

FUNDRAISING INSTITUTE AUSTRALIA

**SUBMISSION IN RESPONSE TO
THE VICTORIAN LAW REFORM COMMISSION CONSULTATION PAPER:
SUCCESSION LAWS: WILLS**

SUBMISSION COVER SHEET

Organisation:	Fundraising Institute Australia (FIA)		
Street address:	Level 2, 60 Archer Street		
Suburb/City:	CHATSWOOD	State & Code:	NSW 2067
Postal address:	PO Box 642		
Suburb/City:	CHATSWOOD	State & Postcode:	NSW 2057
Principal contact:	Mr Rob Edwards		
Position:	Chief Executive Officer		
Phone:	02 9411 6644		
Fax:	02 9411 6655		
Email address:	redwards@fia.org.au		

FUNDRAISING INSTITUTE AUSTRALIA

SUBMISSION IN RESPONSE TO THE VICTORIAN LAW REFORM COMMISSION CONSULTATION PAPER: SUCCESSION LAWS: WILLS

ABOUT FUNDRAISING INSTITUTE AUSTRALIA (FIA)

Established in 1968, FIA's purpose is to make the world a better place by advancing professional fundraising through promotion of standards, professional development pathways and measurable credentials so that our members achieve best practice.

The FIA has developed the Principles & Standards of Fundraising Practice as the professional fundraiser's guide to ethical, accountable and transparent fundraising. The Principles & Standards are vital to how the fundraising profession is viewed by donors, government, the community and fundraisers. They have been adopted in Korea, Poland and New Zealand.

In order to achieve its mission, FIA conducts the following activities:

- Promote and enhance education, training and professional development of fundraisers.
- Provide a resource of fundraising information.
- Advocate for fundraising practice to Government, industry and the community.
- Support and promote certification of fundraisers.
- Develop standards and codes of practice.
- Promote and enhance fundraising as a profession.
- Promote and encourage research into fundraising and philanthropic giving.

Executive Summary

As FIA does not provide legal advice, it will not address the technical legal questions concerning the making of wills contained in this paper. However, FIA considers it appropriate to answer Question W6 – *Should guidelines be provided for professionals who make wills in Victoria dealing with how to minimise the incidence of undue influence on older and vulnerable will-makers? If so, what should those guidelines contain?*

FIA's response is: Yes, guidelines should be provided. FIA's Standard of Bequest Fundraising Practice provides an ethical and professional guideline for fundraisers and lawyers involved in facilitating bequests for charities. The Standard of Bequests Fundraising Practice was written with the aim of facilitating charitable bequests while maintaining ethical and professional best practice.

Since the Standard of Bequest Fundraising Practice was implemented in 2009, FIA has received no complaints about the conduct of fundraisers in relation to seeking bequests, which indicates that the Standard is working well.

In this response, FIA comments on the Standard in detail and also discuss recent research into charitable bequests which shows that such bequests have a high level of public acceptance.

FIA Standard of Bequest Fundraising Practice

FUNDRAISING INSTITUTE AUSTRALIA

SUBMISSION IN RESPONSE TO THE VICTORIAN LAW REFORM COMMISSION CONSULTATION PAPER: SUCCESSION LAWS: WILLS

FIA has considered the role of solicitors and charities in facilitating bequests. It has consulted widely with its members and created the Standard of Bequests Fundraising Practice, which all FIA members are required to comply with. It can be found at this link: http://www.fia.org.au/data/documents/Resources/Principles_Standards/Standard_of_Bequest_Fundraising_Practice.pdf

The Standard is designed to be read in conjunction with relevant State or Territory legislation and draws this to the attention of FIA members in the preamble.

The Standard covers the following:

- Setting up a Bequest Program
- Promotional Materials
- Bequests in Wills
- Organisational Identification
- Professional Conduct
- Information Disclosure
- Compliance and Complaint Management

A model bequest clause is included in Appendix 2 of the Standard. It is provided for guidance only and is not a substitute for legal advice.

Importantly, section 6.1 of the Standard specifically addresses the issue of undue influence as follows:

A Fundraiser must ensure that:

- a) the Fundraiser maintains an appropriate arm's length relationship with the Donor in connection with any Bequest or proposed Bequest;
- b) a Donor is not subjected to undue influence, harassment, intimidation or coercion when approached by the Fundraiser or person under the direction of a Fundraiser for the granting of a Bequest;
- c) a Donor is not prevented or discouraged by the Fundraiser from seeking independent legal advice in relation to a Bequest;
- d) written acknowledgement and receipt of a Bequest is provided to a Donor's executor or legal personal representative; and
- e) where a Bequest is a specific Bequest, a Donor's executor or legal personal representative is informed of how the Organisation intends to use that Bequest.

- 6.2 For the purposes of section 6.1b, 'undue influence' includes any improper conduct by a Fundraiser which has the effect of influencing a Donor to make a Bequest or sign any legal document which the Donor otherwise would not do.

FUNDRAISING INSTITUTE AUSTRALIA

SUBMISSION IN RESPONSE TO THE VICTORIAN LAW REFORM COMMISSION CONSULTATION PAPER: SUCCESSION LAWS: WILLS

The definition of 'undue influence' in section 6.2 is based on the common law definition.

Section 6.3 describes requests by a donor that a fundraiser must comply with in relation to soliciting bequests. These include :

- a) refuse to make a Bequest;
- b) limit the frequency of solicitations by the Fundraiser to the Donor;
- c) not be solicited by mail, telephone, facsimile, email, text messages or other technology;
- d) not receive personal visits;
- e) not receive printed material concerning an Organisation;
- f) have a family member or legal personal representative present;
- g) obtain independent legal advice;
- h) exclude any form of public recognition for their Bequest if they choose to remain anonymous.

Fundraisers are prohibited from the following conduct:

- acting as an executor of the will or suggesting members or employees of their organisation to act as an executor. This was a major reform in fundraising practice (section 6.4)
- using personal or commercial considerations in soliciting bequests (section 6.5)
- deriving a personal benefit (section 6.6)
- accepting a personal benefit (section 6.7)
- offer to financially compensate a donor for drawing of the will (section 6.8)

The Standard also covers the relationship between fundraisers and legal practitioners to ensure that donors are able to make independent and informed decisions about bequests.

These measures include:

- A Fundraiser may compensate a legal practitioner for the preparation of the will of a Donor provided that the Fundraiser discloses this fact in writing to the Donor before compensation is paid and the will is drafted. This section does not replace the need for a Donor to obtain independent legal advice if they so choose (section 6.9)
- A Fundraiser may provide a Donor with a list of legal practitioners who provide legal services in connection with wills and Bequests, provided that the Fundraiser does not endorse the services of a particular law firm. The Fundraiser may obtain such a list from the relevant State or regional Law Society or other appropriate organisation. This section does not replace the need for a Donor to obtain independent legal advice if they so choose (section 6.10)

FUNDRAISING INSTITUTE AUSTRALIA

SUBMISSION IN RESPONSE TO THE VICTORIAN LAW REFORM COMMISSION CONSULTATION PAPER: SUCCESSION LAWS: WILLS

- A Fundraiser may organise a will drafting service for potential Donors or organise a Fundraising Activity with the purpose of encouraging potential Donors to draft and sign wills which include Bequests provided that the Fundraiser and the Organisation inform Donors in writing that Donors may obtain independent legal advice and have no obligation to make a Bequest to the Organisation hosting the Fundraising Activity or finalise their will at the Fundraising Activity (section 6.11)

Any breach of section 6 by a Fundraiser constitutes Professional Misconduct if a complaint is made to FIA. As stated in the executive summary, FIA has received no complaints in any state or territory concerning bequests.

FIA is of the opinion that if fundraisers comply with the Standard, they will be complying with best practice and need no further regulation. FIA urges the Victorian government to endorse FIA's Standard of Bequest Fundraising Practice as a best practice guideline for all fundraisers (not only FIA members, who must comply).

BEQUESTS AND CHARITIES: RESEARCH FINDINGS

The best and most recent research on donors and bequests is the 2008 study by Dr Kim Madden and Dr Wendy Scaife, *Keeping Giving Going: Charitable Bequests and Australians* (2008, Australian Centre for Philanthropy and Nonprofit Studies, QUT). While that study did not examine the effect of undue influence on bequests, it clearly identified why donors leave bequests to particular charities and how much they are inclined to donate. Their findings show that bequestors are well informed donors who like to engage while living with the charities they have made bequests to. They want to make bequests to fulfil their personal goals of philanthropy and helping those in need.

Bequestors donate to charities because they have philanthropic inclinations and see charities as a way for them to express those inclinations. They prefer charities that have an excellent reputation, a high proportion of income going to the cause, and that are well managed. This indicates that bequestors understand their reasons for making a bequest and ensure their requirements for charity selection are met before doing so (Madden and Scaife, p 61)

Bequestors appreciated receiving communications from their selected charity, so they could be assured that their contribution to the cause would be valued (ibid, p 62) Bequestors are inclined to donate higher amounts to charity than other donors. They felt that charitable bequests form a useful function in society and their bequests meant that they were helping those in need.

The typical bequestor feels that their family was well provided for or had no family and is more inclined to make a bequest to a charity that has helped them. Non bequestors are likely to entertain the idea of a bequest, provided that they can find a charity they would like to support and they can afford it (ibid, p 63). The study found a high motivation for making bequests among both bequestors and non bequestors, with only a quarter of non bequestors ruling out bequests.

FUNDRAISING INSTITUTE AUSTRALIA

SUBMISSION IN RESPONSE TO THE VICTORIAN LAW REFORM COMMISSION CONSULTATION PAPER: SUCCESSION LAWS: WILLS

Interestingly, bequestors reported that the act of making a will and needing to see a solicitor was a barrier to will making and hence bequest making (ibid p 63). This indicates that more people may be likely to make bequests if will making was facilitated in some way. FIA has addressed this in sections 6.9, 6.10 and 6.11 of the Standard of Bequest Fundraising Practice. FIA recognises the importance of facilitating will making with ensuring that bequestors are able to obtain independent legal advice and avoid feeling pressured to make a particular bequest.

In Victoria, most bequests are modest. Those with estates less than \$500,000 left a higher proportion (1.81%) of their estates to charity than wealthier bequestors with estates over \$2 million (1.34%). (ibid, p 11 citing Baker's 2007 study)

These results show that bequestors want to give money through their wills to charity for philanthropic reasons and their wishes should be upheld, rather than treated with suspicion.

Practical guidelines for solicitation and handling of bequests, such as FIA's Standard of Bequest Fundraising Practice, meet the need of bequestors to fulfil their philanthropic intentions through bequests, the need of charities to receive bequests to further their work and the need of stakeholders including beneficiaries to ensure that the making of such bequests is fair and in fulfilment of the bequestor's intentions.