that imposing such a restriction and its resulting inefficiencies on estates, where problems arise in only a minority of cases, is going too far and deprives a person of their testamentary freedom.
- 5.2 However, we see benefits in authorising the Legal Services Commissioner to deal with all complaints regarding legal practitioner executors, requiring legal practitioner executors to only be able to charge an hourly rate for executorial work instead of commission (or no charges for executorial work at all), in addition to being required to disclose to beneficiaries the basis for such charges (if any). We consider that implementing such recommendations may result in a decrease in double dipping and excessive and unauthorised charges and an increase in the compliance by legal practitioner executors with their obligations.

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