

THESIS TITLE

*WHERE THERE'S A WILL THERE'S A WAY: EXAMINING THE UNDERUSE OF
STATUTORY WILL LEGISLATION IN AUSTRALIA THROUGH AN ACCESS TO
JUSTICE LENS.*

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ABSTRACT

Statutory will legislation has been a feature of the Australian legislative landscape since 1992 when provisions authorising a court to approve a will for a person who lacks testamentary capacity were first enacted in Tasmania. Since then, each Australian state and territory has introduced a version of the legislation. However, few applications have been made, despite it being promoted as important legislation that enhances the rights of persons with disabilities.

An examination of statutory will literature and the legislative and court based procedures in each state and territory highlights the different approaches taken to manage these applications. In applying the legislation using the prescribed procedure, decision makers have articulated better ways to manage applications, identifying a need for change that has not been forthcoming.

More recently, in 2012 and 2013 underuse of the legislation has attracted the attention of the Victorian Law Reform Commission who initiated an investigation into possible reasons for underuse of the legislation in that jurisdiction.

Despite these initiatives, no uniform approach to examine the causes for underuse of the legislation in Australia has been considered. This thesis suggests that underuse of the legislation can be understood using an access to justice analysis. The analysis provides a sound basis for recommending change that will increase knowledge of the legislation and provide a fairer, more efficient and more effective system and encourage more applications to be initiated.

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I CHAPTER ONE: INTRODUCTION

A *Introduction*

The ability to make a will, to dispose of one's 'bounty' accumulated during a lifetime, is enjoyed by adult citizens across the world. It is exercised by many adults but not by all. In Australia, a valid will is predicated on the will maker possessing the capacity to make a will. If this threshold is met, a will can be made with testamentary freedom: freedom to dispose of assets as one chooses, with or without legal advice.

But what of the person who lacks will-making capacity? What of the person who possesses 'bounty' to be disposed of but who does not meet the threshold capacity criteria? Until the introduction of statutory will legislation, such estates were distributed according to statutory schemes of administration or earlier, possibly outdated, wills. Statutory will legislation changed this, providing a mechanism for a court¹ to authorise the making of a will on behalf of a person who lacks will-making capacity.²

The legislation was originally promoted as an innovative legislative scheme designed to enhance the rights of persons with disabilities.³ To date, it has provided the mechanism for the court to authorise a will to be made in circumstances where distributions according to statutory schemes or an earlier will are inappropriate. It has advanced the autonomy of the person lacking will-making capacity. In some circumstances, it provides a mechanism for the management of the affairs of the person lacking will-making capacity in the context of their wishes. In these instances, it has the potential to be beneficial to the persons seeking to have a will made.

Despite enacted legislation in each Australian state and territory, it is evident that the legislation is underused.⁴ It is submitted that underuse can be understood by reference

¹ In Tasmania, this authority is also conferred on the Guardianship and Administration Board: see Chapter Four.

² John Hockley, 'Statutory wills in Australia: Wills for Persons Lacking Testamentary Capacity' (2006) 80 *Australian Law Journal* 68.

³ New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills*, Report No 85 (1998) [2.4].

⁴ Victorian Law Reform Commission, *Succession Laws: Wills*, Consultation Paper No 11 (2012), 4; Victorian Law Reform Commission, *Succession Laws*, Report (2013), 28.

to barriers to access to justice. Removing or reducing those barriers will increase use of the legislation.

B Thesis Statement

This dissertation examines whether a lack of knowledge of the rights and benefits conferred by the legislation and/or the procedures prescribed in legislation and developed by the court act as barriers to accessing statutory will legislation. If so, these barriers are causing or contributing to its underuse.

A lack of knowledge of and access to statutory will information has been identified as a possible barrier to use by the Victorian Law Reform Commission.⁵ I submit the knowledge issue, however, accounts for only a small part of the identified concerns. This is because addressing a lack of awareness is a modest goal. Further, implementing a solution to fix that lack is a modest and achievable goal.

The more significant cause of underuse of the legislation is the procedures themselves. In each Australian state and territory the Supreme Court is the forum in which applications are commenced.⁶ This is consistent with the model legislation proposed by the Queensland Law Reform Commission as part of the uniform succession laws project in December 1997. The model legislation was based on United Kingdom legislation introduced in 1969 and subsequently amended.

This choice of court did not receive unanimous support. At the consultation stage in 1994, submissions to the Law Reform Committee of Victoria urged the consideration of a tribunal as the appropriate forum because the process was said to be cheaper and more informal.⁷ Tasmania initially chose a Board as the sole forum for this purpose. Judicial commentary has attracted attention to the problems of cost, delay and inefficiency in managing applications. For example, as to cost, Gillard J in *Monger v Taylor* ('*Monger*') said '...costs should be kept to a minimum and the court and the parties should ensure the procedure adopted gives effect to that objective...'⁸ As to delay, Palmer J in *Re Fenwick; Application of J R Fenwick & Re Charles* ('*Fenwick*') said '...there are likely to be many such [statutory will] applications in the future and it

⁵ Ibid 4.

⁶ This is the case with the exception of Tasmania where applications can also be made to the Guardianship and Administration Board on meeting certain legislative criteria.

⁷ Law Reform Committee of Victoria, *Reforming the Law of Wills*, Final Report (1994).

⁸ *Monger v Taylor* [2000] VSC 304 (2 August 2000) [24].

is desirable that they should be dealt with by the court as expeditiously as possible.’⁹ As to inefficiency, the two stage process operating in all states and territories except Western Australia has been criticised by DeBelle J as unnecessary.¹⁰ Although these comments have raised awareness of the need for procedural change, change has not occurred. I submit it is needed.

More recently, in 2012 the Victorian Law Reform Commission identified that the ‘...scheme was not being used by those that it is intended to assist’,¹¹ identifying costs and processes as possible causes. In a 2013 report on succession laws¹² the Victorian Law Reform Commission outlined its views in relation to accessibility, recommending a repeal of the two stage process and concluding that a change from the court jurisdiction was not necessary.

From this we see that problems relating to the use of statutory will legislation have been identified. There is, however, no consistent lens through which these problems are examined. The thesis of this dissertation is underuse of the legislation can be understood and addressed using an access to justice analysis. Based on that analysis it is argued that changes to law and procedure are justified, including whether the court is the best forum to hear applications.

This thesis and proposals will be explored and addressed in the chapters of this thesis. First, however, the background to statutory will legislation in Australia will be outlined.

C Background to Statutory Will Legislation in Australia

Historically, a person has been unable to make a valid will during any period of incapacity.¹³ For a person who never had capacity to make a will, this meant that they never had an opportunity to legally determine who could share in their bounty on their death. For a person who made a will during a period of testamentary capacity but later lacked testamentary capacity this meant that if the provisions of that will were no

⁹*Re Fenwick; Application of J R Fenwick & Re Charles* [2009] NSWSC 530 (12 June 2009) [262].

¹⁰*Hoffmann v Waters* [2007] SASC 273 (20 July 2007).

¹¹Victorian Law Reform Commission, *Succession Law: Wills*, above n 4, 41.

¹²Victorian Law Reform Commission, *Succession Law: Wills*, above n 4, 30-1.

¹³*Public Trustee v Gerristen* [2012] WASC 201 (14 June 2012) [26].

longer appropriate, they had no means by which to change them. Therefore, on their death, assets of the person lacking will-making capacity were distributed either:

- (a) according to an earlier out dated, inappropriate will, potentially varied by applicable family maintenance provisions;¹⁴ or
- (b) according to statutory schemes of administration under intestacy provisions, also variable by relevant family maintenance provisions.

Whilst these outcomes resulted in the finalisation of the financial affairs of the person lacking will-making capacity on their death, that person was unable during their lifetime to have their assets distributed other than by these methods.

It was recognised by law reformers in this area that changes were necessary and in response legislation was enacted to authorise a court to approve or vary a will for the person lacking will-making capacity. A will made in this way was termed a statutory will.¹⁵

A statutory will is a court-approved will or variation of an existing will for a person lacking will-making capacity.¹⁶ The power of the court to approve a statutory will is conferred by state and territory legislation.¹⁷ The legislation enables the court, when authorising the will, to consider making provision from the estate of the person lacking will-making capacity for those persons to whom that person has an obligation to provide.¹⁸ A statutory will can remedy an inadequate or outdated will. It can revoke an inadequate or inappropriate will. It can provide for potential beneficiaries who fall outside the ambit of government approved estate distribution schemes. It can take into account the wishes of the person who lacks will-making capacity thereby supporting individual autonomy.

Moves to introduce the legislation gained momentum in 1991 when the Standing Committee of Attorneys-General initiated the uniform succession laws project to reform the law of wills throughout Australia. One aspect of the project was to introduce legislation authorising the court to approve a will for the person lacking

¹⁴ Testator family maintenance provisions will be discussed in Chapter Three.

¹⁵ Victorian Law Reform Commission, *Succession Laws*, above n 4, 24.

¹⁶ John Hockley, above n 2, 68.

¹⁷ *Succession Act 2006* (NSW); *Succession Act 1981* (QLD); *Wills Act 1997* (Vic); *Wills Act* (NT); *Wills Act 1969* (ACT); *Wills Act 1936* (SA); *Wills Act 2008* (Tas); *Wills Act 1970* (WA).

¹⁸ This obligation arises under intestacy laws and family maintenance provisions.

will-making capacity with the aim of enhancing the rights of persons with disabilities.¹⁹

Between 1992 and 2010, each Australian state and territory enacted a version of the legislation. The legislation contains some procedure but does not set out how each application is to be commenced and managed once in the system. Case management systems are devised by each state and territory individually.

More than twenty years on from 1992, the concern is that the legislation is underused. For example, speaking about the situation in Tasmania in 2008, Parkinson identified that ‘...on average, in the past five years the [Guardianship and Administration] board has received three to four applications per year to make such a will’.²⁰ In 2012, the Victorian Law Reform Commission identified an average of between two to three wills per year under the Victorian scheme indicating ‘...the scheme is not being used by those that it is intending to assist’.²¹ Two applications have been made in Western Australia.²² However, no reasons are published. The Northern Territory has had no applications.

D Access To Justice

Access to justice has been the subject of much research and commentary in Australia and overseas. Studies in Australia during the last 20 years studies have identified and sought to overcome barriers for people seeking to access justice. Some of those studies have focused upon the experiences of the disadvantaged and disabled, including the aged, the incapable person and those with mental illnesses or cognitive impairment. For example, the New South Wales Law and Justice Foundation 2002 background paper as a precursor for the development of a project to identify legal

¹⁹ New South Wales Law Reform Commission, above n 3, [2.4]. The rights of persons with disabilities are recognised internationally by the *United Nations Convention of the Rights for Persons with Disabilities*, opened for signature 30 March 2007, (entered into force 3 May 2008) (‘the Convention’). Though the Convention does not specifically address statutory will applications, it ‘recognises the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices’ (Preamble para n). Statutory will legislation shares this recognition as it aims to give support to individual autonomy.

²⁰Parliament of Tasmania, *Parliamentary Debates*, Legislative Council, 19 November 2008, 30-64 (Doug Parkinson).

²¹ Victorian Law Reform Commission, *Succession Law: Wills*, above n 4, 41.

²² *In the Will of Doris May Frances* (Unreported, Supreme Court of Western Australia, CIV 3332 of 2011) in Richard Williams and Sam McCullough, *Statutory Will Applications: A Practical Guide* (LexisNexis Butterworths 2014); *In the Will of BJ* (Unreported, Supreme Court of Western Australia, CIV 1364 of 2013).

needs, pathways and barriers for disadvantaged persons. Additionally, surveys of older people,²³ disadvantaged areas²⁴ and people with mental illness²⁵ have been conducted to identify legal needs and barriers experienced by persons falling into those classifications.

I submit that access to justice challenges experienced by the disadvantaged and disabled person are experienced by the person who lacks will-making capacity. A review of access to justice studies and other publications, case law, statute, court rules, procedures and practice directions (which will be undertaken in this thesis) reveals a conflict between enabling the person lacking will-making capacity to have a will authorised for them and the practical difficulties in accessing the legislation to obtain it.

This thesis proposes ways that challenges relating to access to justice can be overcome and ways that the practical difficulties in accessing the legislation can be reduced. Education and procedural change is required to increase the use of this important legislation. Education will increase knowledge of the legislation. Procedures can be modified to optimise access to the legislation. Modification will produce a set of procedures that are fair, efficient and effective: creating a more accessible system so the rights of persons with disabilities can, in fact, be enhanced.

E Methodology: Developing a Framework for Investigation and Resolution

This thesis will work within a framework of access to justice stages to test whether:-

- (a) the person who lacks will-making capacity experiences similar barriers to access to justice as disadvantaged and disabled persons; and
- (b) those barriers cause or contribute to underuse of statutory will legislation in Australia.

These stages are derived from access to justice studies which will be outlined in Chapter Two. Specifically, Gray, Forrell and Clarke identified that persons with a

²³ Sarah Ellison et al, 'The Legal Needs of Older People in NSW' (Research Publication, Law and Justice Foundation of New South Wales, 2004).

²⁴ Christine Coumanlos, Zhigang Wei and Albert Z Zhou, 'Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas' (Research Publication, Law and Justice Foundation of New South Wales, 2006).

²⁵ Maria Karras et al, 'On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW' (Research Publication, Law and Justice Foundation of New South Wales, 2006).

cognitive impairment reported barriers to accessing legal assistance. The consequences of these barriers are that legal action may not be taken, or if taken, the person experiences difficulty commencing and proceeding with an action due to the nature of the legal process.²⁶ I submit that these barriers and corresponding consequences can be conveniently categorised as being experienced at three stages. These are stage one, where a person chooses not to access the system at all, stage two, where the person experiences challenges getting into the system and stage three, where the person experiences challenges within the system itself. These stages will be referred to throughout this dissertation.

In Chapter Two, justice in an access to justice context is defined. Key considerations of access to justice for disabled and disadvantaged persons and the barriers to access to justice arising from those considerations are identified and discussed using the three stages outlined above.

Chapter Three will provide a background to succession law for the capable person including a discussion of testamentary freedom and the formalities for a valid will. Testamentary capacity is defined. An outline of the practical aspects of a capable person making a will is provided, including a discussion of the impact of government schemes on the distribution of a deceased person's assets. The purpose of this chapter is to identify the gap between the will making power of the person who has will-making capacity and the person who does not, supporting the need for the introduction of statutory will legislation. This chapter will conclude with a brief introduction to statutory wills as a segue into Chapter Four.

Chapter Four outlines the history of statutory will legislation in Australia including origin and historical development. The aims, key issues and key features of statutory will legislation in Australia are discussed to identify why the legislation is relevant and important.

Chapter Five analyses statutory will procedures and the decided cases to outline the issues judges have experienced using current procedures. This will provide evidence to support the connection between barriers to access to justice for the disadvantaged

²⁶ Abigail Gray et al, 'Cognitive Impairment, Legal Need and Access to Justice' (Justice Issues Paper 10, Law and Justice Foundation of NSW, 2009).

and disabled and those barriers experienced by the person who lacks will-making capacity accessing statutory will legislation.

Chapter Six analyses the impact of these procedures in the context of barriers to access to justice identified in Chapter Two at each of the three identified stages. The purpose of this chapter is to outline the barriers to accessing statutory will legislation created by legislative and court based procedures. It will be argued that the barriers created by the application of these procedures are similar to the barriers identified in Chapter Two and they cause or contribute to underuse of statutory will legislation in Australia. This means that the aims of the legislation outlined in Chapter Four are not being met. In particular, an opportunity to preserve individual autonomy through will-making is being lost as the legislation is not being used.

Chapter Seven recommends changes to be implemented at each of the three stages. It argues that the purpose of change is to reduce the barriers to accessing the legislation by raising awareness of it and providing procedures that make the process more economical, quick and efficient. It is argued that reducing barriers to accessing the legislation encourages use, thereby enhancing the rights of persons with disabilities.

Chapter 8 provides a summary and conclusion.

II CHAPTER TWO: ACCESS TO JUSTICE – A FRAMEWORK FOR EVALUATING THE SUCCESS OF STATUTORY WILL LEGISLATION

A Introduction

‘Justice’ lies at the heart of access to justice inquiries. Before understanding what access to justice means, ‘justice’ requires definition. This chapter defines justice. Key broad considerations of access to justice are then identified. Next, autonomy and capacity are defined as key terms relevant to access to justice and this thesis for two reasons. Firstly, because a move towards autonomy is one of the aims of statutory will legislation to be discussed in Chapter Four and access to justice considerations need to be discussed in the context of the aim of that legislation. Second, capacity is a central issue for the person seeking to access the legislation in both a testamentary capacity and litigation capacity context. Next, barriers to access to justice generally and then those experienced by the disadvantaged and disabled are identified to provide a framework for analysis for the examination of the relationship between barriers to access to justice generally and barriers to accessing and using statutory will legislation. The purpose of looking at access to justice issues in this framework is to analyse the key perspectives of this thesis: that is, access to statutory will legislation is costly and time consuming, creating a less accessible system and this causes or contributes to underuse of the legislation.

B Defining Justice in an Access to Justice Context

The term ‘justice’, resists precise definition. It ‘is usually equated with fair, open, dignified and careful processes,’²⁷ using ‘pre-determined and publically known principles and rules.’²⁸

Whilst there are many scholars who write about justice and access to it, this thesis will use Zuckerman’s three dimensional approach as the basis for explaining what justice seeks to achieve. It is an appropriate framework to analyse access to justice because

²⁷ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Justice System*, Report No 89 (2000), para 1.85.

²⁸ Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*. Project No 92 (1999) para 1.6.

these dimensions formed the foundation of the Australian Law Reform Commissions review of the Federal Justice System.²⁹

Zuckerman's approach identifies three important factors contributing to the ability or desirability of people with legal problems or issues to bring the matter to resolution. He argues justice is three dimensional. These dimensions are truth, time and cost.³⁰ Legal systems seek to achieve an appropriate balance between these three dimensions.

1 Justice and the Truth Dimension

At the core of a just legal system is the pursuit of truth. The purpose of pursuing the truth is to provide the parties with a legally appropriate outcome³¹ whilst preserving the rule of law.³² A legally appropriate outcome must be 'just' as between parties to the litigation and 'just' with reference to community values and expectations.³³ Making and identifying the correct law, applying the law to the facts of the case and arriving at an appropriately considered 'truthful' solution is the basis for western legal tradition such as the Australian legal system. In a court system, procedures assist with finding the truth. The task of the judiciary is to determine legal issues that come before it 'impartially, fairly and according to law'.³⁴ In pursuit of truth, or as Zuckerman calls it, 'rectitude of decision', these procedures are designed to protect the integrity of the decision of the court. They are followed emphatically, though with flexibility,³⁵ by decision makers, to identify the factual truth and provide a supported decision. Therefore, the aim of those procedures in a court system is to strive towards ascertaining the true facts to provide 'perfect' justice in a 'perfect' system,³⁶ to provide consistency in decision making.

²⁹ See for example, Australian Law Reform Commission, above n 27, 26.

³⁰ Adrian Zuckerman, 'Justice in Crisis: Comparative Dimensions of Civil Procedure' in Adrian Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press, 1999), 1.

³¹ Zuckerman, above n 30, 3.

³² The Honourable Sir Gerard Brennan, 'Key Issues in Judicial Administration' (1996) *Journal of Judicial Administration* 138, 140.

³³ Law Reform Commission of Western Australia, above n 28, para 1.5.

³⁴ Justice Ronald Sackville, 'From Access to Justice to Managing Justice: the Transformation of the Judicial Role' (2002) *Federal Judicial Scholarship* 9, 1.

³⁵ Law Reform Commission of Western Australia, above n 28, para [1.6].

³⁶ Brennan, above n 32, 138.

Consistency in decision making (the decision making process) in a system that adopts principles of fairness and rationality³⁷ (the procedures supporting the decision making process) are the focus of providing justice and the system to access it. This is supported by the conclusion of the Access to Justice Taskforce, Attorney Generals Department that the rule of law is an essential feature of a democratic society. Consistency in decision making underpins the rule of law giving people and societies confidence that those laws and decisions will be valued.³⁸ The principles of fairness and rationality feature in the process of upholding the rule of law as these principles underpin an effective way of pursuing the truth to resolve disputes. However, in light of the following two dimensions, this notion of ‘perfect justice in a perfect system’ is difficult to achieve.

2 Time as A Dimension of Justice

The second of Zuckerman’s three dimensions of justice is time. Pursuing the truth takes time. To ascertain the truth, evidence is needed. Obtaining evidence to support the truth takes time to collect and collate. Evidence can be collected at two stages; firstly before any formal hearing process and second, during the course of the hearing.³⁹ The evidence and the method by which this evidence is presented to the court takes time. High demand for court time invariably necessitates delays in matters proceeding to trial. The way facts are put into evidence often results in delay.⁴⁰ For example, evidence by way of affidavit or witness statements, takes time to adequately draft and finalise. Alternatively, if evidence at trial is oral, the process of giving evidence in this manner takes time. The procedures governing evidence are designed to elicit the truth so that the finder of fact can make a decision applying the facts to the law, thereby protecting rectitude of the decision. The pursuit of truth using these evidentiary procedures may lead to the decision coming too late to be of any use to the

³⁷Chris Finn, ‘Some Reflections on the Council’s Discussion Paper on the Scope of Judicial Review’ (Admin Review No 56, Administrative Review Council, Attorney Generals Department, 2004), 6.

³⁸ Access to Justice Taskforce, Attorney Generals Department, Australian Government, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), chapter 1, 1.

³⁹ Finn, above n 37, 12.

⁴⁰ These procedures include, obtaining proofs of evidence before proceedings are commenced, preparation of proceedings and correctly pleading cases, time for responses, defences, interrogatories, discovery and then the time it takes for the court to hear the matter including the opportunity for cross-examination of witnesses and preparation and delivery of submissions.

litigant. If the decision comes too late, it may be unjust⁴¹ because the procedures prevent a decision being made in a timely and cost effective manner. This then raises consideration of the third dimension of justice; that of cost.

3 Cost of Justice Dimension

Whilst cost of litigation means different things to different stakeholders, this thesis focuses on the financial cost of litigation to the individual accessing the system. The system within which the pursuit of justice operates is designed for parties to protect or enforce their legal rights. A decision maker cannot appropriately determine the enforcement and protection of legal rights without getting to the 'true' facts and applying them to the appropriate law. Gathering the information and constructing a legal argument for the finder of fact is labour intensive and involves a financial cost. Therefore, the dimension of cost is closely linked to truth in justice and the time taken to ascertain it. Generally, the more time it takes, the more it will cost, though mere delay (or just the passing of time) does not necessarily lead to higher costs.⁴² Formal procedures and regular court attendance⁴³ contribute to them. For example, the results of a 1993 study of the Victoria and New South Wales civil justice systems conducted by the Civil Justice Research Centre concluded that matters that were finalised on the day of hearing or after verdict incurred higher legal fees than matters settled prior.⁴⁴ This is because by this time, more legal work has been completed to ready a matter for hearing.

Procedurally, by the time of trial, the evidence has been collected, witnesses proofed and arguments prepared. This is done in anticipation of providing information for the court to make a decision: to find the truth. Litigating in a system that is designed to uphold the rule of law as a paramount consideration, comes at a financial cost and takes time, often to the detriment of the parties.

⁴¹ Zuckerman, above n 30, 6. See for example, *Re Davey* [1981] 1 WLR 164 where the person for whom a statutory will was being contemplated was dying at the time the hearing was conducted.

⁴² Deborah Worthington and Joanne Baker, 'The Costs of Civil Litigation: Current Changing Practices', (Research Publication, Law Foundation of NSW, Civil Justice Research Centre, NSW, 1993), 62.

⁴³ These include, for example, case management conferences, directions hearings and status conferences.

⁴⁴ Worthington, above n 42, 65.

C Balancing the Three Dimensions of Justice

In Australia, these three dimensions operate in a dispute resolution⁴⁵ process developed to achieve justice. These systems aim to achieve fair, open, dignified and careful processes measured by a balance between truth, time and cost producing a just outcome. But what does this mean in practice?

The dimension of truth⁴⁶ is paramount to a respected system with consistency in decision-making and rectitude of decision. However, each individual navigating through the process may focus more on one dimension over another. One litigant may find the cost to be reasonable, the time frame to be adequate, accessibility to be satisfactory and the outcome efficient. Another litigant may feel isolated by the cost, be critical of the time within which a matter reaches resolution, find the practices and procedures convoluted and isolating and as a result find the end result and the processes in between difficult to access. A particular dimension may be more important to one individual than another. For example, one individual may want ‘truth’ at any cost, irrespective of time. Clearly, therefore, it is difficult, if not impossible, to design a system that achieves all three justice dimensions equally. Further, equality between dimensions may not be the goal given different litigant expectations. What this means is that when considering access to justice, balancing these dimensions when prescribing procedures is important. Sufficient flexibility, often by way of discretion, should be afforded to the finder of fact so that they can adjust the application of the procedures to suit the case before them.

To do justice, the system should be designed to ascertain the truth, upholding the rule of law using procedures to balance the three dimensions of justice to provide a just outcome.⁴⁷ This will not provide perfect justice but will provide just procedures.⁴⁸

A just outcome appropriately balances the three dimensions of justice, upholding the rule of law, protecting rectitude of decision and providing consistency in decision making. It comes at an appropriate time with proportionate costs. It works in a system to make it fair, open and dignified, using careful processes; a system that is ‘doing’ justice.

⁴⁵ Lawrence B Solum, ‘Procedural Justice’ (2004) 78 *Southern California Law Review* 181.

⁴⁶ Davies says, upholding the rule of law. Solum refers to it as ‘accuracy’.

⁴⁷ Solum, above n 45, 141.

⁴⁸ Zuckerman, above n 30, 4.

There is little point, however, in having a system that can ‘do justice’ if it cannot be accessed. If the expense, time and lack of understanding of the system places it beyond the reach of the members of the community who need to access it the system cannot do justice.

This accessibility problem has been explored in many studies that identify key considerations to access to justice. These will be considered next.

D Access to Justice in Australia

In the past 20 years, there have been a number of access to justice reviews in Australia and overseas. This thesis primarily draws upon access to justice studies in Australia.⁴⁹ This literature incorporates reference to major access to justice studies overseas.

1 The Objectives of Access to Justice

Several objectives of access to justice are identified in Australian access to justice literature. These objectives reflect Zuckerman’s three dimensions of justice. An analysis of recent access to justice studies identifies some common objectives.

In 1994, the Access to Justice Advisory Committee, Standing Committee of Attorneys General identified the objectives of access to justice to be:-

- (a) equality of access to legal services;⁵⁰
- (b) national equity;⁵¹
- (c) equality before the law;⁵²
- (d) a fairer, more efficient and more effective legal system.⁵³

⁴⁹ These include Access to Justice Advisory Committee, Standing Committee of Attorneys General, *Access to Justice: An Action Plan*, (1994); Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (1999); The Victorian Law Reform Commission, *Civil Justice Review: Report*, (2008); Louis Schetzer and Judith Henderson, ‘Access to Justice and Legal Needs. Stage 1: Public Consultations, (Research Publication, Law and Justice Foundation of NSW, 2006); Sarah Ellison et al, ‘The Legal Needs of Older People in NSW’, (Research Publication, Law and Justice Foundation of NSW, 2004); Christine Coumanlos, Zhigang Wei and Albert Z Zhou, ‘Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas, (Research Publication, Law and Justice Foundation of NSW, 2006); Louis Schetzer, Joanna Mullins & Roberto Buonamano, ‘Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW’ (Background Paper, Law and Justice Foundation of NSW, 2003).

⁵⁰ Access to Justice Advisory Committee, *Access to Justice: An Action Plan*, above n 49, para 1.5.

⁵¹ Ibid.

⁵² Ibid. ‘Being treated as equals is a basic requirement of justice.’ Zuckerman, above n 30, 5.

In 1999, the Australian Law Reform Commission identified a justice system that is accessible is one where the processes available for accessing justice are able to be used, understood and are within financial reach of litigants,⁵⁴ with the objective to provide ‘relatively equitable access to the legal process.’⁵⁵

In 2002, the Law and Justice Foundation of New South Wales identified the same first three objectives as identified in the 1994 Access to Justice Advisory Committee study, as key elements of access to justice.⁵⁶ In May 2005, the Attorney General’s Justice Statement identified a strategy to meet the primary objective of creating a ‘simpler, cheaper and more accessible justice system’⁵⁷ by resolving conflicts early, reforming legal rules⁵⁸ and improving access and equity.

In 2008, the Victorian Law Reform Commission identified a number of objectives of a civil justice system including accessibility, affordability, equality, proportionality, timeliness, truth, consistency and predictability.⁵⁹

In 2009, the Attorney-General Department’s Access to Justice Taskforce identified the objective of maintaining the rule of law as an important justice consideration,⁶⁰ with legal costs acting as a barrier to achieving justice.⁶¹

In 2013, the Australian Government’s Attorney-General’s Department identified its access to justice objective as ‘ensuring Australians receive appropriate advice and assistance, no matter how they enter (the) justice system’.⁶² Whilst this objective does not directly refer to the three dimensions of justice, the stated aim of this objective, namely to be to create a simpler, cheaper and more accessible system,⁶³ reflects these three dimensions.

⁵³ Access to Justice Advisory Committee, *Access to Justice: An Action Plan*, above n 49, para 1.5.

⁵⁴ Australian Law Reform Commission, above n 27, para 1.80.

⁵⁵ Australian Law Reform Commission, above n 27, para 1.81.

⁵⁶ Schetzer et al, ‘Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW’, above n 49, 7.

⁵⁷ Commonwealth Attorney Generals Department, *The Justice Statement*, (1995), forward.

⁵⁸ See also the Victorian Law Reform Commission, *Civil Justice Review: Report*, above n 49, 50.

⁵⁹ Victorian Law Reform Commission, *Civil Justice Review: Report*, above n 49, 9.

⁶⁰ Access to Justice Taskforce, Attorney General’s Department, Australian Government, above n 38, 1.

⁶¹ Access to Justice Taskforce, Attorney General’s Department, Australian Government, above n 38, 10.

⁶² Access to Justice Taskforce, Attorney General’s Department, Australian Government *Access to Justice* (2013), www.ag.gov.au/LegalSystem/Pages/Accessstojustice.aspx.

⁶³ Access to Justice Taskforce, Attorney General’s Department, Australian Government, above n 38.

Whilst all these objectives are important to access to justice, a common focus, relevant to this thesis, is to provide a system that is fair, efficient and effective.

2 The 'Fairer, More Efficient and More Effective Legal System' Objective

A number of Australian access to justice publications address the desirability for a system to be fair, efficient and effective.

In 1994, the Access to Justice Advisory Committee⁶⁴ published a report ("the 1994 Report") which considered reform and how it could be achieved in such a way as to make the legal system fairer, more efficient and more effective. Changes were recommended with a view to creating a simpler, cheaper and thereby more accessible system⁶⁵ to achieve a legal system that is fair, efficient and effective.

In 1999, the Australian Law Reform Commission published two Discussion Papers. First, Discussion Paper 62⁶⁶ gave consideration to several overseas and Australian studies on civil justice reform including the 1994 Report. The Commission identified that a 'simpler, cheaper and more accessible legal system'⁶⁷ was desirable, balancing considerations of cost, timeliness, efficiency and accessibility.⁶⁸ Case management and court practices and procedures were identified as factors contributing to access to the legal system. Costs featured in those considerations as the Discussion Paper was concerned with ensuring that disputes were resolved efficiently and cheaply.⁶⁹

Second, Discussion Paper 89 recognised that a system of justice has several functions. These include determining disputes, facilitating settlements without the need for determination and providing and implementing procedures bringing about resolutions. This Discussion Paper draws on the three dimensions of justice to make a multi-functioning system more efficient and effective.

⁶⁴ Access to Justice Advisory Committee, *Access to Justice: An Action Plan*, above n 49.

⁶⁵ *ibid.*

⁶⁶ Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper No 62, (1999).

⁶⁷ Australian Law Reform Commission, above n 66, Terms of Reference.

⁶⁸ Australian Law Reform Commission, above n 66, para 2.2.

⁶⁹ Access to Justice Taskforce, Attorney Generals Department, Australian Government, above n 38.

The considerations of cost, time and efficiency, were also identified as relevant factors in the 1999 Australian Law Reform Commission's Terms of Reference Report number 89.⁷⁰

In 2008, the Victorian Law Reform Commission⁷¹ identified the need for the courts to be more accessible. There was a particular focus on the objectives of timeliness, transparency, efficiency and accountability including modifying and improving civil procedures with a view to reducing the costs of litigation.

What emerges from these access to justice studies and reports is a common desire to implement a system that is cost effective, produces timely outcomes and is efficient. In other words, a system that is fairer, more efficient and more effective. Such a system requires balancing a constant tension between the three dimensions of justice.⁷²

However, a system of justice which delivers efficiency and effectiveness may not necessarily deliver justice.⁷³ This view resonates with that of John Leubsdorf when he says 'making procedure speedier and cheaper might well make it less accurate even though keeping it slower and more expensive will not necessarily make it more accurate'.⁷⁴ Whilst costs and time are important considerations for creating a fair, efficient and effective system, reform focussing on reducing costs and speeding up the process does not necessarily provide a more efficient and effective system nor does it necessarily increase use. Accessibility when balancing these considerations is a complex notion.

3 Accessibility as A Reflection of the Three Dimensions of Justice

As the primary purpose of access to justice studies is to identify ways to facilitate access to justice, I submit accessibility as a reflection of these dimensions requires:-

⁷⁰ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, above n 49, para 1.69.

⁷¹ The Victorian Law Reform Commission, *Civil Justice Review: Report*, above n 49.

⁷² Christine Coumanlos, Zhigang Wei and Albert Z Zhou, above n 24, 4.

⁷³ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, above n 49, para 2.3.

⁷⁴ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, above n 49, para 1.110; J Leubsdorf 'The Myth of Civil Procedure Reform' in A Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press, 1999), 55.

- (a) a balance of time, cost and truth which can be managed by court procedures and practices, ADR processes and litigant attitudes; and
- (b) implementation of procedures striving towards optimal access that allows each individual to exercise autonomous choices in relation to litigation.

A system that implements these two requirements should afford the decision maker factually correct information so that they can apply legal principles to provide an acceptable outcome; that is, a legally and factually correct outcome in a timely and cost effective manner. A system that balances these dimensions must be flexible. It must be flexible so that individuals can exercise autonomy in their litigation choices and decision makers can exercise flexibility in the management of cases through the system. However, to be in a position to make autonomous choices in litigation, the system must be such that barriers to access to justice do not act to deprive the individual of the choice to access the system in the first place.

E Barriers to Access to Justice

1 Barriers to Access to Justice Generally

Many access to justice studies referred to in this chapter identify often common barriers to access to justice. These barriers affect people generally and can be identified to include four broad areas. First, is the availability of legal assistance. Access to information, advice and representation can often be difficult to achieve. The information may not be available. If it is available, it may be difficult to locate and/or interpret. It may be difficult to understand. Advice and representation may be difficult to obtain due to lack of availability of legal advisors, remoteness, disadvantage or lack of affordability.⁷⁵

Second, economic disadvantage can prevent access to justice, particularly justice that costs money. Further, limited financial resources may affect accessing the system and limit the options and choices available to the litigant because certain litigation pathways cost more to access than others.⁷⁶

⁷⁵ Schetzer et al, 'Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW', above n 49, 9.

⁷⁶ Ibid.

The third broad barrier is knowledge. A lack of knowledge of the legal rights available means the litigant will not know they have the ability to enforce those rights. A lack of knowledge of the services available to obtain the initial knowledge and then provide advice and assistance with what to do and how to manage the matter also prevent a person accessing justice. A lack of information, separate to services about matters and their pathways to resolution also act as a barrier to accessing legal rights and remedies.⁷⁷

Fourth, and most relevant to this thesis is the complexity of court structures, litigation and procedures, rules and forms, that is, the system itself, which is commonly complained of as the cause of increased cost and delay, providing a disincentive to access justice.⁷⁸

These four barriers are not confined to any specific class of persons within the community. More specific access to justice studies have identified barriers experienced by particular sectors of the community. Relevant to this thesis are those studies specific to people who are disadvantaged and disabled. Prior to examining the barriers identified in access to justice studies, legal capacity requires definition because legal capacity is fundamental in determining a person's individual ability to participate in the litigation process.

2 Capacity and the Person Who Lacks Will-Making Capacity

The issue of capacity arises in two contexts in this thesis. Firstly, there is capacity in the context of litigation. Second is testamentary incapacity where a person lacks the capacity to make a will. Both are outlined in this chapter. Only a short definition of testamentary capacity will be given here. It will be expanded upon in Chapter Three in the context of a discussion about the requirements of a valid will.

(a) Litigation Incapacity

A person who experiences litigation incapacity is incapable of conducting proceedings on their own behalf and requires representation in court proceedings. Litigation incapacity is an all or nothing concept. There is a presumption of litigation capacity

⁷⁷ Ibid.

⁷⁸ Law Reform Commission of Victoria, *Access to the Law: the Cost of Litigation*, Issues Paper (1990), 34.

until the individual is considered incapable when they are unable to perform a specific task connected to the litigation.⁷⁹ Even an individual who lacks legal capacity for some purposes may be competent to make, or contribute to certain other decisions. Therefore, the ‘... legal and legal-like concepts of competence differ from a more familiar common sense notion of competence as natural ability’.⁸⁰ What this means is that capacity as natural ability is a matter of degree.⁸¹

There is clearly a distinction between legal capacity and capacity in other contexts. For example, mental capacity invoking questions like ‘can this person decide to attend health classes’, is different from capacity in a legal sense invoking questions like ‘does this person have the capacity to enter into gym membership contract’. The considerations are different. That is not to say, however, there is no overlap between legal capacity and capacity in other contexts. Often, to determine legal capacity, psychiatric presentation and medical interpretations of the effect of that presentation are relevant.⁸²

To determine legal capacity an objective analysis of a person’s understanding is required using subjective information about the person being assessed.⁸³ Factors such as level of education, race and social and cultural origins are considered. The individual’s current presentation in the context of their pre-existing presentation is also relevant. The use of medical testing aids such as a mini-mental state examination or aged care assessment team assessment are often used by doctors to assess capacity and provide a report for the determiner to consider when deciding whether the person has legal capacity. Further, the legal context in which the assessment is carried out is relevant. Factors such as complexity and importance of the person’s affairs are also considered.⁸⁴ These subjective factors, and their often transient nature, make capacity difficult to assess.⁸⁵

⁷⁹ Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012), 121.

⁸⁰ Daniel Wilker, ‘Paternalism and the mildly retarded’ (1979) 8 *Philosophy and Public Affairs* 377-92.

⁸¹ Joel Feinberg, ‘Autonomy’ in John Christman (ed), *The Inner Citadel: Essays on Individual Autonomy* (1989), 27.

⁸² Brendan Ashdown, ‘Legal Guardians and Case Guardians: At Least 50 Shades of Grey’ (Paper presented at Family Law Practitioners Association of Western Australia), Fremantle, (5 October 2013), 1.

⁸³ Ashdown, above n 82, 8.

⁸⁴ *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, para 17.

⁸⁵ Ashdown, above n 82, 8, and 12.

However, once a person has been assessed as lacking legal capacity, the incapacity is presumed to continue in relation to the matter or issue in question only until the factors causing incapacity cease.⁸⁶ A finding of incapacity in one context does not mean the person is presumed incapable in another. For example, a person requires a different level of capacity to manage financial affairs than they do to make a will. This is because these legal issues give rise to different considerations. Therefore, for example, a person is not presumed to lack will-making capacity because an administrator has been appointed to manage their financial affairs.⁸⁷

However, if an administrator has been appointed with plenary powers of specifically for the purpose of conducting or defending litigation, the represented person is presumed to lack litigation capacity and must act by representative.⁸⁸ If there is no administrator appointed and there is a question as to whether the person has litigation capacity, the Court in which the proceedings are being conducted must assess whether capacity exists in connection with the legal issue at hand to engage in and understand the litigation.⁸⁹

(b) Testamentary Incapacity

A person who is found to lack will-making capacity is said not to have testamentary capacity. This will be because the person does not have the requisite mental capacity to make a will.⁹⁰ This person is unable to understand the nature of the act of making a will and its effects, understand the extent of property disposed of by will and unable to comprehend and appreciate the claims on the assets in the estate.⁹¹

The test to determine will making capacity and its historical development will be discussed in Chapter Three. Having defined these terms, this thesis will now discuss sources of information about barriers to access to justice for the disadvantaged and disabled.

⁸⁶ Ashdown, above n 82, 15.

⁸⁷ *Re the Full Board of the Guardianship and Administration Board* (2003) WASCA 268 (13 November 2003).

⁸⁸ See for example order 70 *Rules of the Supreme Court 1971*.

⁸⁹ Ashdown, above n 82, 22.

⁹⁰ LexisNexis, *Encyclopaedic Australian Legal Dictionary*, (at January 2011).

⁹¹ *Banks v Goodfellow* [1861-73] All ER 47.

3 Barriers to Access to Justice for the Disadvantaged and Disabled

Disadvantaged and disabled litigants have been identified as being more likely to experience a lack of equality before the law and a lack of opportunity to exercise their autonomous legal rights.⁹² Disadvantaged and disabled litigant have been identified to include people with intellectual or psychiatric disability, people with a low level of education and poor literacy skills, the elderly, those on low incomes and those who are institutionalised.⁹³ Disadvantage and disability do not automatically equate to litigation or testamentary incapacity. This thesis proceeds on the basis that a person who lacks will-making capacity falls into the category of a disadvantaged and disabled litigant. These are described as including:-

- (a) those suffering from a developmental disorder or disability;
- (b) persons diagnosed as suffering from a mental illness;
- (c) persons lacking capacity by reason of disease or accident; and
- (d) a person who may have testamentary capacity but through severe physical disability or injury are completely unable to communicate.⁹⁴

I submit that the barriers experienced by these members of the community described in these terms are analogous to the barriers experienced by the person who lacks will-making capacity. This is to the extent that they have a cognitive impairment in common whereby they fall into the category of a disadvantaged and disabled litigant. Barriers experienced by the disadvantaged and disabled have been discussed in access to justice studies specific to these groups. Surveys⁹⁵ have identified the legal incidences, needs and experiences of various disadvantaged member groups of the broader community including people with mental disorders, people with intellectual disabilities and the elderly.

People with mental disorders were the subject of research in 2003 by the Centre for Mental Health Research of the Australian National University. The Centre examined

⁹² Schetzer et al, 'Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW', above n 49, 16.

⁹³ Schetzer et al, 'Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW', above n 49, 6 and 17.

⁹⁴ J A Starke, 'Wills for Disable Persons – Proposed Reform of the Law' (1989) *Australian Law Journal* 807, 808.

⁹⁵ These include Schetzer and Henderson, above n 49, Law and Justice Foundation of NSW, 'The legal needs of older people in NSW' and 'Justice made to measure: NSW legal needs survey in disadvantaged areas' above n 48, Schetzer, Mullins and Buonamano, above n 49.

the prevalence of mental disorders amongst members of the Australian population receiving income support and the impact mental health had on achieving social and financial goals.⁹⁶ The Paper⁹⁷ published as a result of research concluded that people with a mental illness were amongst the most disadvantaged and vulnerable in society. They found that these people experienced higher levels of poverty.⁹⁸ The Law and Justice Foundation of New South Wales considered these findings of particular interest because it provided insight into justice issues experienced by these members of the community.⁹⁹ As a result, the Foundation conducted research involving a study of access to justice issues experienced by people with mental illness. A report containing their findings¹⁰⁰ identified that for people with disabilities, barriers to access to justice incorporated a number of factors. These included communication difficulties, lack of knowledge and awareness, a reliance on others and a lack of autonomy to make decisions and to seek legal assistance.¹⁰¹

People with intellectual disabilities face similar barriers which included a lack of financial resources and a failure of the legal profession to acknowledge their capacity or partial capacity to give instructions.¹⁰²

For the elderly, Gray, Forell and Clarke¹⁰³ reported on the results of access to justice and legal needs studies in 2009. A relationship between cognitive disability and other groups of disadvantage such as a low income and education existed. Their paper identifies the barriers faced by the disadvantaged or disabled person¹⁰⁴ in meeting their individual legal needs. These are:-

- (a) a lack of knowledge of their legal rights and options such that the person experiencing cognitive impairment was not aware that the problem was

⁹⁶ Department of Social Services, Australian Government, 'Estimating the Prevalence of Mental Disorders among Income Support Recipients: Approach, Validity and Findings' (Policy Research Paper No 21, 2003); page vii.

⁹⁷ Karras, et al, above n 25, 4.

⁹⁸ Karras, et al, above n 25, 1.

⁹⁹ Karras, et al, above n 25.

¹⁰⁰ Karras et al, above n 25.

¹⁰¹ Schetzer and Henderson, above n 49; Karras et al, above n 25.

¹⁰² Schetzer et al, 'Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW', above n 49.

¹⁰³ Gray et al, above n 26.

¹⁰⁴ These are persons with cognitive impairment identified as intellectual disability, dementia, mental illness and brain injury resulting from accident, illness or substance abuse and temporary periods of acute psychological stress focussing on "*the effects of intellectual disability on a person's capacity to access justice*". Gray, et al, above n 26, 1.

- capable of legal resolution,¹⁰⁵ how to go about accessing a system capable of facilitating a legal resolution and once in the system, how to navigate around it;
- (b) experiencing a dependence on other to take action on their behalf.¹⁰⁶ That is, some required assistance with taking legal steps themselves whilst others required a representative to take those steps for them;
- (c) where representatives are required, costs becomes a primary consideration particularly in litigation;
- (d) difficulties dealing with individuals within the system who have a lack of understanding and patience for them;
- (e) that the system itself creates barriers.¹⁰⁷

Though reported in the context of cognitive impairment, comparing these findings to other access to justice research, these barriers appear to be common to the experiences of persons categorised as disadvantaged and disabled. People surveyed by the Law and Justice Foundation of New South Wales experience barriers in seeking help including difficulty in affording assistance due to high costs of legal services,¹⁰⁸ a lack of awareness, a lack of availability of assistance and a lack of community resources.¹⁰⁹

These barriers identified by Gray, Forrell and Clarke therefore crystallise the practical experiences of disadvantaged and disabled persons. Drawing upon these conclusions identified in the research, I submit that the barriers experienced by these persons can usefully be categorised as being experienced at three different stages of the legal process. First, stage one: where a person chooses not to access the system at all. For example, legal action may not be taken due to a lack of awareness that they face a legal issue capable of being resolved or difficulty communicating.¹¹⁰ Second, stage two: where a person experiences difficulty getting into the system and third, stage three: where a person experiences challenges once in the system. People may experience difficulty commencing and pursuing an action due to difficult and lengthy

¹⁰⁵ Gray, et al, above n 26, 5.

¹⁰⁶ Gray, et al, above n 26, 6.

¹⁰⁷ Gray, et al, above n 26.

¹⁰⁸ Coumanlos, Wei and Zhou, above n 49.

¹⁰⁹ Ellison, above n 49.

¹¹⁰ Karras et al, above n 25, 12.

legal processes.¹¹¹ These stages will be used as the framework in this and subsequent chapters to analyse the barriers to access to justice associated with use or desired use of statutory will legislation.

(a) Stage One: Not Accessing the System at all

(i) Lack of Knowledge as A Barrier to Access to Justice

There is support for identifying lack of knowledge as a barrier to access to justice in the Background Paper, Access to Justice and Legal Needs¹¹² where the authors state ‘(p)eople with intellectual disabilities are more likely to have poor educational outcomes and thus have poor knowledge of their rights, obligations or where to seek assistance.’¹¹³ In 2006, the Law and Justice Foundation of New South Wales conducted a legal needs survey in disadvantaged areas which identified that 32.8% of people with a legal issue did nothing about it.¹¹⁴ In 2009, the Attorney-General’s Taskforce identified one of the primary reasons for a person doing nothing is a lack of knowledge.¹¹⁵

Therefore, lack of knowledge is an important access to justice consideration. Strategies that provide little or no information or access to information significantly limit the ability to gain adequate knowledge of the existence of the relevant legal rights.

At stage one, if the disadvantaged and disabled person does not know a particular right or remedy exists, they will not go about accessing a system that can provide assistance for its determination. Likewise, if members of the support network relied upon by the person¹¹⁶ are also unaware, those rights and remedies go undetermined.

¹¹¹ Karras et al, above n 25, 12.

¹¹² Schetzer, et al, ‘Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW’, above n 49.

¹¹³ Schetzer, et al, ‘Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW,’ above n 49, 19.

¹¹⁴ Access to Justice Taskforce, Attorney Generals Department, Australian Government, above n 38.

¹¹⁵ Access to Justice Taskforce, Attorney Generals Department, Australian Government, above n 38, 18.

¹¹⁶ These persons include, for example: carers, medical providers, social workers, care agencies.

(ii) A Dependence on Other to Take Action as A Barrier to Access to Justice

Disadvantaged and disabled persons rely on others to provide assistance with many matters including resolution of legal issues.¹¹⁷ The Law and Justice Foundation of New South Wales identified people with a mental illness/disability sought advice for a serious legal issue from legal or non-legal sources.¹¹⁸ This assistance is often provided informally, without the need for an order appointing someone in a formal capacity to that role. However, where a person experiences litigation incapacity, a formal order appointing someone to act on their behalf to make those decisions can be obtained.¹¹⁹

At stage one, this means there is a reliance on others to alert the person to the fact that the legal right or remedy is capable of resolution and how to make inquiries about it.

(iii) Cost as A Barrier to Access to Justice

Engaging in litigation is an expensive process. Obtaining legal advice and instructing legal advisors to commence and pursue litigation attracts legal fees which the person using those services is required to pay for. Personally incurred costs factor in the decision to access the court system. At stage one, the cost of obtaining legal advice acts as a barrier. If legal advice is unaffordable and the person is not prepared or able to act in person, the person is unlikely to enter the system.¹²⁰

(iv) Difficulty Dealing with Individuals within the System as A Barrier to Access To Justice

The disadvantaged or disabled person experiences problems dealing with individuals within the system. Of those that did something, three commonly reported problems were identified when obtaining assistance with advice regarding the resolution of legal issues.¹²¹ For the disadvantaged and disabled person these were:-

- (a) Difficulty getting through to a service telephone;
- (b) Delay in receiving a response; and;
- (c) Difficulty obtaining an appointment.

¹¹⁷ Schetzer et al, 'Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW', above n 49, 11.

¹¹⁸ Law and Justice Foundation of New South Wales, *Justice Issues*, Paper 17 (2013), 17.

¹¹⁹ Gray et al, above n 26, 3.

¹²⁰ Law and Justice Foundation of New South Wales, above n 118, 17.

¹²¹ Access to Justice Taskforce, Attorney Generals Department, Australian Government, above n 38, 10.

This accords with findings in a 2012 United Kingdom study, noted by the Law and Justice Foundation of New South Wales. In this study, people with an illness or disability experienced significant difficulties obtaining appointments and problems communicating, particularly with staff that lacked experience or were unwilling to help.¹²²

Getting through to a service that may or may not be able to provide assistance is the first cause of these difficulties. Once contact has been made, the service may not provide the assistance sought. There are difficulties communicating with legal practitioners, difficulty understanding the advice given and a lack of admission that the advice is not understood.¹²³ For the practitioner, the causes for these communication difficulties are difficulty understanding the incapable persons lack of time, cost considerations and workloads.¹²⁴

At stage one, difficulty with dealing with individuals means it will be difficult to express a view or to find out whether there is a way to resolve their problem.

(v) The System Itself as A Barrier to Access to Justice

At stage one, knowledge of the risk of costs associated with litigation and knowledge that the system can be convoluted and complicated, may lead to a decision not to access the system.

(b) Stage Two: Getting into the System

(i) Lack of Knowledge as A Barrier to Access to Justice

If a person knows that a right or remedy exists but does not know how to get into the system to have that right or remedy determined, they face a barrier at stage two. For some people, this may lead to a decision to take no action or to take action as a self represented person, guided by the court during the process of litigation. For a person with a mental illness or disability, the decision may differ. In a survey by the Law and Justice Foundation of New South Wales people with a mental illness/disability were

¹²² Law and Justice Foundation of New South Wales, above n 118, 17.

¹²³ Gray et al, above n 26, 6.

¹²⁴ Gray et al, above n 26, 7.

identified as being more likely than those without to seek advice if the problem was serious.¹²⁵ Therefore, although these persons lacked knowledge of how to get into the system, advice was sought about how to do so. This does not necessarily mean that this advice transpires into entry into the system. It also does not describe what may occur if the problem is not serious.

(ii) A Dependence on Other to take Action as A Barrier to Access to Justice

If the disadvantaged and disabled person is involved in legal action lacks litigation capacity, a formal order appointing someone to act on their behalf is required. Court procedure require them to act by representative. In Australia, the appointment of a representative invokes a substitute decision making model by which the representative makes the decisions in the context of that representation. This means there is an erosion of autonomy and a dependence on another to take action on their behalf. Further, the personal representative must act by solicitor. The purpose of this requirement extends from the courts inherent *Parens Patriae* jurisdiction.¹²⁶ This jurisdiction:

... extends to all those persons who are not able to care for themselves (Department of Health and Community Services (NT) v JWB and SMB (Marions Case) (1992) 175 CLR 218; and it extends to interests of...persons disabled because of unsoundness of mind...and that it is important to appreciate the broad nature of the jurisdiction and its capacity to respond to any necessitous circumstances involving persons unable, for reason of disability to care for themselves.¹²⁷

It also extends from:-

...the legislature exercising its power to provide for the interests, protection and welfare of disabled persons.¹²⁸

Whilst there is an abundance of caution to be exercised in the interests of protecting and managing the persons' affairs, either by *parens patriae* jurisdiction, by legislature or a combination of both, from an access to justice perspective, difficulties arise as a result of the procedures surrounding the requirement and mechanism for representation, particularly in the Court. These will be discussed further in Chapter

¹²⁵ Law and Justice Foundation of New South Wales, above n 118, 6.

¹²⁶ *S v State Administrative Tribunal* [2012] WASC 308 (30 August 2012), para 47.

¹²⁷ *Ibid* para 48.

¹²⁸ *Ibid* para 50.

Five where procedures governing representation of a person lacking litigation capacity in legal proceedings are outlined.

Representation can be formal in the sense that a formal order for administration is made. Formal representation is required in court proceedings. Representation can also be informal in the sense that there is no formal order in place but there is a reliance upon others to provide assistance. Informal representation may be common where no court proceedings are on foot but advice may be needed. Whether the representation be formal or informal, the person relies on others to know of the legal rights and remedies (or the ability to find out), what to do about them and to provide that knowledge to, or take action on behalf of, them. The representative is also expected to make inquiries about what to do about the legal issue and then access the system. The consequence is that the person relies on their representative as they experience difficulties knowing if they need to be in the system and if they do, by virtue of the structure of the system, are unable to get into it without the assistance of a representative. Invariably, getting into the system requires the person to be formally represented and to act by lawyer.

At stage two, this reliance involves another person taking action on their behalf formally as their guardian ad litem or next friend. Court procedures formalise this representation acting to protect the incapable person's rights and remedies through appropriate representation. However these protective processes are complicated, time consuming and expensive, concepts that compete with the objective of a fair, more efficient and more effective legal system.

(iii) Cost as A Barrier to Access to Justice

Cost is a substantial barrier to accessing justice. This becomes more pronounced where the individual seeking to access the system experiences some form of disability. Whilst disability and financial disadvantage are not necessarily concurrent, this class of persons will often have less funds available to pay for litigation. The Law and Justice Foundation of New South Wales, for example, identified people with intellectual disabilities as often lacking sufficient financial resources.¹²⁹

¹²⁹Schetzer et al, 'Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW', above n 49, 2.

At stage two, there are additional costs for a person with a decision-making disability of having a representative appointed and the requirement for the representative to engage a lawyer. The representative bears the responsibility to pay costs incurred on behalf of the incapable person and the costs potentially payable to a successful party. This adds an extra layer to the cost barrier as the representative is, themselves, at financial risk.¹³⁰

Overall, these protective provisions relating to the incapable person means they usually experience a greater financial cost in commencing legal proceedings.

(iv) Difficulty Dealing with Individuals within the System as A Barrier to Access to Justice

At stage two, communication problems are a barrier to accessing legal assistance.¹³¹ Where a person is able to communicate, there are two propositions to consider. First there are the varying degrees of the legal professions' ability to understand and interpret the communication and second, acceptance by the court of the content of that communication. If there is no or a limited ability to communicate, then getting into the system is a decision made by a litigation representative. Having a representative may assist with resolution of communication difficulties experienced by the incapable person in both of these propositions. However, this comes at a financial cost because the representative must be formally appointed and must be legally represented, both incurring additional legal costs not necessarily incurred by the capable person.

(v) The System Itself as A Barrier to Access to Justice

To commence an application in the court, a person whose ability to participate in proceedings is affected, is required to be represented in court proceedings. This means that additional procedures are required to ensure representation and protection of that person. Once in the system, representation continues. Further, once an agreement has been reached, court approved compromise is required adding additional procedures and corresponding costs to the proceedings.

¹³⁰ *Oshlack v Richmond River Council* (1998) 193 CLR 72, 97-8.

¹³¹ Schetzer et al, 'Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW', above n 49, 2.

(c) Stage Three: The System Itself

(i) Lack of Knowledge as A Barrier to Access to Justice

Even if a person knows how to access the system, knowing the system is complicated and complex means they are less likely to access the system in the first place. A lack of knowledge as to how to use the procedures, which documents to file, how to construct arguments, the order of proceedings and the rules of evidence can lead to a decision not to access the system at stage three.

(ii) A Dependence on Other to take Action as A Barrier to Access to Justice

When an administrator is appointed concern has been expressed that ‘... the persons own choices and preferences will be ignored and other people will decide for them...(p)eople who have been labelled incompetent are deprived of their ability to satisfy the basic human need to be self-determining...’¹³² They are deprived of their autonomy by reason of a declaration of incapacity. They are assumed to not understand the process or to acknowledge that the problem is capable of legal resolution¹³³ and as such do not possess the power to make legally binding decisions.¹³⁴ However, Australian guardianship legislation requires the decision-maker, when deciding whether or not to appoint a representative to act, to consider the wishes of the person for whom the decision is being made. However, once a representative is appointed, at stage three, the formally appointed representative navigates the system making substituted decisions for the incapable person. It is a potential barrier that it may be difficult to find someone willing to act in these circumstances.

(iii) Cost as A Barrier to Access to Justice

The cost of litigation will vary depending upon which litigation pathway is followed to conclusion¹³⁵ and how it is concluded. As the litigation path varies, so does the cost of following one or many of those litigation paths or using different decision making processes along the litigation path. Factors such as case type, resolution process,

¹³² A. Dhanda, ‘Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future’ (2007) 34 *Syracuse Journal of International Law and Commerce*, 429, 436-7.

¹³³ Gray et al, above n 26, 5.

¹³⁴ Feinburg, above n 81, 28.

¹³⁵ Brennan, above n 32, 112.

involvement of counsel and / or expert witnesses, number of appearances in Court and the way in which litigants are charged (ie: their costs agreement)¹³⁶ all impact upon the cost of each pathway. As the path to litigation can be unpredictable, so can the costs. At times, the costs can be excessive and disproportionate to the matter being litigated¹³⁷ irrespective of whether a matter is complexity of the matter. Applications of an interlocutory or protective nature necessarily increase the cost of litigation which is an identified barrier to accessing justice.

At stage three, practices and procedures, though well intended to reduce the incidence of rising legal costs and disproportionate cost claims, can also have a tendency to increase the cost of litigation by imposing certain criteria and deadlines to be met.¹³⁸ Case management processes can cause higher proportionate costs.¹³⁹ Complicated and time consuming procedures have a tendency to increase costs.¹⁴⁰

The Law and Justice Foundation reports that disadvantaged people are often on low incomes.¹⁴¹ The high cost of legal services and the low incomes of disadvantaged people often means that those on low incomes were denied access to justice because it is simply unaffordable.

As there are numerous paths to justice, the decision making process and procedures that are used will shape the cost of a matter.¹⁴² This would be so, even if there was only one pathway to justice. The rising economic cost of litigation seems destined to shut out lower income earners from accessing justice or having recourse to the legal system due to cost being a barrier to accessibility.¹⁴³ Additionally, extra costs incurred by the person who does not possess litigation capacity by virtue of the extra procedural requirements generally compound the difficulty experienced by the person in accessing justice at this stage.

¹³⁶Ann Eyland, 'Legal Costs and Case Management' (2004) 27 *University of New South Wales Law Journal* 231, 234.

¹³⁷Adrian Zuckerman, 'Lord Woolf's Access to Justice: Plus Change' (1996) 59 *The Modern Law Review* 773.

¹³⁸See for example Tania Matruglia, 'The Costs of Litigation in the Federal Court of Australia: Research conducted for the Australian Law Reform Commission' (Research Publication, Australian Law Reform Commission, July 1999) where she concludes '(c)ases going to hearing cost more than cases resolved at an earlier stage' (62).

¹³⁹Law Reform Commission of Victoria, above n 78.

¹⁴⁰Australian Law Reform Commission, above n 27, 126.

¹⁴¹Coumanlos, Wei and Zhou, above n 24.

¹⁴²Coumanlos, Wei and Zhou, above n 24, 146.

¹⁴³Access to Justice Taskforce, Attorney Generals Department, Australian Government, above n 38, 349.

(iv) Difficulty Dealing with Individuals within the System as A Barrier to Access to Justice

At stage three, where the incapable person exists within the court system, procedure prescribes they are to be represented by someone else in a substituted decision making role. Once a representative is appointed, decisions normally made by a capable person that cannot be made by the incapable persons are substituted for that of their representative. When this occurs, communication is with the representative and not the incapable person. Difficulty communicating at this stage may arise when the incapable person does not realise or appreciate that they require a representative to act on their behalf and attempt to self represent in the litigation process.

(v) The System Itself as A Barrier to Access to Justice

Once in the court system, it is difficult to navigate unless the person is familiar with the processes within the system.¹⁴⁴ The complexity and formality of court processes (including the inappropriate use of alternative court procedures such as mediation where not warranted in certain matters) and a feeling of intimidation in a courtroom setting cause difficulty for the incapable person in the system. Delay, costs order risks and limited remedies within the system itself have been identified as barriers to access to justice.¹⁴⁵ For example, in 1999, the Law Reform Commission of Western Australia reported public complaint of expense and delay in the justice system as a barrier to the efficient management of litigation and access to it.¹⁴⁶ Further, the need for judicial independence unswayed by pressure from government or the public means procedures designed to find the truth inevitably sacrifice accessibility because, regardless of cost and time, the judicial decision must be based on truth to uphold the rule of law.¹⁴⁷ Further, the win/lose outcome of trial and the costs following the event, discourage and in some circumstances prevent, people accessing the system for fear of an adverse costs order.

¹⁴⁴ Access to Justice Taskforce, Attorney Generals Department, Australian Government, above n 38, 62.

¹⁴⁵ Schetzer et al, 'Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW', above n 49.

¹⁴⁶ Law Reform Commission of Western Australia, above n 28, para 1.8.

¹⁴⁷ Law Reform Commission of Western Australia above n 28, para 1.20.

(d) Summary of this Section

Lack of knowledge, communication difficulties, a reliance on others and a lack of financial resources all contribute as barriers to access to justice for the disabled and disadvantaged. Each barrier or a combination thereof, may lead to a decision not to access the system at all. In some circumstances, this may be appropriate. Barriers of cost and delay may be sufficient disincentives preventing unmeritorious litigation being commenced. In other circumstances avoiding litigation may not be suitable. In these circumstances, these barriers make it difficult to enter and navigate the system.

People of all backgrounds, with disparities in wealth and mental and physical health, have the right to equal access to justice in the legal system.¹⁴⁸ However, access requires a careful balance between the three dimensions of justice. To achieve this balance, the system must contain rules and procedures that maintain sufficient flexibility to confer discretion to the court to balance these dimensions appropriately on a case by case basis. Where the parties desire an alternative resolution strategy, alternatives to formal court based procedures in Australia provide mechanisms for the resolution of legal issues outside or within the formal court system. These include, relevant to this thesis, the introduction of tribunals and boards, alternative dispute resolution processes and more flexible procedures within the court system.

4 Responses to Access to Justice Issues by Parliament and Courts

Parliament and courts have addressed access to justice issues in a number of ways including the introduction of alternatives to court based litigation.

(a) Quasi-Judicial Bodies

Quasi-judicial bodies such as tribunals and boards as forums, traditionally the domain of administrative law, have been a feature of the Australian legal landscape for many years, as forums for decision making. Historically, Australian administrative law developed from a common law system with a series of statutory tribunals¹⁴⁹ to a system that included the development of consolidated specialist tribunals to make

¹⁴⁸ Indeed, Article 13 of the *Convention of the Rights of Person with Disabilities* promotes equality for persons with disabilities in accessing justice. For Australia to meet its obligations under the Convention, procedures need to change.

¹⁴⁹ Robin Creyke and Peter McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 3rd ed, 2012), 28, para 1.3.3.

particular decisions on jurisdictions conferred by statute. In Australian states and territories, a similar pattern has emerged. Decisions, traditionally falling within the realms of a court, have been diverted by legislation, to tribunals, boards and other alternative decision making bodies.¹⁵⁰ These bodies have increasingly been given the power to hear a greater variety of matters partly in response to the barriers experienced in the court system. For example, in Western Australia, the introduction of the *Guardianship and Administration Act 1990* (“the Act”)¹⁵¹ meant guardianship and administration decisions, traditionally the realm of the Supreme Court, were vested in the Guardianship and Administration Board, a specialist Board established to make guardianship and administration decisions under the Act.

However, concern about there being no coherent, unified and comprehensive system of decision making has led to the introduction of one tribunal exercising decision making power over a range of legal issues. For example, in 2004, the Western Australian Government passed legislation which led to the creation of the State Administrative Tribunal¹⁵² (“the SAT”) in 2005. Decisions traditionally made by specialist boards were then vested in the SAT.¹⁵³ There was a desire to merge jurisdictions using Boards and Tribunals into one decision making body¹⁵⁴ to streamline ‘the civil and administrative review processes’.¹⁵⁵ This was because the approach as it then was, meant that different Boards and Tribunals operated in their own way, using specific practices and standards unique to that body and the opportunity to ‘share resources’ was not present.¹⁵⁶ Similar considerations were

¹⁵⁰ Examples of such schemes can be seen in Western Australia with the introduction of WorkCover WA, a tribunal empowered by legislation to make decisions under certain workers compensation provisions, the Assessor of Criminal Injuries Compensation who decide compensation claims made by victims of crime on a paper based application system with the option to call a hearing if need be. There is also the State Administrative Tribunal which is conferred with the jurisdiction to hear a range of matters from review of administrative decisions (for example, town planning), to disciplinary hearings and decisions relating to human rights of guardianship and administration. The latter matters have traditionally been decided by the Court exercising its *parens patriae* jurisdiction, an inherent common law power.

¹⁵¹ This legislation was assented to in 1990.

¹⁵² The tribunal was created by the *State Administrative Tribunal Act 2004* which was assented to on 23 November 2004.

¹⁵³ This occurred by virtue of the *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004*.

¹⁵⁴ Western Australian Civil and Administrative Review Tribunal Taskforce, *On The Establishment of the State Administrative Tribunal*, Report (2002), (iii).

¹⁵⁵ Western Australian Civil and Administrative Review Tribunal Taskforce, above n 154, 59.

¹⁵⁶ Western Australian Civil and Administrative Review Tribunal Taskforce, above n 154, 62.

examined by the Northern Territory Law Reform Committee which also concluded that a single unified approach is desirable.¹⁵⁷

There are several advantages of a tribunal system. Relevant to this thesis, the primary advantage is accessibility.¹⁵⁸ This is because the application process is simpler, knowledge of the procedures widely available and inexpensive to access and the process informal, quick and efficient.¹⁵⁹ Further benefits include the publication of written information about applications and hearings, the development of a more flexible and user-friendly system and a more cost effective procedure.¹⁶⁰ ‘... (P)ermitted flexible procedures ... (take) advantage of the right combination of formality, to ensure rigour and informality, to avoid rigidity’.¹⁶¹ A tribunal system allows the tribunal to move between formality and informality depending upon the circumstances of the matter, to achieve the goal of providing ‘...a fair and just review ... by employing rigorous methods in a setting which is as informal as possible’.¹⁶² The general view is that an informal and flexible system can deliver quicker and more cost effective justice, which means individuals are more likely to access it.

Informality and flexibility are not the aims of the court system because the primary focus of the court system is ascertaining the truth as the primary dimension of justice. Reductions in cost and time brought about by informality and flexibility are secondary considerations. To ascertain the truth, the court system follows a formal set of rules and procedures. The process is burdened by procedural technicalities, is difficult to access, is time consuming and costly. Further, the protective nature of court proceedings imposes substituted decision making, steeped in the tradition of the courts *parens patriae* jurisdiction of the court, which brings with it protective procedures.

A tribunal or board is able to encourage individual participation, with a preference for the attendance, at the hearing, of the person about whom a decision is to be made. This is different to the court system, which imposes representatives who make decisions for

¹⁵⁷ Northern Territory Law Reform Committee, *Report on the Review of Administrative Decisions and an Administrative Tribunal*, Report No 29 (2004), 5.

¹⁵⁸ Northern Territory Law Reform Committee, above n 157, 73.

¹⁵⁹ *Ibid.*

¹⁶⁰ Western Australian Civil and Administrative Review Tribunal Taskforce, above n 154, 63-4.

¹⁶¹ The Hon. Justice Garry Downes AM, ‘The Tribunal Dilemma: Rigerous Informality’ (General Meeting of the Council of Australasian Tribunals, The Australian Museum, Sydney 17 September 2008), 4.

¹⁶² Downes, above n 161, 7.

the individual without encouraging the individual to attend. What this means is that, in a tribunal, there is no formal order required for the representation of a person lacking litigation capacity. This is not so in the court. A tribunal has the flexibility to deal with a person lacking litigation capacity in a way that is fit for the matter before it. A court does not and is required to follow prescribed procedure for the representation of the person.

An example of the flexibility of tribunals can be found in a June 2011 publication where the Committee responsible for the South Australian Office of the Public Advocates Supported decision making Project Report of Preliminary Phase “1”, published an initial internal evaluation paper. This defined substituted decision making:-

... in substitute decision making, another person makes decisions on behalf of the person who has a disability.¹⁶³

Current legislation, practices and procedures adopt substituted decision making for legal decisions. However, in some circumstances relating to particular decisions (for example, where a person is to live), it was recognised that a supported decision making model could be considered. For example, the Victorian Law Reform Commission accepted that whilst:-

substituted judgement should be the paramount consideration, it should not be the only consideration when making decisions that seek to promote the personal and social well-being of the represented person.¹⁶⁴

At the time of publication of the report, the Committee identified the development of the “Supported Decision Making Project” by the South Australian Office of the Public Advocate.¹⁶⁵ That project undertook a trial of supported decision making in non-legal decisions involving accommodation, lifestyle and health.¹⁶⁶ It accepted where there is a link between a financial decision and a decision relating to accommodation, lifestyle and health, supported decision making could be considered. For the purpose of the

¹⁶³ South Australian Office of the Public Advocate, *South Australian Supported Decision Making Project*, Report of Preliminary Phase 1 (2011), 6.

¹⁶⁴ Victorian Law Reform Commission, *Guardianship*, Final Report (2012), para 35 of the Executive Summary.

¹⁶⁵ Victorian Law Reform Commission, above n 164, para 38.

¹⁶⁶ South Australian Office of the Public Advocate, above n 163, para 3.2.4.

report, supported decision-making for decisions of a financial nature, were outside the scope of the survey.

To consider supported decision-making in a court forum would require substantial procedural changes and a large change of attitude towards the representation of persons lacking litigation incapacity. Whilst it may not be an appropriate decision making model for all legal matters, it could be adopted in some. However, under the current regime, the court does not have the flexibility to accommodate it.

At the same time, quasi-judicial bodies have not been without criticism. Sometimes structures and procedures become complex and complicated. For example, a variety of forms, evidentiary issues, listing correct information and the consequences of not including certain information all go to making the traditionally informal approach far more formal than originally intended. The consequence is that it becomes a system that is difficult to navigate, difficult to get into, requires more attendances at the tribunal, requires legal representation and ultimately comes at a higher cost.

The informal nature of tribunal procedures has also been criticised. Problems associated with natural justice have arisen.¹⁶⁷ Quasi-judicial bodies have also been criticised as being too informal at times. The temptation to take evidence by way of an unstructured discussion without any clear delineation as to whether the dialogue is accepted as evidence or submission, without safeguards of taking ‘sworn’ evidence and without advising of the right to cross-examine and re-examine can lead to an unjust process.¹⁶⁸ Failing to take measures to ensure the parties had the opportunity to call and give evidence or to be heard or have their submissions considered,¹⁶⁹ failing to exercise its inquisitorial powers¹⁷⁰ and a failure to provide access to documentation containing evidence upon which the decision maker relied have all been criticisms of informality.¹⁷¹

¹⁶⁷ Western Australian Civil and Administrative Review Tribunal Taskforce, above n 154, 35.

¹⁶⁸ Ibid para 76-8, 80.

¹⁶⁹ Ibid para 78.

¹⁷⁰ Ibid para 88.

¹⁷¹ Ibid para 89.

(b) Alternative Dispute Resolution (“ADR”)

ADR processes have become an important alternative to court based hearings. In some jurisdictions, there is a statutory requirement to participate.¹⁷² Additionally, courts and quasi-judicial bodies have introduced ADR as a dispute resolution mechanism to encourage early settlement and identification of issues.¹⁷³ Examples of ADR include mediation and pre-trial conferences and in some jurisdictions, pre-action procedures.¹⁷⁴ A 2007 community survey conducted by Ipsos Australia regarding dispute resolution in Victoria found that 37% of people surveyed preferred to use ADR services because it was a cheaper alternative to court¹⁷⁵ and 24% said it was easier and more accessible than going to court.¹⁷⁶ Additionally, the Law and Justice Foundation of New South Wales identified the majority of legal issues were resolved using ADR processes, identifying the importance of these resolution mechanisms for addressing legal problems, particularly for the disadvantaged and disabled.¹⁷⁷

ADR processes too, are not without criticism. A power imbalance between participants may result in an unfair outcome.¹⁷⁸ Further, being aware of the ADR processes available and engagement with those processes remains too low, notwithstanding the access to justice benefits.¹⁷⁹

(c) Cost Assistance

Availability of financial resources is directly linked to an individual’s ability to access help with legal issues. This is because an impecunious person does not have even-handed access to costly legal assistance. Whilst mechanisms such as Legal Aid and services provided by Community Legal Centres go some way to addressing this inequality, funding constraints often mean that there are limited services available and

¹⁷² Schetzer et al, ‘Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW’, above n 49, 11 *Family Law Act 1975* (Cth), s60I.

¹⁷³ Access to Justice Taskforce, Attorney General’s Department, above n 38.

¹⁷⁴ Schetzer et al, ‘Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW’, above n 49, 11.

¹⁷⁵ IPSOS, *Dispute Resolution in Victoria: Community Survey* (2007), 19.

¹⁷⁶ *Ibid.*

¹⁷⁷ Schetzer et al, ‘Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW’, above n 49, 11.

¹⁷⁸ Schetzer et al, ‘Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW’, above n 49, 11.

¹⁷⁹ Access to Justice Taskforce, Attorney Generals Department, above n 38, 31.

limited funding for those services.¹⁸⁰ The person who is impecunious seek to increasingly rely on services like Legal Aid and Community Legal Centres.¹⁸¹

(d) Case Management Procedures

In response to access to justice issues arising from the court processes, courts have attempted to streamline procedure and processes by introducing systems of case management.¹⁸² These procedures include court based ADR processes like pre-trial conferences and mediations. The Access to Justice Taskforce, Attorney General's Department concluded 'courts have a central role in ensuring fair, simple, affordable and accessible justice'.¹⁸³ To fulfil this role, court based procedures have been increasingly designed to focus on resolution rather than the adversarial system.¹⁸⁴ If matters are incapable of resolution by agreement, active case management of the parties' participation in court processes and in particular the interlocutory steps required to ready a matter for trial including the exchange of evidence, uses strategies that reduce cost time and complexity, have been encouraged and adopted.¹⁸⁵

These case management procedures are also not without criticism. Courts are still criticised as slow and expensive despite implementation of these procedures. For example in the Ipsos Australia survey, 52% of participants identified costs as a disadvantage in taking a dispute to court and 37% identified time as a disadvantage.

(e) Conclusion

As community standards, demands, expectations and situations change, so too should the system within which rights and disputes are determined or resolved; the system of justice.¹⁸⁶ Change is primarily fuelled by the desire to reach a balance between the three dimensions of justice.¹⁸⁷ The ability to reach a balance between these three dimensions is affected by competing access to justice considerations for different stakeholders.

¹⁸⁰ Schetzer et al, above n 49, 9.

¹⁸¹ Karras et al, above n 25, 2.

¹⁸² Schetzer et al, 'Access to Justice & Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW', above n 49, 10.

¹⁸³ Access to Justice Taskforce, Attorney Generals Department, above n 38, 111.

¹⁸⁴ Access to Justice Taskforce, Attorney Generals Department, above n 38, 111.

¹⁸⁵ Access to Justice Taskforce, Attorney Generals Department, above n 38, 112.

¹⁸⁶ Brennan, above n 32, 139.

¹⁸⁷ Zuckerman, above n 30.

Informal and flexible procedures following principles of procedural fairness and natural justice can be fair, equitable, accessible and proportionate in terms of costs, without sacrificing the truth dimension of justice.

Sometimes there is a need to adopt more formal procedures. This formality can be accommodated within quasi-judicial bodies. However, informality and flexibility can also be features of a court system. It can have the flexibility to adopt less formal procedures to achieve fair and accessible justice but there must be a willingness to do so.

Ultimately, there needs to be integrity in the process leading to the outcome whether it be in a court or quasi-judicial forum. A sufficient balancing of the dimensions of justice is required. Procedures that facilitate access to it should be fair, efficient and effective but that do not undermine the rule of law. Proposed solutions to facilitate access will be discussed in Chapter Six.

Additionally, the courts role to protect vulnerable litigants from exploitation, abuse, undue influence and manipulation needs to be recognised. In exercising its protective role, the court needs to be mindful that '(p)ersons with disabilities who experience difficulty in asserting their rights, understanding information presented to them or articulating their choices, have a right to be provided with advocacy assistance and other reasonable accommodation with the aim of giving effect to the persons own decisions.'¹⁸⁸

If cost, disadvantage and disability are not addressed, the system itself (ie: the procedures within the system) may then prevent a person in a position of impecuniosity, suffering social disadvantage or a social, intellectual or physical disability from choosing paths to justice because these issues affect their ability and choice to do so.

¹⁸⁸ Dhanda, above n 132, 440.

III CHAPTER THREE: BACKGROUND TO SUCCESSION LAW AND THE CAPABLE PERSON

A Testamentary Freedom

The ability for individuals to determine who shall inherit their assets is known as testamentary freedom.¹⁸⁹ Individuals exercise testamentary freedom by making a will. Therefore, the starting point for the distribution of any estate is the will of the deceased.¹⁹⁰ Where there is no will (ie: an intestacy) or the will distributes some but not all assets (ie: a partial intestacy), the State prescribes the distribution of assets through intestacy legislation. The law's preference for testate estates reflects the importance society places on the right of the individual to make the decision, rather than the state. Preference for the individual is a reflection of the value placed on individual or personal autonomy. Testamentary freedom reflects this preference.¹⁹¹

Testamentary freedom is, however, subject to legislative restrictions.¹⁹² To provide background for the analysis of statutory wills in subsequent chapters, this chapter will identify will making requirements for the capable person. It will then discuss testamentary capacity as a requirement of a valid will. The practicalities of a capable person making a will are identified followed by a discussion of issues to be considered by a capable testator when making a will. This involves consideration of the state's view on the distribution of assets as reflected in family provision and intestacy legislation.

¹⁸⁹ Lawrence Frolik, 'The Strange Interplay of Testamentary Capacity and the Doctrine of Undue Influence: Are we Protecting Older Testators or Overriding Individual Preferences?' (2001) 24 *International Journal of Law and Psychiatry*, 253, 253.

¹⁹⁰ This is the case in circumstances where a valid will exists. Otherwise intestacy provisions prevail.

¹⁹¹ Frolik, above n 189, 254.

¹⁹² These restrictions include, for example, family maintenance legislation.

B Will Making Provisions for the Capable Person: Requirements of A Valid Will

1 Requirements as to Formality

The formalities for making a will are contained in legislation.¹⁹³ There are three requirements. First, the will¹⁹⁴ must be in writing. ‘Writing’ generally includes printing, photography, photocopying, lithography, typewriting and any other mode of representing or reproducing words in visible form.¹⁹⁵

Second, a will is required to be properly (or duly) executed.¹⁹⁶ Generally, the requirements are that the will is signed by the will maker in the presence of at least 2 witnesses and the witnesses sign the will in the presence of the will maker. In some states, the witnesses are not required to be in the presence of each other.¹⁹⁷

Third, the will maker must be 18 years of age or older.¹⁹⁸

If the will has been executed as above in a manner that conforms with legislation, the will is presumed to be valid unless the presumption can be rebutted.¹⁹⁹ The propounder of the will, therefore, can rely on the presumption of validity unless there is evidence to the contrary. Presumption of validity by due execution was affirmed by the court in *Re Levy Deceased [No 2]* where Sholl J stated ‘(i)n such cases it was nevertheless the practice to grant probate in solemn form on proof of the due execution only, at all events if there was no opposition’.²⁰⁰

As long as a will meets these three requirements it is presumed to be valid. However, there are also provisions in the legislation for the validation of wills that do not meet these formal requirements.²⁰¹ These are called ‘informal wills’. An informal will, for

¹⁹³ *Wills Act 1970* (WA); *Wills Act 2008* (Tas); *Wills Act 1997* (Vic); *Wills Act 1936* (SA); *Succession Act 1981* (Qld); *Wills Act* (NT); *Succession Act 2006* (NSW); *Wills Act 1968* (ACT).

¹⁹⁴ This requirement does not apply to privileged wills.

¹⁹⁵ *Interpretation Act 1985* (WA); *Legislation Act 2001* (ACT); *Interpretation Act 1978* (NT); *Interpretation Act 1987* (NSW); *Acts Interpretation Act 1954* (QLD); *Acts Interpretation Act 1915* (SA); *Acts Interpretation Act 1931* (TAS).

¹⁹⁶ *Wills Act 1970* (WA) s20; *Wills Act 2008* (Tas) s8; *Wills Act 1997* (Vic) s7; *Wills Act 1936* (SA) s8; *Succession Act 1981* (QLD) s10; *Wills Act* (NT) s8; *Succession Act 2006* (NSW) s6; *Wills Act 1968* (ACT) s9.

¹⁹⁷ Frolik, above n 189.

¹⁹⁸ There are provisions in some states for the Court to approve a will for a person under 18 in certain circumstances.

¹⁹⁹ *Re Baden* [1952] ALR 326, *Re Ferreira* [1927] ALR 87, *In the Will of Moriarty* (deceased) [1956] ALR 934.

²⁰⁰ *Re Levy Deceased [No 2]* [1958] ALR 164, para 12.

²⁰¹ See for example *Wills Act 1970* (WA), Pt X.

example, may not have been properly executed because it has not been properly signed, properly witnessed or not signed or witnessed at all. Subject to certain evidentiary and procedural requirements, probate of an informal will can be obtained notwithstanding it does not meet the formal will making criteria of due execution.²⁰²

2 Testamentary Capacity

(a) Capacity to Make A Will Required

Capacity to make a will is not a formal legislative requirement. This is because every adult is presumed to have testamentary capacity until proven otherwise. If there is a challenge to capacity, the propounder of a will can take advantage of the presumption of validity that arises where a will has been duly executed.²⁰³ A properly executed will is presumed to have been made by a competent person possessing testamentary capacity.²⁰⁴

Therefore, in the absence of any evidence to rebut the presumption of validity, such as evidence challenging the deceased's capacity, the court will grant probate subject to the formal legislative requirements being satisfied.

If, however, the validity of the will is challenged, the presumption does not apply and the person propounding the will bears the onus of establishing its validity.²⁰⁵ This requires the propounder to establish the formal legislative requirements as well as establishing the capacity of the deceased person to make a will.²⁰⁶

(b) The Test for Testamentary Capacity

This section will briefly identify the origins of the test for testamentary capacity and how that test is currently applied in Australia. Its relevance to statutory wills will also be explained as will the importance of identifying testamentary capacity in statutory will cases.

²⁰² *Shields v Carotozzolo* (1991) 6 WAR 1.

²⁰³ *Wheatley v Edgar* [2003] WASC 118 (17 June 2003).

²⁰⁴ *Wheatley v Edgar* [2003] WASC 118 (17 June 2003), para 24; *Re: Levy* [1958] 158 ALR 164.

²⁰⁵ *Barry v Butlin* (1838) 12 ER 1089.

²⁰⁶ *Bailey v Bailey* (1924] 34 CLR 558, 570-2.

The test to determine testamentary capacity is ‘that the testator must have ‘sound mind, memory and understanding’.²⁰⁷ The origin of this test is found in *Harwood v Barker*²⁰⁸ where the court said:-

...in order to constitute a sound disposing mind, a Testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his Will, he is excluding from all participation in that property....²⁰⁹

The current test for the test for testamentary capacity at common law is found in the judgment of Cockburn J in *Banks v Goodfellow*²¹⁰ where the following factors were identified. A will maker shall:-

- (a) understand the nature of the act and its effects;
- (b) understand the extent of the property of which he is disposing;
- (c) be able to comprehend and appreciate the claims to which he ought to give effect;
- (d) that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties;
- (e) ‘that no insane delusion shall influence his will in disposing of his property and bring about a disposal of which, if the mind had been sound, would not have been made’;²¹¹

²⁰⁷ Ken Mackie, *Principles of Australian Succession Law*, (Lexis Nexis Butterworths, 2007) para 3.4.

²⁰⁸ *Harwood v Barker* [1840] EngR 1087.

²⁰⁹ *Ibid* 120.

²¹⁰ *Banks v Goodfellow* [1861-73] All ER 47. “Hood J restated the test in *Banks v Goodfellow* in his own words in *In the Will of Wilson* (1897) 23 VLR 197, 199-200. Knox CJ and Starke J treated the test as settled law in *Bailey v Bailey* (1924) 34 CLR 558, 566. The views of two current members of the High Court of Australia, Gleeson CJ and Kirby J are found in *Re Estate of Griffith; Easter v Griffith* (1995) 217 ALR 284, 290 and 295. See also *Shorten v Shorten* [2002] NSWCA 73 (5 March 2002) [54]; *Theophanous v Gillespie* [2001] QSC 177 (14 June 2001) [86]; *Martin v Fletcher* [2003] WASC 59 (26 March 2003) [8]; *Kerr v Bardan* [2004] NSWSC 735 (17 August 2004) [48] and *Trust Co of Australia v Daulizio* [2003] VSC 358 (26 September 2003) [133]. *Banks v Goodfellow* was followed in Ontario in *Murphy v Lamphier* (1914) 31 OLR 287. For a long-standing US case, without the flowery language see, *Cunningham v Stender* 225 P. 2d 977 (1953).” Nick O’Neill and Carmelle Peisah, ‘Chapter 4 - Capacity to Make a Will’ [2011] *Sydney University Press Law Book* 6, footnote 4 para 4.2; <http://worldlii.austlii.edu.au/au/journals/SydUPLawBk/2011/6.html>

²¹¹ *Banks v Goodfellow* (1840) [1861-73] All ER 47.

For (a) above, it is not necessary for the will maker to understand each and every clause in the will. It is adequate that the will maker knew they were making a will and approved its contents.²¹²

For (b) above, an overall understanding of the property is sufficient.²¹³

For (c) above, this requires the will maker to identify and give regard to those who would normally be considered to be recipients of the will maker's assets.²¹⁴ An example of this consideration can be found in *Easter v Griffiths*²¹⁵ where there were conflicting judgments in whether the conduct and behaviour of the will maker, including failure to give consideration of her only son, was a product of mental incapacity or not.

For (d) above, the Court in *Bull v Fulton*,²¹⁶ defined that as:-

a belief, which is not true to fact, which cannot be corrected by an appeal to reason, and which is out of harmony with the individual's education and surroundings...(or)...a fixed and incorrigible false belief which the victim could not be reasoned out of.²¹⁷

This test and its interpretation have been widely adopted in Australia as the test to be used in determining testamentary capacity.²¹⁸

Although there may be levels of incapacity which so obviously affect a person's ability to exercise appropriate testamentary capacity (for example, a comatose person), there are other levels of capacity which may only affect a person's ability to make rational choices. However, based upon the *Banks v Goodfellow* test of testamentary capacity, as long as a testamentary document reflects what would have been expected to be written in the will and that the will maker has considered those who he/she is required to consider, sitting in his or her armchair, testamentary capacity will be satisfied. In addition, even if someone has an affliction that affects their capacity, competence, level of functioning and ability to manage affairs, the product of their deliberations (eg: a will) may reflect rational thought (ie: will maker having

²¹² Mackie, above n 207.

²¹³ *Shaw v Crichton* (unreported, SC, (NSW) 23 August 1995, Powell J).

²¹⁴ Mackie, above n 207.

²¹⁵ *Easter v Griffiths* (1995) 217 ALR 284.

²¹⁶ *Bull v Fulton* (1942) 66 CLR 295.

²¹⁷ *Bull v Fulton* (1942) 66 CLR 295, 339.

²¹⁸ See for example, *Ryan v Kazacos* (2001) ALR 506, *Easter v Griffiths* (1995) 217 ALR 284, *Avsar v Binning* [2009] WASCA 219 (9 December 2009). See also the authorities above n 210.

considered those he / she ought to consider in making a will) and therefore, notwithstanding the prima facie incapacity, their testamentary capacity is intact. For example, Owen JA (to which Miller JA and Newnes JA agreed) in *Avsar v Binning*²¹⁹ said:-

In the twentieth century... in order to establish the required testamentary capacity the testator must be able to understand the effect of the disposition of his or her property. Forms of unsoundness of mind which do not affect the testators ability to understand the effect of dispositions are immaterial.²²⁰

(c) Conclusion

Just because a person is incapable of managing their affairs generally does not mean that they lack testamentary capacity.²²¹ The test for testamentary capacity contemplates fluctuating capacity, allowing a person with infirmities of the mind to make a will during a period of lucidity because testamentary capacity is not needed at all times, only at the time the will is made. The court often finds that the degree of capacity needed to execute a will is quite low.²²² For example, In *Easter v Griffiths* the court said:-

(i)n judging the question of testamentary capacity the courts do not overlook the fact that many wills are made by people of advanced years. In such people, slowness, illness, feebleness and eccentricity will sometimes be apparent—more so than in most persons of younger age. But these are not ordinarily sufficient, if proved, to disentitle the testator of the right to dispose of his or her property by will.... Were the rule to be otherwise, so many wills would be liable to be set aside for want of testamentary capacity that the fundamental principle of our law would be undermined and the expectations of testators unreasonably destroyed.²²³

This passage was most recently cited with approval by Applegarth J in *Frizzo v Frizzo*.²²⁴

²¹⁹ *Avsar v Binning* [2009] WASCA 219 (9 December 2009).

²²⁰ *Ibid* para 67.

²²¹ *Re The Full Board of The Guardianship and Administration Board* [2003] WASCA 268 (13 November 2003).

²²² Frolik, above n 189, 254.

²²³ *Easter v Griffiths* (1995) 217 ALR 284, 295.

²²⁴ *Frizzo & Anor v Frizzo & Ors* [2011] QSC 107 (12 May 2011), para 22.

C Practical Aspects of Making A Will

For a person possessing testamentary capacity, the process of making a will generally is uncomplicated. There are differences for a capable person making a valid will as compared to the making of a statutory will for the incapable person.

First, there is no requirement to seek legal advice or for a will to be drafted by a legal practitioner. Legal advice is optional. A prima facie competent person can make a will with or without legal representation. There is no need to rely on others.

Second, if the will is made with or without legal advice, the cost of doing so can range from nil to a modest cost (depending upon the will makers requirements). Rarely would the preparation of a will cost thousands of dollars (unless there are complex financial structures in place that may require advice beyond will making).

Third, the will maker has control over the time it takes to complete the will. A will can be made immediately or can be drafted over a series of weeks. There is no impediment to the length of time a will maker takes to make a will. No court applications are required. It is simply a process of expressing testamentary dispositions with consideration of the requirements of the legislation. The individual will maker controls the time it takes for a will to be made or drafted and controls the dispositions made in the will (“testamentary freedom”).

From an access to justice perspective, these three benefits are relevant in two respects. First, there are few obstacles for a capable person to make a will. The only access to justice issues that arise are that of cost and time. If the will maker has instructed a legal practitioner to prepare the will, the time it takes a will maker to complete a will usually affects the cost of preparing a will. The will maker may have made specific decisions about their assets but may be unsure how to express those decisions in a Will. They may choose to leave a person out of their will but there may be legal consequences in doing so. The will maker may have a complex financial structure involving trusts and companies which need to be discussed. They may have issues with particular familial relationships which require discussion and decision making on the part of the will maker. The more of these discussions that take place with the legal practitioner, the greater the cost will be to the will maker.²²⁵ The will maker has the

²²⁵ This is the case unless there is a fixed fee arrangement.

ability to controls the time taken to prepare the will and, therefore, the cost of the will, negating any access to justice issues that arise. There are no other parties involved in making the will.

Second, a will maker does not have to rely on others to make the will. The will maker has testamentary freedom. They consider their assets, relationships, obligations and desires and make a will accordingly. The will maker is autonomous in that the person has the freedom to make dispositions to whomever or whatever they choose, subject to consideration of family maintenance legislation that impacts on testamentary freedom. These considerations, which also apply in statutory will cases, will be considered in the next part of this Chapter.

D Issues for the Will-Maker to Consider when Making A Will

1 Family Maintenance Provisions

(a) Purpose of Family Maintenance Legislation

The provisions of family maintenance legislation allow for the court to consider claims and make provision, where appropriate for maintenance, education, benefit and advancement in life²²⁶ of certain classes of persons. These persons can make a claim against the estate of the deceased where they have been left without proper provision, whether by will or under an intestacy. Family maintenance legislation was initially introduced to provide for the widow and / or children who had been left out of (or poorly provided for in) their husbands or fathers will.²²⁷ The legislation provides for the court to determine whether adequate provision has been made for a person entitled

²²⁶ This is generally the terminology used in family maintenance legislation.

²²⁷ Rosalind Atherton, 'Concept of Moral Duty in the Law of Family Provision – A Gloss or Critical Understanding', (1999) 5 *Australian Journal of Legal History* 5, 9. See also *Dillon v Public Trustee of New Zealand* [1941] AC 294 where the court said at 303-4 'The manifest purpose of the Family Protection Act...is to secure, on grounds of public policy, where a man who dies, leaving an estate which he distributes by will, shall not be permitted to leave widow and children inadequately provided for, if the court in its discretion thinks that the distribution of the estate should be altered in their favour, even though the testator wishes by his will to bestow benefits on others, and even though he framed his will as he contracted to do'. See also Rosalind Croucher, 'Law Reform as Personalities and Pragmatics – The Family Provision Act 1982 (NSW): A Case Study', (2007) 11 *Legal History* 1, 3.

to claim under the relevant legislation²²⁸ and if not, for the court to make adjustments to the distribution of the estate to meet what it assesses as adequate.²²⁹

Family maintenance provisions allow the court to over-ride the will-maker's testamentary freedom by altering the distribution of the estate where persons entitled to claim have been left without adequate provisions for maintenance, education or advancement in life.²³⁰ The legislation therefore limits the will-maker's autonomy of choice to do with one's bounty what one wishes. The class of persons entitled to claim now extends beyond the widow and children of the deceased person.

(b) Identification of Family Maintenance Provisions

In all Australian states, legislation identifies persons entitled to claim.²³¹ The categories of persons include:-

- (a) a partner of the deceased, married or de facto;²³²
- (b) child, stepchild²³³ (maintained by the person immediately before their death) or grand child (whose parent had died or who was not financially supported by their parents if one or both alive at the time of the death of the deceased person);
- (c) parent of the deceased (if the parent was maintained by the deceased before death or if the deceased person died leaving no partner or children surviving);
- (d) former wife or husband;²³⁴
- (e) brother or sister of the deceased (subject to certain criteria).²³⁵

²²⁸ *Andre v Perpetual Trustees WA Ltd (as Executor of the Will of Barbara Helen Owen Stewart)* [2009] WASCA 14 (15 January 2009) where President Steytler (Pullin and Buss JJA concurring) said 'the first stage has come to be described as the 'jurisdictional question'.

²²⁹ *Singer v Berghouse* (1994) 181 CLR 201; *Vigolo v Bostin* (2005) 221 CLR 19.

²³⁰ Rosalind Croucher, 'Contracts to Leave Property by Will and Family Provision After *Barns v Barns* (2003) 196 ALR 65 - Orthodoxy or Aberration', (2005) 27 *Sydney Law Review* 263, 264.

²³¹ *Family Provision Act 1969* (ACT), s7, *Succession Act 2006* (NSW) s57, *Family Provision Act* (NT), s7, *Succession Act 1981* (QLD) s41, *Inheritance (Family Provision) Act 1972* (SA), s6, *Testators Family Maintenance Act 1912* (Tas), s3A, *Administration and Probate Act 1958* (VIC), s91 and *Family Provision Act 1972* (WA), s7.

²³² Some states require that to fit the de facto criteria the parties must be in a de facto relationship for more than 2 years.

²³³ NSW legislation provides a child who the deceased had parental responsibility can claim. It can be, therefore, broader than a step child. Victorian legislation extends this category to persons for whom the deceased had a responsibility to make provision.

²³⁴ The former wife or husband is entitled to claim if they can establish they were maintained by the deceased prior to the deceased's death.

²³⁵ This provision exists in South Australia only.

Parliaments in each state and territory have regularly reviewed and added to persons entitled to claim. This regular review reflects a constant tension between individual rights (ie: exercising testamentary freedom) and social expectations (ie: the state's assessment for whom the will maker has an obligation to provide).²³⁶ These provisions also affect the incapable person in statutory will cases as the court is required to consider potential claims under family maintenance provisions when making an order for a statutory will.

(c) How these Provisions Affect the Person who Lacks Will-Making Capacity in Statutory Will Applications

Family Provision considerations are the same for statutory will applications as they are for the capable person making a will. The difference is that the court is required to consider the wishes of the individual against their obligation to those whom he or she ought to provide maintenance, education and advancement in life, ie: a preference for an individual to make a will versus statute imposed distributions. In statutory will applications the court is required to consider who may be entitled to claim under family maintenance legislation²³⁷ in deciding whether or not the will should be approved.

2 Intestacy Provisions

(a) Meaning of Intestacy

An intestacy in relation to the estate of a deceased person occurs when that person dies without having a valid will.²³⁸ An intestacy can occur where the deceased made no will at all, where the deceased made a will that is invalid or where the deceased has left a valid will but the will does not account for the distribution of all of the assets of the estate of the deceased person.

Each state and territory in Australia enacted legislation identifying how the assets of a deceased person are to be distributed in the event of an intestacy. Intestacy laws differ between States and Territories but each legislative intestacy provision

²³⁶Croucher, above n 230, 271.

²³⁷ See, for example *Wills Act 1970 (WA)* s41(1)(h).

²³⁸ Hockley, J J, MacMillan, P R and Curthoys, J, LexisNexis, *Wills Probate and Administration WA*, (at 1999), 8001.

contemplates a method of distribution that parliament considers appropriate as to who should benefit from the estate of the deceased person.²³⁹

(b) Who is Entitled on Intestacy

The categories of beneficiaries entitled to a share of the deceased's estate on an intestacy include a partner, issue (children), parents, next of kin (brothers and sisters, nieces and nephews, grandparents, uncles, aunts and cousins) or, in the event that these classes do not exist, the State or Territory.²⁴⁰ The distribution of assets in an intestate estate vary depending upon the categories of beneficiaries alive at the time the person died.

(c) Difficulties with Intestacy Provisions

Like the considerations for family maintenance provisions, intestacy provisions highlight conflict between individual autonomy (testamentary freedom) and social expectations. Intestacy provisions do not account for a will maker's desire to:-

- (a) donate to a charity;
- (b) provide for someone who does not fall under the provisions;
- (c) leave their estate to someone other than the state or territory in the event that no other class of persons under the intestacy provisions exists.

In addition, they do not provide for the event that any beneficiary pursuant to the intestacy provisions may have caused or contributed to the death of the deceased but do not fall within the forfeiture rule and they will therefore inherit.²⁴¹ Kirby J in *Troja v Troja*²⁴² outlined the meaning of the forfeiture rule. 'By that rule, a person who

²³⁹ Lawrence Frolik, 'Legacies of Possessions: Passing Property at Death' (1996) 20 *Generations* 9.

²⁴⁰ *Administration and Probate Act 1929* (ACT), s49 (Schedule 6); *Succession Act 2006* (NSW), Chapter 4; *Administration and Probate Act* (NT) Schedule 6; *Succession Act 1981* (QLD) s35 (schedule 2), *Administration and Probate Act 1919* (SA) s72G; *Administration and Probate Act 1935* (Tas) s44; *Administration and Probate Act 1958* (Vic) division 6 and *Administration Act 1903* (WA,) s14.

²⁴¹ See for example *CDMA* [2005] TASGAB 1 (12 May 2005).

²⁴² *Troja v Troja* (1994) 33 NSWLR 269.

feloniously kills another is ordinarily denied enjoyment of the property which would otherwise have been acquired as a result of that death.²⁴³

(d) How these Provisions Affect the Person who Lacks Will-Making Capacity

Intestacy provisions allow the estate of an incapable person to be distributed in accordance with the legislation in the event that the deceased dies intestate. Although it ensures the distribution of an estate, it does so according to social expectations enacted in legislation. It does not necessarily provide for individual circumstances and considerations. Those persons whom the incapable person may wish to benefit if they had capacity but who fall outside of the class of persons entitled to benefit under the intestacy provision, receive no consideration. This is why statutory will legislation is important. The court can consider beneficiaries that fall outside of the intestacy provisions or exclude people within them and approve a will for the incapable person to make provision for beneficiaries the incapable person may wish to provide for had they had the requisite testamentary capacity. The historical development of statutory will legislation and its aims and key features is discussed in the next Chapter.

²⁴³ Ibid, 271.

IV CHAPTER FOUR: THE AIMS OF STATUTORY WILL LEGISLATION

A Introduction

This chapter will introduce terms relevant to statutory wills, the background and origins of the legislation in Australia, the provisions in each state relating to the criteria to be considered by the court and a general overview of how they are created. This will be relevant to Chapter Five where the provisions of each state based statute relating to statutory wills will be examined along with the local procedure enabling access to the legislation in each state and territory. It will further be relevant in identifying the reasons behind the introduction of the legislation and the issues considered in its introduction. Identification of these provisions will provide a basis upon which to examine the practices and procedures in each state in Chapter Five and to analyse access to justice considerations in Chapter Six.

B Terminology and Considerations

Statutory will legislation ‘empowers a judge having jurisdiction under the Act to order, direct or authorise the execution...’²⁴⁴ of a will or codicil for the person who lacks will-making capacity which is a will or codicil that could be made by the incapable person had he or she not lacked the capacity.

The making of a statutory will ‘presupposes that neither the existing will, if any, nor the relevant intestacy rules or family provision legislation can do justice in certain circumstances.’²⁴⁵ The legislation therefore, attempts to bridge the gap between what society says is an appropriate distribution of estate assets and what the person who lacks will-making capacity could do should they have capacity. How then did the legislation come to be enacted in Australia?

C The Uniform Succession Laws Project: A Brief History

In 1991, the Standing Committee of Attorneys-General initiated the uniform succession laws project with the aim of making succession laws uniform across all

²⁴⁴ R. F. Yeldham, J.I. Winegarten, T. Synak R.B. Rowe (eds), *Tristram and Coote’s Probate Practice* (Butterworths, 28th ed, 1995), [3.430]. This definition is based on section 96(1)(e) of the *Mental Health Act 1983* (UK).

²⁴⁵ New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills*, Issues Paper 10 (1996).

States and Territories of Australia. In 1992, the Queensland Law Reform Commission was asked to co-ordinate the project upon recommendation from the Queensland Attorney General. In 1994, the Queensland Law Reform Commission released an issues paper outlining various areas for consideration with regards to succession laws and identified, examined and proposed reform in four discrete areas of succession law: intestacy, family maintenance, administration and will legislation.²⁴⁶ In 1995, the National Committee on Uniform Succession Laws was established, co-ordinated by Queensland Law Reform Commission with participation by all Australian Jurisdictions.²⁴⁷ In 1996 the Queensland Law Reform Commission published a working paper²⁴⁸ on uniform succession laws and in December 1997 the National Committee presented its final report which included model legislation and a recommendation that the legislation be implemented in each Australian Jurisdiction. This thesis is concerned with the proposals in relation to wills legislation considered by the project and, more particularly, legislation for statutory wills.

D Statutory Will Legislation Prior to and as part of the Succession Laws Project

The model legislation published by the Queensland Law Reform Commission in December 1997, provided for the introduction of statutory wills. The model legislation drew upon a combination of the legislation in place in the UK, together with comments on the UK legislation by the Victorian Chief Justice's Law Reform Committee²⁴⁹ and the New South Wales Law Reform Commission²⁵⁰ as well as the draft provisions of the *Wills (Miscellaneous) Amendment Bill 1993* (SA) and the draft *Wills Act 1994* (Vic).²⁵¹

This section will first look at the recent history of the statutory will legislation in the UK prior to the commencement of the Uniform Succession Laws Project in Australia. Second, the comments of the Victorian Chief Justice's Law Reform Committee and

²⁴⁶ Queensland Law Reform Commission, *First Issues Paper: The Law of Wills*, Issue Paper No MP10 (1994), [1.1].

²⁴⁷ Rosalind Croucher, 'Towards Uniform Succession In Australia' (2009) 83 *Australian Law Journal* 728.

²⁴⁸ Queensland Law Reform Commission, *The Law of Wills*, Miscellaneous Paper No 19, (1996).

²⁴⁹ Victorian Chief Justice's Law Reform Committee, *Wills for Mentally Disordered Persons*, Report (1985).

²⁵⁰ New South Wales Law Reform Commission, *Wills for Persons Lacking Will-Making Capacity*, Discussion Paper No 20 (1989).

²⁵¹ Queensland Law Reform Commission, *Report on the Law of Wills*, Report No 52 (1997), (i) and (ii).

the New South Wales Law Reform Commission will be discussed. Finally, the background to the introduction of legislation in Australia, the development of the Uniform Succession Laws Project and recommended legislation will be explored. The purpose is to identify aims, key features and issues considered by various jurisdictions at various stages of consideration to provide a background for access to justice considerations.

1 *The UK Experience*

Statutory wills in the UK find their statutory origins in 1959 when they were first introduced into legislation relating to mental health.²⁵² The concept of the court interfering with the passing of property on death predates by centuries the introduction of legislation for court approved wills. It is not intended to take the reader on a long journey through time to ascertain where the first authority arose for the Crown to exercise Royal prerogative over those who lacked capacity. Instead, more recent history will be discussed to provide an appreciation of the introduction of statutory will legislation in the UK and ultimately, in Australia.

In the UK, matters governing ‘lunacy’ and their effect on property fell under the Lord Chancellor’s ‘lunacy’ jurisdiction in the Court of Chancery. Perhaps the turning point for consideration of the legislation was the introduction of the *Law of Property Act 1925* (England), the effect of which will be explained in later paragraphs. In addition to the introduction of the *Law of Property Act 1925*, there were changes to the intestacy provisions by the introduction of the *Administration of Estates Act 1925* where, sections 45 and 46:-

- (a) provided that property no longer passed to the male offspring by right; and
- (b) introduced provisions requiring assets to escheat to the Crown if there were no living relatives.

Between 1890 and 1925, the ‘lunacy’ jurisdiction was exercised by Judges who were possessed of a prerogative to manage the affairs of the person who lacks will-making capacity under powers conferred by the *Lunacy Act 1890* (England). Those powers were not considered to be exhaustive. That is, although there were powers indentified

²⁵² Croucher above n 247, 733.

in the Act, under the inherent jurisdiction of the Crown's Prerogative, the Crown had the ability to do what was required to be done for the benefit of the person who lacks will-making capacity.²⁵³ In terms of property and assets, those powers were limited, however, extending only to making payments that the incapable person *would* have made had they had capacity to make the decision to pay. These decisions were only limited or extended by the discretion of the Judge exercising the prerogative.²⁵⁴ *In the matter of P*,²⁵⁵ Lewison J provided examples of the types of payments that would have been typical such as payments to local charities (as was customary of the time) and costs associated with educating an heir to the property of the person who lacks will-making capacity. The court did not have the jurisdiction or the right to make payments from the estate of the person who lacks will-making capacity for something that person *could* have made. The distinction between 'would' and 'could' here is relevant for the development of the UK legislation and its introduction in Australia for reasons that will be explained later.

With the introduction of the *Law of Property Act 1925* and changes to intestacy laws,²⁵⁶ the Judge's role expanded. Whilst that Act did not confer any jurisdiction on the court to make a will for a person who lacks will-making capacity, s171 provided the court with the power to 'direct a settlement to be made of the property of a lunatic...'.²⁵⁷ The practical aspect of this power was that the court was given certain powers by the Act to enter into 'revocable settlements' to protect that person's interest in property (for example: by way of life interest) and to create a mechanism for the distribution of property in these settlements on the death of the person. Lewison J advances the view that this legislation was used to 'fill the gap caused by the inability

²⁵³ Henry Studdy Theobald, *The Law Relating to Lunacy*, (London Stevens and Sons Ltd, 1924), 6.

²⁵⁴ Theobald, above n 253, 7-8.

²⁵⁵ *In the Matter of P* [2009] EWHC 163 (Ch) (9 February 2009).

²⁵⁶ Where section 45(1)(b)(vi) stated:

In default of any person taking an absolute interest under the foregoing provisions, the residuary estate of the intestate shall belong to the Crown or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, as bona vacantia, and in lieu of any right to escheat. The Crown or the said Duchy or the said Duke may (without prejudice to the powers reserved by section nine of the Civil List Act, 1910, or any other powers), out of the whole or any part of the property devolving on them respectively, provide, in accordance with the existing practice, for dependants, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision.

²⁵⁷ *In the Matter of P* [2009] EWHC 163 (ch) (9 February 2009), [10]; *Law of Property Act 1925* (UK) s171.

of the patient to make a will.²⁵⁸ The court, therefore, applied this section as a quasi-will making provision, organising the financial affairs of the person who lacks will-making capacity during their lifetime to prescribe divesting of assets on their death. This is particularly evident from the wording of section 171(1)(c) which states considerations, under that section, extend to any ‘injustice’ that may result from an earlier will or intestacy provisions if the court does not intervene.

This position prevailed until 1959. With the introduction of the *Mental Health Act 1959* (UK), the court was no longer able to apply s171 of the *Property Law Act 1925* due to the introduction of S102(1) of the *Mental Health Act 1959* which provided:-

The judge may, with respect to the property and affairs of a patient, do or secure the doing of all such things as appear necessary or expedient – (a) for the maintenance or other benefit of the patient, (b) for the maintenance or other benefit of members of the patient’s family, (c) for making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered, or (d) otherwise for administering the patient’s affairs.

Section 103 empowered the court to make settlements as was the case under s 171 of the *Law of Property Act 1925*. In 1969, the court’s powers under s103 were expanded by section 17 of the *Administration of Justice Act 1969* (UK). This section prescribed amended section 103 of the *Mental Health Act 1959* by inserting the following paragraph as (dd) to section 103, thereby directing the making of a will for the person who lacks will-making capacity:-

the execution for the patient of a will making any provision (whether by way of disposing of property or exercising a power or otherwise) which could be made by a will executed by the patient if he were not mentally disordered, so however that in such cases as a nominated judge may direct the powers conferred by this paragraph shall not be exercisable except by the Lord Chancellor or a nominated judge.

Therefore, in summary, the first express statutory power conferred on the court in the UK to direct a will be made for an incapable person was created in 1969. Whilst the

²⁵⁸ *In the Matter of P* [2009] EWHC 163 (ch) (9 February 2009), para 10.

court did not have power to make such a direction prior to that, there were mechanisms in place such that the court, exercising Royal prerogative or pursuant to powers conferred by statute, could, to a certain extent, provide for what was to happen to the assets of the person who lacks will-making on their death through settlements (post 1925) or payments (pre 1925).

Sections 102 and 103 of the *Mental Health Act 1959* were repealed by the *Mental Health Act 1983*.²⁵⁹ The 1983 legislation provided the court with the power by virtue of s96(1)(e) to:-

...make such orders and give such directions and authorities as he thinks fit for...

...

- (e) the execution for the patient of a will making any provision (whether by way of disposing of property or exercising a power or otherwise) which *could* be made by a will executed by the patient if he were not mentally disordered; (my italics).

This provision appears to be a relaxation of the *would* requirements under the provisions of the *Lunacy Act 1890*, encompassing more possibilities than what the person who lacks will-making capacity *would* do. The term *could* invokes greater flexibility for the court to consider a range of options where ‘it is not necessary for the court to be satisfied that the patient would definitely have chosen one way of giving effect to them rather than another’²⁶⁰ but gave the court ‘a range of choices which would be equally valid.’²⁶¹ The significance of the difference between *would* and *could* is the court has more flexibility in deciding whether the application should be granted or not.

The *Mental Health Act 1983* became subject to amendment in 2005 with the introduction of the *Mental Capacity Act 2005*.²⁶² It came into force on 1 October 2007.²⁶³ This Act replaced Part 7 of the *Mental Health Act 1983* and abolished the *Enduring Powers of Attorney Act 1985*. The considerations of the *Mental Capacity Act 2005* date from 1995 when the English Law Reform Commission published a

²⁵⁹ The *Mental Health Act 1983* also repealed other sections of the *Mental Health Act 1959* but they are not relevant for this thesis.

²⁶⁰ *Re C (a patient)* [1991] 3 All E.R. 866, 870, cited with approval in *Boulton v Sanders & Ors* [2004] ESCA 112, para 110.

²⁶¹ *Ibid.*

²⁶² The Bill was introduced into Parliament in 2004, receiving the royal assent in 2005.

²⁶³ David Rees, ‘Re P-Statutory wills and the Mental Capacity Act’, (2009) 15 *Trusts and Trustees* 494.

report on mental incapacity following a period of consultation. The Report entitled *Making Decisions* was subsequently published in 1999 and the proposed draft *Mental Incapacity Bill* was published in 2003. A period of consultation and amendment ensued until the Bill was introduced into parliament in 2004.²⁶⁴

The primary difference between the 1985 legislation and the 2005 legislation is the test to be applied by the court in deciding whether the proposed will is appropriate. Whilst the 1983 legislation identified the test of a will as one which could be made by the person who lacks will-making capacity, s16(i) of the 2005 legislation gives the court power to execute a will in favour of the represented person using a ‘best interests’ test which, in accordance with s4, requires consideration of a number of matters.²⁶⁵

2 The Australian Experience

The Australian Uniform Succession Laws Project did not have the opportunity to consider the provisions of the *Mental Capacity Act 2005* as that Act came into force well after the initiation of the project in Australia and after recommended legislation was provided to the States and Territories for consideration.²⁶⁶ Thus, the recommended legislation reflects more closely the provisions of the *Mental Health Act 1983*. The Victorian Chief Justices’ Law Reform Committee and the New South Wales Law Reform Commissions considered the 1983 UK legislation prior to the commencement of the uniform succession laws project. These considerations will now be outlined.

(a) Victoria

In 1985 the Victorian Chief Justice’s Law Reform Committee published a Report entitled *Wills for Mentally Disordered Persons*²⁶⁷ (“the 1985 Victorian Report”) which considered whether the court should have the power to authorise a will for a person

²⁶⁴ Yeslin Gearty, ‘The Mental Capacity Act, the Office of the Public Guardian and the new Court of Protection’ (2007) 9,(3) *The Journal of Adult Protection* 39, 40.

²⁶⁵ Matters to be considered focus on the wishes and participation of the incapable person.

²⁶⁶ However, these provisions will be considered later in this thesis when looking a proposal’s for reform.

²⁶⁷ Victorian Chief Justices Law Reform Committee, above n 249.

lacking testamentary capacity.²⁶⁸ The Committee considered the legislation in the UK as a basis for the introduction of similar legislation in Victoria and recommended there be legislation authorising a Judge to make a will for a person incapable of making a will for themselves. Whilst the Committee used the 1983 UK legislation as a basis for the recommendation, they did recommend some variations as applicable to Victorian law.

These recommended variations included the following.

First, an application should not be limited to persons already declared incapable of managing their own affairs and incapable of making a will. The Committee considered that there may be persons who are capable of managing their own affairs but incapable of making a will. The Committee therefore recommended that the legislation should extend to persons who lack testamentary capacity though they have capacity for some other purposes.

Second, there was a proposed variation in who could make the application for a statutory will. The Committee stated in strong terms that the Public Trustee would be an appropriate entity to make the application and, indeed, anticipated that he/she would be the applicant in most circumstances given his/her protective role pursuant to the provisions of *Public Trustee Act 1958 Administration of Justice Act 1969* (Vic) in force at the time.²⁶⁹ The Victorian Commission sought to divide ‘who can apply’ into categories of applications without leave (for example, those categories of persons who could be an applicant under the UK legislation) and applications with leave. This proposition was abandoned in favour of a 2 stage process which was adopted in the legislation. Under this scheme, applications could be made by any person with leave of the Court. This allowed the Court to ‘screen’ appropriate applicants and applications at the leave stage to determine if the application could be dealt with substantively.²⁷⁰

In 1994, the Victorian Law Reform Commission again considered a statutory will-making scheme. The Committee responsible for this Report recommended legislation

²⁶⁸ Victorian Chief Justices Law Reform Committee, above n 249, 1.

²⁶⁹ See ss 49, 50, 53, 54H and 54I. Also referred to in Victorian Chief Justices’ Law Reform Committee, 247, 6.

²⁷⁰ *Wills Act 1997* (Vic) s21.

in the form of the draft *Wills Act 1994* (Vic) to be implemented with refinement of the variations identified in the 1985 report. For example, the Report recommended the legislation extend to minors (ie: persons under the age of 18 years), that any person could apply and a ‘with leave’ provision be introduced not to differentiate between who can apply but to be used as a ‘screening device to ensure...only adequately founded applications’²⁷¹ proceed.

In December 1997, one month before the publication of the model legislation by the National Law Reform Committee, Victorian statutory will legislation, which adopted the abovementioned recommendations, came into force.

(b) New South Wales

In 1989, the New South Wales Law Reform Commission considered a scheme for wills for persons lacking testamentary capacity in Discussion Paper 20.²⁷² The Commission proposed the introduction of a scheme similar to the scheme (then) operating in the UK but with variations. The variations considered were similar to those considered by the Victorian Committee in the 1985 Report and included the following.

First, who will be covered by the scheme. The Committee recommended a statutory will making scheme cover anyone who may require it, not limited to ‘patients coming within the ambit of mental health and protective legislation.’²⁷³ This is an interesting statement which highlights the difference in the background to the legislation between the UK and Australia. That is, UK legislation arises from the Lord Chancellors lunacy jurisdiction which found its origins in managing property of the person who lacks will-making capacity from a mental health perspective. The New South Wales Committee seems to approach it from a legal perspective rather than a mental health perspective in that, rather than the requirement for a statutory will arising from mental health contact (for example, a hospital or a tribunal applications), it should be a consideration irrespective of contact with other mental health services or organisations dealing with mental health issues. The Committee also acknowledged that the

²⁷¹ Victorian Law Reform Commission, *Reforming the Law of Wills*, Final Report (1994), [5A.19].

²⁷² New South Wales Law Reform Commission, above n 250.

²⁷³ *Ibid* 1.

legislation should be accessible to a wide group of people and not limited to a select few who come within the ambit of the mental health legislation.

Second, a variation as to who could apply was proposed. The Committee sought to extend the provisions to cover anyone who may wish to make an application. That is, anyone beyond those with an interest in the estate either under an earlier will, on intestacy or under the provisions of the family maintenance legislation. This would include people like social workers (who are often involved in tribunal applications), government departments (for example the Department of Child Protection who may want to put statutory wills in place for children who leave their care upon attaining the age of 18, the Public Trustee or other organisations with a protective role) or friends. The New South Wales position here differed from the Victorian position in that the New South Wales Committee did not consider it appropriate to divide applicants into categories of ‘with leave’ and ‘without leave’.

Third, variations as to who should be informed were considered. The UK legislation left it to the judge’s discretion as to whether the person for whom the will has been made should be informed of the will having been made. The Commission thought this approach to be inconsistent with the rights of the person for whom the scheme protects and in recognition of that person’s rights, the individual should be informed, regardless. Additionally, the Commission felt that the court should have the discretion to inform close relatives of an application having been made.

Finally, as to testamentary capacity, the UK scheme did not require a full assessment of testamentary capacity, thereby allowing for the possibility of a will to be made where the court has reason to believe the person was incapable. Whilst not making any particular recommendations on the subject, the Commission discussed a procedure whereby the issue could be considered as part of the statutory will application or part of a different type of protective application (such as an application for the appointment of an Administrator). A separate scheme aside from including the consideration as part of the statutory will application, whilst meritorious, would need to be mindful of different procedural considerations in different jurisdictions and different evidentiary burdens potentially leading to different results as well as duplication.

Following on from this Discussion Paper, in 1992, the New South Wales Law Reform Commission recommended the introduction of a will-making scheme for persons who lack testamentary capacity.²⁷⁴

The Victorian and New South Wales Reports predate the publication of the model legislation produced by the Uniform Succession Laws project which made recommendations that statutory will legislation should be considered in each of those jurisdictions. Subsequent to the initiation of the National Uniform Succession Laws project in 1991 and prior to the publication of the model legislation in 1997, both South Australia and Tasmania considered their own versions of statutory will legislation. These draft versions will be considered later in this Chapter.

(c) Uniform Succession Law Project: Recommended Legislation

The first Issues Paper published by the Queensland Law Reform Commission in 1992²⁷⁵ outlined at paragraph 1.11, 12 issues most in urgent need of uniformity. The final issue on the list was consideration of statutory wills.²⁷⁶ This consideration arose in the context of legal capacity to make a will and at paragraph 2.2 the Commission considered whether the Court should have the power to make a will for persons lacking testamentary capacity, citing various issues to be considered. The Commission identified statutory wills as an issue but no further consideration was given to the topic.

In 1991, after a series of submissions on Issues Paper 47, the National Committee for Uniform Succession Laws, co-ordinated by the Queensland Law Reform Commission, recommended model legislation as a basis of reform of succession laws to be considered by the States and Territories. This model legislation was published in December 1997 by the National Committee.²⁷⁷ Prior to the publication of the model legislation a number of key issues, including statutory wills, were considered. This

²⁷⁴ New South Wales Law Reform Commission, *Wills for Persons Lacking Will-Making Capacity*, Report No 68 (1992), 2.

²⁷⁵ Victorian Chief Justices Law Reform Committee, above n 249; Victorian Law Reform Commission, above n 271; New South Wales Law Reform Commission, above n 250.

²⁷⁶ Note: the list included in the issue paper was not intended to be exhaustive.

²⁷⁷ Queensland Law Reform Commission, above n 251.

chapter will now look at the Australian position to identify the aims and key features relevant to the introduction of the legislation in Australia.

E Aims and Key Issues Considered

Whilst considering the introduction of statutory will legislation in Australia, early Reports²⁷⁸ based their considerations on legislation then in place in the UK focussing on managing the affairs of the person who lacks will-making capacity rather than promoting or focussing on autonomy. From these early reports, the aim of giving the court extended powers to manage a persons' affairs can be identified. For example, in the 1985 Victorian Report after outlining the legislation in the UK, the Committee recommended that legislation along the lines of the UK be implemented with some changes. This recommendation was made in light of considerations relating primarily to those persons who may expect to benefit from the estate of the deceased rather than the wishes and expectations of the deceased himself or herself. This is particularly evident at paragraph 14 where the Committee states:-

We give some further examples of situations where a Judge might in his discretion exercise the power to have a statutory will made on behalf of a person: where the person's family situation or the extent of his estate has changed since the making of an earlier will; where the person has been divorced since the making of an earlier will; where the person has no will and has lived all his life with a de facto wife who would take nothing upon an intestacy; where the moral claim of some member of the person's family is such that the distribution upon an intestacy would be unjust; where the moral claim of some person would not be met by distribution on intestacy.

There was a focus on an injustice in relation to the distribution of an estate on those that may be left behind rather than a focus on the individuals' wants, needs and desires. These early Reports therefore aim to focus on the management of the affairs of the person who lacks will-making capacity and will be discussed further below.

²⁷⁸ Victorian Chief Justice's Law Reform Committee, above n 249; Victorian Law Reform Commission above n 271.

1 *Aims*

(a) Aim One: Early Focus on Management of Affairs

Earlier in this chapter, the origin of the UK legislation was outlined. It arose from the Lord Chancellors lunacy jurisdiction²⁷⁹ over “patients” who do not have the capacity to manage their own affairs. This jurisdiction was seated in a requirement for the court to intervene in relation to the management of the financial and property affairs of the person who lacks will-making capacity. This occurred for their benefit during their life time and upon their death in circumstances where they did not possess the requisite capacity to manage these matters themselves.

Given this origin, statutory will provisions were introduced to assist with the management of the estate of persons coming within the scope of the relevant mental health legislation. The early UK provision contained initially in the 1959 Act (by the 1969 amendments), then in the 1983 Act was ‘mixed in’ with applications for administration during a person’s lifetime. It was an addendum to the power of the Court in managing the affairs of the person who lacks will-making capacity rather than the separate statutory will provisions that we see in Australian legislation today and indeed in the model legislation published by the National Committee in 1997. The UK provisions gave the court a range of powers, including the making of a statutory will, when considering administration and guardianship matters of persons lacking capacity.

Additionally, in the early days, the aim of the UK legislation seems to be focussed on those left behind receiving their ‘fair share’ of the estate of the person who lacks will-making capacity rather than focussing on what that person actually wanted to happen. This is evident in the fact that the judge was under no obligation to tell the ‘patient’ that a will has been made, nor seek any input from them.²⁸⁰ In addition, it was usual practice for a Judge to seek a report from one of the ‘Lord Chancellor’s Visitors who visits the patient, investigates the patient’s mental capacity and reports to the Judge.’²⁸¹ This collection of evidence goes to the issue of capacity rather than the

²⁷⁹ Chief Justices Law Reform Committee, above n 249, para 3.

²⁸⁰ *Mental Health Act* (1983) (UK) s 95-7.

²⁸¹ Victorian Chief Justices’ Law Reform Committee, above n 249, para 10.

wishes of the person who lacks will-making capacity. This, in turn, had a significant impact on the autonomy of that person as they are being excluded from the decision making process. It's a 'you can't do it so we will do it for you' mentality arising from the Court's early attitudes that a person is not capable of doing anything if you are declared incapable. There is no question of degree.

Understandably in Australia in the early days, this position flowed through to the thinking of the Committees responsible for Papers and Reports considering statutory will legislation, primarily because the legislation proposed by the draft Victorian bill and draft South Australian Bill was modelled on the UK provisions.

Early considerations in the 1985 Victorian Report looked at the position then in the UK as discussed above. The Committee's recommendations reflect the position in the UK at the time and did not put the wishes of the person who lacks will-making capacity as a substantial consideration in the process. What then occurred was that a will was in place for a person who may not know about it nor approved its contents. This infringed upon settled notions of autonomy. The draft Victorian provisions combined statutory will making power with the power to administer their financial affairs during their lifetime as in the UK.²⁸² The aim therefore appeared to be to create a regime to best manage the persons' affairs rather than to take into account the wishes of the person who lacks will-making capacity when doing so.

The Australian deliberations then slowly moved towards consideration of autonomy of the individual as a statutory will making considerations.

(b) Aim Two: The Move Towards Autonomy: Enhancing the Rights of Persons With Disabilities

The modern position expands on the management function of the legislation to include autonomy of the person as a consideration.

²⁸² Victorian Chief Justices' Law Reform Committee, above n 249, Second Schedule.

In 1989, the NSW Law Reform Commission²⁸³ sought to deviate from the UK and early Victorian position in relation to the attitude and consideration of the ‘patient’. It was proposed by the Commission in Discussion Paper 20 that the person who lacks will-making capacity be informed of the will and its contents, where ‘practicable’²⁸⁴ because the Commission did

not believe that this (ie: not informing the patient) is consistent with the recognition of the rights of the person whose wishes the scheme is created to protect. Recognition of these rights is one of the basic themes of this reference, and would seem to require, at the very least, that a person lacking testamentary capacity be made aware of the contents of the disposition made on his or her behalf.²⁸⁵

This statement seems to be the first recognition of the importance of the wishes of the person who lacks will-making capacity in the process and the outcome and appears to be the first recorded deviation from the UK model on this issue. This goes some way to including that person and represents a shift in the attitude towards consideration of the person as an individual with wishes and desires as to what is to happen to their assets on their death. It falls far short, however, of including them in the proceedings and the decision making process.

In 1992, the New South Wales Law Reform Commission felt that such a scheme would ‘greatly enhance the rights and dignity of persons with disabilities by enabling their property to be devised appropriately by having regard to their current situation.’²⁸⁶ This concept was further expanded in 1998, where the New South Wales Law Reform Commission succinctly stated the aim of a statutory will making scheme was to provide the person who lacks will-making capacity with a will that replicates their views and wishes or what their views and wishes would be if they were capable²⁸⁷ to circumvent that person’s assets being dispersed in a way that is different to those views.²⁸⁸ Such a scheme would implement and reflect the right of the incapable person to determine what is to happen to their bounty on their decease as

²⁸³ New South Wales Law Reform Commission, above n 250.

²⁸⁴ Ibid para 4.3.

²⁸⁵ Ibid para 4.5.

²⁸⁶ New South Wales Law Reform Commission, above n 274, [2.4].

²⁸⁷ Ibid para 2.2.

²⁸⁸ Ibid para 2.3.

well as preserve their autonomy by allowing the incapable person's assets to be divided according to their wishes and views or according to what their wishes and views could be should they be capable.²⁸⁹ This is evidenced in the recommendation²⁹⁰ where the Commission, after acknowledging that such a scheme is 'a significant intrusion on the person's freedom and autonomy,' recommended that the person lacking the capacity be joined as a defendant to give them an opportunity to participate. This reflects an early recognition of the incapable person themselves contributing to the making of their will.

This aim was considered further in 1994 by the Law Reform Committee of Victoria.²⁹¹ The Committee considered that existing family maintenance provisions and intestacy provisions were likely to exclude a person or class of persons from benefiting from the estate of a deceased incapable person because they were not an included class of beneficiaries under either of those schemes. The Committee indicated that the incapable person may wish to make provision for such a person or class of persons and there should be a mechanism for them to be included;²⁹² a mechanism enabling those persons to access the legislation also.

Following on from this, in 1998, the New South Wales Law Reform Commission recommended the introduction of a statutory will making scheme as a '...means of providing a person lacking testamentary capacity with a will reflecting, as far as possible, current intentions or at least what his or her intentions would have been but for the disability.'²⁹³ The focus of the introduction of the provision was that such a scheme would '...greatly enhance the rights and dignity of persons with disabilities by enabling their property to be devised appropriately by having regard to their current situation.'²⁹⁴

Subsequently, consideration was given in various Australian jurisdictions to the appropriate factors to consider in the legislation. The 1997 model legislation provided

²⁸⁹ Ibid para 2.4.

²⁹⁰ New South Wales Law Reform Commission, above n 274.

²⁹¹ Law Reform Committee of Victoria, *Reforming the Law of Wills*, Final Report (1994).

²⁹² *Reforming the Law of Wills*, ibid [5A.11].

²⁹³ New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills*, Report 85 (1998), [2.2].

²⁹⁴ Ibid [2.4].

a range of factors the court must consider. For example, initial factors address why the application is being made, the size of the estate and a draft will. The next consideration is the wishes of the person followed by any previous wills. Following that are considerations of interested parties (under intestacy/family maintenance provisions, charities, carers and others who may have a moral claim but no legal mechanism to claim). These considerations seek to facilitate access to the legislation.

(c) Summary of Aims

In the early days the primary aim of the legislation considered by the Victorian Chief Justice's Law Reform Committee and the Victorian Law Reform Committee was to manage the incapable persons affairs without taking into account (to any significant degree) the incapable persons wishes. This is because early considerations arose from the UK provisions which had the same focus. Over time however, community attitudes to the incapable person have changed. This is reflected in the comments of the New South Wales Law Reform Commission referred to above. It became more widely accepted that capacity was not an all or nothing concept and that the individual should be able to participate, where possible, in the process and the wishes of the individual be taken into account (whether by direct inquiry or investigation of earlier wills and expression of wishes). The modern position seems to be to provide a scheme for the distribution of the incapable persons assets upon their death in the context of first considering the wishes and views of the incapable person (ie: preserving their autonomy, whereby they can retain some control over what is to happen to their assets on their death), then second, the interests of those with an interest in the estate either under intestacy legislation, family maintenance legislation or who otherwise may have an interest.

In addition, the wishes of a person in an objective sense include a requirement for the court to consider an estate distribution scheme that provides a fair and reasonable distribution to those persons to whom the deceased may have some moral or other duty to provide for. This arises historically from the 1959 and 1983 UK Acts and early Australian considerations.

2 Key Issues Considered

Arising from the legislative aims a number of issues were considered in the Uniform Succession Laws project. Here these issues will be examined.

(a) Need for the Legislation²⁹⁵

In 1985 Victorian Report considered whether a statutory will-making scheme should be established in Victoria. After considering the UK provision and identifying the categories of applications in the UK, the Committee concluded that it was desirable legislation. Primarily, the reasons were that the intestacy and family maintenance provisions might not adequately deal with changes in the incapable persons circumstances since making a will or give effect to what may be perceived to be the incapable persons wishes and desires at death. For example, provision for de facto (then not entitled to claim under family maintenance provisions or on intestacy) or a moral claim not provided for adequately or at all.

In May 1994, the Victorian Chief Justice's Law Reform Committee provided examples of circumstances in which a statutory will might be considered. These include:-

- (i) Where the incapable persons circumstances have changed since making a will;
- (ii) Divorce;²⁹⁶
- (iii) where there is no will and the incapable person has a de facto partner who would not take on an intestacy;²⁹⁷
- (iv) where there is a person who has a moral claim on the estate of the incapable person but who would not be provided for under relevant family maintenance or intestacy provisions;
- (v) distributions under an existing will.²⁹⁸

²⁹⁵ Law Reform Committee of Victoria, above n 291, 36.

²⁹⁶ Most jurisdictions have now introduced legislation whereby a will made prior to divorce becomes invalid upon divorce.

²⁹⁷ De facto status is now recognised in all family maintenance and intestacy legislation so this issue would no longer arise.

²⁹⁸ Victorian Chief Justices' Law Reform Committee, above n 249, 4-5.

In July 1994, the Queensland Law Reform Commission identified the issue of whether the court should have the power to make a will for an adult lacking testamentary capacity²⁹⁹ as an issue ‘in most urgent need of uniformity.’³⁰⁰

In 1996, the New South Wales Law Reform Commission considered it appropriate to have such legislation particularly where there were gaps between what a capable testator might do and what the intestacy and family maintenance legislation directs.³⁰¹

Thereafter, the assumption was that a scheme would be appropriate and subsequent reports focussed on ‘how’ (ie: the procedure) is to set it up rather than ‘whether’ that should be done.

(b) *Whether the Provisions Should Extend to Minors*³⁰²

In 1989 the New South Wales Law Reform Commission recommended any statutory will making scheme extend to minors to complement the provisions authorising the court to grant leave to make a will for a minor and that incapable minors should not be excluded simply because of incapacity.³⁰³ The incapable minor may lack competency and therefore cannot make a will under the competency provisions but may have sufficient assets (such as a compensation payment, inheritance etc) for a will to be made, particularly where the intestacy provision may benefit a person who should not benefit (for example, a parent who had deserted the child) or may not benefit a person who should benefit (eg: a carer or close friend).³⁰⁴ This recommendation was confirmed in the 1992 Report.³⁰⁵

Consideration of similar legislation in other states was undertaken and the extension of the provisions to minors was recommended for continuity and to avoid ambiguity.³⁰⁶ For example, in 1994, the Victorian Law Reform Committee recommended the

²⁹⁹ Queensland Law Reform Commission, above n 246, para 2.2.

³⁰⁰ Ibid para 1.11.

³⁰¹ Law Reform Commission of New South Wales, *Uniform Succession Laws: The Law of Wills*, Issue Paper 10 (1996), para 2.2.

³⁰² Victorian Law Reform Commission, above n 271, 36.

³⁰³ New South Wales Law Reform Commission, above n 250, para 4.11.

³⁰⁴ New South Wales Law Reform Commission, above n 274, 2.

³⁰⁵ New South Wales Law Reform Commission, above n 250, para 2.31.

³⁰⁶ Ibid.

statutory will making power not be limited to adults stating ‘there is no reason why, if a minor is incapable, a provision should not be made for him or her.’³⁰⁷

In 1998, the New South Wales Law Reform Commission recommended the court be allowed to make a statutory will for a minor and reconfirmed the reasons for doing so as stated in earlier Reports. The Commission went further to explain that such authority would be relevant particularly where the minor was to be awarded a large sum of money and where they may have been abandoned by one or both parents whereby intestacy provisions would not be suitable.³⁰⁸

The Commission³⁰⁹ also considered various contexts in which a court approved wills for persons lacking testamentary capacity would be of benefit. These contexts were where the person:-

- a. Was suffering from an illness or injury that may well be fatal; and
- b. Had sufficient estate to make application to the court worthwhile; and
- c. Wished the estate to be distributed otherwise than in accordance with the intestacy rules, which might well only benefit both the parents of the minor. A minor may wish his or her estate to go to one parent, or the minor may simply wish to benefit another person, for example, a de facto spouse, a particular sibling or carer.

In relation to minors, s16 of the *Succession Act 2006* (NSW) authorises the court to make a will for a minor. There are similar provisions contained in the legislation in other jurisdictions. WA is the only state that does not have a provision for court approved wills for minors.

(c) When the Application can be Made

In 1994, the Victorian Law Reform Committee preferred a provision for a will to be made after the death of the incapable person when the size and extent of the estate was ascertainable and all claims could be before the court. However, the Queensland Law Reform Commission considered this issue and reached a different conclusion.³¹⁰ Whilst the Commission initially considered that permitting an application within a short period (6 months) following the death of the incapable person to account for the

³⁰⁷ Victorian Law Reform Commission, above n 271 para 5A.25.

³⁰⁸ Ibid para 5.32.

³⁰⁹ Victorian Chief Justices’ Law Reform Committee, above n 249, 2.

³¹⁰ Queensland Law Reform Commission, above n 251.

reluctance of an applicant to bring an application during the incapable persons lifetime, ignorance of the law or costs considerations, the Committee decided that such concerns could be appropriately addressed by family maintenance legislation post death and it was desirable to have a ‘single legislative regime’³¹¹ to do so after death.

In 1998, the New South Wales Law Reform Commission considered this position³¹² and recommended that an application should not be made after the death of the person, not because of the impact such a late application would have on the autonomy of the person but because the relevant family maintenance provisions should adequately deal with such altered distributions. The Commission considered that allowing applications after death would be inconsistent with family maintenance provisions and any distribution after death should be dealt with under a single statutory regime.³¹³ Ultimately, the Commission recommended implementation of the model statutory will legislation with some variations.

(d) The Test to Determine the Views and Wishes of the Person Who Lacks Will-Making Capacity³¹⁴

Considerations included the incapable person’s survival for years after the approval of the will, what to do with a will of a person made when capable becoming inadequate, family and intestacy provisions and whether the court approved will needs to deal with the whole of the estate.³¹⁵

This notion is fundamentally reflected, not in the evidence required to put before the court but in the ‘test’ to be applied by the court in deciding whether a will should be made. The model legislation attached as schedule 2 to the Queensland Law Reform Commissions report 52 (1997) provided at 21(b) that the court must refuse an application unless it is satisfied that the will ‘is or might be one that would have been made by the proposed testator if he or she had testamentary capacity.’³¹⁶

³¹¹ Ibid 66.

³¹² New South Wales Law Reform Commission, above n 274.

³¹³ Ibid para 5.29.

³¹⁴ Victorian Law Reform Commission, above n 271, 44.

³¹⁵ Ibid 36.

³¹⁶ Croucher, above n 247, 6.

This model provision reflects clause 6 of the draft *Wills Act 1994* (Vic). This differs from the provision in s7 of the *Wills Act 1936* (SA) which states at 7(3)(b) that the proposed will must be one that ‘..would accurately reflect the likely intentions of the person if he or she had testamentary capacity.’ This test seems to be a reflection of the ‘would’ provisions arising from early English legislation (*Lunacy Act 1890* discussed at paragraph 4.1.3 herein).

S22 of the *Succession Act 2006* (NSW) applied a different test in that the proposed will ‘...is, or is reasonably likely to be, one that would have been made by the person if he or she had testamentary capacity.’ The Queensland legislation incorporates a different test. By virtue of s24 of the *Succession Act 1981* (QLD) the will must be one that ‘...is or may be a will...that the person would make if the person were to have testamentary capacity.’ These provisions seem to reflect the more modern and flexible ‘could’ provisions arising from the *Mental Health Act 1983* (UK).

The Victorian legislation ultimately enacted the test as being ‘...the proposed will or revocation accurately reflects the likely intentions of the person, if he or she had testamentary capacity.’ This was amended in 2007³¹⁷ to one which ‘...reflects what the intentions of the person would be likely to be, or what the intentions of the person might reasonable be expected to be, if he or she had testamentary capacity.’ These amendments arose as a result of the courts interpretation of this test in *Boulton v Sanders & Ors*.³¹⁸ In this case, the incapable person had made a will leaving a large provision to a beneficiary that had predeceased her. There was no gift over provision of that specific bequest so it would pass to beneficiaries on intestacy. The applicant in that matter sought to vary that part of the will to include a gift over provision different to a division of the estate according to intestacy provisions. The trial judge found that there was no evidence to lead to a conclusion that the deceased did not intend to omit a gift-over provision and refused the application. That is, there was no evidence to support that the inclusion of a gift over provision reflected the likely intentions of the incapable person in accordance with s26(b) of the *Succession Act 2006*. The matter was taken on appeal.

³¹⁷ By No 38 of 2007 as a result of the decision of *Boulton v Sanders & Ors* [2004] VSCA 112 (11 June 2004).

³¹⁸ *Boulton v Sanders & Ors* [2004] VSCA 112 (11 June 2004).

The Court of Appeal interpreted the ‘likely intentions’ test at [111] and [112] and said:-

...s26(b) requires satisfaction on the balance of probabilities that the proposed will accurately reflects the testator’s likely intentions. The question is not whether the testator would probably have preferred the proposed will to intestacy; nor whether the proposed will is one of a number of possible proposed wills, all of which might be equally likely to reflect the testator’s likely intentions. ...the requirement of accurate reflection demands a substantial degree of precision and exactitude about the “likely intentions.

This decision identified the difficulties arising from the wording of the legislation which led to the Court to narrowly interpret the test to be applied in determining what it is the incapable person wants or would want in a will. The Court’s interpretation of the term “likely intentions” in this case, reflected the “would” provisions in the model legislation requiring, as the Court said, ‘...a substantial degree of precision and exactitude....’³¹⁹ Therefore, the term ‘accurately reflects the likely intentions’ did not provide for the same flexibility that the term ‘could’ would provide, in deciding whether the proposed will or alternation was within the scope of a will that the incapable person would consider, weighing up the relevant factors the court is required to consider in s28, thereby providing little scope for flexibly autonomous determinations.

Additionally, the wording made it difficult to establish with ‘precision and exactitude’³²⁰ what the likely intentions of an incapable person who had never had capacity would be, thereby making applications on behalf of such persons who fall into that category, difficult to bring.³²¹ This case was decided at a time when consideration of the introduction of the legislation in Western Australia was being made. The Western Australian Law Reform Committee sought to avoid the difficulties experienced in *Boulton v Sanders* and therefore enacted legislation reflecting the 1983 UK position.

³¹⁹ *Boulton v Sanders* [2004] VSCA 112 (11 June 2004) [52].

³²⁰ *Boulton v Sanders* [2004] VSCA 112 (11 June 2004).

³²¹ Parliament of Victoria, *Parliamentary Debates, Second Reading Speech*, Legislative Assembly, 23 May 2007, (Rob Hulls, Attorney-General Victoria, *Parliamentary Debates Second Reading Speech*, Legislative Council 19 July 2007, (John Lenders, Minister for Education).

The test in the Western Australian legislation is contained in s42(1)(b) which states ‘the suggested will, alteration or revocation, or that will, alteration or revocation as revised under section 43(1)(b), is one which ‘could’ be made by the person concerned if the person were not lacking testamentary capacity’. The test contained in s21(b) of the model legislation (prior to any enactment in Western Australia) is that ‘the proposed will, alteration or revocation is or might be one that ‘would’ have been made by the proposed testator if he or she had testamentary capacity’.

In Tasmania, the test is for the will to be one that ‘would’ have been made by the incapable person had they possessed testamentary capacity. This was changed in the *Wills Act 2008* to ‘reasonably likely’.

Similar to the Queensland and Victorian legislation, the legislation in Tasmania seems to put the management issues ahead of the wishes of the person. The test used by this state by virtue of s16E(c) differs from the model legislation in that the Court has to be satisfied that ‘...the proposed will, alteration or revocation is, or is reasonably likely to be, one that would have been made by the person...’

In the Northern Territory the test is for the will to be one that ‘is or might be one that would have been made by the proposed testator if he or she had testamentary capacity’.³²² In New South Wales, the test is that the will ‘is, or is reasonably likely to be, one that would have been made by the person if he or she had testamentary capacity.’³²³

Though these tests are articulated in the legislation using different terminology, the guiding principles found in the judgement of Megarry V-C in the English case *Re D(J)*³²⁴ governing the application of the test are:-

- ‘(i) The Court should assume that the incapacitated person has a brief lucid interval in which the Will is made;

³²² *Wills Act 2000 (NT)* s21(b).

³²³ *Wills Act 1968 (ACT)*, s16E(b); *Succession Act 2006 (NSW)*, s22(b); *Wills Act 2008 (Tas)*, S24.

³²⁴ *Re D(J)* [1982] Ch 237.

- (ii) During this notional interval the incapacitated person has full knowledge of both of the past and of the future in which he relapses into his actual state of incapacity;
- (iii) In this lucid interval the Court must consider the actual and not a hypothetical incapacitated person;
- (iv) The Court should assume that the incapacitated person has had the benefit of competent advice;
- (v) The Court should assume that the incapacitated person would take a broad brush “rather than an accountant’s pen” to the provisions of his Will.³²⁵

These principles were approved by the court in Australia in *Boulton v Sanders*.

(e) *The Requirement for Leave*

In 1992, the New South Wales Law Reform Commission³²⁶ considered the leave issue and recommended leave be obtained before the application proceeded. The purpose behind the leave provision was to prevent frivolous applications by ‘any person’ applying under the legislation simply to use it as a means to determine if there is a provision for them in the will. The Commission considered the threshold question of capacity at the leave stage could be relaxed such that the applicant only had to show the person for whom the will is to be made ‘may’ lack testamentary capacity but would then be required to prove the incapable person lacked testamentary capacity in the substantive application.

In 1994, the Victorian Law Reform Committee considered it appropriate that a requirement for leave be included. The purpose of including this requirement was to act as a screening device to ensure “...only adequately founded applications will proceed, that the applicant is an appropriate person and that potential parties are notified”.³²⁷ The disadvantage of having a leave requirement and hence, a two stage process was the potential for two applications and two appearances with access to justice considerations such as time and cost, potentially discouraging meritorious

³²⁵ Barbara Rich, ‘Statutory Wills: an Epitaph for the ‘Lucid Interval’ (Research Publication, Office of Public Guardian (UK), 2 October 2010.

³²⁶ New South Wales Law Reform Commission, above n 274 para 2.14.

³²⁷ Victorian Law Reform Commission, above n 271, para 5A.19.

applications from being made.³²⁸ The Committee concluded that a way around the disadvantages was to allow both applications to be heard simultaneously thereby being used as a ‘fast track’ procedure.³²⁹

In 1997, the Queensland Law Reform Commission preferred the two stage process with the requirement for leave before the substantive application proceeded and was concerned with how to deal with it procedurally. Ultimately the model legislation recommended the two stage process.³³⁰ Each State and Territory (except for WA) has the leave requirement in the legislation. Western Australia did not adopt the two stage process, giving as the reason, the desire to reduce litigation.³³¹

*(f) Forum*³³²

In 1992, the New South Wales Law Reform Commission recommended the Supreme Court act as the appropriate jurisdiction for applications to be made. As an alternative, the Committee considered the appropriateness of such power vesting in the Guardianship Board on the basis that it may be a cheaper and more informal jurisdiction. However, the Commission concluded that the Supreme Court was the most appropriate jurisdiction for three main reasons.

First, ‘testamentary capacity is a legal concept familiar to the courts and customarily applied by the courts.’ Second, ‘the informality and privacy which are claimed as virtues of the Guardianship Board can also be provided by the Protective Division of the Supreme Court as may be appropriate.’ Third, ‘the Protective Division already has analogous power to examine whether a person is capable of managing his or her affairs and to order that the estate of the person be subject to management.’³³³

The 1985 and 1994 Victorian Law Reform Committee Reports proceeded on the assumption that the appropriate jurisdiction was the Supreme Court and the South

³²⁸ Ibid para 5A.20.

³²⁹ Ibid para 5A.21.

³³⁰ Queensland Law Reform Commission, above n 251, 65.

³³¹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 30 March 2006, 933b-935a (Jim McGinty, Attorney General).

³³² Victorian Law Reform Commission, above n 271, 38.

³³³ New South Wales Law Reform Commission, above n 274, para 2.6.

Australian draft legislation was predicated on the court being the appropriate jurisdiction.

In 1994, the Victorian Law Reform Committee followed the 1992 recommendation of the New South Wales Law Reform Committee that statutory will making power should be conferred on the court. This position reflected the position in the South Australian draft legislation and the 1985 Victorian Law Reform Committee Report.

In Tasmania, a different approach was taken and the *Wills Legislation Amendment Bill 1994* conferred jurisdiction on the Guardianship and Administration Board with the court overseeing the statutory wills rather than having the power conferred on it.³³⁴

The Queensland Law Reform Commission also considered a joint scheme between the Guardianship Board and the Supreme Court identifying several advantages. These include the following:-

- (a) the Board already dealing with questions of capacity in other applications;
- (b) Board Members having judicial or legal experience;
- (c) less formal operations and therefore more likely to be less complicated;
- (d) the exercise of an inquisitorial role.

More difficult or highly contested application could be determined in the Supreme Court and dual jurisdictions will provide applicants with flexibility and choice, particularly concerning cost considerations.³³⁵

The 1998 New South Wales Law Reform Commission Report³³⁶ recommended a statutory will made in one Australian jurisdiction be recognised in another particularly in the spirit of the push for national uniformity of succession laws and to avoid confusion between States. All States and Territories enacted legislation appointing the court as the appropriate jurisdiction. Tasmania is the only state that also allows applications, subject to certain criteria, to be made to the Guardianship and Administration Board.

³³⁴ Queensland Law Reform Commission, *Uniform Succession Laws: Wills*, Miscellaneous Paper No 15 (1996).

³³⁵ *Ibid* 14.

³³⁶ New South Wales Law Reform Commission, above n 293, para 5.40.

(g) *Persons who can Apply*³³⁷

The 1985 Victorian Law Reform Committee considered the Public Trustee as being the most likely applicant in statutory will applications³³⁸ predicated upon the authority to manage an incapable persons affairs being conferred on him/her, even if the person is not a protected person. Notwithstanding the assumption that the Public Trustee will bring most applications, the Committee recommended any person should be able to bring the application but with leave to prevent abuse of process.³³⁹

In 1989, the New South Wales Law Reform Commission considered there may be disinterested persons (eg: a solicitor or social worker) who may best determine whether an application should be made. As such, ‘any person’ should be able to apply. The abuse of process concerns raised by the Victorian Law Reform Committee in 1985 could be addressed by the requirement for leave.³⁴⁰ In 1992, the New South Wales Law Reform Commission recommended any person should be able to apply for similar reasons expressed in the 1989 Report.

Each state and territory enacted legislation providing for any person to apply.

(h) *Cost*³⁴¹

Costs were considered in the contexts of the application for leave and in deciding the appropriate forum for applications to be heard. In 1992, the New South Wales Law Reform Commission recommended the court have discretion in relation to any costs orders to be made.³⁴² In 1998, the Commission considered that in appropriate cases a substantive application could be heard at the same time as the leave application thereby reducing costs. The Commission also considered jurisdiction of a Registrar to hear applications in relation to small estates. Whilst this may potentially save on costs, the Commission identified this as a procedural rather than substantive issue so did not explore the issue further in terms of the legislation and left it to the States and Territories to decide whether a Registrar could hear such applications.

³³⁷ Victorian Law Reform Commission, above n 271, 39 and 43.

³³⁸ Victorian Chief Justices’ Law Reform Committee, above n 249, para 23.

³³⁹ Ibid para 24.

³⁴⁰ Ibid para 4.4.

³⁴¹ Victorian Law Reform Commission, above n 271, 45.

³⁴² New South Wales Law Reform Commission, above n 250, para 2.3.

(i) Summary

These key considerations are relevant to this thesis. Firstly, issues (d) to (h) above reflect considerations of access to justice identified in chapter two. Second, considerations of procedure (ie: the requirement for leave and the application and interpretation of the statutory test), jurisdiction, parties and costs are all relevant factors in balancing the dimensions of justice in a statutory will context. Considerations of who can apply and the application of the test are relevant to the truth dimension. These features assist with ascertaining the true facts. The requirement for leave aligns with the time, cost and truth dimensions. It can prevent unmeritorious claims thereby preventing time wasted on such applications. It can extend the time, however, by possibly leading to two hearings. It assists with ascertaining the true facts as to obtain leave the case must not be without merit. Costs considerations reflect the cost dimension as does who can apply and the requirement for leave.

Some of these issues are now features of statutory will legislation in Australia. For example, with the exception of WA, all jurisdictions apply a two stage process where leave is required. Any person can apply but unmeritorious applications are screened out at the leave stage. The Supreme Court is the chosen jurisdiction except in Tasmania where applications can also be made to the Board. Procedure that allows for an appropriate balance of these features within the three dimensions of justice become important mechanisms to achieving a system that is fair, effective and efficient and therefore more likely to be used. Ultimately, the legislation needs to be meaningful. This can be achieved by making it more accessible. Accessibility can be achieved through appropriate procedure. The next Chapter will identify and analyse the procedure adopted for statutory will cases.

3 Enacting the Legislation in the States and Territories of Australia

Although progress, development and implementation of the legislation in each State and Territory was slow and sporadic, discussion about statutory will legislation was vigorous. Whilst a scheme was considered in 1985 Victorian Report then again in 1989 by the New South Wales Law Reform Commission and national discussions commenced in 1991, it was not until 1996 that the first state enacted the legislation, with each State slowly following suit. Tasmania enacted their Statutory Will

legislation in 1992.³⁴³ South Australia followed sometime after in 1996, followed closely by Victoria in 1997, the Northern Territory in 2001 (with the implementation of the *Wills Act 2000* in March 2001), New South Wales in 2006 (*Succession Act (2006)* section 18), Queensland (with proclamation of the amendments on the 1st April 2006) then Western Australia in 2008. Finally, the ACT enacted their legislation in April 2010.

Despite recommendations as to uniformity with the production of ‘model’ legislation for consideration by each of the States and Territories by the National Committee in 1997, there are variations of these provisions between states as well as to the wording to the test enacted legislation between each State and Territory as to the way the incapable persons intentions are considered.

³⁴³ *Wills Act 2008* (TAS) s30.

V: CHAPTER FIVE: ANALYSIS OF STATUTORY WILL PROCEDURE AND CASE LAW

A Introduction

Statutory Will procedure exists in legislation and rules of practice. Although Chapter two identified access to justice barriers arising at three stages these procedures only occur in stages two and three of the access to justice framework. The first stage (not accessing the system at all) is not relevant to this part of the thesis as none of the procedures fit within that stage. This chapter analyses how the court has applied these procedures and discusses the cost implications for applicants and the person with decision-making disability.

B Identification of Procedure Within Stages Two and Three

1 Stage Two: Getting into the System

Procedures at this stage can be divided into two categories. First, procedures that govern representation for the incapable person in legal proceedings and second, procedures that provide the mechanism for the commencement of the application.

(a) Procedures Governing Representation of the Person who Lacks Litigation Capacity in Legal Proceedings

The definition of a person who lacks litigation capacity is provided in Court rules.³⁴⁴ Once a person has been found to be incapable, the rules require that person to be represented.³⁴⁵ The incapable person cannot commence or defend an application in Court unless represented.

³⁴⁴ For example, in Western Australia, Order 70 of the *Rules of the Supreme Court 1971* define an incapable person to be an infant, a represented person within the meaning of the *Guardianship and Administration Act 1990* or a person declared by the Court to be incapable of managing his or her affairs. If the person under a disability is a minor, then they are assumed to be a represented person for the purpose of this order. Likewise, if the person is a represented person (having been declared so under the *Guardianship and Administration Act 1990* or its equivalent), then they are assumed to be a represented person. If however, the person does not fall into either of these categories, the court has to embark on an exercise to decide whether or not the person is incapable such as to be declared a 'person under a disability' for the purpose of this order. If so, a representative is appointed. Order 4 of the *Supreme Court Civil Rules 2006 (SA)* defines a person under a disability as a child, a person whose affairs are administered under law for the protection of the person, or a person who is not physically or mentally capable of managing their affairs or making rational decisions regarding the court proceedings.

³⁴⁵ Rule 7.13 of the *Uniform Civil Procedure Rules 2005 (NSW)* prevents an incapable person from bringing or defending any action unless by 'tutor'. The court has the power to appoint a tutor but if

These rules apply equally to parties in Statutory will cases as they do in any Supreme Court action. Case law shows this is done at an early stage. For example, in *Public Trustee v Phillips*,³⁴⁶ an order appointing a guardian ad litem for the incapable person was made in chambers prior to proceeding to a formal hearing.³⁴⁷

In *Re Will of Jane*,³⁴⁸ an interlocutory application was made for a representative to be appointed for the represented person. In *Griffin v Boardman*³⁴⁹ a guardian ad litem was appointed by the court at an early date for the incapable person.

In an interlocutory application in *Martina Pieternella De Jager*,³⁵⁰ a guardian ad litem was appointed for the incapable person.

In contrast to this court requirement, in the Tasmanian tribunal forum, no formal representation or appointment is required.

(b) Procedure for the Commencement of an Application

All jurisdictions require a written application to the Court (or the Board, in Tasmania). The type or classification of the application varies, depending on the prescribed procedure of the particular jurisdiction. For example, in some jurisdictions, the application is commenced by an originating summons or motion setting out the relief

there is a person willing to act and does so, no formal appointment need be made but a consent to act in that capacity is required. Order 15 rule 2 of the *Supreme Court (Miscellaneous Civil Proceedings Rules) 2008 (VIC)* provides that a person under a disability requires a litigation guardian to bring or defend proceedings in court. The litigation guardian is required to act by solicitor. For Queensland, see section 93 of the *Uniform Civil Procedure Rules 1999 (Qld)*. In South Australia, as a general rule, a person under a disability (termed a “protected person” by virtue of order 79 of the *Supreme Court Civil Rules 2006 (SA)*) must be represented by a litigation guardian unless the court permits the person to act personally. Regulation 275 of the *Court Procedure Rules 2006 (ACT)* requires a person under a disability to commence or defend an action only by litigation guardian. Regulation 15.02 of the *Supreme Court Rules (NT)* requires a person under a disability to commence or defend an action by litigation guardian who must act by a solicitor. In Tasmania, a person under a disability is required to be represented by a litigation guardian pursuant to order 292 of the *Supreme Court Rules 2000 (Tas)*. The litigation guardian acts in that capacity subject to filing certain documents.

³⁴⁶ [2004] SASC 142 (28 May 2004).

³⁴⁷ *In the Estate of S* [2012] NSWSC 1281 (8 October 2012), the plaintiff and the second defendant were appointed guardians of the represented person.

³⁴⁸ [2011] NSWSC 624 (20 July 2011).

³⁴⁹ [2009] SASC 315 (2 October 2009).

³⁵⁰ [2012] SASC 236 (21 December 2012).

sought and the persons affected.³⁵¹ In others, persons affected are not required to be identified.³⁵² Other jurisdictions provide for an application to be commenced by claim or application.³⁵³ In all jurisdictions, the application is required to be supported by an affidavit addressing statutory criteria.

In Tasmania, the procedure for commencement of an application in the Guardianship and Administration Board is less formal. Here an application is commenced by the applicant completing prescribed Form 14: Statutory Will, which addresses, amongst other things, the criteria the Board is to consider under the *Wills Act 2008 (Tas)*. Accompanying Form 14 is a form entitled “healthcare professional CHCPR-E”, to be completed by a Health Care professional, psychologist or medical practitioner. The forms specifically ask for information regarding testamentary capacity of the person for whom the will is proposed. As this procedure makes use of prescribed forms, the application becomes more readily accessible because the applicant is directed to those form in as the mode of commencement rather than having to navigate

³⁵¹ practice Direction 9.3.1(3)(a) of the Supreme Court *Consolidated Practice Directions (WA)* provides that a statutory will application is to be commenced by originating summons which is to set out the nature of relief sought and the persons or class of persons affected or concerned. The represented person is to be named as a defendant unless they are making the application (or someone on their behalf in which case they will be the plaintiff). In NSW statutory will applications fall under Division 2 rule 6.4(1)(h) of the *Uniform Civil Procedure Rules 2005* and are required to be commenced by summons. Rule 6.12 prescribes the summons is to specifically state any relief claimed. Regulation 88.05 of the *Supreme Court Rules (NT)* requires an application for a statutory will to be made by originating motion using a prescribed form. In Tasmania, an application to the Supreme Court for a statutory will is commenced by virtue of order 89(p) of the *Supreme Court Rules 2000 (Tas)*. The mode of commencement is by way of originating process with a supporting affidavit addressing matters in the Act. The originating summons is to be accompanied by an affidavit addressing testamentary capacity, the appropriateness of the applicant to make the application and all matters set out in section 41 (unless the court otherwise directs). Notice to the defendant under order 6.14 must be accompanied by an affidavit setting out the matters to be considered by the Court under the Act.

³⁵²In Victoria, Order 17 of the *Supreme Court (Miscellaneous Civil Proceedings Rules) 2008 (VIC)* sets out the procedure governing statutory will applications. Order 17 Rule 5(1) provides the application is to be commenced by originating motion supported by an affidavit. Order 17 Rule 5(4) does not require interested parties to be named, joined or served but only to state whether the application is made on notice and if so, to whom it has been or is proposed to be given.

³⁵³ For Queensland, section 10 of the *Uniform Civil Procedure Rules 1999 (Qld)* provides an application can be commenced either by claim or application. In statutory will matters, it appears that the appropriate way to commence and action is by application as the relevant law does not prescribe a specific process to be used. The Rules require a primary action (defined in order 28 as an action separate from other actions in the court) to be commenced by originating process in the form of a summons (order 34) in the approved form (form 2, Supreme Court Practice Directions). Regulation 34 of the *Court Procedure Rules 2006 (ACT)* requires an application to the Supreme Court to be commenced by either an originating application or originating claim. In statutory will applications, an originating application would be used as regulation 34 states that if a Territory law allows a person to apply to the court for an order and that law does not prescribe the process to be used, then it is to be commenced by originating application.

through the court rules and practice directions to find out how to commence, as in the court system.

2 Stage Three: The System Itself

The procedures at this stage fall into four categories. Firstly, the requirement for leave, second, representation of interested parties, third, the hearing itself and finally, costs. These categories have been identified from an analysis of the prescribed legislative and court based procedures and the case law commenting on the practical use of these procedures. Each of these categories is discussed below.

(a) Requirement for Leave

Two points arise when considering the leave requirement. First, in every jurisdiction except Western Australia and applications to the Guardianship and Administration Board in Tasmania, a statutory will application involves a two stage process. The first stage requires the applicant to obtain leave.³⁵⁴ After leave is granted, the substantive application is considered at the second stage. Usually, these two stages are heard at the same time.³⁵⁵

The purpose of the leave provision is to discourage applications that are baseless and unmeritorious. For example, Gillard J in *Monger v Taylor* (“*Monger*”) considered the leave requirement as ‘...a screening process to ensure that frivolous baseless claims are not made and in particular a baseless allegation that a person lacks testamentary capacity’.³⁵⁶ The court in that case granted leave and made an order authorising the will contemporaneously.

DeBelle J in *Hoffmann v Waters* considered the requirement for permission³⁵⁷ was:-

³⁵⁴ *Succession Act 2006 (NSW)* s18, *Succession Act 1981 (QLD)* s22, *Wills Act 1997 (Vic)* s21(2), *Wills Act (NT)* s20, *Wills Act 1969 (ACT)* s16A(1) (referred to as a ‘note’ at the end of this subsection), *Wills Act 1936 (SA)* s7(1) (referred to as ‘permission’ rather than ‘leave’), *Wills Act 2008 (Tas)* s23.

³⁵⁵ *Succession Act 1981 (QLD)* s22 provides for the leave and substantive applications to be heard together, *Wills Act 2008 (Tas)* s23, Order 17 Rule 6 of the *Supreme Court (Miscellaneous Civil Proceedings Rules) 2008 (VIC)* provides that if leave is granted to bring the application, the court can either proceed with the application or give directions as to progress. Pursuant to Regulation 88.05 of the *Supreme Court Rules (NT)*, once leave is granted, the application proceeds as if it were the substantive application for a statutory will. See also the comments of DeBelle J in *Hoffmann v Waters* [2007] SASC 273 in relation to the South Australian legislation.

³⁵⁶ [2000] VSC 304 (2 August 2000), [22].

³⁵⁷ This term is referred to in the South Australian legislation and is the equivalent to the term ‘leave’ contained in the legislation in other Australian states and territories.

...included to provide a process by which to screen out baseless or unmeritorious applications and, in particular, baseless claims that a person lacks testamentary capacity. ...³⁵⁸

This was further approved by Atkinson J in *Sadler v Eggmolesse* who observed that the purpose of the leave provision was to ‘screen out unmeritorious applications.’³⁵⁹

The second point is identified in *Boulton v Sanders*, by Balmford J (citing with approval *Monger*) ‘...that the leave application is at least as important as the substantive application itself, and in most cases would be the most important application.’³⁶⁰ This point is in effect related to the first in that the importance of obtaining leave is to fulfil the purpose of the leave requirement. That is, to screen out baseless and unmeritorious applications.

However, there is mixed judicial opinion regarding the importance and indeed, relevance of having the leave requirement. For example, in *Hoffmann v Waters*,³⁶¹ DeBelle J was critical of the need for a two stage process questioning whether obtaining ‘permission’ to bring an application was a necessary step. He observed that discouraging unmeritorious and frivolous applications could be achieved simply by looking at the need to establish that the incapable person lacked testamentary capacity. If they did not lack capacity, then the application would be refused. As such he thought consideration should be given to the removal of the leave requirement because “...the cost of an application for permission...adds an unnecessary cost burden on what is already an expensive process.”³⁶²

This criticism seems to find support in the subsequent approach taken by the court to the leave requirement in some jurisdictions. There is a growing trend to consider the leave and substantive applications together providing merit to DeBelle J’s comments. For example, in *Bryant v Blake*³⁶³ the court heard the leave application and the substantive application together. Gray J in *Rak* observed ‘...where the application is

³⁵⁸ [2007] SASC 273 (20 July 2007), [10].

³⁵⁹ [2013] QSC 40, (1 February 2013), 1.

³⁶⁰ [2003] VSC 405 (16 October 2003), [11].

³⁶¹ [2007] SASC 273 (20 July 2007).

³⁶² *Ibid* [28].

³⁶³ [2004] SASC 369 (19 November 2004).

not obviously without merit, it is appropriate that leave to proceed and the substantial application be heard concurrently.³⁶⁴ In *Griffin v Boardman*, the court directed the permission and substantive applications be heard at the same time because the application appeared to have ‘some merit.’³⁶⁵ In *Elayoubi, application of Wosif*,³⁶⁶ the application was managed on an urgent basis with the leave and substantive applications heard contemporaneously. The evidence was brief but the court judged it sufficient. Instructions were readily obtained at trial and the matter finalised quickly. In *Martina Pieternella De Jager*,³⁶⁷ the court heard the permission and substantive applications at the same time. In *Estate of S*, Ward J granted leave to bring the application and made an order that a will be made in the same hearing.³⁶⁸ In *Sadler v Eggmolesse*, Atkinson J indicated that the application for leave can be considered in the same hearing as the substantive application where all the evidence is available.³⁶⁹ Otherwise, the application for leave can be heard then adjourned to final hearing when all the evidence is available and before the court.

These cases demonstrate that Australian courts are taking a common approach by hearing the leave and substantive applications together. Sufficient information has to be provided at the leave stage for the court to determine if, indeed, the application is baseless or unmeritorious. More comprehensive information has to be provided to determine the substantive application at stage two including the information already provided at the leave stage. Therefore, there seems little point in having a two stage process because the applicant is presenting the same information twice. This adds to the costs because there are potentially two hearings. The court’s solution to this has been to generally hear both stages together, making the need for a two stage process redundant. In light of this it might be suggested that the Western Australian and Tasmanian legislative approach is preferable. These approaches contain no requirement to obtain leave to bring the application³⁷⁰ and all aspects of the application are considered at the same time in a single hearing.

³⁶⁴ [2009] SASC 288, (1 September 2009) [11].

³⁶⁵ [2009] SASC 315 (2 October 2009) [2].

³⁶⁶ [2010] NSWSC 1004 (26 August 2010).

³⁶⁷ [2012] SASC 236 (21 December 2012).

³⁶⁸ [2012] NSWSC 1281 (8 October 2012), [4].

³⁶⁹ [2013] QSC 40, (1 February 2013) 1.

³⁷⁰ See also applications to the Guardianship and Administration Board in Tasmania contained in the *Wills Act 2008 (Tas)*.

(b) Representation of Interested Parties

The second stage three category of procedural issues concerns the representation of persons with an interest in the application. In New South Wales, Queensland, Western Australia, Northern Territory and Tasmania, the legislation provides that a court must refuse the application unless those persons with an interest in the application have an opportunity to be represented in the proceedings.³⁷¹ The purpose of this mandatory requirement is to meet the object of the legislation described by Balmford J in *Boulton* as ‘... to ensure so far as the law can do it that those who have a duty not so much to reward but rather to provide maintenance and support do so by appropriate testamentary disposition.’³⁷² This means that to ensure that the people who might be affected by the proposed will are given an opportunity to inform the court of their position, the court must not grant a will unless those persons have been given the opportunity to do so. These persons have a right to be heard and to be heard. In practical terms, it is likely that persons who will be adversely affected if a statutory will is not made will consider participating. However, if those adversely affected persons agitate for a different will then those who are benefiting should also have the opportunity to participate. This must refuse provision therefore ensure justice can be done because all those affected either by a will being made or not being made, are able to participate.

Therefore, in deciding what will the court is to approve for the incapable person, the interests of the individual, that is the ‘should I reward a benefactor’ question³⁷³ can be weighed against the public purpose question: “do I have a duty to make provision for...proper maintenance and support?” Balancing these considerations requires those persons interested to be given the opportunity to participate. Whilst balancing these factors is important to meet the object of the legislation, access to justice issues arise. Specifically, this provision lends itself to attracting more parties participating in the litigation. In addition to privacy concerns, the more parties that participate, the longer the application will take and the more costly it will be making it less attractive to access the legislation.

³⁷¹ *Succession Act 2006 (NSW)* s22, *Succession Act 1981 (QLD)* s24(e), *Wills Act 1970 (WA)* s42(1)(d), *Wills Act (NT)* s21(e), *Wills Act 168 (ACT)* s16E(e), *Wills Act 2008 (Tas)* s24 for applications made to the Supreme Court and s33 for applications made to the Guardianship and Administration Board.

³⁷² [2003] VSC 405 (16 October 2003), [24].

³⁷³ This question was posed by Balmford in *Boulton* *ibid*.

To give effect to the ‘must refuse’ provision in a way that minimises the access to justice problems identified, some jurisdictions have introduced their own procedures. For example, the WA Supreme Court has sought to address this in a practice direction. Practice Direction 9.3.1 says that the person or class of persons affected by the application should be identified in the originating summons but shall not be given notice until the court has directed. This alerts the court to who the interested parties are before steps are taken to join them.

The Supreme Court of Western Australia has managed this by directing notice be given by serving a letter with a copy of the originating summons and will on the interested parties. Those parties were joined as defendants in the original application though none participated.³⁷⁴

In Tasmania’s tribunal jurisdiction, the Board gives notice of the hearing to certain interested parties and conducts the hearing in accordance with Division 1 Part 10 of the *Guardianship and Administration Act 1995* without the need to join them.

Examples of how the court has approached representation of interested parties in jurisdictions containing the ‘must refuse’ provision are provided by the following cases.

In *AB v CB & Ors*,³⁷⁵ the mother of a severely incapacitated girl commenced an application for a will to be made for her daughter. The court joined all relevant parties, namely the mother, father and brother, as defendants but none participated in the proceedings.

In *Deecke v Deecke*,³⁷⁶ the issue of representation of the represented persons’ father arose. In that case the represented person had no will and therefore, the beneficiaries of her estate on intestacy were her mother, father and brothers. The mother was the applicant and her application was supported by the three brothers. The represented persons father was notified of the application and provided with copies of the documents by email. Although not formally served, the Court was satisfied that he had been given notice and an opportunity to participate as he had communicated with

³⁷⁴ *In the Will of BJ* (Unreported, Supreme Court of Western Australia, CIV 1364 of 2013).

³⁷⁵ [2009] NSWSC 680 (20 July 2009).

³⁷⁶ [2009] QSC 65 (1 April 2009).

the plaintiffs solicitors by email about the application and the documents stating his position. This was held by the court to be sufficient to establish the plaintiff had taken adequate steps to allow for the representation of the father in the proceedings.

In *Re Will of Jane*³⁷⁷ the son of an incapable person brought the application. His sister and brother (the incapable persons other children) were joined as defendants. Other interested persons were notified although they are not identified in the reasons.

The Guardianship and Administration Board in Tasmania took a different approach than the Supreme Court in previous cases, to the participation of interested parties. In *EKI (Statutory Will)*,³⁷⁸ the Board conducted an independent investigation into the interested parties' views of the application. The matter was listed for hearing with interested parties being notified of the hearing date.

These cases show that although the mandatory provision exists, the court has tried to comply with the provision without unnecessarily involving or joining parties. This helps to keep costs down and reduces the time involved. If parties seek to participate, however, the court must hear why they ought to be allowed to participate.

In other jurisdictions, a 'must refuse' requirement does not exist. For example, s29 of the *Wills Act 1997* (Vic) provides a mechanism for interested persons to appear³⁷⁹ provided that they are 'any other person who has, in the opinion of the Court, a genuine interest in the matter.'³⁸⁰ However, it is not a requirement that an application must be refused if such persons are not given the opportunity to be represented. Section 7(7) of the *Wills Act 1936* (SA) provides a list of persons entitled to appear and be heard but there is no 'must refuse' provision. However, when read in conjunction with Rule 98 Order 8 of the *Supreme Court Civil Rules 2006* (SA), notice of an application is to be given to persons as directed by the Registrar and to such other persons who appear to the court to have an interest in the application. Order 38 rule 4 of the *Supreme Court Civil Rules 2006* (SA) requires every person whose interests may be directly and adversely affected and whose presence before the court is required

³⁷⁷ [2011] NSWSC 624 (20 July 2011).

³⁷⁸ [2010] TASGAB 12 (12 July 2010).

³⁷⁹ See also *Wills Act 1936* (SA) s 7(4)(d) and (e).

³⁸⁰ *Wills Act 1997* (Vic) s29. In *Wills Act 1936* (SA) s7(7) it is described as a "proper interest".

for judgement to be entered is to be made a defendant to the application. Therefore, if the interested party falls within this provision, they are required to be made a defendant. Notice is insufficient, arguably restricting the discretionary aspect of this States legislation.

There are a number of examples of how the court has approached representation of third parties in jurisdictions that do not contain the ‘must refuse’ provision. In *Monger*, the plaintiff, a nephew of the represented person by marriage, brought an application for a statutory will. The represented person had no will and would die intestate. On intestacy, her sister would be the sole beneficiary. The application was issued without the sister being joined. The court said the plaintiff ‘...should take all steps necessary to identify and locate any person who may have a genuine interest....’³⁸¹ Rather than joining those identified parties to the action, Gillard J suggested³⁸² the plaintiff could proceed to tell those persons about the application and suggest they may wish to attend the leave application. Ultimately, the sister was subsequently joined as a defendant.

In *Boulton v Sanders*,³⁸³ section 29 of the *Wills Act 1997* (Vic) provided that persons who, in the courts opinion, have a genuine interest in the matter may appear at an application for leave. In that case, ten parties were named as defendants. The Plaintiff was the daughter of a close friend of the represented person. The first Defendant was the represented person and the remaining nine Defendants were nieces and nephews who shared in the estate on intestacy. Two Defendants took no part in the proceedings whilst eight did. Of those eight, five filed affidavits. All those persons entitled to appear were joined as defendants. However, charities who had benefited under an earlier will were not joined as their legacies were not being disturbed by the application. They joined only those parties likely to be materially or adversely affected.

³⁸¹ [2000] VSC 304 (2 August 2000) [25].

³⁸² *Ibid* [29].

³⁸³ [2003] VSC 405 (16 October 2003).

In *Public Trustee v Phillips*,³⁸⁴ an order was made for the attempted service on an interested party to the proceedings. Service was unable to be effected. The Court was critical of this but ultimately found that notice was not required to be given to that party because he had acted against the interests of the represented person when he had power under an enduring power of attorney and had no contact with her since his release from prison some years prior. Arguably, it would not be an option under the ‘must refuse’ provisions.

In contrast, in *Bryant v Blake*,³⁸⁵ the court was not satisfied that a half sibling not be given an opportunity to be heard or notified of the proceedings because she had not maintained any contact with the incapable person or the plaintiff.

In *Rak* the parents of the incapable person commenced an application for a will for their brain-injured son. Other interested parties were the incapable persons two siblings. One sibling was also under a disability to the other was appointed his guardian ad litem. Gray J was satisfied that notification to these interested parties complied with section 7(7)³⁸⁶ and they were not joined. However, one interested party participated in the proceedings by filing an affidavit.

These cases illustrate that whilst there are differing requirements in each jurisdiction, the court is adopting a flexible approach within the confines of the procedural provisions. It can do this by invoking incidental provisions contained in the legislation where the court can make necessary procedural orders or directions.³⁸⁷ However, whilst these provisions can be invoked, it can only do so within the confines of the legislation and associated court rules. In some instances, it is submitted, this unnecessarily ties the court’s hands. The court cannot avoid notification and/or joinder and therefore cannot prevent an increase in cost and time should those parties wish to participate. In jurisdictions where the ‘must refuse’ provision does not operate the court can none the less proceed with the application without offending the provisions

³⁸⁴ [2004] SASC 142 (28 May 2004).

³⁸⁵ [2004] SASC 369 (19 November 2004).

³⁸⁶ [2009] SASC 288 [13].

³⁸⁷ *Succession Act 2006 (NSW)* s18(5). Note, the NSW Court’s authority to do so also arises from *Civil Procedure Act 2005 (NSW)* s61, 62 and 86, *Succession Act 1981 (QLD)* s21(3), *Wills Act 1997 (Vic)* s23, *Wills Act (NT)* s 22(c), *Wills Act 1968 (ACT)* s 16A(5), *Wills Act 1970 (WA)* s43(1)(a).

of the legislation, avoiding unnecessary adjournments, reducing time and cost. Less parties, less time and less cost can produce an equally good outcome.

(c) The Hearing Itself

The third category of procedural consideration in stage three concerns the hearing itself.

Statutory will applications are usually heard in open court. However, there are provisions in the rules that allow matters to be dealt with on papers without the need for attendance at court. This was identified as a possible appropriate procedure by Palmer J in *Fenwick, Re; Application of J R Fenwick & Re Charles* where he stated '(t)here is no need for straightforward, unopposed cases such as *Re Fenwick* and *Re Charles* to be heard in open Court and for Counsel to appear to make submissions. Such application can be dealt with on papers by a Judge in Chambers...'³⁸⁸ on the condition that the evidence is "so clear and convincing as to all matters upon which the Court must be satisfied".³⁸⁹

He went on further to say:-

"As with decisions made in Chambers in uncontested application under the *Protected Estates Act* and the *Adoption Act* there is no need for publication of reasons for a decision made in Chambers in straightforward, unopposed applications for a statutory will. Many of such applications will involve minors or mental health issues or matters of concern only to the immediate family members. There is no public interest in publishing reasons for judgment in such cases. Further, the dispensation of the requirement to give reasons in such applications will permit them to be dealt with far more quickly than otherwise".³⁹⁰

These comments are relevant considerations for access to justice. A benefit of dispensing with reasons is that a decision can be delivered immediately without the need to reserve for the purpose of drafting reasons, therefore delivering justice in a timely manner. A pitfall of not publishing reasons is that persons will not gain knowledge of the process and how it is applied to the legislation. However, as will be discussed in Chapter Seven, knowledge of the legislation can be addressed in other

³⁸⁸ [2009] NSWSC 530 (12 June 2009), [263].

³⁸⁹ Ibid [262].

³⁹⁰ Ibid [265].

ways. For example, where the application is contested, the matter can be heard in open court and reasons for decision delivered *ex tempore* or by way of written reasons.

C Costs

Two issues arise here. The first concerns the amount of costs of applications generally and the second concerns the approach the court takes to costs orders as a result of those applications.

1 The Amount of Costs

Statutory will applications have been criticised for being expensive. The discussion of the application of procedural requirements earlier in this Chapter illustrates why this is so. Separate procedures associated with the two stage process, inclusion of interested parties and representation of the incapable person need to be separately addressed and all add to the cost of the application. Cost issues have also attracted the attention of the Court. The court has commented on these costs. For example, DeBelle J observed in *Hoffmann v Waters*³⁹¹ that the costs of bringing an application for a statutory will are substantial. This cost aspect has also attracted the attention of law reformers. For example, in a consultation paper on Succession Law: Wills, the Victorian Law Reform Commission identified ‘...that the average cost of an uncontested statutory will application is \$7,600.00’ and for contested applications up to \$40,000.00.³⁹² This is expensive in relative terms for making a will compared to the person who does not lack testamentary capacity as discussed in Chapter Three.

2 The Court’s Approach to Costs Orders

The legislation is liberal in terms of the court’s discretion regarding costs in that the court can make any order it thinks fit.³⁹³ Practically, the court has approached costs in three ways. Firstly, parties may bear their own costs. This may be in the form of a positive order to this effect or alternatively, the court may make no order as to costs. This outcome is common in circumstances where a party is advancing his or her own interests. Second, the court has ordered the losing party pay the costs of the successful party(s). This outcome is common in highly contentious proceedings, particularly

³⁹¹ [2007] SASC 273 (20 July 2007).

³⁹² Victorian Law Reform Commission, *Succession Law: Wills*, Consultation Paper 11 (2012).

³⁹³ See for example, *Wills Act 1970* (WA), s43(1)(d).

where a party is advancing their own interests. Third, the court has ordered costs be paid from the estate of the person lacking will-making capacity. This outcome is common in uncontentious matters, particularly where the applicant has no interest in the matter except for advancing the interests of the person lacking will-making capacity.

(a) Examples where Parties Bear their own Costs

In *Monger*, the parties resolved their dispute as to the appropriate terms of a will and asked the court to approve the will in the form agreed. Gillard J, in making no order as to costs, said ‘...costs should be kept to a minimum and the court and the parties should ensure the procedure adopted gives effect to that objective.’³⁹⁴

In *Hoffmann v Waters* DeBelle J said ‘...there is a strong argument that, since parties are seeking to advance individual interests, each party should bear their own costs’.³⁹⁵

In *Re Will of Jane [No 2]*³⁹⁶ the court ordered that the plaintiff should pay the first defendants costs of the proceedings with no order as to costs of the second and third defendants (who were the children of the represented person). In forming this conclusion, Hallen AsJ affirmed the position in *Monger* that:-

Since parties are seeking to advance individual interests each party should bear their own costs.³⁹⁷

(b) Examples where the Unsuccessful Party is ordered to Pay the Costs of the Successful Party(s)

In *Boulton* there were several interlocutory steps, substantial affidavits and protracted hearings which led parties to incur high costs. Each party argued for their costs to be paid by someone else. The plaintiff argued that costs should be paid out of the estate of the represented person, as to make a costs order against the plaintiff ‘...would discourage the initiation of proceedings...’.³⁹⁸ Six of the ten defendants argued that costs should follow the event as was the usual order in civil litigation matters. Defendants six to ten submitted that in circumstances where the applicant is an

³⁹⁴ [2000] VSC 304 (2 August 2000), [24].

³⁹⁵ [2007] SASC 273 (20 July 2007), [26].

³⁹⁶ [2011] NSWSC 883 (12 August 2011).

³⁹⁷ [2000] VSC 304 (2 August 2000), [25].

³⁹⁸ [2003] VSC 405, [4].

independent administrator of the affairs of the person lacking will-making capacity, they should be entitled to costs out of the estate.³⁹⁹

The trial judge refused to make an order that the applicants' costs be paid from the estate of the person lacking will-making capacity. In the subsequent costs decision of *Boulton v Sanders (No 2)*,⁴⁰⁰ Balmford J ultimately ordered the plaintiff pay the defendants costs on a party-party basis. He considered that although '(m)ost litigation involves a risk of a costs order' it did "...not wish to suggest that (he) would regard the ordinary principles that costs follow the event as necessarily appropriate to every application...".⁴⁰¹ However, given that the plaintiff stood to benefit substantially from the estate had her application been successful, the court considered the relationship of the plaintiff to the outcome was such that she should bear the cost consequences arising from the litigation risk she took.

The Court of Appeal, in *Boulton v Sanders* was of the view that because the person lacking will-making capacity nor her administrator were joined as parties to the action, it could not make a costs order against their estate.⁴⁰² The Court commented that 'the legislation was aimed at the benefit and protection of incapable person'⁴⁰³ and therefore in circumstances '...where an application is reasonable and really prompted by a desire to protect the property of an incapacitated person, the applicant should not bear the costs.'⁴⁰⁴ *Dodds-Streeton AJA* went on further to say:-

Where an application is brought by and for the benefit of persons including the applicant, rather than by a disinterested administrator, the ordinary principles governing costs in adversarial litigation properly apply. It should not be presumed that the estate, rather than an unsuccessful applicant, will be ordered to pay the costs of the proceedings merely because there is a "fair case of dispute."⁴⁰⁵

In *Mace v Malone (No 2)* Daubney J, refused costs to be paid from the assets of the person lacking will-making capacity and ordered the unsuccessful party to pay the

³⁹⁹ [2003] VSC 405, [6].

⁴⁰⁰ [2003] VSC 409 (21 October 2013).

⁴⁰¹ *Ibid* [10].

⁴⁰² [2004] VSCA 112 (11 June 2004), [146 – 156].

⁴⁰³ *Ibid* [144].

⁴⁰⁴ *Ibid*.

⁴⁰⁵ [2004] VSCA 112 (11 June 2004), [153].

costs of the successful party. His reasoning was that, as there was no benefit for the person lacking will-making capacity in the litigation, he could see no reason why his assets should be reduced by ‘...this spat between the competing camps in the family’.⁴⁰⁶

(c) Examples where Costs were Ordered to be Paid from the Estate of the Person who Lacks Will-Making Capacity

Hoffmann was an uncontentious application where the mother of the person lacking will-making capacity sought the court to approve a will excluding the father on the basis that the mother was his full-time carer and the father only had intermittent contact. DeBelle J, in ordering the costs be paid from the estate of the person lacking will-making capacity, noted that a frivolous applicant with an unmeritorious application faces the likelihood of an adverse costs order against them, which would be a sufficient deterrent to bring such a claim in the first place.⁴⁰⁷ This was not the case in this matter.

In *Rak*,⁴⁰⁸ the court awarded costs to be paid from the estate of the person lacking will making capacity because the application was genuine and reasonable.⁴⁰⁹

In *Estate of S*,⁴¹⁰ Ward J ordered that the costs be paid from the estate. In *AB v CB & Ors*,⁴¹¹ costs were also ordered to be paid from the estate. Additionally, in *Martina Pieternella De Jager*⁴¹² costs of all parties were ordered to be paid from the estate.

The case law discussed above indicates a trend towards awarding costs from the estate if the application is meritorious, uncontested and for the benefit of the incapable person. Additionally, if the applicant is the representative of the incapable person and not advancing their own interests, there is sufficient reason to allow the representative’s costs to be paid from the estate of the person lacking will-making capacity. The court’s approach to contentious applications has either been to order the

⁴⁰⁶ [2011] QSC 98 (6 May 2011), [5].

⁴⁰⁷ [2007] SASC 273 (20 July 2007), [27].

⁴⁰⁸ [2009] SASC 288 (1 September 2009).

⁴⁰⁹ The value of the assets was in excess of \$4mn so a costs order from the estate was easily absorbed in the context of the value of the estate.

⁴¹⁰ [2012] NSWSC 1281 (8 October 2012).

⁴¹¹ [2009] NSWSC 680 (29 July 2009).

⁴¹² [2012] SASC 236 (21 December 2012).

unsuccessful party pay the costs of the successful party, no order as to costs or for the party to bear their own costs.

3 Summary of Procedural Issues

This Chapter has examined the application, through case law, of statutory will procedure for the purpose of identifying issues affecting the use of the legislation. This examination shows four broad issues arise from case law. Firstly, the leave requirement may be unnecessary and therefore a two-stage process is not appropriate. Second, the ‘must refuse provision’ in terms of representation of persons interested in the application may be unnecessary. Third, the courts take different approaches to the hearing process being either in open court or in chambers and the publication of reasons with some not publishing. Finally, there is an issue with the financial costs associated with an application and who should pay them.⁴¹³

As to the first issue, the criticism is that a leave requirement is unnecessary and adds to costs. The court is commonly hearing the leave and substantive applications together using the same evidence at the leave stage as for the final stage. This indicates the leave requirement may be removed. The purpose of the leave requirement can be met by frivolous litigants being faced with prospects of a costs order for an unsuccessful application.

As to the second issue, procedures governing the participation of interested parties vary. The Court has been looking at more flexible ways to deal with representation of interested parties. The ‘must refuse’ provision, however, affords limited flexibility and commonly leads to joinder of all interested parties, thereby increasing the likelihood of participation and, thus, costs.

As to the third issue, hearings in open court with published reasons are unnecessary in uncontested applications. They add to the cost of the application by requiring more appearances. They add more time because it takes time to write and deliver reasons. Reasons may be required in unsuccessful contested applications. However, instead of writing reasons as a matter of course, written reasons could only be provided if

⁴¹³ See Debelle J’s comments in *Hoffmann v Waters* [2007] SASC 273 (20 July 2007).

requested by a party who would only be likely to do so if contemplating an appeal. Whilst some jurisdictions already make orders without providing written reasons,⁴¹⁴ clarity is required regarding the ability to do so, particularly for the benefit of the parties. Alternatives should more readily be considered.

As to costs, in uncontested meritorious applications, the common order is costs are paid from the estate of the incapable person.⁴¹⁵ In contentious or unmeritorious applications or where an applicant seeks to benefit, costs generally follow the event.

Where costs are paid from the estate of the incapable person, awareness that the money paid towards costs could be utilised elsewhere for the benefit of the incapable person is relevant. This is because

In determining whether it is appropriate to exercise the discretion to order that the costs of an application ... be paid from the estate of a living but incapacitated person, the avoidance of any potential adverse impact on that vulnerable person's long-term security and welfare will always be an important consideration.⁴¹⁶

D Conclusion

Procedural amendments to reduce costs and streamline the application process are beneficial to encouraging use of the legislation as long as the amendments do not result in an unjust process or outcome. Procedures are not going to achieve perfect access to justice because different litigants may want different things from the litigation. Common challenges for all parties to a statutory will application have been identified in this chapter. The court has been looking at ways of improving these procedures to overcome these challenges by encouraging flexibility, handling matters expeditiously and reducing costs. As Palmer J said in *Fenwick, Re; Application of J.R Fenwick & Re Charles* '(t)here are likely to be many such applications in the future and it is desirable that they should be dealt with by the Court as expeditiously as possible.'⁴¹⁷

⁴¹⁴ See for example, *In the Will of Doris May Frances* (Unreported, Supreme Court of Western Australia, CIV 3332 of 2011).

⁴¹⁵ For example see *Application by Peter Leslie Kelso* [2010] NSWSC 357 (22 April 2010) and *AB v CB* [2009] NSWSC 680 (20 July 2009).

⁴¹⁶ *Ibid* [154].

⁴¹⁷ [2009] NSWSC 530 (12 June 2009), [262].

However, the court can only work within the limits of prescribed procedure. Prescribed procedure creates barriers to accessing the legislation and provides disincentives to apply. This will be discussed in the next chapter.

VI: CHAPTER SIX: BARRIERS AND SOLUTIONS

A Introduction

People accessing statutory will legislation experience barriers at three stages of access to justice: not accessing the system, getting into the system and the system itself. Chapter Two identified five barriers to access to justice experienced by disadvantaged and disabled persons. In this Chapter, the barriers that are applicable to the statutory will applications and the case law discussed in Chapter Five are analysed.

Before the barriers and solutions are discussed, this Chapter examines whether it is necessary to change the forum to hear statutory will applications to a quasi-judicial body, in order to improve access to justice in statutory will proceedings. This is because submissions were made in 1992 to the New South Wales Law Reform Commission to consider a Board as the forum to hear applications.⁴¹⁸ Thereafter, the barriers will be examined at each stage. This Chapter will then propose changes to be made to facilitate greater access to the legislation.

B Quasi-Judicial Bodies as the Forum to Hear Applications

Quasi-judicial bodies provide an approach that is informal, flexible and transparent.⁴¹⁹ Quasi-judicial bodies also purport to provide justice that is fair, just, economical and quick,⁴²⁰ features often said to be lacking in a court.

An additional feature of a quasi-judicial body is that the presence at the hearing of the person with a disability for whom a decision is being made is encouraged and is considered of central importance because their fundamental human rights are being affected.⁴²¹ This approach is consistent with the aims of statutory will legislation which seeks to promote autonomy of the person lacking will-making capacity.

The benefits of a less formal approach formed the basis of submissions to the New South Wales Law Reform Commission that a tribunal should be considered an

⁴¹⁸ New South Wales Law Reform Commission, above n 274, para 2.6.

⁴¹⁹ Robyn Creyke, 'Integrity in Tribunals' (2013) 32 *University of Queensland Law Journal* 45, 49, 52.

⁴²⁰ Access to Justice Taskforce, Attorney Generals Department, Australian Government, Chapter 10, recommendation 10.8; *Administrative Appeals Tribunal Act 1975* (Cth), s2A.

⁴²¹ Legislative Council Select Committee, Parliament of Tasmania, *Mental Health Legislative Measures*, Final Report (2009), 31.

appropriate jurisdiction to hear statutory will applications. This suggestion was dismissed in New South Wales on the basis that these qualities could be provided by the court. However, the Commission did not say whether such procedures are currently provided in the court and if not, how they could be. Further, since the introduction of the legislation, no procedures have been introduced to allow the court to take a less formal approach to statutory will applications. The applications are governed by procedure which existed prior to the legislation being introduced.

At the time the submissions were made to the New South Wales Law Reform Commission, there was no uniform administrative tribunal which could manage statutory will applications. Although the Guardianship Tribunal of New South Wales was in existence, it was (and is) a specialist tribunal conducting hearings about adults whose decision making capacity is affected. Hearings are not presided over by a judge. Therefore, hearing applications in this tribunal would have required substantial legislative change. As of 1 January 2014, however, this tribunal will be integrated into a single tribunal to be known as the New South Wales Civil and Administrative Tribunal (NCAT).⁴²² Therefore, if such a submission were made today, it might not be so readily dismissed, particularly if there are judicial officers available to preside over hearings.

Notwithstanding the position in New South Wales, Parliament, for example in Western Australia, can, and has, introduced legislation that ‘...provide(s) for the interests, protection and welfare of disabled persons or persons in need of guardianship or administration orders in the manner best suited to cater for their requirements and to establish a tribunal and rights of review, to deal with applications concerning the interests of such persons...in which a legislative regime and policy has been specifically devised to care for persons, or categories of persons, in need of special care and protection.’⁴²³

Where parliament has seen fit to introduce legislation giving the power to a quasi-judicial body, rather than a court, to make decisions regarding guardianship and administration of a person lacking capacity to make those decisions for themselves, it can give power to a quasi-judicial body to approve a will for the person lacking will-

⁴²² www.tribunals.lawlink.nsw.gov.au/tribunals/index.html.

⁴²³ *S v State Administrative Tribunal (No 2)* [2012] WASC 306 (29 August 2012), [49].

making capacity. There are sound arguments for statutory wills to be heard in a less formal, less costly system that facilitates a move towards autonomy of the person lacking will-making capacity. These will be discussed in the following paragraphs.

Firstly, the Tasmanian legislature has seen fit to confer such power to the Guardianship and Administration Board to decide statutory will applications that meet certain criteria.

The procedure adopted by the Board is:-

...conducted as much as possible in an informal inquiring style primarily to facilitate the meaningful inclusion of people with disabilities into the process...⁴²⁴

This approach makes it easier for the person lacking will-making capacity to participate and for the process to be more accessible and easier to navigate. In addition, the Board possesses an inquiry function⁴²⁵ to ensure all relevant material integral to a decision is available to the decision maker for consideration. This inquiry function can be utilised to ascertain relevant information and responses from interested parties without the need to join them or otherwise have them participate in the proceedings.

Second, applications reviewed by the Board are mostly uncontroversial and uncontested though sometimes the issues raised are complex.⁴²⁶ With the 2008 amendments to the Tasmanian statutory will legislation, the Board is still empowered to hear applications but where alterations to an existing will are required, Parliament decided the court is the appropriate forum for these applications to be heard.⁴²⁷ The reason for this was that in a situation where no will existed, the Board was creating an interest and accordingly it was unusual for the will to be contested. Where a will already exists, an alteration that takes away an existing beneficial interest may cause controversy best dealt with in a more formal setting.⁴²⁸

⁴²⁴ Legislative Council Select Committee, Parliament of Tasmania, above n 421, 31.

⁴²⁵ Terry Carney, 'Limits and the Social Legacy of Guardianship in Australia' (1989) *Federal Law Review* 231, 239.

⁴²⁶ Parliament of Tasmania, *Parliamentary Debates*, Legislative Council, 19 November 2008, 30-64 (Doug Parkinson).

⁴²⁷ *Ibid.*

⁴²⁸ *Ibid.*

Third, benefits of a more informal forum include case management and hearing of matters in a less formal manner than that experienced in a court. For example, formal pleadings are not required and non-legal advocates can act as representatives. The Board can inquire about the interests of potential parties rather than be required to join them. These procedures allow quasi-judicial bodies to hear matters more quickly and at lower cost⁴²⁹ as there is a significant reduction in court events. Additionally, restrictions in relation to awards of costs⁴³⁰ potentially remove the risk of costs being paid from the estate of the person lacking will-making capacity.

Fourth, in terms of the cost and time dimensions of justice, access considerations for a quasi-judicial body are different than for a court. It is submitted that the aim behind the purpose of procedure for quasi-judicial bodies together with the consultative and inclusive purposes of those procedures align better with the modern aim of the statutory will legislation. Compared with adversarial trial procedures adopted by the court, which create barriers excluding or discouraging the person lacking will-making capacity or their representatives applying for a statutory will, a quasi-judicial body provides a less formal approach to hearings in that forum.

Quasi-judicial bodies, however, are not without criticism. It has been suggested that informality can be taken too far. If a hearing proceeds in a conversational tone with no clear indication of whether the parties are giving evidence or not, whether the words spoken are taken as submissions and lack of clarity as to whether there are opportunities for cross examination,⁴³¹ the procedure may not achieve justice. Absence of a clear structure as to the content and direction of the conversation⁴³² and direction as to how the conversation was being treated,⁴³³ might distract parties from the serious legal implications of the tribunal's decision and the importance of putting a case and contesting evidence submitted by other parties. This affects the truth dimension of justice.

⁴²⁹ Schetzer, Mullins and Buonamano, above n 49, 11.

⁴³⁰ Generally costs are not awarded.

⁴³¹ *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 (29 August 2012), para 76.

⁴³² *Ibid.*

⁴³³ *Ibid* [80].

These criticisms can be addressed by prescribing and following a specific process. There are usually provisions governing this process in a quasi-judicial body which provide for an appropriate fact finding process.⁴³⁴

One way that these concerns can be addressed is to appoint a judge to preside over hearings in a quasi-judicial body. A judge is appropriate because the nature of the matter being considered, particularly the determination of testamentary capacity, has traditionally been decided by a judge in the Supreme Court. Additionally, the significant legal implications of granting or not granting a statutory will application, lends weight for the need for a judge to make the decision. Additionally, having a judge preside may also alleviate some of the concerns identified in the second reading speech of the *Wills Bill 2008* (Tas) allowing controversy to be dealt with by a judge in a tribunal setting using less formal procedures.

As a further protective measure, a right of appeal can rest with the Supreme Court, the ultimate common law custodian of the *parens patriae* jurisdiction, through an application to the Court of Appeal.

In conclusion, informality and flexibility are attractive features of the processes within a quasi-judicial body whether exercised by a judge or other tribunal member or panel. In this respect, it is these processes, rather than the forum itself, that are needed to increase use of the legislation. The New South Wales Law Reform Commission correctly, I submit, stated that informality, flexibility and transparency providing justice that is fair, economical and quick, can be provided by a court. To do so in statutory will cases requires amendments to legislation and procedure to provide for less formal procedures. Unless those less formal procedures are in place, people are less likely to access the legislation because of the barriers to be identified in this Chapter. A change in forum is not necessary to improve access to justice in statutory will proceedings because, as discussed in the next section of this Chapter, it is possible to implement less formal procedures in a court.

⁴³⁴ Creyke, above n 419, 46; A J Brown et al, 'Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems', *National Integrity Systems Assessment (NISA) Final Report* (2005), 9.

C Barriers and Solutions to Accessing Statutory Will Legislation

Commonly experienced barriers to access to justice were identified in Chapter Two. The barriers relevant to each of the three identified access to justice stages arising from the use of statutory will legislation will be discussed in this Part. In addition, lack of knowledge as a barrier will be considered.

1 Stage One: Not Accessing the System

The most prominent barrier to accessing statutory will legislation at this stage is a lack of knowledge.⁴³⁵ The least inhibiting barrier is cost.

(a) Barrier One: Lack of Knowledge

Enquiries about a statutory will application will not be made and an application will not be commenced where there is a lack of knowledge of the legislation and the benefits it confers.

This proposition is supported by observations contained in the 1985 Victorian Chief Justices' Law Reform Committee Report⁴³⁶ which looked to experiences in the United Kingdom following the introduction of statutory will legislation in that jurisdiction. More recently, the Victorian Chief Justices' Law Reform Committee identified that a lack of knowledge that the legislation existed⁴³⁷ was a primary reason for it not being initially used.

(b) Barrier Two: Costs

There are two matters to consider regarding costs at this stage. First are the costs associated with a person seeking to commence an application making an inquiry about the application. For a person to make an informed choice as to whether to commence an application they need legal advice. This attracts a financial cost, particularly where private lawyers are consulted. If the person is unable to afford a private lawyer they may not access the legislation to have a statutory will made. However, as a statutory will only benefits a person lacking will-making capacity with sufficient assets, it is likely that inquiries will only be initiated if there are likely to be sufficient assets to

⁴³⁵ Victorian Chief Justices' Law Reform Committee, above n 249.

⁴³⁶ Ibid.

⁴³⁷ Ibid.

distribute on the death of the person. If the person lacking will-making capacity has sufficient assets to warrant an application, the cost of obtaining legal advice from a private lawyer compared to their accumulated assets might not act as a significant disincentive. This means that cost, for this person might not act as a barrier to commencing an application.

Second, is the advice as to future cost. If we assume that a person will initiate inquiries with a lawyer about making an application for a statutory will, having obtained knowledge of the legislation and its effect. Their lawyer will inform their client of the procedure, estimated costs and time. They will be given advice regarding the 'loser pays' discretion and the risk of the representatives' exposure to costs. This advice as to future costs may discourage a decision to make an application. Whilst this is not unique to statutory will applications, limiting future costs might encourage the person to commence an application.

2 Solutions to Barriers at Stage One

(a) Increase Knowledge of the Legislation

An obvious solution addressing lack of knowledge as a barrier at stage one is to provide information and education programs designed for non-legal advisors. In 2009, the Attorney Generals' Access to Justice Taskforce found that facilitating an understanding of rights and how to exercise them was important to access to justice principles and barriers to justice could be ameliorated by the implementation of an effective system for the provision of information when needed.⁴³⁸

A scheme, co-ordinating legal and non-legal services, can be the mechanism for education and the provision of information. Educating (or provide opportunities for the education of) non-legal advisors about the legislation and providing basic information to facilitate referral to legal services can assist with the application.

The reason for targeting non-legal advisors is because they are sources of assistance and information for the disabled and disadvantaged. For example, in 2002, the Law and Justice Foundation of New South Wales reported that 74.4% of disadvantaged

⁴³⁸ Access to Justice Taskforce, Attorney Generals Department, Australian Government, above n 38, 10-11.

persons surveyed⁴³⁹ sought legal assistance from non-legal advisors including family and friends, community based workers, government and non-government organisations and professional bodies. A Canadian study on the prevalence of civil justice problems in 2006 identified 22.1% of people surveyed sought assistance from non-legal advisors to solve a legal problem.⁴⁴⁰ Of this 22.1%, 35.7% sought advice from non-legal advisors for wills and managing the affairs of a relative unable to do so on their own. Sources of this non-legal assistance were 18.3% Government, 13.7% friends and relatives and 5.3% from other organisations.⁴⁴¹

A scheme will need to follow the Law Reform Commission of New South Wales' recommendation that:-

...all relevant government agencies responsible for informing the community generally about their rights and duties...should...ensure that they also prepare material that is appropriate for people with intellectual disability.⁴⁴²

An example of where information is provided can be found in the Tasmanian Guardianship and Administration Board ("the Board"). The Board has published a statutory will fact sheet which provides information such as defining terminology, who can apply and the role of the Board in the application.⁴⁴³ Standard application forms can be accessed through this website and applicants are encouraged to call the Board to speak to a staff member before completing an application.⁴⁴⁴ Additionally, attention to the existence of statutory will legislation is identified in Chapter 43 of the Law Handbook⁴⁴⁵ in New South Wales. However, no information is provided about them or the application process.⁴⁴⁶

To increase knowledge, a comprehensive approach is required. Education through organisations such as Community Legal Centres (CLC's), Government agencies (such as the Office of the Public Advocate and the Public Trustee), and professional bodies (through the health and allied system, financial advisors and counsellors and medical

⁴³⁹ Persons surveyed included persons who lacked capacity. Coumanlos, Wei and Zhou, above n 24, 3 (Executive Summary).

⁴⁴⁰ Rebecca Sanderfur, *Access to Justice* (Emerald Group Publishing Ltd UK, 2009), 11.

⁴⁴¹ *ibid.*

⁴⁴² Gray et al, above n 26, xxxvii and 11.

⁴⁴³ www.guardianship.tas.gov.au/_dta/assets/pdf_file/0020/67061/10_Statutory_Wills.pdf.

⁴⁴⁴ www.guardianship.tas.gov.au/forms2.

⁴⁴⁵ Trudy Coffey and Rosemary Long, *Your Practical Guide to Law in New South Wales: Law Handbook* (Thomson Reuters (Professional) Australia Ltd, 12th ed, 2012).

⁴⁴⁶ Coffey and Long, above n 445, 1166.

service providers) will assist. Updating the Law Handbook in each state to include a section on statutory wills and placing information on the website of the court, relevant Government agencies and professional bodies would ensure the information is available to those looking for it. This will equip non-legal advisors with information as to the existence of the legislation so they can seek out the services of private lawyers or other legal services to assist with an application. As this recommendation can be incorporated within existing services, there should be no significant financial cost.

(b) Cost Assistance: Community Legal Centres and Legal Aid

Legal Aid and CLC's provide a valuable source of information to the community and are often consulted for assistance with legal and financial matters.⁴⁴⁷ Development of community information sessions, flyers and fact sheets by these organisations would assist the person seeking the information about statutory wills. As the information can usually be provided at little or no cost to the user, this information would assist persons to make an informed decision as to whether or not to apply. Additionally, these and other community organisations may offer one off advice from a solicitor or, if funding permits, assistance with completing an application. However, most organisations are funded to provide particular services. Those funders allocating resources to particular projects or organisations are generally interested in assisting distinct fields of legal need for purposes particular to that funder.⁴⁴⁸ Therefore, obtaining funding will require a need for the service to be established to support an application to the funders for allocation of resources for that purpose.

3 Stage Two: Getting into the System

Barriers to accessing statutory will legislation at this stage are the system itself and costs. Getting into the system is the period between obtaining advice about statutory wills and then making a decision to proceed, up to filing the application in court.

⁴⁴⁷ John Storer, Judith Stubbs and Colleen Lux, 'Economic Cost Benefit Analysis of Community Legal Centres' (Paper, National Association of Community Legal Centres, 2012), 5.

⁴⁴⁸ Daniels, Stephen and Martin, Joanne, Legal Services for the Poor: Access, Self-Interest, and Pro Bono (March 11, 2009) in Rebecca L Sandefur (ed), *Access to Justice: Sociology of Crime, Law and Deviance* (Emerald Group Publishing Limited, 2009) available at SSRN: <http://ssrn.com/abstract=1357680>.

(a) Barrier One: The System itself - Preparing and Filing the Application

Chapter Five explained that an application for a statutory will commenced in a court involves the use of formal procedures which have not been adapted specifically to these applications.

When commencing an application in a court, two difficulties arise. First, in some jurisdictions, the identification and naming of interested parties is challenging. Who is considered to be ‘interested’ for the purposes of the legislation and who should be joined or notified pose difficulties for an application in considering the commencement of an application. More will be said of this provision in the barriers and solutions at stage three.

Second, the procedure for appointing a legal representative for the person lacking will-making capacity in court proceedings involves several documents to be filed and steps to be followed. This procedure was discussed in Chapter Five.

(b) Barriers Two: Costs

Whilst the person lacking will-making capacity may have the resources to fund an application, those resources may be better used in other ways for that person’s benefit. Therefore, if they do have the financial resources to engage a private lawyer, the costs associated with obtaining legal advice and representation, of drafting the relevant documents and paying the court filing fee act as a disincentive to apply because these generally finite resources may be better utilised elsewhere. The system itself is responsible for these higher costs as the procedures by which applications are commenced are costly.⁴⁴⁹

4 Solutions to Barriers at Stage Two

(a) Cost Assistance

Legal Aid and CLC’s could be funded to assist with the drafting and representation for the more straight forward applications where they are made by the representative of the person lacking will-making capacity. Any other person seeking to commence an application, particularly where they benefit personally from the proposed will, should

⁴⁴⁹ *Hoffmann v Waters* [2007] SASC 273 (20 July 2007).

not be included in the funding scheme. This is because it is a litigation risk they take personally rather than for the benefit of the person lacking will-making capacity.

It might encourage an application to be made if the representative of the person lacking will-making capacity is making the application, dispensing with a filing fee or deferring payment until it can be determined whether the cost could be borne by the estate of the person lacking will-making capacity.

(b) Case Commencement Procedures

Statutory will applications could involve completion of standardised forms. Applicants would be assisted firstly, by a standard application form and second, by information kits and brochures. Information kits or guidelines can also be published with relevant forms. For example, the Family Court of Western Australia publish kits for divorce and consent orders for property and child issues which are available on the Court's website.⁴⁵⁰ The Guardianship and Administration Board in Tasmania publishes fact sheets and forms for statutory will applications. It is anticipated that guidelines for medical practitioners in assessing testamentary capacity should be provided including information relating to the requirements of *Banks v Goodfellow*⁴⁵¹ and suggestions for an outline of a report addressing specific criteria.⁴⁵²

If the information regarding the person lacking will-making capacity is of a sensitive nature, there should be provision for the medical practitioner to provide that information directly to the court rather than through the applicant or other party. The decision maker can then exercise discretion in relation to disclosure of that information. Additionally, there should be no filing fee charged, although the person making the application should bear the cost of the medical practitioner providing the information.

The medical evidence could be by way of medical report attached to the relevant form containing an attestation clause. Examples of forms can be found in the Court of Protection jurisdiction in the United Kingdom.⁴⁵³

⁴⁵⁰ www.familycourt.wa.gov.au/F/forms.aspx?uid=2986-4517-2424-3041.

⁴⁵¹ *Banks v Goodfellow* [1861-73] All ER 47.

⁴⁵² O'Neill and Peisah, above n 210.

⁴⁵³ http://hmctsformfinder.justice.gov.uk/...rt_forms_category=court_of_protection.

Further, legal representation is necessary to protect the person lacking will-making capacity from adverse influence, abuse and poor decision-making. Rather than employing formal court procedures appointing a representative, a more informal approach can be considered. This could involve the representative completing a single form consenting to the appointment and declaring they have no interest in the matter adverse to the person lacking will-making capacity.

The benefit of standardised specialised application forms accompanied by kits and guidelines is that it provides certainty, encourages the provision of all relevant information to the court and reduces costs. It assists with issue identification, that is, identifying the real matters in issue, as the forms would prescribe information required, reducing the inclusion of irrelevant information.⁴⁵⁴ This would streamline progress of the matter. It provides knowledge of the application process by informing the applicant of what is required, removing uncertainty. The procedure is easy to follow and the party making the application can clearly identify what information is required for hearing as it is all in one place. It has the potential to reduce costs because the information required is clear and finite. It also promotes autonomy of the person lacking will-making capacity by encouraging applications to be made. Whilst, ultimately, the representative of the person lacking will-making capacity must act by solicitor, the form, supported by a guide or kit, drafted in plain English, will be easier to understand by the representative or non-legal advisor, than specified court documents scattered throughout a set of rules requiring the services of legal practitioners for interpretation.

The difficulty associated with this approach is that it requires the court to design appropriate forms and kits which may act to shift costs from the applicant to the court. However, once completed, the process will become clearer and there would be only occasional updating required. The benefit of encouraging applications to be made is greater than the cost to the court in designing the forms and kits.

5 Stage Three: The System Itself

Once barriers to stage one and two have been overcome, advice has been obtained and an application made, difficulties arise for the person when they enter the system.

⁴⁵⁴ Justice Steven Rares, 'Judicial Intervention and case flow management' (2011) *Federal Judicial Scholarship* 12, para 11, 18 to 20.

Barriers to accessing statutory will legislation at this stage are the procedures within the system, and costs.

(a) Barrier One: The System Itself

Procedures governing the initiation and progress of a statutory will application predate the introduction of the legislation and have not been adapted or designed specifically for statutory will applications. It is accepted that the purpose of case management procedure is to balance the three dimensions of justice⁴⁵⁵ to provide an outcome that:-

- (a) upholds the rule of law (good decision based on best evidence, best evidence obtained by best practice/procedure); and
- (b) is a good legal outcome for the parties.

However, such purposes are difficult to achieve in a system that is not designed specifically for statutory will applications.

At this stage, two parts to this barrier arise. First, there is the requirement for leave in all but the Western Australian jurisdiction. This is the first stage of the two stage process discussed in Chapter Five, the second stage being the substantive application. The second part to this barrier is the procedure surrounding representation of interested parties to the application. That is, in six out of eight states and territories, the court must refuse an application if interested parties are not given the opportunity to be represented in the proceedings.

(i) Requirement for Leave

In all states and territories except for Western Australia, applicants must obtain leave to commence an application before a substantive application is considered. A common approach by the courts in dealing with leave applications was identified in Chapter Five. This is for the leave application to be heard at the same time as the substantive application, primarily because matters considered at each stage are the same. There are mixed views amongst the judiciary about the benefits and therefore, the necessity of the leave requirement. DeBelle J thought it unnecessary because it

⁴⁵⁵ Michael Legg, 'The Federal Court of Australia's Fast Track' (2012) *University of New South Wales Law Research Series* 12; Rares, above n 454, [3].

adds an unnecessary costs burden.⁴⁵⁶ Balmford J thought it to be the most important part of the application.⁴⁵⁷ The Victorian Law Reform Commission issued a discussion paper seeking submissions as to the necessity to retain it.⁴⁵⁸ Concern regarding increased costs and delay associated with the two stage process act as a barrier to accessing the legislation.

(ii) Representation of Interested Parties

Chapter Five established that six of the eight states and territories contain a provision that the court must refuse an application unless adequate steps have been taken to allow persons interested in the application to be represented in the proceedings.⁴⁵⁹

The time and cost involved in deciding who are the interested parties, how they can be represented in proceedings and who bears the responsibility of ensuring adequate steps are taken to allow them to be represented, act as an impediment to using the legislation. This is not only because it can be difficult to ascertain who is interested for the purposes of the legislation (and once identified, to locate them) but also because there are conflicting judicial approaches to the ‘adequate steps’ requirement for the inclusion of these parties. For example, in *Re Will of Jane*,⁴⁶⁰ adequate steps included the applicant taking ‘...all steps necessary to identify, locate, and serve any person who may have a legitimate interest in the application.’⁴⁶¹ In *Re Fenwick Palmer* J said that it ‘...is a matter of discretionary assessment’⁴⁶² as to what specific information the court requires to satisfy the adequate steps requirement. In *Re Crawley*⁴⁶³ Palmer J found it was not a requirement to join the interested parties as defendants to the application but for interested parties to be ‘...given due notice of it.’⁴⁶⁴ In Western Australia, the court manages this requirement through a Practice Direction that prevents notification of the application to any party except for the person lacking will-making capacity, until the court has directed notice be given.⁴⁶⁵ What constitutes notice and, more particularly, what is to be included in the notice, is

⁴⁵⁶ *Hoffmann v Waters* [2007] SASC 273 (20 July 2007).

⁴⁵⁷ *Boulton v Sanders* [2003] VSC 405 (16 October 2003).

⁴⁵⁸ Victorian Law Reform Commission, *Succession Law: Wills*, above n 4.

⁴⁵⁹ *Rak* [2009] SASC 288, (1 September 2009).

⁴⁶⁰ *Re Will of Jane* [2011] NSWSC 624 (20 July 2011), [94].

⁴⁶¹ *Ibid.*

⁴⁶² *Re Fenwick; Application of JR Fenwick and Re Charles* (2009) 76 NSWLR 22 (12 June 2009), [125].

⁴⁶³ *Re Crawley* [2010] NSWSC 618 (9 June 2010).

⁴⁶⁴ *Ibid.*, [2].

⁴⁶⁵ Supreme Court of Western Australia Consolidated Practice Directions, practice direction 9.3.1(3)(c).

likewise, undefined. That is, there is no procedure in place to identify what information is required to be included in the notice and what form it is to take. This creates a barrier which also needs to be addressed.

(b) Barrier Two: Costs

The cost of accessing legal advice and then making an application are significant barriers to face. Once, however, advice is obtained and an application has been made, the procedures by which the application is managed act as a further barrier. This is because applications are commenced using procedures designed for that adversarial system. Adversarial procedures focus on preparing the matter for trial in open court rather than looking to less formal approaches to resolution.⁴⁶⁶ Modern case management has embraced procedural reform to improve access to justice through better use of judicial resources by adopting a case management system where matters are individually managed by the judge hearing the matter. This allows the judge to control the litigation processes and encourage resolution. However, there is, ultimately, still a focus on preparing the matter for trial⁴⁶⁷ and each appearance before the court incurs costs. Statutory will legislation exists within this system and applications are subject to the same problems. In addition, the legislation is inclusive of other interested parties. Though it seeks to be less formal by prescribing that the court is not bound by the rules of evidence, the court is still required to case manage the application in readiness for trial.

Trial is inevitable in a statutory will case. The difference in how it is case managed will depend on whether it is contested or uncontested, as identified by the position in Tasmania. Case management procedures provide the framework within which matters are progressed through the court, although the court has power to control the conduct of proceedings in addition to these rules.⁴⁶⁸ Early case preparation is necessary in statutory will applications as there is a legislative requirement in all jurisdictions for obtaining evidence as to testamentary capacity and addressing a number of criteria prescribed by the relevant legislation. Further, in most jurisdictions early preparation is required to provide the evidence needed to obtain leave, the first stage in the two

⁴⁶⁶ Productivity Commission, Australian Government, *Access to Justice Arrangements*, Issues Paper (2013), 20.

⁴⁶⁷ Finn, above n 37, 12.

⁴⁶⁸ See for example *Rules of the Supreme Court (WA)*, Order 1 Rule 3A.

stage process. Thereafter, the procedure is governed by state and territory rules and practice directions.

Existing procedures have been prescribed in rules and practice directions and applied by decision makers to make applications as timely, efficient and cost effective as possible. This is illustrated by the examination of case law in Chapter Five. For example, both stages of the two stage process have been heard at the same time.⁴⁶⁹ Whilst case managing applications in this way may, theoretically, have a positive effect on the speed by which applications are dealt with and the costs associated with the matter, a labour intensive process still exists.⁴⁷⁰ That is, managing applications requires interlocutory appearances as well as the final appearance at trial. These appearances increase the number of court events and each court event causes further costs to be incurred.⁴⁷¹ Additionally, inclusion of parties has the potential to increase the number of defendants. With a number of defendants participating in the proceedings, the likelihood of a great number of court events and therefore, increased costs is high. The amount of costs depends upon what case management orders are being made and whether there is an increase or decrease in court events.

Case management orders can only be made in the context of the prescribed practice and procedures. ‘...The main reason why our procedural system causes excessive costs...is that it is too labour intensive... (A reason identified for this conclusion)...is the perceived need to achieve perfect justice.’⁴⁷² Whilst procedural reform has gone some way to alleviating the labour intensity and associated costs and time, problems still exist today. For example, electronic information was not something contemplated by drafters of case management processes in the past. The volume of evidence has increased because of the ease of generation and storage. The impact of this additional material is that trials and evidentiary processes take longer⁴⁷³ and cost more. The courts are ever mindful and often critical of the high and/or unnecessary costs of litigation. For example, in the context of claims under Family Maintenance

⁴⁶⁹ see for example, *Bryant v Blake* [2004] SASC 369 (19 November 2004).

⁴⁷⁰ Australian Law Reform Commission, above n 27, 5.

⁴⁷¹ Australian Law Reform Commission, above n 27, [4.21].

⁴⁷² G.L. Davies, ‘A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and their Rationale’ (1996) 5 *Journal of Judicial Administration* 201, 203.

⁴⁷³ Rares, above n 454, [47].

legislation, Heenan J in *Dion Giuseppe Sergi By Next Friend Aileen Solowiej v Sergi*⁴⁷⁴ said:-

(t)hat the potential impact which legal costs may have on a small estate in influencing beneficiaries or claimants under the *Inheritance Act* to yield in negotiations, not because of the plausible merits of a claim, but, rather, because proceedings may so significantly deplete the estate that, even if unsuccessful, it seems economically preferable to yield to an unmeritorious claim is a very undesirable feature of claims...

These comments apply equally to costs associated with statutory will applications. The choice not to proceed with an application because it is economically preferable for the financial resources to be used elsewhere or because the costs are high and perhaps unnecessary is an undesirable consequence of procedures governing applications.

Judges have criticised the cost of proceedings in the statutory will cases discussed in Chapter Five. Despite this criticism there appears to be little or no impetus for change: costs are high, judges are critical but the fact remains that no single approach has yet been identified or implemented to reduce costs and therefore, access to the legislation.

6 Solutions to Barriers at Stage Three

The adversarial nature of the administration of the provisions of statutory will legislation create barriers to access to justice in the system. To some extent these barriers may be overcome or reduced at this stage by legislative amendments dispensing with the two stage process and softening of the ‘must refuse’ provision regarding representation of parties. Additionally, amendments to case management procedures are appropriate.

(a) Legislative Amendments

The solutions proposed here by way of legislative amendments cover two areas: firstly, legislative amendments to overcome the barrier of representation of interested parties and second, legislative amendments to overcome the barrier of the requirement for leave.

⁴⁷⁴ *Sergi By Next Friend Solowiej v Sergi* [2012] WASC 18 (20 January 2012).

(i) Legislative Amendments to Overcome the Barrier of Representation of Interested Parties

Legislation in six of the eight states and territories⁴⁷⁵ seeks to control the inclusion of parties interested in the application by providing that the court ‘must refuse’ an application unless adequate steps have been taken to allow those with a legitimate interest in the application to be represented in the proceedings. Judges applying these provisions have taken different approaches to managing the interests of these parties including joinder, notification and proceeding without either. These different approaches cause confusion regarding who to join as defendants and who to notify. This barrier can be overcome by removing the ‘must refuse’ provision from the legislation and substituting it with ‘may’ refuse. This will align these provisions with the South Australian and Victorian provisions to allow those interested parties to be persons who may participate, which may, at the discretion of the court, mean that they could be required to be given notice but not be joined as a defendant. Alternatively, if the court decides it is appropriate, it could choose to proceed notwithstanding an interested party has not been notified of the application (as was the case in *Public Trustee v Phillips*).⁴⁷⁶

Removing ‘must refuse’ and replacing it with ‘may’ refuse will then provide the court with appropriate discretion to choose whether to join or notify parties depending on the circumstances of each case. The court may proceed with the interests of those parties in mind without the need for them to participate. An example of where the court may exercise its discretion in this manner with the flexibility contained in the proposed changes is where the represented person is close to dying and the will application is urgent.⁴⁷⁷ In such cases, if the legislation did not compel notification of all interested parties, the court could consider the interests of the interested parties without joining or notifying them. This scenario occurred in the English case of *Re Davey*⁴⁷⁸ where the court exercised its discretion not to notify the husband who had recently married the person lacking will-making capacity. Given the impending death of the person and the circumstances of the marriage, it instead relied on his ability to

⁴⁷⁵ These are Western Australia, Northern Territory, New South Wales, Queensland, Tasmania and the Australian Capital Territory.

⁴⁷⁶ *Public Trustee v Phillips* [2004] SASC 142 (28 May 2004).

⁴⁷⁷ This was as the case in *Re Davey* [1981] WLR 164.

⁴⁷⁸ *Re Davey* [1981] 1 WLR 164.

bring an application under family maintenance provisions if aggrieved by the terms of the will. In this example, the person's wishes were preferred over the interests of a third party. The court should be able to have the option of exercising the discretion in these circumstances.

The benefit of the proposed amendment is that it provides some flexibility which was be particularly important in the circumstances described above, where the application was urgent (eg: impending death). It will also be of benefit where not all parties can reasonably be notified, found and / or served in time and where claims under statutory schemes could be made.⁴⁷⁹ At the same time, a decision not to notify an interested party should not be readily made as there are benefits in parties participating in the proceedings. For example, they may possess information relevant to the courts determination of the application ensuring the court has ascertained all relevant facts. This is important in upholding the truth dimension of justice. However, the costs of each of these parties actively participating and the costs of service of proceedings or of notices on them can potentially be high, which is likely to detract from the willingness to make an application.

Softening of the strict legislative 'must refuse' provisions will assist with the ability to vary current court based procedures so that statutory will applications are less likely to attract a substantial number of defendants, reduce court events and reduce costs. It will afford the court discretion and flexibility on the appropriate way to proceed on a case by case basis.

(ii) Legislative Amendments to Overcome the Barrier of the Requirement for Leave

Chapter Five outlined various views of the court in relation to the requirement for leave. Currently, there appears to be a judicial preference to shift away from a two-stage process towards a single stage application, similar to that of Western Australia.⁴⁸⁰ It appears to be accepted that the purpose of the leave requirement, that is to screen out frivolous and baseless claims, can be achieved without requiring a two-stage process.⁴⁸¹ The leave stage can be removed from the legislation and

⁴⁷⁹ For example, a claim under family maintenance legislation could be made.

⁴⁸⁰ See for example, *Hoffmann v Waters* [2007] SASC 273 (20 July 2007) and the Victorian Law Reform Commission, *Succession Laws*, above n 4, 29.

⁴⁸¹ Debelle J in *Hoffmann v Waters* [2007] SASC 273 (20 July 2007).

unmeritorious applications screened at the case management procedure stage. The mechanism for this can fall under the Registrar's jurisdiction which is discussed later in this Chapter.

Removing the leave requirement will simplify the process such that only one stage is required. This will lighten the cost burden on the applicant. This recommendation is consistent with the comments of DeBelle J in *Hoffmann v Waters*⁴⁸² discussed in Chapter Five. It is also consistent with the recent recommendation of the Victorian Law Reform Commission that a statutory will application should involve one stage instead of two.⁴⁸³

(b) Case Management Procedures

Different approaches for the management of statutory will applications could be considered and/or adopted. The current court practice directions and rules prescribe how applications are to be made under existing procedure. They fit the existing legislation into existing procedure rather than adapting, amending or varying the procedures to cater for the new legislation. The conundrum with this approach is that the informal nature of the legislation is inconsistent with an adversarial approach in which existing procedures operate.

Amendments to procedure may assist to overcome barriers at this stage. Solutions by way of changes to case management procedure would include proposals to overcome the barrier of representation of interested parties. This would involve the introduction of procedures surrounding notification and/or joinder of interested parties. Proposals to overcome the second barrier, that of costs, include conferring jurisdiction on a Registrar to hear certain applications and/or Registrars otherwise exclusively case managing statutory will applications for hearing by a Master or Judge.

Case management reform at this level contemplates the introduction of a sub set of rules specifically designed for statutory will applications which can be incorporated into the rules of the court.

These rules would provide for the following:-

⁴⁸² Ibid.

⁴⁸³ Victorian Law Reform Commission, *Succession Laws*, above n 4, 29.

- (a) Mode of commencement of the application (previously addressed in solutions to barriers at stage two);
- (b) Case management;
- (c) Who may hear/determine applications (Registrars jurisdiction and the jurisdiction of a Judge or Master);
- (d) Notification to interested parties identified in the application;
- (e) Intervention/joinder of notified parties to the application.

(i) Overcoming the Barrier of Representation of Interested Parties

To facilitate the court's discretion to join or notify interested parties without compromising the truth dimension regarding representation of parties in the application, the initiating process and documents in support needs to identify the persons or classes of persons affected by the application rather than joining them as parties. If using current standard court documents, this would allow the application to be issued without naming all parties interested as defendants to the action. If using specialised forms developed in response to the barriers at stage two as suggested previously in this Chapter, then a particular part of the form would provide for the listing of interested parties and their contact details. Notification or joinder of parties would then be left to the discretion of the court either to be decided on the papers or at a directions hearing.

When exercising its discretion whether or not to join parties, consideration can be given to the following. First, for those persons who may have a claim under family maintenance provisions, it may not be necessary to join them as Defendants because, even if a statutory will is made affecting any disposition such persons may expect to receive from the will of the deceased, they can still bring a family provision claim on the death of the person. However, it is desirable to avoid a second action if the issues can be resolved in the first.

If upon initiating the application the applicant decides there are interested parties who should be notified and/or given an opportunity to participate, the applicant can file with the initiating process, a minute of proposed orders for directions for that party to be notified or cited. These orders should include the following:-

- (a) The originating process be served on the interested party;

- (b) A copy of the proposed Will be served on the interested party;
- (c) The Plaintiff's affidavit in support of the originating summons not be served on the interested party (with the exception of the incapable person's representative).

If notice to interested parties is appropriate, it could alternatively take the form of Practice Direction B of the *Court of Protection Rules 2007* (UK). This Practice Direction supplements Part 9 of the *Court of Protection Rules 2007* (UK) which states notification should include advice that an application has been commenced, that it relates to the exercise of the court's jurisdiction in relation to a statutory will for the person lacking will-making capacity and of the order or orders sought,⁴⁸⁴ including a copy of the draft will.

If the court accepts that the interested party(s) identified by the applicant should be notified, it can direct notice be given in terms of the preceding paragraph and this direction can be made on papers. This will avoid the need for the parties to attend the court for those directions thereby reducing court events and corresponding costs. This proposal could be facilitated by amendments to court practice directions setting out the steps to be followed to initiate and comply with this process. Alternatively, these procedures could be included in the relevant court rules if it is considered new rules are required specifically for statutory will applications.

The benefits of the amendments proposed in this scenario are firstly, little difficulty would be experienced in implementing changes. Amendment to a practice direction is not an onerous task and could be easily facilitated within the administrative processes of the court. However, if amendment to the Rules are required, the task may be more complex: though it is still achievable. Second, the new procedure may potentially reduce the number of persons participating in an application particularly when the onus is placed on those notified parties to apply to be joined rather than being joined at the outset.⁴⁸⁵ As such, any cost implications by being joined and participating may discourage those notified parties from applying to be joined unnecessarily. In addition, this approach potentially limits the number of participants, allowing so far as

⁴⁸⁴ Practice Direction B, *Court of Protection Rules 2007* (UK).

⁴⁸⁵ Similar provisions exist in order 73 rule 4 of the *Rules of the Supreme Court 1971* (WA) relating to probate proceedings where an intervener with an interest in the estate of the deceased can apply to be joined.

is possible in a suitable case, for the person who lacks will-making capacity to exercise some autonomy in who participates and receives their otherwise private information.

The disadvantages of this proposed reform must be considered. Firstly, if those notified parties choose to participate, there are extra costs in applying to be joined. These may be borne by the person lacking will-making capacity at the conclusion of the matter (depending upon the Court's attitude to costs).⁴⁸⁶ Second, this approach goes little way to preserve autonomy because there are still many people who may be notified and who may participate in the proceedings rather than it being a private matter between the applicant and the court. Third, if the court exercised its discretion and does not join or notify certain parties, the truth dimension may be compromised and interested parties adversely affected robbed of the opportunity to participate.

The problem, however, arises for the person who may have standing to bring a family provision claim but who may not be able to establish 'need' and therefore receive little or no provisions from the estate under family provision legislation. The considerations of this person in a statutory will application are different to the considerations in the family provision legislation. If a person in this situation is not given the opportunity to be heard, then the process and outcome cannot be just because the truth dimension is being compromised. That is, the court is not provided with all of the information relevant to its decision.

Second, the court should have the discretion whether to join or notify persons who take in the event of an intestacy. This is because potentially these are the persons most directly affected by a statutory will (where there is no prior will). Further, not all persons who take on intestacy have standing to claim under family maintenance provisions (for example, an uncle or cousin). These persons may have a moral claim to the estate of the deceased but cannot advance their claim unless they are given the opportunity to participate in statutory will proceedings.

These problems can be rectified by the court ordering the applicant to notify the affected person of the application. This can be achieved by the court ordering a

⁴⁸⁶ This is because the court has discretion to make any order regarding costs. See for example section 43(1)(d) of the *Wills Act 1970* (WA).

citation issue against a non-party whose interest in the application may be adversely affected, similar to the provisions contained in Order 73 Rule 5 of the *Rules of the Supreme Court 1971 (WA)* relating to probate proceedings. Should that person wish to be joined, they could express this to the court by letter or alternatively apply to be joined as an intervener. In probate proceedings in Western Australia, a person showing their interest in a probate application but who is not a defendant, can apply for an order to intervene.⁴⁸⁷ This procedure could be extended to include statutory will matters. It should be a matter of discretion for the affected person whether or not they choose to participate and then for the court to decide whether they should, considering all the circumstances of the case.

(ii) Registrar's Jurisdiction

To reduce the barriers once an application is in the system, jurisdiction could be given to Registrars to hear applications. The jurisdiction of Registrars could be extended to mirror the jurisdiction of the Guardianship and Administration Board in Tasmania where the Board can hear applications in the absence of a pre-existing will. Provision to refer the application to a judge or master if necessary could be included if matters are complex or contested.

It is suggested that all applications could initially be sent to a Registrar for case management. Those applications falling within the Registrars jurisdiction can be managed and decided by a Registrar. Registrars could primarily decide the matter on papers with the ability to call a hearing if necessary. Procedure could be conducted in a similar manner to the approach to common form probate applications. That is, documents are filed, the Registrar assesses them and if satisfied, a grant issued.⁴⁸⁸ If the application is defective, a letter or a requisition could be issued by the Registrar, seeking rectification of the deficiency. If the application is substantially defective a case management hearing could be called. Much could be done on papers without the requirement of attendance at court.

Those applications falling outside of the Registrar's jurisdiction and those applications within the Registrar's jurisdiction but decided by the Registrar to be proper for

⁴⁸⁷ *Rules of the Supreme Court 1971 (WA)*, Order 73 Rule 4.

⁴⁸⁸ *Non Contentious Probate Rules 1976 (WA)*, rule 4 to rule 10.

determination by a judge or master, can be case managed by the Registrar for hearing by a master or judge, adopting the ‘master list’ model⁴⁸⁹ where all applications are initially designated to a Registrar and subsequently allocated for case management.

Once all material is available for a determination to be made, the Registrar could either make the decision if it falls within their jurisdiction or refer it to a judge for hearing if it does not. A final determination can be made by either a hearing in open court or, where appropriate, on papers.

D Conclusion

There are barriers that inhibit access to statutory will legislation at all stages of the justice system. If access to the legislation is hindered at any stage, it is less likely to be used.

A lack of knowledge is the first barrier to overcome. Second, barriers created by court management procedures and legislation need to be addressed. Third, the barrier of costs needs attention. These barriers make it less attractive to commence and proceed with an application.

There are ways to address the barriers experienced by the person lacking will-making capacity accessing statutory will legislation. These range from increased knowledge to legislative and case management reform.

Strategies to increase knowledge are uncontroversial. Online information, fact sheets, forms, kits and checklists are achievable changes. Additionally, legislative changes, by removing the two stage process and ‘must refuse’ provisions is supported by some courts and reform agencies. This change is achievable, though it requires political will and may take some time to implement. A more controversial proposal is the argument whether a quasi-judicial body or the court is the most appropriate forum to hear applications.

A sound basis for considering a quasi-judicial body as the forum to hear applications has been set out in this Chapter, centred primarily upon the reduced cost and time that can be achieved through the more informal processes of a tribunal. The conclusion

⁴⁸⁹ Productivity Commission above n 466, 22.

advanced in this thesis, however, is that the answer does not lie in the choice of forum itself, but in the qualities of the forum. If the court adopted less formal procedures, the barriers caused by the system itself would be reduced. This can be achieved in the Supreme Court through a combination of changes including changes to case management procedure in commencing and managing the application and conferring jurisdiction on a Registrar to hear applications that meet certain criteria.

The court can be given the flexibility to adapt procedures and decide applications in a more informal way. Whilst legislation such as the *Guardianship and Administration Act (WA)* confers guardianship and administration decisions to a tribunal instead of the court, the legislation ‘...has not excluded the jurisdiction in this (Supreme) court to make appropriate orders for persons under disability or in need of protection.’⁴⁹⁰ Whilst it is possible to consider a quasi-judicial body as the forum to hear statutory will applications for its informality and flexibility, it can also be argued that the same objectives will be achieved if the court, instead, uses the flexible processes traditionally afforded to such bodies. Additionally the Supreme Court is the appropriate forum as it has the inherent *parens patriae* jurisdiction of the crown or the state.⁴⁹¹ This includes the person lacking will-making capacity. ‘...(I)t is important to appreciate the broad nature of the jurisdiction and its capacity to respond to any necessitous circumstances involving persons unable, for reasons of disability, to care for themselves.’⁴⁹²

The Supreme Court, traditionally, has been the custodian of decisions regarding testamentary capacity. Therefore, on balance, the best outcome is for the Supreme Court to remain the forum to hear statutory will applications and for changes to be introduced to provide a less formal approach. Changing the way applications are commenced by introducing standardised forms, changing procedures to provide for flexibility and informality and introducing a Registrar’s jurisdiction would allow a less

⁴⁹⁰ *S v State Administrative Tribunal of Western Australia [No 2]* [2012] WASC 306 (29 August 2012), [51].

⁴⁹¹ *Ibid* [47].

⁴⁹² *Ibid*.

formal, less costly approach to be achieved. It would make the legislation more meaningful because it would be used.⁴⁹³

⁴⁹³ N. Korac-Kakabde et al, 'Inequality of Discourse: Problematic Consumption of Justice in the Common Law Legal System' (2001) 16(3) *Women in Management Review* 126, 134.

VII: CHAPTER SEVEN: CONCLUSION

Introduction of statutory will legislation in Australia was first considered by the Victorian Chief Justice's Law Reform Commission in 1985.⁴⁹⁴ A national approach to introduce the legislation in each Australian state and territory began in 1991 with the establishment of the Succession Laws Project, co-ordinated by the Queensland Law Reform Commission. Twenty two years on, statutory will legislation has now been enacted in each state and territory.

Statutory will legislation initially proposed to be introduced in Australia, aimed to manage the affairs of the person lacking will-making capacity. Later, the importance of autonomy of the person with a decision-making disability in the will-making process and outcome was given greater attention. Since its introduction, use of the legislation has been slow. However, some applications that have been made illustrate the benefits of the introduction of the legislation. It enhances the rights of persons with disabilities by allowing the court to approve a will in circumstances where, previously, no will could be made. This can be said to have enhance the autonomy of the person lacking will-making capacity by requiring their wishes to be considered by the court and reflected in the terms of the will. It also provides a mechanism for the management of the affairs of the person lacking will-making capacity while taking into account that person's wishes.

Despite these positive observations however, an examination of case law suggests that the aims of the legislation are still not being met because it is underused. This is due, in part at least, to a lack of knowledge of the benefits conferred by the legislation and the barriers created by the legislation and procedure identified in this thesis, causing the aims not to be met.

A The Aims are Not Being Met

1 The Aims

Two primary aims of statutory will legislation were identified in Chapter Four. The first is a focus on management of the affairs of the person lacking will-making capacity. That is, '...what if anything would be reasonable provision in all of the

⁴⁹⁴ Victorian Chief Justice's Law Reform Committee, above n 249.

circumstances for the various contestants.⁴⁹⁵ Contestants include the person lacking will-making capacity, those persons who have standing to claim under statutory schemes of distribution and any other person with an interest in the application who may expect to receive a benefit from the estate. The second aim seeks to achieve the management of those affairs in the context of the wishes of the person lacking will-making capacity. This second aim emphasises the value of autonomy.

(a) Aim One: Early Focus on Management of the Affairs of the Person Lacking Will-Making Capacity

In all the cases discussed in Chapter Five, prior to the introduction of statutory will legislation the financial affairs of the person lacking will-making capacity were managed either by the unaltered provisions of an earlier will, statutory schemes or by the court approving a statutory will. *Boulton v Sanders*,⁴⁹⁶ for example, allowed a distribution of an estate on a partial intestacy to stand. That is, the court chose not to disturb a partial distribution according to the statutory scheme for intestacy. There are circumstances where this will not be satisfactory as statutory schemes of distribution or earlier wills may not be appropriate. Whilst these distributions allow for the management of the affairs of the person lacking will-making capacity, these schemes or the earlier will may not provide for contestants whom the person may wish to provide but whom do not fall within the provisions of an earlier will or statutory schemes. In these circumstances, an application might not be made if the representative of the person lacking will-making capacity does not know about the legislation. If they do, they may choose not to access the system because of costs and complexity. If they decide to access the system, once in the system, it is suggested that they will find it costly and difficult to navigate, with uncertain outcomes.

The legislation's aim of managing the affairs of a person with a decision-making disability therefore, is not being met through statutory will legislation to the extent that it might. Instead it will only be partially achieved through statutory schemes of distribution or an earlier will.

⁴⁹⁵ Fox J in *Re Davey* [1981] 1 WLR 164, 171.

⁴⁹⁶ *Boulton v Sanders* [2004] VSCA 112 (11 June 2004) at 4] and [133].

(b) Aim Two: A Move Towards Autonomy

The wishes of the person and the outcome for the contestants, particularly those not covered by statutory schemes, are not considered independently by the court unless by statutory will application. Although the affairs of the person lacking will-making capacity are ‘managed’ by the law through distribution of their estate by means other than the statutory will scheme, their wishes are not an explicit consideration.

Current statutory will legislation seeks to balance the management aim with the aim of giving the individual a voice in the outcome. The legislation facilitates the autonomy of the person by requiring the wishes of the person lacking will-making capacity to be considered. In addition, it allows those parties with an interest in the application to participate. Decisions about statutory wills involve judicial balancing of factors for and against each of the views of the various interested parties when applying the statutory test in the legislation.

The legislation, however, and the court based adversarial procedures it envisages pose challenges for the participation by the parties. The requirement for leave creates an unnecessary step⁴⁹⁷ as the two stages are often heard at the same time.⁴⁹⁸ This requirement causes applications to become too difficult, too costly and too slow.⁴⁹⁹ Further, addressing the question of who is an interested party has led to a variety of approaches ranging from proceeding without notification to potential interested parties⁵⁰⁰ to joinder of all interested parties.⁵⁰¹ Additionally, approaches to hearings have varied with the most common procedure being for matters to be heard in open court. That said, some procedural steps have been taken on papers.⁵⁰²

Therefore, whilst the legislation encourages the court to give consideration to the wishes of contestants including the person lacking will-making capacity, the procedures impact upon their autonomy because there still seems to be a focus, not only in the legislation but also in case law and court procedure, on the management of the affairs of the person lacking will-making capacity and their moral obligations

⁴⁹⁷ *Hoffmann v Waters* [2007] SASC 273 (20 July 2007).

⁴⁹⁸ See for example *Estate of S* [2012] NSWSC 1281 (8 October 2012) and *Griffin v Boardman* [2009] SASC 288 (11 September 2009).

⁴⁹⁹ *Hoffman v Waters* [2007] SASC 273 (20 July 2007) [28].

⁵⁰⁰ *Public Trustee v Phillips* [2004] SASC 142 (28 May 2004).

⁵⁰¹ *Boulton v Sanders* [2003] VSC 405 (16 October 2003).

⁵⁰² *Re Fenwick; Application of J R Fenwick & Re Charles* [2009] NSWSC 530 (12 June 2009).

rather than the individual. This is reflected, practically speaking, in the procedures by which applications are to be initiated and managed. For example, the two stage process, the must refuse provision and the mechanisms by which applications are commenced and managed inhibit the choice of whether or not to apply; they create barriers to accessing the legislation. The statutory aim of maximising the autonomy of a person to make a will is not being achieved if the legislation is underused. In order to encourage applications, changes are required to make the system more accessible.

B Reasons for Underuse

A number of the reasons for underuse of the legislation in Australia are access to justice related. Three access to justice issues arise in particular. Firstly, there is a lack of knowledge of the rights conferred by the legislation. Second, procedures impose barriers to accessing the legislation. These barriers are contained in both legislation and case management procedure. In the legislation, these are the two stage process in all jurisdictions except for Western Australia and the requirement that a court must refuse an application if interested parties are not given an opportunity to be represented in the proceedings in six of the eight states and territories. The case management barriers are the manner in which applications are commenced, the requirement for a judge or master to hear the application and the many interlocutory steps, usually requiring court appearances.

The third access to justice issue arising is that of costs which is closely linked to the current procedures. High and unnecessary costs arise as a by-product of a complex adversarial system. Costs similarly feature as a barrier, albeit to a lesser extent, when obtaining advice and initiating the application.

Courts have managed these barriers by using existing procedures as flexibly as possible. Further, some attempts have been made to increase knowledge of the legislation. However, a consolidated approach to reform is required to overcome these barriers so as to encourage greater use of the legislation.

C Proposals for Change

Change will initially require the introduction of schemes to increase knowledge and awareness of the legislation, particularly for non-legal advisors. Providing information, education and services to non-legal advisors through Legal Aid and

CLC's means that people upon whom the person lacking will-making capacity relies will be aware of the legislation and therefore, more likely to consider accessing it for the benefit of the person lacking will-making capacity. At stages two and three, information can be provided in prescribed forms and explanatory kits.

At the outset of this thesis, it was observed that a lack of knowledge was just a small part of the hypothesis for underuse. A more pressing issue is to reform the procedures that are followed to ensure that the system in which these applications are made is fair, efficient and effective.

A uniform approach modifying or changing procedures at stages two and three making them less formal and more flexible will encourage use. Indeed, case law demonstrates that the court desires this.⁵⁰³ Courts have modified existing procedures on a case-by-case basis to provide as much flexibility as possible within existing procedural rules and/or guidelines. However, the court is still limited by existing procedure, particularly where procedure is prescribed by legislation. Reform of procedure is required to afford less formality and more flexibility on how these applications can be initiated and managed.

Proposals for reform outlined in Chapter Six include consideration of whether a quasi-judicial is a more appropriate forum to hear applications. A quasi-judicial body is an attractive forum to achieve a statutory will management system that is fairer, effective and efficient because these bodies are already set up to offer more flexible, less formal procedures. Additionally, they are less adversarial in nature than courts. However, as discussed in Chapter Six, the informality attached to hearings in some quasi-judicial bodies, is not without criticism. Concerns can be overcome by a Judge presiding over the hearing. Further protection can be afforded by granting a right of appeal to the Supreme Court.

Notwithstanding these possibilities, it is concluded on balance that a change of forum is not required. There are a number of reasons why it is best that statutory will applications remain in the Supreme Court. Applications that are straight forward, unopposed and well prepared could be dealt with without appearance in open court

⁵⁰³ See for example, *Monger v Taylor* [2000] VSC 304 (2 August 2000) and *Re: Fenwick* [2009] NSWSC 530 (12 June 2009).

and without the need to give reasons. This latter point is important given the personal and private nature of the information and affairs of the person lacking will-making capacity.⁵⁰⁴ In some jurisdictions, this may require procedural amendment to both the legislation and local procedure. In others, this proposal can operate within the existing case management system with variations to practice directions to provide guidelines to lawyers in this area. However, procedural flexibility once an applicant is in the system does not operate to reduce the barrier of getting into the system in the first place. That is, an applicant is still required to adhere to the formal application process requirements making it expensive and labour intensive. This can be overcome by introducing kits and forms standardised for statutory will applications making the information on how to apply readily available to the public in plain English on easy terms using website publication.

The reforms proposed in this thesis are important to achieve the aims of the statutory will legislation. Education of non-legal advisors to encourage applications to be made and reform to make these applications easier and ultimately the legislation more accessible will give meaning and everyday access to it. Reform will provide consistency and uniformity in the management of statutory will matters. This will build confidence in the system, predictability, efficiency and economy in procedure and thereby encourage its use. Additionally, these proposals are important to law reformers in this area to encourage optimum accessibility to the rights conferred by the legislation, for a section of the community that is most likely to benefit from it.

Easier and more ready access will encourage use of the legislation, and a person who lacks will-making capacity to achieve an expression of testamentary autonomy more readily. After all, where there is a will, there is a way.

⁵⁰⁴ Palmer J in *Re Renwick* [2009] NSWSC 530 (12 June 2009), [263] and [265].

VIII BIBLIOGRAPHY

A *Articles/Books/Reports*

Atherton, Rosalind, 'Concept of Moral Duty in the Law of Family Provision – A Gloss or Critical Understanding', (1999) 5 *Australian Journal of Legal History* 5

Berlin, Isiah, 'Two Concepts of Liberty' in *Liberty: Incorporating Four Essays on Liberty*, (Oxford University Press, 2002)

Bone, R. 'Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness' (2003) 83 *Boston University Law Review* 485

Brennan, G. 'Key Issues in Judicial Administration' (1996) *Journal of Judicial Administration* 138

A J Brown et al, 'Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems', *National Integrity Systems Assessment (NISA) Final Report* (2005)

Burger, W. 'Isn't There a Better Way?' (1982) *American Bar Association Journal* 274

Carney, Terry, 'Limits and the Social Legacy of Guardianship in Australia' (1989) 18 *Federal Law Review* 231

Carpenter, Belinda and Ball, Matthew, *Justice in Society* (The Federation Press, 2012)

Claussen, Kathleen, 'A Review of *When Legal Orders Collide: The Role of Courts* by Sabino Cassese' (2012) 19 *Indiana Journal of Global Legal Studies* 413

Coffey, Trudy and Long, Rosemary, *Your Practical Guide to Law in New South Wales: Law Handbook* (Thomson Reuters (Professional) Australia Ltd, 12th ed, 2012).

Crago, N. 'Reform of the Law of Wills' (1995) 25 *Western Australian Law Review* 256.

Creke, Robyn, McMillan, Peter, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 3rd ed, 2012)

Creyke, Robyn, 'Integrity in Tribunals' (2013) 32 *University of Queensland Law Journal* 45

Croucher, Rosalind, 'Contracts to Leave Property by Will and Family Provision After *Barns v Barns* (2003) 196 ALR 65 - Orthodoxy or Aberration', (2005) 27 *Sydney Law Review* 263

Croucher, Rosalind, 'Law Reform as Personalities and Pragmatics – The Family Provision Act 1982 (NSW): A Case Study', (2007) 11 *Legal History* 1

Croucher, Rosalind, 'Towards Uniform Succession In Australia' (2009) 83 *Australian Law Journal* 728

Croucher, R. 'An interventionist, paternalistic jurisdiction? The place of statutory wills in Australian Succession Law' (2009) 32 *University of New South Wales Law Journal* 674

Croucher, R. 'Statutory Wills and Testamentary Freedom – Imagining the Testator's Intention in Anglo-Australian Law' (2007) *Oxford University Commonwealth Law Journal* 241

Daniels, Stephen and Martin, Joanne, Legal Services for the Poor: Access, Self-Interest, and Pro Bono (March 11, 2009) in Rebecca L Sandefur (ed), *Access to Justice: Sociology of Crime, Law and Deviance* (Emerald Group Publishing Limited, 2009)

Davies, G and Sheldon S, 'Some Proposed Changes in Civil Procedure: Their Practical Benefits and Ethical Rationale' (1993) 3 *Journal of Judicial Administration* 111

Davies G. 'Civil Justice Reform in Australia' in Zuckerman A (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press, 1999)

Davies, G. 'A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and their Rationale' (1996) 5 *Journal of Judicial Administration* 201

Davies, G. and Sheldon, S.A. 'Some Proposed Changes in Civil Procedure: Their Practical Benefits and Ethical Rationale' (1993) *Journal of Judicial Administration* 111

Dhanda, A. 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar of the Future', (2007) 34 *Syracuse Journal of International Law and Commerce* 429

Diamond, B, 'Defamation and Mental Capacity' in *Legal Aspects of Mental Capacity* (Blackwell Publishing Ltd, Oxford, UK, 2008)

Douglas, Roger Neil; Jones, Melinda, *Administrative Law: Commentary and Materials* (Federation Press, 1999)

Douglas, Roger Neil; Jones, Melinda, *Douglas and Jones's Administrative Law* (Federation Press, 2006)

Dworkin, G. *Cambridge Studies in Philosophy: the Theory and Practice of Autonomy* (Cambridge University Press, 1988)

Eyeland, A. 'Legal Costs and Case Management' (2004) 27 *University of New South Wales Law Journal* 231

Feinburg, Joel, 'Autonomy' in John Christman (ed), *The Inner Citadel: Essays on Individual Autonomy* (1989)

Frolik, Lawrence, 'Legacies of Possessions: Passing Property at Death' (1996) 20 *Generations* 9

Frolik, Lawrence, 'The Strange Interplay of Testamentary Capacity and the Doctrine of Undue Influence: Are we Protecting Older Testators or Overriding Individual Preferences?' (2001) 24 *International Journal of Law and Psychiatry*, 253

Gary, S. 'Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance' (1997) 32 *Wake Forest Law Review* 397

Gearty, Yeslin, 'The Mental Capacity Act, the Office of the Public Guardian and the new Court of Protection' (2007) 9,(3) *The Journal of Adult Protection* 39

Gramatikov, M. 'A Framework for Measuring the Costs of Paths to Justice' (2009) *The Journal of Jurisprudence* 111

Hall, Daniel E, *Administrative Law: Beureaucracy in Democracy* ((Prentice Hall PTR, 2011)

Hockley, J. 'Statutory wills in Australia: Wills for Persons Lacking Testamentary Capacity' (2006) 80 *Australian Law Journal* 68

Korac-Kakabadse, N. Knyght, P. And Kouzimin, A. 'Inequality of Discourse: Problematic Consumption of Justice in the Common Law Legal System' (2001) 16(3) *Women in Management Review* 126

Langbein, John H. 'Substantial Compliance with the Wills Act'' (1975) 88 *Harvard Law Review*, 489-531

Legg, Michael, 'The Federal Court of Australia's Fast Track' (2012) *University of New South Wales Law Research Series* 12

Leubsdorf, J, 'The Myth of Civil Procedure Reform' in Zuckerman, A. (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press, 1999)

Lidz, Charles. W. Fischer, Lynn and Arnold, Robert M. *The Erosion of Autonomy in Long Term Care*, (Oxford University Press, 1992)

Mackie, Ken , *Principles of Australian Succession Law*, (Lexis Nexis Butterworths, 2007)

Noone, M.A. 'Access to Justice Research in Australia' (2006) 31 *Alternative Law Journal* 30

O'Neill, Nick and Peisah, Carmelle, 'Chapter 4 - Capacity to Make a Will' [2011] *Sydney University Press Law Book 6*, <http://worldlii.austlii.edu.au/au/journals/SydUPLawBk/2011/6.html>

Radford, M. 'An introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust and Guardianship Matters' (1999-2000) 34 *Real Property, Probate and Trust Journal* 601

Rees, David 'Re P-Statutory Wills and the Mental Capacity Act', (2009) 15 *Trusts and Trustees* 494

Rich, B. 'Re P: Statutory Wills: an Epitaph for the 'Lucid Interval' (2009) PCB 210

Rohlf, M. 'Immanuel Kant' in Zalta, Edward N (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2010 Edition) available at URL=<<http://plato.stanford.edu/archives/fall2008/entries/personsl-autonomy/>>

Roness, Paul G, 'Types of State Organizations: Arguments, Doctrines and Changes Beyond New Public Management' (2007) *Transcending New Public Management: The Transformation of Public Sector Reform*, 65-88.

Sackville, R. 'From Access to Justice to Managing Justice: the Transformation of the Judicial Role' (2002) *Federal Judicial Scholarship* 9

Sage-Jacobson, Susannah L, 'The Dawn of a New Era for Administrative Justice in South Australia' (2011) *Law Society Bulletin South Australia* 30

Sanderfur, Rebecca, *Access to Justice* (Emerald Group Publishing Ltd UK, 2009)

Simmons, Beth, 'See You in "Court"? The Appeal to Quasi-Judicial Legal Processes in the Settlement of Territorial Disputes' in Paul Francis Diehl (ed), *A Road Map to War: Territorial Dimensions of International Conflict*, (Vanderbilt University Press, 1999)

Slater, N. 'Can Attorneys Assess the Legal Capacity of Elderly Clients?' (2007) *The Elder Law Report* 7

Starke, J A, 'Wills for Disable Persons – Proposed Reform of the Law' (1989) *Australian Law Journal* 807

Solum, Lawrence. 'Procedural Justice' (2004) 78 *Southern Californian Law Review* 181

Theobald, Henry Studdy, *The Law Relating to Lunacy*, (London Stevens and Sons Ltd, 1924)

Vines, Prue, *Law and Justice in Australia, Foundations of the Legal System* (Oxford University Press, 3rd ed, 2013).

Walker, B. Proportionality and Cost-Shifting (2004) *University of New South Wales Law Journal* 214

Wells, W.A.N, *Law, Judges and Justice for the Community* (Butterworths, 1991)

Wilker, Daniel, 'Paternalism and the mildly retarded' (1979) 8 *Philosophy and Public Affairs* 377-92

Williams, Richard and McCullough, Sam, *Statutory Will Applications: A Practical Guide* (LexisNexis Butterworths 2014)

Yeldham, R. F., Winegarten, J.I., Synak, T., Rowe, R.B. (eds), *Tristram and Coote's Probate Practice* (Butterworths, 28th ed, 1995)

Zuckerman, Adrian, 'Justice in Crisis: Comparative Dimensions of Civil Procedure' in Zuckerman, Adrian (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press, 1999)

Zuckerman, A "Lord Woolf's Access to Justice: Plus Change' (1969) 59 *Modern Law Review* 773

B Cases

AB v CB [2009] NSWSC 680 (20 July 2009)

Andre v Perpetual Trustees WA Ltd (as Executor of the Will of Barbara Helen Owen Stewart) [2009] WASCA 14 (15 January 2009)

Application by Peter Leslie Kelso [2010] NSWSC 357

Avsar v Binning [2009] WASCA 219 (9 December 2009)

Bailey v Bailey (1924) 34 CLR 558

Banks v Goodfellow [1861-73] All ER 47

Barry v Butlin (1838) 12 ER 1089

Boulton v Sanders [2003] VSC 405 (16 October 2003)

Boulton v Sanders (No 2) [2003] VSC 409 (21 October 2013)

Boulton v Saunders & Ors [2004] VSCA 112 (11 June 2004)

Bryant v Blake [2004] SASC 369 (19 November 2004)

Bull v Fulton (1942) 66 CLR 295

Jeavons v Chapman (No2) [2009] SASC 3 (12 January 2009)

CDMA [2005] TASGAB 1 (12 May 2005)

Cunningham v Stender 225 P. 2d 977 (1953)

Deecke v Deecke [2009] QSC 65 (1 April 2009)

Dillon v Public Trustee of New Zealand [1941] AC 294

EKI (Statutory Will) [2010] TASGAB 12 (12 July 2010)

Elayoubi, application of Wosif [2010] NSWSC 1004 (26 August 2010)

Estate of S [2012] NSWSC 1281 (8 October 2012)

Frizzo & Anor v Frizzo & Ors [2011] QSC 107 (12 May 2011)

Griffin v Boardman [2009] SASC 315 (2 October 2009)

Harwood v Barker [1840] EngR 1087

Hill v Hill [2001] VSC 83 (28 March 2001)

Hoffmann v Waters [2007] SASC 273 (20 July 2007)

In the Matter of P [2009] EWHC 163 (Ch) (9 February 2009)

In the Will of BJ (Unreported, Supreme Court of Western Australia, CIV 1364 of 2013)

In the Will of Doris May Frances (Unreported, Supreme Court of Western Australia, CIV 3332 of 2011)

In the Will of Moriarty (deceased) [1956] ALR 934

In the Will of Wilson (1897) 23 VLR 197

Kerr v Bardan [2004] NSWSC 735 (17 August 2004)

Mace v Malone (No 2) [2011] QSC 98 (6 May 2011)

Martin v Fletcher [2003] WASC 59 (26 March 2003)

Martina Pieternella De Jager [2012] SASC 236 (21 December 2012)

Masterman-Lister v Brutton & Co [2002] EWCA Civ 1889

Monger v Taylor [2000] VSC 304 (2 August 2000)

Murphy v Lamphier (1914) 31 OLR 287

Oshlack v Richmond River Council (1998) 193 CLR 72

Peter Leslie Kelso [2010] NSWSC 357 (22 April 2010)

Public Trustee v Gerristen [2012] WASC 201 (14 June 2012)

Public Trustee v Phillips No SCCIV-03-800 [2004] SASC 142 (28 May 2004)

Rak [2009] SASC 288, (1 September 2009)

Re Baden [1952] ALR 326

Re C (a patient) [1991] 3 All E.R. 866

Re D(J) [1982] Ch 237

Re Davey [1991] 1 WLR 164

Re Estate of Griffith; Easter v Griffith (1995) 217 ALR 284

Re Fenwick; Application of J R Fenwick and Re Charles [2009] NSWSC 530 (12 June 2009)

Re Ferreira [1927] ALR 87

Re Levy Deceased [No 2] [1958] ALR 164

Re The Full Board of The Guardianship and Administration Board [2003] WASCA 268 (13 November 2003)

Re Will of Jane [2011] NSWSC 624 (20 July 2011)

Re Will of Jane [No 2] [2011] NSWSC 883 (12 August 2011)

Rhodes v Swithenbank (1989) 22 QBD 577

Ryan v Kazacos (2001) ALR 506

S v State Administrative Tribunal (No 2) [2012] WASC 306 (29 August 2012)

Sadler v Eggmolesse [2013] QSC 40 (1 February 2013)

Sergi By Next Friend Solowiej v Sergi [2012] WASC 18 (20 January 2012)

Shaw v Crichton (unreported, SC, (NSW) 23 August 1995, Powell J)

Shields v Carotozzolo (1991) 6 WAR 1

Shorten v Shorten [2002] NSWCA 73 (5 March 2002)

Singer v Berghouse (1994) 181 CLR 201

Theophanous v Gillespie [2001] QSC 177 (14 June 2001)

Troja v Troja (1994) 33 NSWLR 269

Trust Co of Australia v Daulizio [2003] VSC 358 (26 September 2003)

Vigolo v Bostin (2005) 221 CLR 19

Wheatley v Edgar [2003] WASC 118 (17 June 2003)

C Legislation, Rules

Acts Interpretation Act 1915 (SA)

Acts Interpretation Act 1931 (TAS)

Acts Interpretation Act 1954 (QLD)

Administration Act 1903 (WA)

Administration and Probate Act 1919 (SA)

Administration and Probate Act 1929 (ACT)

Administration and Probate Act 1935 (Tas)

Administration and Probate Act 1958 (VIC)

Administration and Probate Act (NT)

Administrative Appeals Tribunal Act 1975 (Cth)

Consolidated Practice Directions (WA)

Court of Protection Rules 2007 (UK)

Court Procedure Rules 2006 (ACT)

Enduring Powers of Attorney Act 1985 (UK)

Family Law Act 1975 (Cth)

Family Provision Act 1969 (ACT)

Family Provision Act (NT)

Family Provision Act 1972 (WA)

Guardianship and Administration Act 1990 (WA)

Guardianship and Administration Act 1995 (Tas)

Inheritance (Family Provision) Act 1972 (SA)

Interpretation Act 1978 (NT)

Interpretation Act 1985 (WA)

Interpretation Act 1987 (NSW)

Law of Property Act 1925 (UK) s171

Legislation Act 2001 (ACT)

Lunacy Act 1890 (UK)

Mental Capacity Act 2005 (UK)

Mental Health Act 1959 (UK)

Mental Health Act 1983 (UK)

Non-Contentious Probate Rules 1976 (WA)

Rules of the Supreme Court 1971 (WA)

State Administrative Tribunal Act 2004 (WA)

State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004 (WA)

Succession Act 2006 (NSW)

Succession Act 1981 (Qld)

Succession Amendment Bill 2005 (Qld)

Supreme Court Civil Rules 2006 (SA)

Supreme Court Rules (NT)

Supreme Court Rules 2000 (Tas)

Supreme Court (Miscellaneous Civil Proceedings Rules) 2008 (VIC)

Uniform Civil Procedure Rules 1999 (Qld)

Uniform Civil Procedure Rules 2005 (NSW)

Testators Family Maintenance Act 1912 (Tas)

Wills Act 1968 (ACT)

Wills Act 2000 (NT)

Wills Act 1936 (SA)

Wills Act 2008 (Tas)

Wills Act 1997 (Vic)

Wills Act 1970 (WA)

Wills Bill 2008 (Tas)

D Treaties

United Nations Convention of the Rights for Persons with Disabilities, opened for signature 30 March 2008 (enter into force 3 May 2008)

E Other

1 Discussion Papers, Issue Papers, Research Papers and Parliamentary Reports

Access to Justice Advisory Committee, Standing Committee of Attorneys General, *Access to Justice: An Action Plan* (Report, 1994)

Access to Justice Taskforce: Attorney-General's Department, Australian Government, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, (2009)

Access to Justice Taskforce: Attorney-General's Department, Australian Government, *Access to Justice* (2013) www.ag.gov.au/legalsystem/pages/Acesstojustice.aspx

Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No 69 (1994)

Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69 (1994)

Australian Law Reform Commission, *Cost Shifting – Who Pays for Litigation*, Report No 73 (1995)

Australian Law Reform Commission, *Federal Jurisdiction*, Background Paper 1 (1996)

Australian Law Reform Commission, *Alternative or Assisted Dispute Resolution*, Background Paper 2 (1996)

Australian Law Reform Commission, *Judicial and Case Management*, Background Paper 3, (1996)

Australian Law Reform Commission, *The Unrepresented Party*, Background Paper 4 (1996)

Australian Law Reform Commission, *Civil Litigation Practice and Procedure*, Background Paper 5 (1996)

Australian Law Reform Commission, *Review of the Adversarial System of Litigation*, Issues Paper 20 (1997)

Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking Legal Education and Training*, Issues Paper 21 (1997)

Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking Family Law Proceedings*, Issues Paper 22 (1997)

Australian Law Reform Commission, *Technology – What it Means for Federal Dispute Resolution*, Issues Paper 23 (1998)

Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Federal Tribunal Proceedings*, Issues Paper 24 (1998)

Australian Law Reform Commission, *Review of the Adversarial System of Litigation: ADR – Its role in Federal Dispute Resolution*, Issues Paper 25 (1998)

Australian Law Reform Commission, *Experts*, Background Paper 6 (1999)

Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper No 62 (1999)

Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89, (1999)

Australian Research Council, Australian Government, *Access to Administrative Review: Provision of Legal and Financial Assistance in Administrative Law Matters*, Report No 30 (1988)

Australian Research Council, Australian Government, *Access to Administrative Review by Members of Australia's Ethnic Communities*, Report No 34 (1991)

Australian Research Council, Australian Government, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39, (1995)

Baker, J, 'Who Settles and Why? A Study of the Factors Associated with the Stage of Case Disposition' (Report, Justice Research Centre, Law Foundation of New South Wales, 1994)

Commonwealth Attorney Generals Department, *The Justice Statement*, (1995)

Coumanlos, Christine, Wei, Zhigang and Zhou, Alvert Z, 'Justice Made to Measure: New South Wales Legal Needs Survey in Disadvantaged Areas' (Research Publication, Law and Justice Foundation of New South Wales, 2006)

Delaney, Marie and Wright, Ted, 'Plaintiffs' Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-Trial Conference and Mediation', (Research Publication, Justice Research Centre, Law Foundation of New South Wales, 1997)

Department of Justice Queensland, *Uniform Civil Procedure Rules for the Supreme Court, District Court & Magistrates Court – Consultation Draft*, Report (1997)

Department of Social Services, Australian Government, 'Estimating the Prevalence of Mental Disorders among Income Support Recipients: Approach, Validity and Findings' (Policy Research Paper No 21, 2003)

Ellison, Sara et al, 'The Legal Needs of Older People in NSW', (Research Publication, Law and Justice Foundation of NSW, 2004)

Family Law Council, Attorney-General's Department, Australian Government, *Family Mediation*, (1992)

Family Law Council, Attorney-General's Department, Australian Government, *Family Law Appeals and Reviews*, (1996)

Finn, Chris, 'Some Reflections on the Council's Discussion Paper on the Scope of Judicial Review' (Admin Review No 56, Administrative Review Council, Attorney Generals Department, 2004).

Gray, Abigail et al, 'Cognitive Impairment, Legal Need and Access to Justice' (Justice Issues Paper 10, Law and Justice Foundation of New South Wales, 2009)

Guest, Chris and Murphy, Tom, 'Economic Evaluation of Differential Case Management' (Report, Justice Research Centre, Law Foundation of New South Wales, 1995)

House of Representatives Standing Committee on Legal and Constitutional Affairs, *To Have and to Hold: Strategies to Strengthen Marriage and Relationships*, Report (1998)

IPSOS, *Dispute Resolution in Victoria: Community Survey* (2007)

Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, *The Family Law Act 1975: Aspects of its Operation and Interpretation*, (1992)

Karras, Maria. McCarron, E. Gray, A. And Ardasinski, S, 'On the Edge of Justice: the Legal Needs of People with a Mental Illness in NSW', (Research Publication, Law and Justice Foundation of New South Wales, 2006)

Law and Justice Foundation of New South Wales, *Justice Issues*, Paper 17 (2013)

Law Reform Commission of Victoria, *Access to the Law: The Cost of Litigation* (Issues Paper, 1990)

Law Reform Committee of Victoria, *Reforming the Law of Wills*, Final Report (1994)

Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999)

Law Society of New South Wales, *Access to Justice: Final Report*, Report (1998)

- Law Society of New South Wales, *ADR Task Force Report*, Report (1999)
- Legislative Council Select Committee, Parliament of Tasmania, *Mental Health Legislative Measures*, Final Report (2009)
- Matruglio, T, 'Researching Alternative Dispute Resolution', (Report, Justice Research Centre, Law Foundation of New South Wales, 1992)
- Matruglio, T, 'So Who Does Use the Courts?' (Report, Justice Research Centre, Law Foundation of New South Wales, 1993)
- Matruglio, T, 'Plaintiffs and the Process of Litigation: An Analysis of the Perception of Plaintiffs Following their Experience of Litigation' (Report, Justice Research Centre, Law Foundation of New South Wales, 1994)
- Matruglio, T and Baker, J, 'An Implementation Evaluation of Differential Case Management: A Report on the DCM Program in the Common Law Division of the Supreme Court of New South Wales (Report, Justice Research Centre, Law Foundation of New South Wales, 1995)
- Matruglia, T. 'The Costs of Litigation in the Federal Court of Australia: Research Conducted for the Australian Law Reform Commission' (Research Publication, Australian Law Reform Commission, 1999)
- McCullough, Sandra, 'Older People and the Law: An Investigation into the Legal and Consumer Needs of Older People in Victoria' (Final Report, Consumer Law Centre Victoria Ltd, 1995)
- National Alternative Dispute Resolution Advisory Council, *Primary Dispute Resolution in Family Law: A Report to the Attorney-General on Part 5 of the Family Law Regulations*, Report (1997)
- National Alternative Dispute Resolution Advisory Council, *Alternative Dispute Resolution Definitions*, Report (1997)
- National Alternative Dispute Resolution Advisory Council, *Issues of Fairness and Justice in Alternative Dispute Resolution*, Report (1997)
- National Alternative Dispute Resolution Advisory Council, Commonwealth of Australia, *A Framework for ADR Standards*, Report to the Commonwealth Attorney General (2001)
- New South Wales Law Reform Commission, *Wills for Persons Lacking Will-Making Capacity*, Discussion Paper No 20 (1989)
- New South Wales Law Reform Commission, *Scrutiny of the Legal Profession: Complaints against Lawyers*, Report (1993)

New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills*, Issue Paper No 10 (1996)

New South Wales Law Reform Commission, *Uniform Succession Laws: Family Provision*, Issue Paper No 11 (1996)

New South Wales Law Reform Commission, *Wills for Persons Lacking Will-Making Capacity*, Report No 68 (1992)

New South Wales Law Reform Commission, *Uniform Succession Laws: the Law of Wills*, Report No 85 (1998)

New South Wales Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons*, Discussion Paper 42 (1999)

New South Wales Law Reform Commission, *Recognition of Interstate and Foreign Grants of Probate and Letters of Administration*, Issue Paper 21 (2002)

New South Wales Law Reform Commission, *Uniform Succession Laws: Family Provision*, Report 110 (2005)

New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Issue Paper 26 (2005)

New South Wales Law Reform Commission, *I Give, Devise and Bequeath: An Empirical Study of Testators' Choice of Beneficiaries*, Research Report 13 (2006)

New South Wales Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons*, Report 124 (2009)

New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report 116 (2009)

Northern Territory Law Reform Committee *Report on the Review of Administrative Decisions and an Administrative Tribunal*, Report No 29 (2004)

Productivity Commission, Australian Government, *Access to Justice Arrangements*, Issues Paper (2013)

Queensland Law Reform Commission, *Uniform Succession Laws for Australian States and Territories*, Issues Paper No 1: The Law of Wills WP 46 (1994)

Queensland Law Reform Commission, *First Issues Paper: The Law of Wills*, Issue Paper No MP10 (1994)

Queensland Law Reform Commission, *Uniform Succession Laws: Wills*, Miscellaneous Paper No 15 (1996)

Queensland Law Reform Commission, *The Law of Wills*, Miscellaneous Paper No 19, (1996)

Rich, Barbara, 'Statutory Wills: an Epitaph for the 'Lucid Interval' (Research Publication, Office of Public Guardian (UK), 2 October 2010

Schetzer, Louis and Henderson, Judith, 'Access to Justice and Legal Needs. Stage 1: Public Consultations' (Research Publication, Law and Justice Foundation of New South Wales, 2006)

Schetzer, Louis, Mullins, Joanne and Buonamano, Roberto, 'Access to Justice and Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW' (Background Paper, Law and Justice Foundation of NSW, 2003)

Senate Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation: A Survey of Reforms to the English Legal Profession*, Discussion Paper No 1 (1991)

Senate Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation: Introduction to the Issues*, Discussion Paper No 3 (1991)

Senate Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation: Contingency Fees*, Discussion Paper No 4 (1991)

Senate Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation: Access to Legal Services: The Role of Market Forces*, Background Paper (1992)

Senate Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation: Methods of Dispute Resolution*, Discussion Paper No 6 (1991)

Senate Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation*, Discussion Paper No 7 (1992)

Senate Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation: Legal Aid: 'for richer or poorer'*, Discussion Paper No 8 (1002)

Senate Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation: The Legal Profession: A Case for Microeconomic Reform* (1992)

Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice: First Report – Foundations for Reform*, Report (1993)

Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice: Second Report – Checks and Imbalances*, Report (1993)

Senate Legal and Constitutional Reference Committee, *Inquiry into the Australian Legal Aid System – First Report*, Report (1997)

Senate Legal and Constitutional Reference Committee, *Inquiry into the Australian Legal Aid System – Second Report*, Report (1997)

Senate Legal and Constitutional Reference Committee, *Inquiry into the Australian Legal Aid System – Third Report*, Report (1997)

South Australian Office of the Public Advocate, *South Australian Supported Decision Making Project*, Report of Preliminary Phase 1 (2011)

The Australian Law Reform Commission, *Review of the Adversarial System of Litigation*, Issues Paper No 20 (1997)

Victorian Chief Justices Law Reform Committee, *Wills for Mentally Disordered Persons*, Report (1985)

Victorian Law Reform Commission, *Reforming the Law of Wills*, Final Report (1994)

Victorian Law Reform Committee, *Technology and the Law*, Report (1999)

Victorian Law Reform Commission, *Civil Justice Review*, (Report, 2008)

Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012)

Victorian Law Reform Commission, *Succession Laws: Wills*, Consultation Paper No 11 (2012)

Victorian Law Reform Commission, *Succession Laws*, Report (2013)

Western Australian Civil and Administrative Review Tribunal Taskforce, *On The Establishment of the State Administrative Tribunal*, Report (2002)

Williams, et al, *Report of the Review of Scales of Legal Professional Fees in Federal Jurisdictions*, Report (1998)

Woolf, Lord, *Access to Justice: Final Report*, Final Report to the Lord Chancellor on the Civil Justice System in England, United Kingdom (1996)

Worthington, Deborah and Baker, Joanne, ‘The Cost of Civil Litigation: Current Changing Practices’ (Research Publication, Law and Justice Foundation of New South Wales, Civil Research Centre New South Wales, 1993)

2 Looseleaf Services

Butterworths, *Wills Probate and Administration Service Western Australia*, Volume 1 (at Service No 30) 24

3 Parliamentary Debates

Parliament of Tasmania, *Parliamentary Debates*, Legislative Council, 19 November 2008, 30-64 (Doug Parkinson)

Parliament of Victoria, *Parliamentary Debates, Second Reading Speech*, Legislative Assembly, 23 May 2007, (Rob Hulls, Attorney-General Victoria)

Parliament of Victoria, *Parliamentary Debates Second Reading Speech*, Legislative Council 19 July 2007, (John Lenders, Minister for Education)

Western Australia, *Parliamentary Debates*, Legislative Assembly, 29 March 2006, 932 (F Fiebeling)

Western Australia, *Parliamentary Debates*, Legislative Assembly, 30 March 2006, 933b-935a (Jim McGinty, Attorney General)

Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 June 2006, 4351 (S E Walker)

Western Australia, *Parliamentary Debates*, Legislative Council, 28 June 2006, 4427 (Kim Chance, Agricultural – Leader of the House)

4 Dictionaries, Encyclopedias

LexisNexis, *Encyclopaedic Australian Legal Dictionary*, (at January 2011).

5 Papers

Ashdown, Brendan, 'Legal Guardians and Case Guardians: At Least 50 Shades of Grey' (Paper presented at Family Law Practitioners Association of Western Australia), Fremantle, (5 October 2013)

Brand, Michael C and Uher, Thomas E, 'Adjudication Determinations in Australia' (Paper presented at 20th Annual ARCOM Conference, Edinborough, 1-3 September 2004)

Cairns, B, 'The Use of Discovery and Interrogatories in Civil Litigation' (Australian Institute of Judicial Administration, Melbourne, 1990)

Church, T and Sallmann, P, 'Governing Australia's Courts' (Australian Institute of Judicial Administration, Melbourne, 1991)

Clyne, David, 'Compromising Claims of a Client Under a Legal Disability in the District and Supreme Courts' (Paper, Law Society CPD), Perth, (31 October 2012)

Cranston, R et al, 'Delays and Efficiency in Civil Litigation' (Australian Institute of Judicial Administration, Melbourne, 1985)

Downes AM, The Hon. Justice Garry, 'The Tribunal Dilemma: Rigerous Informality' (General Meeting of the Council of Australasian Tribunals, The Australian Museum, Sydney 17 September 2008)

Finn, Justice Paul, 'The Courts and the Vulnerable' (Paper, Centre for International and Public Law, Faculty of Law, The Australian National University: Law and Policy Papers No 5, 1996)

Freckelton et al, 'Australian Judicial Perspectives on Expert Evidence: An Empirical Study' (Australian Institute of Judicial Administration, Melbourne, 1999)

Lane, P, 'Court Management Information – A Discussion Paper (Australian Institute of Judicial Administration, Melbourne, 1993)

Parker, S, 'Courts and the Public' (Australian Institute of Judicial Administration, Melbourne, 1998)

Powles, H et al, 'The Litigant in Person – A Discussion Paper' (Australian Institute of Judicial Administration, 1993)

Storer, John, Stubbs, Judith and Lux, Colleen, 'Economic Cost Benefit Analysis of Community Legal Centres' (Paper, National Association of Community Legal Centres, 2012)

Williams, P, et al, 'The Cost of Civil Litigation Before the Intermediate Courts of Australia' (Australian Institute of Judicial Administration, 1992)

7. Websites

www.tribunals.lawlink.nsw.gov.au/tribunals/index.html

www.familycourt.wa.gov.au/F/forms.aspx?uid=2986-4517-2424-3041

www.guardianship.tas.gov.au/_dta/assets/pdf_file/0020/67061/10_Statutory_Wills.pdf

www.guardianship.tas.gov.au/forms2