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ABN: 171 491 188 65

VIA EMAIL: LAW.REFORM@LAWREFORM.VIC.GOV.AU

FAO: Ms Lindy Smith
Victorian Law Reform Commission
GPO Box 4637
MELBOURNE VIC 3001

Thursday 28th March 2013

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

Dear Ms Smith,

Thank you so much for taking the time to meet with me and my colleagues from the sector earlier this month. It was good to get an insight into the review process and hear from you about some of the drivers behind the consultation.

I am writing to you today on behalf of **Include a Charity**, as one of its volunteer Directors. This letter forms our submission in response to your consultation papers relating to the review of Victoria's Succession Laws.

I would like this submission to be treated as a public submission.

Charitable gifts in wills

Much of the work of Australian charities is only made possible by gifts included in their supporters' wills. In the absence of accurate empirical data, it is estimated that charitable gifts in wills contribute approximately $600m-$800m each year to enable Australian charities to carry out their work. From market research data, we estimate that about 7.5% of Australians include gifts to their favourite charities in their wills.

The Include a Charity campaign

Include a Charity is a not-for-profit membership organisation with 143 Australian member charities with gifts in wills fundraising programs. The main focus of the Include a Charity campaign is to promote charitable giving through wills to the Australian public. Our aim is to make this way of giving to charities a normal cultural practise. We aim to inspire more Australians to include charitable gifts in their wills to help support their favourite charities in the future.

Our specific goals include increasing the proportion of Australians aged over 60 who include charitable gifts in their wills from 7.5% to 12% by 2020. We know that gifts left to charities in Victorian probated wills make a very significant contribution to many charities, both State and nationally-based.

Family comes first

Of course we acknowledge that family and others that you care about or have a duty to provide for 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 and the disposal of their assets.

Victorian gifts in wills

An academic study of charitable gifts in wills contained within Victorian probated wills was conducted by Dr Christopher Baker, a Research Fellow from the Asia-Pacific Centre for Social Investment and Philanthropy at Swinburne University. He analysed 1,700 wills that had been probated in Victoria during 2006 for charitable gifts. His research has confirmed that about 7% of Victorian wills contained an element of charitable giving. You can read more about his research here:

http://www.tasa.org.au/conferences/conferencepapers07/papers/340.pdf

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The current succession laws in Victoria directly affect charitable bequests received by charities not only based and operating in Victoria, but across the country. Charities named as beneficiaries in wills probated under Victorian law could be significantly impacted by any changes that are made to this legislation.

From will-drafting practises, appointment of executors, payment of executor's commission, through to family provision applications, succession laws have the potential to affect the amount of money from deceased estates that is successfully directed towards charitable activities. Succession laws help to decide whether or not Victorian will-makers' true charitable intentions are successfully realised or their final wishes are fulfilled after they have passed away.

Data about challenges to wills

Include a Charity knows from anecdotal feedback from our members that there are an increasing number of instances in which they are being drawn into costly legal issues relating to resolving challenges to their charitable entitlement as named beneficiaries in their supporters' wills.

As part of Include a Charity's work we gather data relating to the income our members receive from gifts in wills. We also gather data about the number and scope of estates in which charities have been named as beneficiaries that have also been the subject of family provision applications.

We are in the process of gathering data relating to their income from gifts in wills that our members received in 2012. We would be happy to share this 2012 data with you when it becomes available in early April.

In the meantime, our figures for 2011 are actually drawn from only 46 charity members. In 2011 those 46 charities collectively received $160,713,782m from charitable gifts in wills. Out of the 46 charities reporting income from gifts in wills, 18 of them (39%) also reported that their entitlement had been adversely affected by family provision applications. Those 18 charities reported 123 instances in 2011 in which their entitlement as named beneficiaries had been adversely affected by family provision claims. Please note that it has not been possible to separate instances which specifically relate to Victorian probated wills as this data was not gathered as part of the process.

There have been a number of academic studies on this subject. Please refer to the links below for further information -

Keeping giving going: charitable bequests and Australians.
Queensland University of Technology, Brisbane, Queensland.
http://eprints.qut.edu.au/27259/1/Keeping_Giving_Going.pdf

Every player wins a prize? Family provision applications and bequests to charity.
The Australian Centre for Philanthropy and Nonprofit Studies, Brisbane, Queensland.
http://eprints.qut.edu.au/28202/1/c28202.pdf

Succession laws impact on charitable giving

The current succession laws impact on charities and we believe that any changes to Victoria's succession laws could affect the charitable gifts that our members receive in the future. It is important that the changes your propose to make permit Victorians to have well-drafted wills that reflect and fulfil their charitable intentions, addresses the volume of opportunistic claims made against estates and reduces their associated costs to charitable beneficiaries.

This will become an increasingly important issue once you take into account 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 including charitable beneficiaries than ever before being probated in Victoria in the future.

Place these statements alongside the fact that we anticipate the greatest transfer of intergenerational wealth that the world has even seen to occur over the next 20 years, there is a great deal at stake. The potential ability for more Victorians to leave the philanthropic footprint that they want for the benefit of future generations is in jeopardy.

The charity sector as an important community stakeholder

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

Please take into account all of the submissions that you receive from charities and their peak bodies. We also urge you to consider seeking appropriate further evidence from those individual charities that lodge submissions, the Include a Charity campaign and the Fundraising Institute of Australia.

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 the tension this often has with family provision laws? How can we promote and facilitate charitable giving that is in-line with succession laws in a 21st Century context?

The message we promote to the public through the Include a Charity campaign is that once they have appropriately provided for those whom they have a responsibility, they should consider including gifts to their favourite charities in their wills. Once their responsibility has been fulfilled, testamentary freedom should hold and their gifts directed in the manner in which they had envisaged and intended.

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

Law to reflect community expectations

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

Our anecdotal 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. Many people are unaware that their final wishes could be altered or 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 and opportunistic basis.

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

Charities often seen as 'soft-targets'

Many claimants perceive that charities are a 'soft-target' amongst potential claimants. This view can lead to them being encouraged to lodge applications in cases where they may not have done so if the beneficiaries were 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, as is often the case when you examine current legal practice and the outcomes of many mediations.

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

Responses to specific questions in consultation paper

FP1 - What factors affect a decision to settle a family provision application rather than proceeding to court hearing?
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 many charities make their decision on the basis of:

- Whether 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 courts ruling on awarding of costs
- The cost to the estate of defending a family provisions claim by the executor, particularly when it is a small estate
- Whether there is an operational need for income in the short term
- Perceived reputational risks to the charity, irrespective of the validity or strength of the application. A question that most charities are faced with in these 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?’

FP3 To what extent does the current law allow applicants to make family provision claims that are opportunistic or non-genuine?
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. We believe that 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 the Commission has 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 and who has a demonstrated financial need, is provided for through an amendment to a testator’s will. In these instances charity beneficiaries are likely to come to a swift and amicable 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.

We would urge the Commission to find ways in which the Succession Laws could be strengthened in order to deter non-genuine or opportunistic applicants making a claim in the first place.

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FP10 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.

FP17 Should there be a legislative presumption that, in family provision proceedings, an unsuccessful applicant will not receive their costs out of the estate?
We believe that the law should state that if a challenge fails then the unsuccessful applicant should pay for all mediation and court costs for the plaintiff and the defendant (the Estate). This would compare favourably to the current situation where the Estate pays for all court and mediation costs no matter whether an applicant is successful or not. Cost orders which pay for the defendant's costs for defending their application diminishes the estate. This is particularly problematic when an application is lodged against a small estate.

We hope that any changes will reduce the costs of charities defending their legitimate rights as beneficiaries, direct the courts to ensure that the costs of the non-genuine claimants are not borne by the estate and encourage the courts to use their powers to summarily dismiss weak or opportunistic claims at the earliest occasion to prevent excessive legal costs from mounting in the first place.

Please further engage with the charity sector
Please seek further information from the charity sector and consider 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 submission further you can contact me [redacted]

Yours sincerely,

[redacted]

Ross Anderson
Volunteer Director
Include a Charity