VICTORIAN LAW REFORM COMMISSION –SUCCESSION LAWS REVIEW

Consultation Paper – **INTESTACY**

Submission of PATRICIA LISBETH STRACHAN, [redacted]
Retired Accredited Specialist in Wills and Estates (Vic.)

I1 - I am inclined to agree. Intestate estates can appear simple and turn out to be complex. I once had to trace beneficiaries through the nightmares of 5 generations of a family. Illegitimacy and the subsequent marriage of parents were three situations I struck, plus the question of paying a $64.OO entitlement to the grandmother of an orphaned illegitimate baby (the 5th generation), after having obtained the consent of the baby's three uncles who could have claimed that money should be split among them.

I2 - No. Introducing a survivorship requirement of 30 days is absolute nonsense. I can picture a future television "Underbelly" program specialising in crooks bumping off beneficiaries in deceased estates before the 30 days are up. The law in NSW and Tasmania and the Wills Act 1997 (Vic) should be amended accordingly.

The 30 day provision was invented by solicitors as a way of avoiding payment of double death duties and for no other reason. It still has its uses in some Wills such as between husband and wife, but to extend it to all is ridiculous.

After the introduction of that stupid provision in Victoria and NSW, I was careful to inform every client who came to me for preparation of a Will and ask them whether they wanted gifts contained in their Wills to operate immediately upon their death or after the expiration of 30 days after their death. They were unanimous in wanting their gifts to take effect immediately, so I made sure that those ridiculous provisions were negated in every Will – including my own.

I3 – This is hard to answer. It seems to me that the value of the statutory legacy should have some relationship to the value of the shared house and to the value of the whole estate, especially when homes in Melbourne suburbs are selling at astronomical prices. There needs to be some realistic solution.

I4 – I am inclined to think Yes. If the children are young their surviving parent needs access to funds for their support. If they are adult, the needs of the surviving parent should take precedence.

I5 – My view is that the current Victorian legislation should not be altered BUT it seems to me that factors such as age, health, need and ability to work have to be considered.

I6 – Every case is different. I believe that the worst that could happen would be to rush in and change the current Victorian legislation. A lot of points need to be considered carefully.

I7 – No. The partner can argue that assets were joint assets. If they were not joint assets, they may well be ones having sentimental value to the children of a first marriage.

[redacted]

I8 – No. Too complex and can easily operate unfairly.

I9 – Victoria should abolish per capita and stick to per stirpes.

I10 – Yes. If the parent wanted the hotchpot rule to apply, he should have made a Will and included that provision. Benefits received by children in the lifetime of a parent have often been earned many times over. Why should those children be penalised if the parent dies intestate?

I11 – The hotchpot provision should be neither retained nor amended.

I12 – No. The deceased and the solicitor who prepared his Will should have taken care to avoid a partial intestacy. It is so simple to include an alternative provision.

I13 – It should not be retained.

I14 – I do not know. My father (1896-1960) told me there were no indigenous people living in this area in his lifetime. The late Tom Mitchell (one-time Attorney General of Victoria would have known how to answer this question.

I15 I am unable to comment.

. . . . . .

The obvious way to avert intestacy would be to force people to make a Will as soon as they turn 18.

Wills should be simple, the cost should not be excessive, and a Will should be prepared and executed without delay. The public are not being given a present when television commercials offer them free will forms. It reminds me of a poem I read when I was a child. For all I know A.B. Paterson may have written it. The last line was along the lines of, "It's only the whoops of the junior Bar dividing Gilhooley's estate".

I believed and still believe that Justice Hutley was on the right track when he introduced his First Edition of Wills Precedents – but compare it with the later editions!!!

VICTORIAN LAW REFORM COMMISSION – SUCCESSION LAWS REVIEW

Consultation Paper – **WILLS**

Submission of PATRICIA LISBETH STRACHAN, [redacted]
Retired Accredited Specialist in Wills and Estates (Vic.)

W1 - No.

All will-makers should be treated the same. How dare Fiona Burns even hint that because I am over the age of 80 years, somebody has to say I am capable of making a Will!

As for special witnessing provisions, solicitors preparing Wills should have sufficient experience and knowledge to know and discuss with a client whether they should take any precautions, such as having a 3-way discussion with the will-maker's GP. If they don't, they should not be practising.

Only once did a GP tell me he thought a poor pensioner client was not fit to sign a Will in which he left his all to his wife, who owned the house. I left the Will on the GP's desk, suggesting that if on a future occasion he felt differently, he might have it executed and return it to me. He did that and the executed Will was in my hands within days. His children were perfectly happy with the provisions of his Will after he died.

As for notaries witnessing Wills, I believe there are now 2 in this large district, maybe more. I could guarantee that I know more about the capacity of will-makers than they do. It would be easy money for them. Does anyone consider the monetary cost to the will-maker?

I have had Wills witnessed by a medical practitioner, where I thought it wise to take the precaution, but to make it law is like saying that all solicitors don't know how to do their job properly and all will-makers lack capacity.

W2 - No.

If the will-maker doesn't want the witnesses to know the document is a Will, that is his decision and it should be respected by the witnesses and by the law-makers.

W3 - No.

The rule that a witness cannot receive a benefit under a Will should be reinstated. I do not object to the witness receiving a benefit if all the other beneficiaries freely consent, but not otherwise. Abuse is too easy, particularly with people making "lawyers joy" Wills.

W4 – No.

People would not go to solicitors to make their Wills. They would prefer the "lawyers joy" variety.

[redacted]

W5 – No.

Surely a solicitor would be discussing the situation with the client and act in the appropriate manner.

W6 – No.

This leaves me wondering what is behind this question. Surely a solicitor would act in the appropriate manner. Guidelines might be necessary for students. I do not know what other "professionals" make wills in Victoria.

W7 - Solicitors should keep their eyes open, be on the alert, determined to do the best they can for the client.

In my view, solicitors should keep the cost of preparing Wills within the reach of every client, even if the client is a pensioner.

W8 - No.

Solicitors should know their job.

W9 – No.

If there is "lack of knowledge and approval" the problem could lie at the feet of whoever prepared the Will.

W10 – No.

I do not see how any changes could help. The fraud or forgery would probably occur before death and before a solicitor came on the scene. Solicitors should always be on the alert but television advertisements offering "free will forms" don't help.

W11 – Perhaps.

It would probably do no harm in these days when many are greedy. At times I have seen the influence of another solicitor in the provisions of a Will. In one case, a client had made a substantial gift to a certain organisation. It had to have been recommended by a certain solicitor who had died. The client said as much and decided to eliminate that gift. Was that undue influence?

W12 – Maybe it <u>is</u> too narrow.

W13 - To refer to line 11 of point 3.25 of the consultation paper – "in the best interests of the incapacitated person". Who really knows what are the best interests of the incapacitated person. I would prefer to see the assets of the incapacitated person used to make his/her life as good as possible.

[redacted]

I believe Victoria should not adopt the National Committee's recommended guiding principle and should eliminate Part 3 of the Wills Act 1997. There is always Part IV of the Administration and Probate Act, 1958.

I do not like either the Victorian law or the National Committee's suggested legislation. Perhaps it would be better, provided the incapacitated person has no dependants, for the estate to pass to the Crown, to be used for researching the cause of the disability or positively helping persons with such disability. Genuine carers don't look for reward.

W14 – That sounds sensible.

W15 – By making it less expensive yet keeping it out of the hands of the Supreme Court and VCAT. Maybe the answer is to have such matters handled by a Master of the Supreme Court, without the need for expensive representation.

W16 – I have already commented at **W13**.

W17 – For the poor, applications should be free. The impression I get is that disinterested applicants already get more consideration than the interested. I have found that genuine carers are only interested in the welfare of the incapacitated person and not in benefiting from his death.

Perhaps the legislation should be directed towards finding genuine carers and making wills in their favour. If that can't be done then the statutory wills provisions should be scrapped altogether.

W18 - Yes.

It is high time that the common law relating to ademption was put in writing, e.g. where a specific asset no longer exists and had not been given to the intended beneficiary in the lifetime of the deceased, the value of the asset should be paid to the intended beneficiary. Whether out of residue or pro rata according to other bequests would depend on the Will and/or the nature of the estate at date of death.

W19 – (a) That would depend on the attitudes of other beneficiaries and on the solicitor handling the estate.

(b) If the law has been set out clearly and applied correctly, everyone would have to accept the situation.

W20 – I have never had to deal with matters raised by S. 53 of the Guardianship and Administration Act 1986 (Vic.). My clients have been blessed with good administrators who have given me no hassles. My objection to the Act is the absurd notion that one administrator only *must* only be appointed. My experience has been that if there is more than one administrator each is only too anxious to see that between them they do what is the very best for mum or dad; they do not argue or fight; and the chance of anyone helping themselves to money or assets is negligible. I understand that someone at VCAT is blocking the appointment of more than one administrator, hence the form in the Schedule. NSW is way ahead of Victoria there.

[redacted]

Here is an example told to me by a client – her sister was sole administrator for their mother, a pensioner in a nursing home (one of the poor required by the government to be admitted). The home contacted my client because moneys due to the home were not being paid. When the client went to her mother's Bank, she found that the administrator had drawn out and pocketed all the moneys in the mother's account - the whole $600.00 of it!

W21 – Yes.

(a) Either the same interest they would have had in the property if it had not been sold or an appropriate order for compensation from the estate.

(b) Only actions taken after the donor has lost capacity.

(c) A separate account should be maintained (term deposit?) and income should follow the capital.

W22 - It depends on the circumstances. Persons acting under an enduring power of attorney often assume that they can access the Will. I recall an occasion when an attorney demanded release of the client's papers to another firm of solicitors. The client's firm complied with the authority, but kept a photocopy of the Will in the client's deed packet, as a precaution.

I have never supplied a copy of a Will to an attorney. I recall telling two attorneys they could not sell Mum's house. They were people I had known from childhood. They asked no questions, they accepted what I said.

Should access depend upon proof of lack of capacity? I imagine that could be vital in Melbourne – not so necessary in the country where everyone knows everyone.

VICTORIAN LAW REFORM COMMISSION – SUCCESSION LAWS REVIEW

Consultation Paper - **FAMILY PROVISION**

Submission of PATRICIA LISBETH STRACHAN, [redacted]
Retired Accredited Specialist in Wills and Estates (Vic.)

FP1 - There are at least two factors which would affect a decision to settle a family provision application rather than proceeding to court hearing – COST and DELAY.

FP2 - The current period within which an application for family provision can be made in Victoria is (c) too short. The better period is 12 months from date of death, as in NSW.

From 1971 until somewhere around 2007, I handled all the firm's Probate matters – both NSW and Victorian.

Invariably, when Victorian beneficiaries were informed that a grant of representation had been made and they had six months to act, they were stunned – a state of mind which was not helped by the Solicitors for the estate hounding me when I was acting for a person contemplating a family provision application. It was not sufficient to write a letter confirming that a client intended to make a family provision application, the practice of the estate's Solicitor was to demand instant lodgement in the Court.

FP3 - In my view the current law does not allow applicants to make family provision claims that are opportunistic or non-genuine.

I believe Solicitors are conscientious about warning clients of the risks involved and that the results of no two applications are the same – thus there is no guarantee that the client will succeed or even be awarded an order for costs.

FP4 - I hope so. In my experience, Solicitors are always careful to warn intending applicants.

FP5 - I am unable to comment.

FP6 - I unable to make a generalisation, but I would think so – hence the large percentage of out of Court settlements.

FP7 - In my experience, it is not often that people deal with their assets during their lifetime with the intention of frustrating the operation of the family provision law. I have always hated the NSW notional estate provisions which I always believed were intended to reap more Death Duty for the government.

I can only recall two cases which might be regarded as relevant :-

1. A pensioner client asked me how to defeat a possible family provision claim. I told her to transfer to her intended beneficiary a half share as joint tenant in her house property – virtually her only asset. I made sure that she understood that she would

[redacted]

have to live 3 years after the transfer, in order to defeat a possible claim. She declined, because of the stamp duty involved, so I advised her to make an affidavit settling out truthfully the nature of the relationship with the person who might make a claim. That was done. After the client's death, a claim was made. I warned the Solicitor who acted for the claimant, but the matter went to the NSW Supreme Court, where the claimant not only lost, but was ordered to pay the executor's costs. Unfortunately the claimant didn't have enough money to pay the full amount.

2. A very old retired gentleman spent the last few years of his life transferring assets to his children. Periodically he came back to me to change his Will, so that it would fit in with the changed circumstances. Following his death, his children were happy with his Will. Then an interstate solicitor wrote to me stating that he was acting for one of the children who intended to make a family provision application. I set out in my reply what the client had done in his lifetime and, so far as I knew it, the extent to which the client had benefited each child. Next thing I knew, I received a letter from the child apologising and stating that there would be no application.

FP8 - I am a great believer in testamentary freedom! Yes, people should be entitled to deal with their assets during their lifetime to minimise the property in their estate. I have only just been talking to a relative on that very subject, not for any sneaky reason, but because his children are old enough to handle any assets passed on to them and there comes a time when parents should let go.

FP9 - The purpose of family provision legislation should be fairness to dependants and to the estate. Governments used to get their whack by way of Probate Duty and Estate Duty. Now they get it by way of GST. The Administration and Probate Act 1958 (Vic.) used to provide for widows, widowers and children. Now it goes too far. What happened to testamentary freedom?

FP10 - No. Family provision laws should seek to go back to what they set out to do in the first place.

FP11 - No. It is too wide. Victoria should go back to the original legislation with, perhaps provision for grandchildren reared by the deceased. There are too many schemers around.

FP12 - No. The NSW provision is too wide. Why should a former spouse get a second bite at the cherry? Everyone wants a cash settlement these days, not weekly maintenance.

FP13 -

(a) No. They are too wide.

(b) Yes. The categories should go no further than spouse, children and grandchildren reared by the deceased. There are too many scheming people in society.

FP14 - The current 'responsibility' criterion is too wide. I can accept the needs of a disabled or mentally handicapped child or grandchild reared by the deceased, but otherwise I agree with Professor Rosalind Croucher that family provision law risks discouraging self-reliance and becoming 'a blueprint for bludging'. These days there are far too many young people

quite happy to live a bludging way of life. (Maybe the answer is to bring back National Service for males and females).

FP15 - Definitely. Bludgers know every trick in the book and they can learn it all before they even leave school.

FP16 - Victoria should throw out 'responsibility' criterion.

FP17 - It would do no harm, but I should think that every legal practitioner knows that not only can the applicant find himself bearing the burden of his own costs, he can be left with the burden of bearing all costs.

FP18 - It would do no harm to include both (a) and (b), but I believe that every legal practitioner in Victoria would have dinned this information into an intending applicant at their very first interview and would have repeated it from time to time.

FP19 -Item 2.142 says it all.

FP20 - I am unable to comment. If 95% of family provision applications are settled out of Court, that is one of the reasons.

FP21 - I am unable to comment. If 95% of family provision applications are being settled out of Court, then cost is one of the reasons.

There is an interesting Article by Matthew Groves in the March 2013 issue of the Law Institute Journal.

VICTORIAN LAW REFORM COMMISSION – SUCCESSION LAW REVIEW

Consultation Paper - **DEBTS**

Submission of PATRICIA LISBETH STRACHAN, [redacted]
Retired Accredited Specialist in Wills and Estates (Vic.)

D1 – No. Leave it alone.

D2 – No. Leave it alone.

D3 – No. Leave it alone.

D4 – No. Even after re-reading R.A. Sundberg, *Griffiths Probate Law and Practice* (Lawbook Co. 3rd ed. 1983) 73-4, I still say leave it alone.

D5 – No. Judging by some of the Wills I have seen, this is one of the worst things that could be done.

D6 - I believe it would be unwise to tamper. I cannot see how any more efficiency or effectiveness could be achieved.

D7 – Why? I do not see any need. My younger son says, "If it works, why tamper with it?".

D8 - I am puzzled as to how the Administration and Probate Act 1958 (Vic.) could abolish the priority of a debt to the ATO.

D9 – No. I do not see any difference in meaning between the wording in the Victorian and NSW Schedules.

[redacted]

VICTORIAN LAW REFORM COMMISSION – SUCCESSION LAWS REVIEW

Consultation Paper - **EXECUTORS**

Submission of PATRICIA LISBETH STRACHAN, [redacted]
Retired Accredited Specialist in Wills and Estates (Vic.)

E1 - Yes.

(a) It should extend to disbursements, fees and any other amounts.
(b) Bearing in mind that executors' accounts are no longer filed, the Court should be able to conduct a review on its own initiative and also to do so on the application of a person interested in the estate.
(c) Not necessarily. (This is a hard one to answer, but I often wonder whether legal education in the field of succession is adequate).
(d) Yes, but it would need to commence from the date when beneficiaries received from the executors (i) a request for their consent to payment of commission and (ii) a bill of costs and draft statement of account and distribution.
(e) Yes.
(f) The Court should have a discretion.
(g) Yes, as to administrators and individual trustees. Unable to comment as to State Trustees.

E2 - No. The testator has made the choice. It should not have been made lightly. The knowledge that particular executor has may well be the reason why he/she was appointed. If there is any doubt, it should have been put to rest when the Will was made. Any independent advice, whether legal or medical, should have been obtained then.

E3 - It should not be necessary, but a legal practitioner executor always has that option. Surely Rule 10 requires compliance anyway.

E4 - Why not? I always told clients point blank that I preferred not to be appointed an executor and that I would not allow them to leave me anything in their Will. Only once I agreed to accept a legacy ($1,000) on the insistence of a client, a close friend who had been the secretary of another Solicitor in the firm.

E5 - Yes. Particularly as so many Victorian Solicitors have told me that they are entitled by law to charge a commission of 5% (not up to 5%), I think it is better that the requirements be set out in legislation.

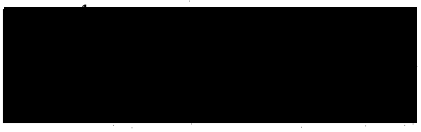
E6 - Yes, the more information, the better - in relation to all aspects of estate administration. This was the view of Ivan Gilbert Kell, who was the greatest wills and estates solicitor between Sydney and Melbourne. (I was his assistant for 10 years prior to his death in 1981).

E7 - No. I am horrified by hourly rates charged by some. Why are solicitor-executors so keen to charge? When trapped into being an executor, I only once applied for commission, in NSW, and that was because my co-executor, who had been left a legacy wanted to apply,

[redacted]

bearing in mind the huge amount of work we had done. Apart from that occasion, I have never asked for commission nor charged for executorial services.

As to E6 and E7 – I was consulted by a widowed pensioner, one of a large number of residuary beneficiaries in a large Victorian estate. The solicitor-executor had sent them all copies of his firm's bill of costs and a draft statement of administration and distribution, showing himself as receiving a 5% commission. In his covering letter, he stated that he was entitled by law to receive a commission of 5% and asked each to sign and return a form of consent. My client's share was less than the executor proposed to pay himself by way of commission, but she couldn't afford to apply to the Court. I felt like crying with her but instead I phoned the Law Institute's costs consultant, John Ahern, and we talked about costs. The upshot was that I beat the executor down to a commission of 1.5%.



VICTORIAN LAW REFORM COMMISION – SUCCESSION LAWS REVIEW

Consultation Paper – **SMALL ESTATES**

Submission of PATRICIA LISBETH STRACHAN, [redacted]
Retired Accredited Specialist in Wills and Estates (Vic.)

SE1 - The current figures in the Administration and Probate Act 1958 (Vic.) should be raised. Being a country Solicitor, I find it hard to suggest appropriate figures – perhaps $60,000 and $80,000. I also find it hard to suggest how they should be determined – perhaps the Registrar of Probates could advise.

SE2 –

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

(b) The value should be set by the Administration and Probate Act 1958 (Vic.), not by subordinate legislation.

SE3 - I cannot suggest a better way.

SE4 - Yes. I believe people would trust the Supreme Court Probate Registry.

SE5 - I doubt very much whether formal assistance through the Supreme Court Probate Registry could be replaced by anything which would be clearer or more comprehensive. I have always been impressed by the Registry.

SE6 - Yes, the introduction of a sliding fee scale would encourage people to seek grants of representation in small estates. While I approve of the NSW nil fee for small estates, I believe it would be hard to find justification for a fee of $5000.

SE7 - I am unable to comment.

SE8 - The second threshold should be retained. I am unable to comment on the second question. I believe that the nature of the assets of the estate to be administered may deserve consideration.

I know from experience that the NSW Public Trustee has on one occasion in the past, refused to administer an estate because there were no assets from which it could readily collect its costs.

SE9 - I should have thought the net value of the estate was appropriate, but perhaps this is why I feel that the nature of the assets of the estate ought to be considered.

SE10 - No. Legal practitioners should not be permitted to file elections to administer. I see no advantages in such a change. [redacted]

SE11 - Yes. The filing party should be required to file the will with the Court.

SE12 - No. Advertisements giving notice of intention to file an election to administer should not be moved from newspapers onto the Supreme Court website

There are areas in the State where, in my view, the public rely on newspaper advertisement to identify notices of intention. Notices of intention to apply for probate or administration should have continued to be advertised in newspapers in certain more remote areas.

SE13 - Never!

SE14 - Not knowing what stricter procedural safeguards might be under consideration, I cannot comment.

SE15 - Yes.

SE16 – I am unable to comment.

SE17 – I am unable to comment.

SE18 - I am unable to comment.

SE19 - No. Legal practitioners should not be permitted to advertise for deemed grants. I was admitted to practise in NSW in 1954 and in Victoria in 1956. I do not approve of what amounts to legal practitioners touting/advertising for business. I do not have a clue what benefits such a change might produce.

SE20 - I should think that the more safeguards, the better.

SE21 - I am unable to comment.

SE22 – Yes. Section 32 of the Administration and Probate Act 1958 (Vic.) could be expanded by increasing the $25,000 and $12,500 limits.

The recommendation of The National Council for Uniform Succession Laws could be incorporated as a separate subsection/section of the Act.

I know the length Banks will now go to make it difficult for moneys to be claimed without a grant of representation (even where a grant has been obtained in another State).

It should cover not just persons, but Banks, Companies etc. and the limit should exceed $15,000.

SE23 - No. I believe it would be too risky in Victoria (also NSW). There are some very talented crooks in this world.

SE24 - No. Don't soften Section 33 of the Administration and Probate Act, 1958 (Vic.). The focus needs to be tough. I have seen and heard too much.

[redacted]

SE25 - No. The Victorian provision should not be modified. By all means give informal administrators someone they can go to for free help and advice. For example, the Law Institute of Victoria has a system by which it can ask accredited specialists to provide free advice.

SE26 – I do not know. If they are honest, they will cope.

SE27 - No. Administration of small estates should not be made too easy. It could encourage dishonesty.

SE28 – I can only suggest appointing all beneficiaries in a small estate as joint administrators.

[redacted]