FIGHTING ALZHEIMER'S FOR AUSTRALIA
FIGHTDEMENTIA.ORG.AU



Dr Ian Hardingham QC
Commissioner
Victorian Law Reform Commission
GPO Box 4637
MELBOURNE VIC 3001

27 March 2013

**RE: VICTORIAN LAW REFORM COMMISSION'S REVIEW OF SUCCESSION LAWS**

Dear Dr Hardingham

I am writing to you on behalf of Alzheimer's Australia Vic as a submission to your consultation papers relating to the review of Victoria's Succession Laws. In particular our submission relates to the Consultation Paper relating to "Family Provision" I would like this submission to be treated as a public submission.

**Succession Laws and Alzheimer's Australia Vic**

Alzheimer's Australia Vic is a charity and the state's peak body providing education, support, advocacy and information for Victorians living with dementia their families and carers. There are 74,000 Victorians living with dementia, this number will double over the next ten years.

As a charity we have over the years received gifts that have been left to us in many of our supporter's wills after they have named us as one of their beneficiaries. These gifts allow us to continue to meet the needs of people living with dementia and their families and carers. We hope that any changes to Victoria's succession laws will not impact the amount of charitable gifts that we receive in the future and potentially increase our associated costs, thereby reducing our ability to provide much needed services.

This will become an increasingly important issue if you take into account the fact that charitable giving through deceased estates will increase in prevalence over time. This, combined with the fact that Australia has an ageing population profile, will result in more wills that include charitable beneficiaries than ever before being probated in Victoria.

The potential for more Victorians to leave a lasting legacy for the benefit of future generations may be in jeopardy, if we do not get the law correct as it relates to "family provision".

Alzheimer's Australia Vic
Sarah Lustig Family Resource Centre
98-104 Riversdale Road, Hawthorn, Victoria 3122
Locked Bag 3001, Hawthorn, Victoria 3122

**T** 03 9815 7800 **F** 03 9815 7801 **E** alz@alzvic.asn.au
**National Dementia Helpline 1800 100 500**

**Patron** The Honorable Alex Chernov AO, QC, Governor of Victoria

Alzheimer's Disease and Related Disorders Association of Victoria Inc ABN 14 671 840 186

**The charity sector as a stakeholder**

We ask if you could carefully consider all of the options and investigate the potential implications that any changes you recommend may make, as they will undoubtedly have an impact on the charity sector. We would also like the charity sector to be viewed as an important stakeholder in this public consultation process.

We also urge you to consider seeking appropriate further evidence from those individual charities who lodge submissions, including the " Include a Charity "campaign and the Fundraising Institute of Australia.

**Reflecting community expectations**

One of your terms of reference refers to ensuring that Victorian law operates justly, fairly and in accordance with community expectations in relation to the way that property is dealt with after a person dies.

Our experience is that the community expects that a person's charitable beliefs, values and choice about their final gifts should be a matter for personal discretion. Those decisions that are made in sound mind should not be altered or subject to being amended by rulings after that person has passed away and is not able to properly defend their decisions.

All too often there are instances in which a person's final wishes to benefit their few favourite charities through gifts in their will are overturned or ignored. Distributions from the deceased estate, which they had clearly intended to benefit charitable purposes, are often diverted to other individuals who seek to challenge and alter the terms of the testator's will, often on a questionable basis.

All too often charities are witnesses to occasions in which a testator's charitable intentions get re-written or discarded through mediation at a time when they are no longer around to defend their decisions or support the reasonableness of their gifts, hence their wishes are ignored.

**Charities seen as 'soft-targets'**

Many claimants perceive that charities are a 'soft-target' amongst beneficiaries. This view can lead to them being encouraged to lodge applications in cases where they may not have done so if the other beneficiaries are individuals. The sector is mobilising to increase awareness and knowledge amongst the legal profession about the right of charities to defend their status as beneficiaries. We perceive there is a need to re-position charities as rightful beneficiaries, not lesser beneficiaries in the eyes of the law.

We believe that there needs to be ways in which the succession laws can help will-writers get the balance right between drafting wills that permit acceptable levels of testamentary freedom, charitable giving and take full account of family provision law.

Perhaps there could be a requirement for solicitors to gather more robust evidence in defence of including charitable beneficiaries at the point of drafting a will that they deem is likely to be the subject of a family provision application? If solicitors increased the level of supporting evidence they gathered whilst taking instructions for their clients' wills, this may help to illustrate whether the testator turned their mind and carefully considered the circumstances that may become the subject of a future claim or challenge.

**Question FP1 in your consultation paper asks- What factors affect a decision to settle a family provision application rather than proceeding to court hearing?**

As a charity with a clearly defined charitable purpose, we of course acknowledge that family and others that you care about come first. However, we do believe that individuals should be able to

exercise a degree of testamentary freedom that allows them to fulfil any charitable intentions and reflect their own personal values when making decisions about the drafting of their wills.

Under the current legislation and public policy there is the presumption that the deceased will-maker must provide for the proper maintenance and support of persons for whom they had a responsibility to make provision. Victoria's criteria-based approach to eligibility to make family provision application has resulted in an increase in the number of applicants with weak claims, or what you have termed 'opportunistic or non-genuine claims'.

We acknowledge there are many instances when it is only right and fair that a person for whom the deceased had a responsibility to make provision. In these instances charity beneficiaries are likely to come to a swift agreement and settle the matter with minimum legal cost.

However, there are other instances in which it is becoming increasingly apparent that there are opportunistic claims being lodged on the presumption that charity beneficiaries will compromise, irrespective of the strength or validity of the claim and the needs-based assessment.

There are many factors that charities consider when it comes to making a decision to settle a family provision application rather than proceeding to court hearing. Some of these are cost-based decision and others are reputational-based considerations.

In summary we understand that many charities make their decision on the basis of:

- Considering if they have the capacity and knowledge to even consider defending their rights as a named beneficiary
- The projected cost of seeking legal advice and representation
- The strength and validity of the family provision application
- Likelihood of the application being upheld and the outcome of the court's ruling on awarding of costs
- Perceived reputational risks to the charity, irrespective of the validity or strength of the application. A question that most charities are faced with in this matter, 'Is there a possibility that media interest could distort the facts of the case and cast the charity's defence of our rights as a beneficiary in a bad light?

**Statistics relating to Alzheimer's Australia Vic**

Each year we receive gifts from Wills that are probated under Victorian Succession Laws.

Over the last few years an increasing number of Wills in which we have been named as a beneficiary have been challenged under the current family provision legislation (Part IV of the Administration and Probate Act 1958).

As a result of these challenges, the amount distributed from deceased estates to our charity has been reduced by approx 50%. All such challenges have been settled at Mediation with none proceeding to Court due to anticipated financial costs and the delay involved.

**Costs**

We would urge the Commission seek ways in which the Succession Laws could be strengthened in order to deter weak or opportunistic applicants in the first place. We hope that any changes will reduce the costs of charities defending their legitimate rights as beneficiaries and direct the courts to ensure that the costs of the non-genuine claimants are not borne by the estate. We would hope that courts would be encouraged to use their powers to summarily dismiss weak or opportunistic claims at the earliest occasion to prevent excessive legal costs from mounting.

We are of the view that legal costs in both Mediation and Court actions should be borne by unsuccessful applicants and as described and suggested in 2.130 and 2.132.

**Question FP10 in your consultation paper asks- Are there wider purposes or aims that family provision laws should seek to achieve?**

Family provision law may have the effect of generating a sense of entitlement and could be said to discourage self-reliance and encourage reliance on others. We believe that Succession Laws should help individuals draft wills that characterise their family's values and charitable intentions. Laws need to enable an individual's personal beliefs and philanthropic wishes to be better and more fairly reflected in reality.

**Limiting eligibility to make a Family Provision Claim**

On pages 36 to 40 of your Consultation paper starting at 2.106 through to 2.127 we note that considerable comment and options are discussed as to limiting eligibility. Since the 1997 amendments were introduced we are of the opinion based on our experience that many opportunistic claims have been made given the very wide categories of people who can apply. We are of the view that fewer people should be able to apply for family provision and the wishes of the testator be honoured.

As a consequence, we support the comment in 2.106 that the class of applicants should be reassessed as part of the Commission review. We know and understand that it is a difficult area to review as there are always "exceptions to the rule" and situations which involve "unintended consequences" and we would not wish to exclude some people who may fall into such categories from being able to claim. However, if we were asked to record a specific option from those which the Commission puts forward in 2.109 then we would prefer Option 2 (introducing a flexible list of applicants as in New South Wales.)

**Reconciling testamentary freedom, charitable giving and family provision law**

At a time when charities, our communities and Governments are promoting philanthropy and charitable giving as a social norm, how can we reconcile this inherent conflict with family provision laws? How can we promote and facilitate charitable giving that is in-line with succession laws in a 21st Century context?

We believe that the Commission has an opportunity to take a positive stance on charitable giving and promote changes to the current legislation that will result in the charitable intentions of more individuals being better reflected through well-drafted and executed wills.

Please consider seeking further information from the charity sector and engaging with the Include a Charity campaign and the Fundraising Institute of Australia as representatives of charitable beneficiaries.

If you would like to discuss this further you can contact either me or our Bequest Consultant David Bramley. David attended your recent round table discussion meeting and discussed a number of these issues with you and the attendees.

Yours sincerely

[redacted]

Maree McCabe
Chief Executive Officer