**SUBMISSIONS REGARDING PROPOSED AMENDMENTS TO THE LEGAL PROFESSIONAL UNIFORM LAW**

**BY LAWSON HUGHES PETER WALSH LAWYERS**

We have read and considered the consultation paper published by the Legal Services Council on proposed amendments to the Legal Profession Uniform Law.

We set out below our comments for submission to the Legal Services Council and the Law Institute of Victoria in relation to Recommendation 18 and Recommendation 23 of the proposed amendments which relate to the rights of beneficiaries of a deceased estate to seeks costs reviews.

The consultation paper notes that the amendments to Part 4.3 of the Legal Profession Uniform Law ("the **LPUL**") (Legal costs) are proposed *inter alia* to improve consumer protection and "*to remove the potential for perverse outcomes to arise"*. It is submitted that Recommendations 18 and 23, if enacted in their current proposed format, will not actually achieve this goal and rather will *increase* the potential for perverse outcomes to arise due to the potential for the proposed changes to result in outcomes that are contrary to the efficient administration of estates.

Our firm has a long history of representing both executors and beneficiaries in estate administration and estate related disputes. We also have significant experience in acting for independent court appointed administrators and executors.

In this submission, a reference to "executor" includes "administrator", singular includes the plural and masculine includes the feminine.

**General Submission - Unique Characteristics of Executor's Position**

We recognise that the beneficiaries of deceased estates who are not executors may, depending on the actions of the executor, feel somewhat excluded from the administration process, particularly if the relationship between the beneficiaries and the executor is tense or is the subject of "hostile" litigation between an executor and one or more of the beneficiaries.

However, it is submitted that the proposed amendments in their current format do not achieve the outcome anticipated by the Legal Services Counsel and will not provide a *"cheap and quick resolution*" for complainant beneficiaries.

A stated objective of the proposed amendments is to *"empower clients to make informed choices about costs"*. This is a noble objective and certainly in the public interest. However, the key word is "clients". A beneficiary of a deceased estate is not a "client" of the law practice. The client is the executor and a law practice already has disclosure obligations to its client under the LPUL in relation to legal costs. In addition, the law practice and the executor are entitled to enter a legally binding costs agreement (enforceable in the same manner as any other contract (s. 184 of the LPUL)) subject to the law practice having complied with its disclosure obligations and a client's right to have the costs assessed.

A question must be raised as to the relevance of the parties entering any costs agreement if a person, such as a beneficiary of a deceased estate, who is not a party to the costs agreement can then challenge the costs charged notwithstanding that they have been charged pursuant to a validly entered and legally enforceable legal contract. It is acknowledged that the current provisions of the LPUL enable a "third party" to challenge an assessment of costs but the position of the executor (and the legal practice engaged by the executor) and beneficiaries needs to be distinguished from the position of "third party payers".

A law practice cannot require every beneficiary to sign a costs agreement as the beneficiaries are not the clients of the law practice. Further, even if beneficiaries were placed into the same category as third party payers, there are a number of significant issues that would flow as a consequence.

The current rationale under the LPUL dealing with third party payers (both associated and non-associated) cannot be easily applied to beneficiaries of a deceased estate for the following reasons:

(a) The definition of a "third party payer" under the LPUL requires there to be a legal obligation on the third party (ie the beneficiary) to pay the legal costs. Depending on whether the third party is associated (ie the legal obligation is owed to the law practice) or non-associated (ie the legal obligation is owed to a person other than the law practice) determines what rights the third party has (including on costs reviews) and what obligations (including disclosure) that the law practice has.

(b) It is noted that a beneficiary could not be said to owe a legal obligation to a law practice to pay legal costs and it is rarely the case that a beneficiary is under a legal obligation to the executor to pay the legal costs incurred by the executor but it can arise in the context of litigation and costs orders made by a Court. Fundamentally, a beneficiary of an estate is not obligated to accept a disposition to them under a Will and it would be therefore be a perverse outcome if a beneficiary was under a legal obligation to pay legal costs incurred by an executor.

(c) The LPUL has extensive provisions dealing with the rights of third party payers. The LPUL also includes provisions that contemplate the option for a costs agreement being entered between an associated third party payer and a law practice. The clear intention of such a provision is to enable the law practice and the third party payer to reach agreement on the basis upon which legal costs are to be charged and to create a legally enforceable agreement between them.

    It is submitted that it would be practically impossible for a law practice to be required, in order to have certainty over the basis for charging costs and their recovery, for the law practice to enter costs agreements with beneficiaries. The class of beneficiaries may still be open, there may be beneficiaries that are minors or under a disability, the beneficiaries may not yet be located, issues of conflict may arise and beneficiaries (or at least one beneficiary in a class of many) may simply refuse to enter an agreement especially if hostilities with the executor already existed or develop. Further, issues of conflicts and confidentiality would arise if the law practice was required to enter costs agreement with the executor (as client) and beneficiaries, especially in any hostile litigation with the beneficiaries.

Even if the position of a beneficiary was dealt with separately and independently from the current category of "third party payers" under the LPUL, the following underlying principles (some of which are reflected in the current provisions of the LPUL applying to third party payers) and issues need to be carefully considered:

i. The LPUL recognises that where a legal practice is not in a direct legal relationship with a third party payer (ie a non-associated third party payer), the assessment of costs at the instigation of that third party payer does not impact upon the amount of legal costs payable by the client (s. 198(10)). This preserves the privity of contract between the law practice and its client, recognises the fact that the arrangements reached between a client and law practice should be upheld and addresses the implications of a costs review where the law practice is not in any legal relationship with the party seeking the review.

ii. Generally, an executor has no pecuniary interest in the quantum of legal costs charged. An executor will rely on the general right of indemnity in respect of costs and expenses incurred by him or her. However, if a beneficiary of an estate is granted a right to make an application for an assessment of costs, it would be prudent for all executors to hold back assets to meet any costs orders or increased costs assessments and refrain from distributing the estate in full until after the time period for making such applications has expired (currently the LPUL permits assessments up to 12 months after a bill was served or paid). This will add to the delay in the administration of deceased estates. Private executors and the law practices they have engaged would be entitled to "wait out" this period in order to avoid being "out of pocket" especially if the assessment resulted in a higher costs assessment.

iii. There are many estates that involve tension and/or conflict between an executor and beneficiaries. This is especially the case where an independent executor or administrator has been appointed as a result of disputes between beneficiaries and/or executors named in the Will. In addition, in many deceased estates beneficiaries are often unrepresented.

This can result in extra communication between the law practice and the beneficiaries, by email, telephone, attendance at the office etc., thereby increasing legal costs to the estate. This could be necessitated at the request of the executor including as a result of the executor's unwillingness to communicate with the beneficiaries for reasons unconnected to the solicitor and client relationship.

The additional costs involved may prompt any one or more of the beneficiaries to apply for a costs assessment which, even if the costs assessed are found to be fair and reasonable, will involve significant time and resources of the law practice and the executor and with little or no initial costs or costs risk on the beneficiary bringing the application.

iv. The preparation of an itemised bill or a bill of costs in taxable form can be an extremely time consuming and costly process. Currently, the commercial rates charged by costing firms to prepare a bill of costs in taxable form are around 10% of the total professional fees in the bill. In the event that a beneficiary is provided with a right to seek a costs assessment, the LPUL should be amended to require the beneficiary to be liable for such costs. Without such a provision, it would create a substantial and unjust burden on the legal practice in circumstances where the client (ie the executor) has accepted the costs and considers them to be reasonable and appropriate.

v. This costs review process is open to abuse which could cause an extended delay of 14 months or more in administering the estate and making a final distribution of estate funds (which can occur only after all debts and expenses of the estate have been paid), perhaps motivated by reasons outside the solicitor/client relationship particularly in estates where the relationship between the executor and the beneficiaries or amongst the beneficiaries themselves is acrimonious. This would result in great cost and inconvenience to the legal practice who is acting for the executor in such litigation.

vi. Further, it is generally an obligation of an executor to report to beneficiaries and keep them informed and in large or complex estates, it can be the case that beneficiaries, even with regular updates, fail to acknowledge or understand the amount of work involved or work undertaken by an executor. In our experience, it is the unfortunate reality that many estates are not straightforward. Again, to provide a beneficiary with a right to have all of the legal costs assessed, without any initial cost obligation being placed on that beneficiary would create fertile ground for the provisions to be abused and at great expense to the law practice.

vii. Regulation 74 of the *Legal Profession Uniform General Rules 2015* provides that when an itemised bill is higher than the lump sum bill, the additional costs may be recovered by the law practice only if the law practice made appropriate disclosures when giving the lump sum bill and the costs have been the subject of an assessment. In the event that a beneficiary has a right to seek a costs assessment, the following questions arise:

1. Who will be liable for the additional costs? How can these be recovered by a law practice?
2. What if the estate has been fully distributed before an assessment is made or determined?
3. The LPUL includes provisions (section 198(10)) that the outcome of a costs assessment by a third party does not impact on the legal obligation of a client to pay the legal costs. However, given that a private executor (ie not a trustee company) generally has no pecuniary interest in the legal costs charged to the estate, is an executor entitled to rely on his/her indemnity from the estate to pay legal costs charged by the law practice under its costs agreement with the executor?
4. Is the executor or law practice required to chase or take action against the residuary beneficiaries to recoup the additional monies owing to the law practice?

viii. An executor stands in a fiduciary relationship to the estate and the beneficiaries so an executor has an obligation to review all costs incurred and if considered appropriate, initiate and prosecute any costs review process as expeditiously as possible in order to finalise the administration of the estate. However, a beneficiary has no such fiduciary obligations and so they could, arguably, use the review process to delay the finalisation of the estate for their own purposes.

We understand that the majority of beneficiaries would presumably not abuse the costs review process in this manner. However, the possibility would still exist for *"perverse outcomes"* such as the above to arise.

ix. Beneficiaries have a wide range of existing rights and remedies against executors including seeking an Administration Account or, depending on the conduct of the executor, seeking removal of the executor and the appointment of a replacement. Further, in practice the Supreme Court of Victoria Trusts Equity and Probate List is taking a very proactive, practical, inquisitorial and prudent approach in matters in that List to the incurring and quantum of legal costs by executors and beneficiaries pursuant to the powers available under the *Civil Procedure Act 2010 (Vic)*.

**Specific Responses to Proposed Amendments**

We have set out below our specific comments in relation to the specific amendments proposed.

**Recommendation 18**
*Amend subs 198(1) to add beneficiaries of deceased estates or potential beneficiaries arising from intestacy.*

- The addition of "*beneficiaries of deceased estates*" is too broad. The stated reasoning behind the proposed amendment is that *"beneficiaries will ultimately pay the legal costs which are borne by the estate"*.

  In fact, it is generally only the **residuary** beneficiaries of deceased estates who are impacted by the legal costs paid by the estate as per s 39A of the *Administration and Probate Act 1958* ("the **APA**") which deals with the application of assets in solvent estates for the payment of debts, including testamentary and administration expenses.[i]

  If one of the aims of the proposed amendment is to assist those who *"will ultimately pay the legal costs"* of a deceased estate, then the wording of the current recommendation goes well beyond the stated purpose and should, at a minimum, be limited to residuary beneficiaries only. This distinction would become particularly important in estates where the Will of the deceased included many specific bequests to multiple beneficiaries in addition to nominating residuary beneficiaries. To grant a right to beneficiaries other than those that receive the residuary estate provides little to no practical benefit in achieving that outcome or to any of the other beneficiaries. In fact, if the wording is left broad, it could be used for mischievous purposes where there are disputes between beneficiaries and those who have no interest in the residuary estate wish to, for example, cause delays.

- If changes are to be made as proposed, the wording used of "potential beneficiaries" as a class entitled to seek an assessment of costs should be revised. Technically, any relative of a testator could be a "potential beneficiary" of that testator in the event that there is a Will or Grant of Probate but all Wills are subsequently found to be invalid and/or a Grant of Probate is revoked. In other words, a relative in the class that takes upon an intestacy will always be a "potential beneficiary". As a result, any amendments should be limited to "beneficiaries" once a grant of Letters of Administration has been because the class of residuary beneficiaries can then be determined by the executor .

**Recommendation 23**
*Expand the definition of 'consumer matters' in s 269 to include complaints by beneficiaries of deceased estates or arising from intestacy.*

- The consultation paper notes that the purpose of the amendment proposed in Recommendation 23 is to afford beneficiaries of deceased estates *"a cheap and quick resolution to their complaints"*. It is doubtful that this amendment, as drafted, will achieve that outcome.

- The addition of "*beneficiaries of deceased estates*" is too broad and should be limited to residuary beneficiaries and those entitled on intestacy only. See comments for Recommendation 18 which are equally applicable here.

- In our experience it is usually in estates where the beneficiaries and the executor do not have a good relationship that the beneficiaries seek additional information regarding the legal costs charged to the estate over and above the information disclosed in the Administration and Distribution Statement that is usually provided. In such instances the motivation of the beneficiary may be frustration with the executor or other matters unrelated to the law practice. It is submitted that in such cases the beneficiaries would have alternative equitable remedies open to them against the executor particularly given the fiduciary relationship between the executor and the beneficiaries.

It is submitted that there are adequate protections in place, including the substantive rights provided to executors to review legal costs charged by the law practice they have engaged. The executors are obliged to act in the best interest of the beneficiaries. Given the executor's role as a client and working relationship with the law practice, and as a result the knowledge of all of the legal work performed, the executor is the person with the requisite knowledge and understanding to make an assessment on any decisions relating to a costs assessments. The proposed amendments do not appropriately balance the costs and inconvenience involved in a costs assessment, including the substantial costs and delays in preparing a bill of costs in taxable form. Further, the proposed amendments seek to place a beneficiary out of reach of costs consequences of any costs assessments notwithstanding that the client of the law practice already has extensive rights to do so.

The proposed amendments fail to adequately address the consequences that an assessment commenced by a beneficiary could have to the legally enforceable contract that the law practice will have entered in good faith with its client, the executor, in relation the manner and basis for which the law practice intends to charge legal costs.

Lastly, if any amendments are to be implemented, they should be limited to a beneficiary only having the right to seek a costs assessment:

(a) where the beneficiary is a residuary beneficiary (including intestate estates after an administrator has been appointed); and
(b) only where the law practice has sought to base its costs other than on the scale set out in the Appendix to *Supreme Court (Administration and Probate) Rules 2014*; and
(c) only where the law practice has not had its file assessed for costs by a Law Institute of Victoria Costs Lawyer or similar and/or not provided a copy of the assessment to the executor client with the invoice.

We acknowledge that in a situation where the executor client is an associate of the law practice then there is a perception that this situation may require greater scrutiny. In that situation, the above could apply but it could be be made mandatory, that is the law practice be required to:

(a) have their costs calculated on the scale set out in the Appendix to *Supreme Court (Administration and Probate) Rules 2014*; or
(b) have their file assessed by a Law Institute of Victoria Costs Lawyer or similar and a copy of the assessment be provided to the executor client with the invoice.

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[1] Except in the more unusual scenario where under the Will property has been specifically appropriated, devised, bequeathed, directed to be sold or subject to a charge for the payment of a debt or liability of the Estate – s 39A(2)(a) of the APA. However, in our experience where such a clause is included in a Will it generally deals with payment of a debt or liability which relates specifically to the encumbered property, such as Capital Gains Tax, Land Tax, local authority charges etc. and does not refer to legal costs of the estate in general, which would still be paid from the residuary estate.