

FZ/ldb

25 March 2013

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

Dear Ms Smith,

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

I am writing to you today on behalf of The Royal Society for the Prevention of Cruelty to Animals (Victoria) "RSPCA Victoria". 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.

Succession laws impact charitable giving

As a charity we have 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. The current succession laws impact on charities and we believe that any changes to Victoria's succession laws could affect the charitable gifts that we receive in the future. It is important that the changes permit Victorians to fulfil their charitable intentions, addresses the volume of opportunistic claims made against estates and reduce their associated costs.

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 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 stakeholder in this public consultation process.

Please take into account all of the submissions that you receive from charities. We also urge you to consider seeking appropriate further evidence from those individual charities that lodge submissions.

Succession Laws and RSPCA Victoria

RSPCA Victoria is a leader in animal welfare and we are committed to improving the lives of animals in our community. Our staff and volunteers work tirelessly to care for and protect animals across Victoria, guided and inspired by our vision for the future.

RSPCA Victoria is the trusted advocate for animals and leads social change so that all animals live according to the Five Freedoms:

- Free from hunger and thirst.
- Free from discomfort.
- Free from pain, injury and disease.
- Free to express normal behaviour.
- Free from fear and distress.

Changes made to Victoria's Succession Laws could have either a positive or negative impact on the income that is realised from gifts in Wills, and thus the resources that are directed towards fulfilling our mission and reaching our vision.

- In 2011/2012 financial year we received \$6,390,046 in the form of gifts that were included in our Victorian supporters' Wills.
- Each year we receive approximately 140 gifts that are probated under Victorian Succession Laws.
- Over the last 3 years, 16 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 an estimated \$1,300,000.

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 conflict 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 our supporters 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 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 would be shocked to hear 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 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 wills that permit acceptable levels of testamentary freedom, charitable giving and take full account of family provision law.

FP1 - 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, of course we 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.

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 RSPCA Victoria 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 by the charity 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 matters is, 'Is there a possibility that media interest could distort the facts of the case and cast the charity's defence of its rights as a beneficiary in a bad light?'

In the 16 claims made on an Estate in which RSPCA (Victoria) was a residual beneficiary, the categories of complaints were as follows:

- Spouse (3)
- Son / Daughter (4)
- Partner (non defacto) (1)
- Step Daughter / Step Son (2)
- Brother / Sister (1)
- Niece / Nephews (2)
- Neighbours / Friends (3)

A settlement was agreed at or prior to a court ordered mediation on all but one of its claims. For the one claim that proceeded to court, the plaintiff, a step son of the deceased was uninterested in any offers put to him in mediation and made it clear that he would settle for no less than the full estate. The Judge awarded the full Estate to the plaintiff.

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 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.

We cannot comment on this, as costs vary so much from case to case and are not recorded on the database. RSPCA (Victoria) have not had any cases go through the County Court and are aware this is very rare.

The awarding of costs affects the charitable distributions as the Estate incurs more fees, therefore less to distribute but this of course is self explanatory.

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.

There have been two occasions when the RSPCA have not been invited to a mediation or been aware that a Part IV claim had been lodged on an Estate until the matter had been settled. We believe that this would not have been permissible if the residual beneficiary was a person and not a charitable entity. Executors need to be made more aware that charities have rights to all the information of a claim and consultation in any settlement offers.

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.

If you would like to discuss this submission further you can contact Fiona Zafirakos, Corporate Affairs Manager [REDACTED] or Lindsey De Bartolo, Corporate Affairs Assistant [REDACTED]
[REDACTED]

Yours sincerely,

Maria Mercurio
Chief Executive Officer
RSPCA Victoria