2 January 2013

The Hon Philip Cummins
Chair
Victorian Law Reform Commission
GPO Box 4637
MELBOURNE VIC 3001

Dear Mr Cummins

Succession Laws – Family Provision

I wish to make a short submission in relation to the Commission's Term of Reference relating to family provision under Part IV of the *Administration and Probate Act 1958.*

My submission is based on:

- My personal views of the law as it currently stands, and
- My experience as a mediator in several family provision disputes.

The current law

Section 91 of the Administration and Probate Act is very broadly expressed. It enables the Court to order that *provision be made out of the estate of a deceased person for the proper maintenance and support of a person for whom the deceased had responsibility to make provision.*

This responsibility is sometimes referred to a moral duty to make provision for applicants or further provision for particular beneficiaries based on the generally expressed criteria set out in section 91.

The examples of cases cited in paragraphs 2.17 to 2.19 of the Discussion Paper indicate how much this new provision differs from the previous, far clearer law which allowed provision to be made only for certain relatives and dependants of the deceased.

In my opinion, the current law goes too far in interfering with a will maker's long established right to leave his or her estate according to his or her wishes (with limited and well justified exceptions).

In support of that primary submission, it seems to me that the law requires judges (in cases which reach a judicial determination) to decide moral (rather than quantifiable legal) claims on an estate which can be made by a potentially wide range of applicants. The judges must do so without the benefit of any explanation from the will maker of his or her reasons for the provisions made in the will.

As a result, the current law comes very close to requiring judges to rewrite or least significantly amend the deceased's will. It is difficult to think of another area of the law where property rights or entitlements (both of the will maker and his or her specified beneficiaries) are able to be so significantly affected on such general considerations as *responsibility to make provision* and *moral duty*.

Finally, the current law must leave many will makers with grave and troubling concern that:

- The provisions they have made for the distribution of their estate will not be implemented as they wish
- Persons whom they have for their own good reasons chosen not to include in their will may take a benefit from their estate to the detriment of their chosen beneficiaries
- The administration of their estate may be delayed by legal proceedings, and
- The value of their estate may be depleted by legal costs.

Accordingly, I submit:

- The current law goes too far in interfering with freedom of testation
- The purpose of family provision legislation should be to protect a limited range of applicants (comprising spouses and dependants or at least a considerably narrower range of claimants than permitted under the present law) not just to prevent them from becoming dependent on the state but also to respect the will maker's wishes as much as reasonably possible
- Consequently, section 91 of the Administration and Probate Act should be significantly tightened (possibly along the lines of the New south Wales legislation) as to the applicants who may apply under Part IV of the Act and the basis for a successful application should be more limited and more precisely defined by relationship, dependence and need, and
- The current law definitely should not be extended even further to interfere with a person's entitlement to deal with their assets as they see fit during their lifetime, even if that dealing has the effect of reducing their estate.

Experience in mediations

The Commission has been told that a high proportion (up to 95%) of family provision matters settle (see paragraph 2.4 of the Discussion Paper). My experience as a mediator is that most Part IV cases in which I was involved settled at mediation.

It follows that much of the commentary in the Discussion Paper about the cost rules that apply to judicially determined claims misses the point. Most cases do not get to that stage and the legal costs of the claim come out of the estate one way or another.

The executor's costs are taken out of the estate and, most commonly, the applicant takes his or her costs into account in determining what settlement to accept.

In many instances, the costs of a judicially decided claim would significantly deplete an estate. So the costs incurred up to the mediation and the potential costs of pursuing the claim to a court decision are a great incentive for settlement, irrespective of the merit (or lack of merit) of the claim on the estate.

As a result, Part IV proceedings are free from the risk of an adverse cost order for many, if not most, applicants.

The fact that most Part IV cases settle also means that the reforms introduced in the *Civil Procedure Act 2010* are of little effect in dissuading opportunistic and dubious claims as there is little likelihood that the claim will be determined by a judge.

It may be possible to increase the number of applications to have a claim that *has no real prospect of success* dealt with by a judge under section 63 of the Civil Procedure Act.

However, it appears that applications for summary judgment in Part IV cases have so far had very limited success. In this regard, I refer you to a presentation made by Barrister Jeremy Smith entitled *Summary Judgment in Part IV Claims* delivered at the Law Institute of Victoria on 8 November 2012.

Mr Smith's analysis of recent Part IV summary judgment cases does not suggest that many claims will be finally dealt in this way while section 91 remains in its present form and, of course, the summary judgment application itself will add to the costs to be borne by the estate.

Therefore, I submit:

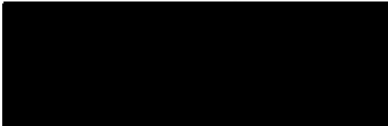
- There is considerable pressure to settle Part IV claims without a judicial determination to avoid legal costs depleting an estate

- Dubious or unmeritorious claimants are not deterred by the threat of a cost order being made against them as most matters settle and costs are borne by the estate

- The reforms set out in the Civil Procedure Act are unlikely to deter unmeritorious applications if the strong likelihood is that the matter will not be judicially determined, and

- There will be only a very limited possibility of obtaining summary judgment and cost orders in unmeritorious applications while the range of applicants and the breadth of the criteria under which their applications are assessed remain as broad as they are at present.

Yours sincerely



Robert Cornall AO