NORTHERN TERRITORY LAW REFORM COMMITTEE:

REPORT ON UNIFORM SUCCESSION LAWS

A REVIEW OF THE RECOMMENDATIONS OF THE NATIONAL COMMITTEE FOR UNIFORM SUCCESSION LAWS AND DRAFT BILLS ON INTESTACY AND FAMILY PROVISION

Report No.31 – September 2007

MEMBERS OF THE NORTHERN TERRITORY LAW REFORM COMMITTEE

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TABLE OF CONTENTS

TERMS OF REFERENCE

The Northern Territory Law Reform Committee (NTLRC) is asked to investigate and report to the Northern Territory Attorney-General on the reports submitted by the National Committee on Uniform Succession Laws to the Standing Committee of Attorneys-General on:

- Family Provision; and
- Intestacy

with a view to reporting back to the Northern Territory Attorney-General on the model laws, their suitability for adoption in the Northern Territory, any steps that would need to be taken to allow for their adoption, and any other issues surrounding them.

INTRODUCTION

The question of succession to property on the death of the owner presents society (i.e. the State) with two competing and disparate principles, both, in themselves, commendable.

The first is the generally accepted view that, as citizens have the right, during their lifetime, and within the bounds of legality, to deal with their property as they choose, so that right should continue on death. The testator's wishes, expressed in a properly executed will, should be carried out. The dead may have no vote but the living can make sure that a testator governs from the grave, because that is exactly what they want for themselves.

The philosophy is plainly and tersely expressed by Petruchio:- "I will be master of what is my own".[1]

A small group of dour rationalists have argued through the ages, and with little success, that beneficiaries should not get a head start over equally virtuous citizens. All property should revert to the State on the death of the owner, so that the State may apply it for the general good. Regrettably, the average Australian seems to think that he knows better than the State what to do with his assets[2], and, even worse, entertains unworthy thoughts that the capacity of a government bureaucracy to deal with a citizen's assets is limited to expanding the capacity of a government bureaucracy.[3]

For many years the State chose a middle course – allowing the testator freedom of distribution but abstracting a substantial slab of the proposed distribution by way of death or inheritance taxes. This happy compromise was thwarted by a controversial Queensland

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[1] Taming of the Shrew – Act 3, Scene 2. In fact Petruchio is here being extremely chauvinistic, since the rest of his speech makes it clear that he is including his wife as part of that property which he claims as his own. "Autres temps, autres moeurs".

[2] Usually, of course, to the family. In splendid verse, Mary Gilmore acknowledges the argument for common sharing but knows that the emotional tie will prevail.

> "*All men at God's round table sit.*
> *And all men must be fed.*
> *But this loaf in my hand,*
> *This loaf is my son's bread."*

[3] In ruder terms an average Australian would express his views more succinctly in language similar to that used by Trinculo, the first time he speaks in Act IV Scene 1 in "The Tempest".

Premier who abolished such impositions in his State. This was, at first, considered by other State governments as a local and hazardous eccentricity, until an alarming number of their own citizens (with their assets), started to decamp for the pleasures of the Queensland Gold and Sunshine coasts, now further enhanced by the prospect of unencumbered testamentary disposition. Rather hastily, the other State and Territory governments fell into line, as did, eventually, the Federal Government. State rivalry may be one of the unexpected advantages of the Federal system.

But to allow unfettered freedom of testamentary distribution conflicts with the second principle of fairness and justice. Testators can be forgetful, capricious or malicious. Should they thereby be permitted to ignore persons towards whom they had a clear moral obligation by reason of dependency, obligation or relationship? The classic case is the dutiful daughter giving up youth, marriage and career to look after the aged parents who leave her destitute; but that is just one example of many. Should the law step in to convert the moral obligation to a legal one?

Those adhering strongly to the principle of total freedom of disposition acknowledged that hardship might sometimes occur but felt that the cure would be worse than the disease. If a testator could, in the well-worn phrase "cut his son off with a shilling", well that was bad luck for the son; but the alternative of the son and hordes of other relations having the right to make claims upon the estate could be disastrous for the estate. Furthermore, as the conservatives pointed out, there were already acceptable legal remedies. Those left bereft might claim that the testator was "not of sound mind, memory or understanding" at the time of the execution of the will, or that the will had been executed while the testator was under the "undue influence" of some other persons. But legal proceedings of this nature were fraught with difficulty and uncertainty.

If was left to the more enlightened Dominions to redress the balance. Pioneered by New Zealand in 1900 and followed by the Australian States and Canada, measures were enacted that allowed the courts, within certain defined limits, to make provision, or further provision, out of the estate of a testator for persons whose claims should in fairness or justice be recognised.[4]

[4] Which would include "John Vavasour de Quentin Jones" in the poem by Hilaire Belloc. This young lad's unfortunate tendency for throwing stones, one of which struck his aged uncle, caused that indignant and exceedingly wealthy relative to strike his nephew out of his will and leave everything to

Originally these provisions applied only to the testator's "family" as variously defined, and this intent was reflected in the designation of the statutes by terms such as, "Family Provision Act" or "Testator's Family Maintenance Act". But, in accordance with changing social mores, the class of those who could claim was gradually widened, to include, for instance, those in a de facto relationship; while in some jurisdictions that class is now extended to any person the court might consider has a fair and equitable claim on the testator for some form of maintenance or support. There is nothing surprising in this; once a court is given the power, in certain specified cases, to override the testator's discretion and impose its own discretion in accordance with broad principles of equity, it becomes difficult to argue that such principles should be restricted only to some specified cases and not to others. Non-relatives, for instance, may often be more deserving of, and dependent on, the testator's bounty than relatives.

The old privilege of almost unfettered testamentary discretion has thus been limited to a much narrower field. Within that field the testator may still leave what he likes to whom he likes provided he does not neglect those beneficiaries whom the laws will impose upon him if he does neglect them.

The same rules apply to intestacy where, in effect, the law provides a blueprint of succession upon which a notional will is constructed. Such an instrument is equally adjustable by the court if a proper claim can be made under the Inheritance Provision Acts.

This statutory encroachment on both testate and intestate estates bears some similarity to the actions of the Chancellor in earlier times, when he stepped in to prevent a person enjoying a legal right if the exercise of that right would result in an unjust, even if legally correct, situation. So, the present statutes control disposition either by will or intestacy if that disposition creates an injustice to any individual whose connection by relationship or dependency should be recognised.[5]

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his nurse "Miss Charming" "who now resides in Portman Square, and is accepted everywhere". No doubt an appropriate "TFM" application would these days restore to John, apparently the only surviving relative, some portion of the estate lost by petraphilia.

[5] Some limited State control over testamentary disposition was recognised in earlier times. Holdsworth – H.E.L. – vol 3 at 550 tells us that it is "probable that in the days of Glanville and Bracton a man who had a wife and children could not leave all his chattels by will. The wife and children had certain rights to the property of which he could not deprive them".

As the various Australian Colonies attained self-government, they all separately enacted laws governing the form of wills and the administration of a deceased's estate, and specifying the method of division on intestacy.[6] In the 20th century the Colonies (now States) enacted various forms of Family Protection Acts, similar in general approach, but differing in detail from the original New Zealand model. Likewise, in the fourth quarter of the twentieth century, when the Territories attained self-government they, too, proceeded with legislation relating to the various forms of succession recognised in the States.

The result has been that while the legislation in the States and Territories clearly originates from mutually agreed principles it differs in local detail.[7] This becomes increasingly inconvenient in a nation where freedom of movement throughout the continent is accepted as the unchallenged and unchallengeable right of any Australian citizen. Large numbers of citizens move from one part of the country to another and the tide increases every year. It becomes incongruous and clumsy to find that if a person has acquired real or personal property, transitory or permanent, in various parts of the country, his estate will be subject to different rules from different regimes.

The position is summarised in the Report of the Queensland Law Reform Commission to the Standing Committee of Attorneys General.

"Among the States and Territories there are numerous significant differences in the law of wills. In intestacy, the rights of a surviving spouse vary greatly from jurisdiction to jurisdiction. In family provision schemes, qualification to apply for provision is far from uniform as are also the grounds on which the Courts in different jurisdictions may order that provision be made. In the administration of deceased estates, there is a lack of uniformity in the law relating to devolution of title and the payment of debts from assets, and uncertainty with respect to interstate recognition of grants of probate".[8]

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[6] The common ancestor of these laws was the *United Kingdom Wills Act 1837* adopted by the South Australian Parliament in 1842 and hence imported into the Northern Territory in 1863 when South Australia annexed the Territory.

[7] Fullagar J in Coates V National trustees (1956) 95 CLR at 517 commenting on the various State laws of the Inheritance Family Provision type:- "It is, perhaps, unfortunate that each successive draftsman has thought he could do a little better than any of his predecessors."

[8] Miscellaneous Paper 28 – December 1997 p (ii)

It was as a result of these problems that in 1991 the Standing Committee of Attorneys General (SCAG) advocated the development of uniform succession laws for the whole of Australia.

Subsequently, the National Committee for Uniform Succession Laws was constituted. The Committee is comprised of representatives from State and Territory law reform agencies and experts in succession laws. The Committee has itself produced a series of reports on succession laws and has also generated separate reports from law reform agencies on the same theme.

What is ultimately contemplated is far greater uniformity in the laws of succession throughout Australia. Full unanimity is unlikely, because a particular State or Territory may be so convinced of the importance of its own local variation that it feels it should not yield to uniformity in this particular point.

In December 1997 the Standing Committee presented, to SCAG, its report on the law of wills.[9]

The Report contained a draft Wills Bill (the Uniform Wills Bill 1997) and a commentary on the provisions contained in the draft.

In February 1999 the Northern Territory Law Reform Committee (NTLRC) reported to the Northern Territory Attorney-General on the Draft Wills Bill.[10]

The Standing Committee has now produced a Report to SCAG on Family Provision [11] and a further Report on Intestacy.[12]

The Attorney-General of the Northern Territory (the Hon Syd Stirling) has by letter of 14 August 2007 requested the NTLRC to examine the National Committee's Family Provision Report and to make a similar examination and report concerning the National Committee's

[9] Consolidated Report to the SCAG on the Law of Wills – December 1997.

[10] Report No. 19 – February 1999 – LRCNT.

[11] Queensland Law Reform Commission – Miscellaneous Paper 28 – December 1997 – Supplementary Report – Queensland LRC – report No. 58 – July 2004.

[12] National Committee for Uniform Succession Laws – report to SCAG – March 2007.

Report on intestacy when that became available. In fact, this latter Report became available, shortly after the date of the Attorney-General's letter.

Consequently the NTLRC has examined both Reports of the National Committee, and now presents its observations and recommendations to the Attorney-General.

In preparing these Reports the NRLRC constituted two sub-committees, one on Intestacy and one on Family Provision.

For the membership of these sub-committees the NTLRC called on the help of lawyers with a special interest and expertise in these areas.

Apart from members of the NTLRC, the following persons gave assistance on the sub-committees.

Intestacy Sub-Committee

Peter Shoyer	NT Registrar General
Robert Bradshaw	Director of Legal Policy and NT representative on the National Committee for Uniform Succession Laws.
Paul Maher	Practitioner with special knowledge of succession laws.

Family Provision Sub-Committee

Gail Fleay	NT Public Trustee
Carolyn Walters	Practitioner with special knowledge of succession laws.

The Law Reform Committee expresses its gratitude to these people who generously gave of their time and expert knowledge in these matters.

Essentially, both sub-committees approved the draft bills prepared by the National Committee. Both sub-committees took the view that, so far as possible, uniformity in State or Territory legislation was desirable. Hence minor variations between the local (NT) statute and the Model Act were usually resolved in favour of the Model Act, even if it were thought that the local provision was slightly better expressed.

The reports and recommendations of the two sub-committees were subsequently endorsed by the general Committee of the NTLRC.

In the Northern Territory, and presumably in Queensland and Western Australia, the problem of succession laws applying to Indigenous peoples becomes acute. Clearly enough, if such people adhere to the old customs, there is really no place for the detailed rules provided for intestacy or family provision. In many cases goods are held in common or the duty to provide for children or the elderly is regarded as an obligation for the whole tribe. Anthropologists can point to rules of inheritance differing from district to district.

A pragmatic approach is appropriate, such as that presently obtaining in the Northern Territory where the Public Trustee has wide discretion to deal with distribution of deceased's assets if any dispute arises, but otherwise leaves it to the members of the community to administer according to the accepted local rules.

Of course, such local rules will not apply to Indigenous families who have been assimilated into the wider community and who will expect that their estates will be subject to the same rules as for any other persons in the wider community.

The NTLRC therefore now reports to the Hon. the Attorney-General on the matters requested by him in the letter of 14 March 2007.

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PRESIDENT

NATIONAL COMMITTEE FOR
UNIFORM SUCCESSION LAWS

REPORT ON INTESTACY

Preface

Intestacy occurs where a deceased person has failed to execute a will or execute a will that disposes of some or all of his or her property. A deceased person who has died in intestacy is referred to as 'intestate'. Legislative regimes (known as intestate succession) establish rules of distribution in cases of intestacy.

Generally, the rules of distribution on intestacy attempt to apply the community's views on what should be done with the estate of a person who has died intestate. One objective is to produce the same results as would have been achieved if the intestate had the foresight, the opportunity, the inclination or the ability to produce a will.

The rules of intestate succession acknowledge the needs of family members only at the most general level.

An important issue to be considered in intestate succession is the need to balance the competing requirements of the surviving spouse or partner and the issue of the intestate. However, the rules of distribution cannot always meet the needs of family members on the individual level. In this regard an important interrelationship is created between the rules of distribution on intestacy and family provision regimes.[13]

Legislation for the distribution of property in cases of intestacy exists in each Australian State and Territory. The relevant legislation in the Northern Territory which administers intestate succession is the *Administration and Probate Act* (NT).[14]

In 1991 the Standing Committee of Attorneys-General[15] decided to establish the National

[13] Legislative regimes for family provision orders exist in all Australian States and Territories. The relevant legislation in the Northern Territory is the *Family Provisions Act* (NT).

[14] Generally, Northern Territory intestacy provisions are located at Part III, Division 4 of the *Administration and Probate Act* (NT).

Committee on Uniform Succession Laws to consider the enactment of uniform succession laws in Australian States and Territories. The National Committee is comprised of representatives from State and Territory law reform agencies and experts in succession laws. The Queensland Reform Committee coordinated the work of the National Committee at the request of the Queensland Attorney-General.

The National Committee submitted its Report on Intestacy in March 2007.[16] After considering existing state and Territory laws, discussions on law reform and other various options, the National Committee made a total of 47 recommendations outlined in its Report.

Generally, the National Committee Report on Intestacy relates to and makes recommendations on the following issues:

- Identifying and general treatment of spouses and partners (including domestic partners).

- Property distribution where the spouse or the partner survives the intestate. The Report looks at several scenarios – for example where the spouse or the partner, but no issues survive; and where both the spouse or the partner and the issue survive.

- Receipt by the surviving spouse or partner of the intestate's personal chattels, statutory legacy and a share of the remainder of the estate.

- Election by the surviving spouse or partner to obtain any property from the intestate's estate.

- Distribution of property where the intestate is survived by more than one spouse or partner.

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[15]The Standing Committee of Attorneys General comprises of the Attorneys-General from the Commonwealth and from the States and Territories. The Committee is often referred to by its acronym "SCAG".

[16] The National Committee for Uniform Succession Laws, *Intestacy: Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, March 1997).

- Consideration of the parent-child relationship in order to determine distribution of the intestate's estate to the children of the intestate and the descendants of those children. Identifying and dealing with the parent-child relationship are also considered, including the position of unborn children, step-children, and children adopted by a step-parent.

- Distribution to the relatives of the intestate other than the spouse or partner. In particular, whether the rules of distribution for people belonging to a group entitled to the property should be by distribution *per stirpes* or *per capita*.

- General order of distribution and the limit for distribution.

- Cases where the intestate is survived only by relatives who are more remote than first cousins.

- Implementation of a survivorship period and applying the survivorship period to children conceived but born after the intestate's death.

- Whether a person's share of an estate should immediately vest without the need for that person to turn 18 years old or marry.

- The requirement for a scheme where a person must account for any benefits received from the deceased before death or in the will (in the case of partial intestacy).

- Circumstances where it would be appropriate for the general law to apply without qualification in cases where an indigenous person dies intestate.[17]

- Necessity for some miscellaneous provisions including provisions that define 'intestacy', provisions that relate to beneficially interested personal representatives, construing references to statutes of distribution, heirs and next of kin, and the abolishment of courtesy and the right of dower.

[17] The NT, along with Queensland and Western Australia, has a separate regime for distributing the estate of an indigenous person who has died intestate, but only where the intestate has not entered into a valid marriage for the purposes of the *Marriage Act 1961* (Cth). Indigenous customary marriages are recognised in intestacy under section 6(4) of the *Administration and Probate Act* (NT). Part III, Division 4 of the *Administration and Probate Act* (NT).

The 47 Recommendations of the National Committee have been incorporated into a draft Intestacy Bill *2007.*[18]

[18] The *Intestacy Bill 2007* is attached as appendix A to the Intestacy Report of the National Committee for Uniform Succession Laws, *Intestacy: Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, March 1997) ("the National Committee Intestacy Report"). It is also worth noting that the *Intestacy Bill 2007* was drafted by Northern Territory Parliamentary Counsel, Mr Geoff Hackett-Jones QC.

Commentary on the Recommendations of the National Committee and the Intestacy Bill

The Northern Territory Law Reform Committee ("the Committee") has considered the recommendations of the National Committee and the draft Intestacy Bill 2007; and provides the comments which follow.

Distribution of the estate of indigenous persons who have died in intestacy

In considering the recommendations of the National Committee and the draft Intestacy Bill 2007, the Committee has given particular attention to the National Committee's recommendation on intestacy provisions for indigenous people.

The Northern Territory is one of few Australian jurisdictions which make specific legislative provision for indigenous persons in rules for distribution in intestacy (Queensland and Western Australia also make provision for indigenous persons). Part 3, Division 4A of the *Administration of Probate Act* (NT) establishes a separate regime for the distribution of the estate of an indigenous person who has died intestate where that person has not entered into a valid marriage for the purposes of the *Marriage Act* (Cth). [19]

The Committee notes that the National Committee endorsed the Northern Territory approach in creating special provisions in the *Administration and Probate Act* (NT) for indigenous persons who have died intestate. [20] Recommendation 45 of the National Committee relates to indigenous persons who have died intestate.

The Committee, through the 'Northern Territory Law Reform Committee - Committee of Inquiry into Aboriginal Customary Law', has previously recognised that there is now wider

[19] The Australian Law Reform Commission has previously recognised that the Northern Territory has gone further than any other jurisdiction in its intestacy legislation to establish a mechanism for a 'traditional distribution of property' - Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 229.

[20] The National Committee Intestacy Report at 244.

recognition that customary law become, in some way, part of the general law in Australia.[21] Recommendation 11 of the Report of the Committee of Inquiry into Aboriginal Customary Law stated:

> ***"Recommendation 11:Aboriginal customary law as a source of law.***
>
> *The Northern Territory Statehood Conference resolution that Aboriginal customary law be recognised as a "source of law" should be implemented."*[22]

In traditional societies customary laws will govern who should keep sacred objects previously in the custody of a deceased person. Customary rules will also govern the giving of gifts and obligations under kinship. These customary rules of distribution will affect non-indigenous ideas on priority of claims and narrow concepts of kin. [23]

The Law reform Commission of Western Australia in its Final Report on Customary Laws, acknowledged that relevant customary laws are still practised in Western Australia for distribution of property upon death.[24] The Northern Territory situation is likely to be similar to that found in Western Australia with regard to the use of customary laws.

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[21] Northern Territory Law Reform Committee oversaw the publication of the Report of the Committee of Inquiry into Aboriginal Customary Law - Committee of Inquiry into Aboriginal Customary Law, *Report on Aboriginal Customary Law* (Report No.28. 30 June 2003).

[22] Committee of Inquiry into Aboriginal Customary Law - Committee of Inquiry into Aboriginal Customary Law, *Report on Aboriginal Customary Law* (Report No.28. 30 June 2003) Main Report at page 38.

[23] Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1, 224 – 232.

[24] Law Reform Commission of Western Australia, *Aboriginal Customary Laws. Final Report. The Interaction of Western Australian Law with Aboriginal law and culture.* (Project No. 94, September 2006) at 223.

Recommendation 1:

A domestic partnership (or equivalent) should be one recognised as such under the relevant law of the jurisdiction if:

a) It has been in existence for two years;
b) A child has been born to the relationship; or
c) It has been registered under the law of the jurisdiction that deals with the registration of domestic partnerships.

The Committee accepts Recommendation 1 of the National Committee.[25]

However, while the Committee accepts Recommendation 1, it also notes that the process of determining whether the intestate was in a de facto relationship may be burdensome for smaller estates. The costs of that process may deplete the resources of small estates or be disproportionate to the ultimate benefit obtained.

The Committee recommends that Recommendation 1 of the National Committee be varied so that smaller estates are excluded from the need to go through the process required to determine whether the intestate was in a de facto relationship. A simple definition should be developed for de facto relationships in estates which are below a certain threshold.

Recommendation 2

There should be no provision stating that spouses should be treated as separate persons.

[25] Clause 7 of the *Intestacy Bill 2007* links the definition of a "domestic partnership" to "local legislation dealing with the recognition of de facto relationship". Section 3A of the *De Facto Relationships Act* provides various circumstances which may be considered in determining whether a de facto relationship exists.

The Committee accepts Recommendation 2 of the National Committee.

Recommendation 3

The surviving spouse or partner should be entitled to the whole of the intestate estate where there are no surviving issue of the intestate.

The Committee accepts Recommendation 3 of the National Committee.

Recommendation 4

Where the intestate is survived by a spouse or partner and issue, the spouse or partner should be entitled to the whole estate except in cases where some of the issue are issue of the intestate from another relationship. In cases where some of the issue are issue of the intestate from another relationship, the intestate should be shared between the spouse and all surviving issue.

The Committee accepts Recommendation 4 of the National Committee.

Recommendation 5

Where the intestate is survived by a spouse or partner and issue from another relationship, the spouse or partner should be entitled to all the tangible personal property of the intestate except for:

a) property used exclusively for business purposes;
b) banknotes or coins, unless they are part of a collection made in pursuit of a hobby or some other non-commercial purpose;
c) property held as a pledge or other form of security;

d) property in which the intestate invested as a hedge against inflation or adverse currency movements, such as gold bullion or uncut diamonds; and
e) any interest in land.

The Committee accepts Recommendation 5 of the National Committee.

The Committee notes that the model law definition does not essentially change the current position in Northern Territory under the *Administration and Probate Act* (NT).

However, the Committee acknowledges that the exclusive nature of the definition may be problematic with items such as artwork. For example, an item of expensive artwork that could fall within the category of a business asset or mere decoration may cause a problem if the item were used for both purposes.

Recommendation 6

Where an intestate is survived by a spouse or partner and issue of another relationship, the spouse or partner should be entitled to a statutory legacy. The statutory legacy should be set at $350,000 for all jurisdictions. The amount of the statutory legacy should be adjusted to reflect changes in the Consumer Price Index between 1 January 2006 and 1 January in the year of the death of the intestate. The spouse or partner should also be entitled to interest in addition to the legacy, with the interest calculated in accordance with the provisions that will apply to general legacies, namely 2% above the last cash rate published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.

The Committee accepts Recommendation 6 of the National Committee.

The Committee notes that it is important that the statutory legacy be adjustment by the Consumer Price Index in order to maintain national consistency.

Recommendation 7

In cases where the surviving spouse of partner is entitled to claim statutory legacies in more than one jurisdiction, he or she should receive legacies of a combined value that is no more than the highest statutory legacy from among the jurisdictions in which he or she is entitled.

The Committee accepts Recommendation 7 of the National Committee.

Recommendation 8

Where an intestate is survived by a spouse or partner and issue of another relationship, the spouse or partner should be entitled to one-half of the residue of the intestate estate after he or she has received the personal effects of the intestate and the statutory legacy (with interest). The issue of the intestate should be entitled to the remaining half-share *per stirpes.*

The Committee accepts Recommendation 8 of the National Committee.

Recommendation 9

The surviving spouse or partner should be able to elect to obtain any property in the intestate's estate.

The Committee accepts Recommendation 9 of the National Committee.

Recommendation 10

Anyone (who is not the surviving spouse or partner) who seeks to apply for letters of administration or distribute an intestate estate must give the surviving spouse or partner written notice advising of his or her right to make an election before they apply or distribute (as the case may be). The notice should indicate the requirements for exercising the right to election including relevant time limits.

Recommendation 10 is accepted on the basis that the wording of clause 17 of the Intestacy Bill clause be maintained. [26]

The Committee notes that clause 17 of the Intestacy Bill does not reflect the terms of Recommendation 10.

The terms of Recommendation 10 differentiate the application for letters of administration from the distribution of the estate where the surviving spouse of partner is required to give written notice of his or her right to make an election before the application or distribution. Clause 17 of the Intestacy Bill does not make that differentiation and merely states that notice must be given before the administration of the estate can be commenced.

The Committee prefers the wording of the Intestacy Bill over the wording in the Recommendation 10.

[26] The Intestacy Bill 2007 states:

17 – Notice to be given to spouse of right of election

1) *An intestate's personal representative must, before commencing the administration of the intestate estate, give notice to the intestate's spouse of the spouse's right of election stating –*

   a) *how the right is to be exercised; and*

   b) *the fact that the election may be subject to the Court's authorisation and the circumstances in which such an authorisation is required; and*

   c) *that the right must be exercised within 3 months (or a longer period allowed by the Court) after the death of the notice.*

2) *Notice is not required under this section if the spouse is the personal representative, or one of the personal representatives, of the intestate.*

Recommendation 11

Where the surviving spouse or partner is not one of the personal representatives of the intestate, he or she should give notice of his or her elections to the people who gave the notice advising of the right and to the issue of the intestate.

Where the surviving spouse or partner is one of the personal representatives of the intestate, he or she should give notice to the other personal representatives and to the issue of the intestate.

The Committee accepts Recommendation 11 of the National Committee.

Recommendation 12

The surviving spouse or partner should give notice of his or her election in writing.

The Committee accepts Recommendation 12 of the National Committee.

Recommendation 13

Where the surviving spouse or partner is not one of the personal representatives of the intestate, he or she must elect to obtain the relevant property within three months of receiving notice of the right of election.

Where the surviving spouse or partner is one of the personal representatives of the intestate, he or she must elect to obtain the relevant property within three months of applying for the letters of administration or of commencing the distribution of the estate as the case may be.

The court should have the power to extend this period when it considers it proper to do so for any reason affecting the administration or distribution of the estate, including when a question of the existence, or nature, of a person's interest in the intestate estate had not been determined when the administration of the estate was first granted or the distribution first commenced.

The Committee accepts Recommendation 13 of the National Committee.

The Committee notes that the amendments to the *Stamp Duty Act* (NT) may need to be considered so that a transfer pursuant to an election is exempted from stamp duty.

The same comments with Recommendation 10 apply in relation to the terms of clause 18 of the Intestacy Bill in that the Committee prefers the wording of clause 18 over the wording in Recommendation 13 which differentiates the application for letters of administration from the distribution of the estate.[27]

Recommendation 14

A requirement or consent made or given concerning election by a surviving spouse who is a minor should be as valid and effective as it would be if the spouse had attained majority.

The Committee accepts Recommendation 14 of the National Committee.

[27] Clause 18 states:

18 – Time for making election

1) The election must be made –

2) if the spouse is entitled to notice of the right of election – within 3 months after the date of the notice; or

a) if the spouse is the intestate's personal representative (or one of the personal representatives) – within 3 months after the administration commences.

2) The Court may, however, if it considers there are proper reasons for doing so, extend the time for making the election.

Recommendation 15

The surviving spouse or partner should be able to revoke his or her election at any time before the transfer of the relevant property without the need for consent by any other person.

The process required in order to allow a spouse or partner to exercise their right to elect to obtain property is potentially time and resource consuming. Resources could therefore be wasted where the spouse or partner decides to revoke their election. Although the Committee accepts Recommendation 15 of the National Committee, the Committee reserves acceptance on the basis that obligations should be attached to the right to revoke an election.

The Committee recommends that the following requirements be attached to the revocation of an election:

- the personal representative must make reasonable endeavours to get consent and enable the election to be completed; and

- the electing spouse or partner is liable for procuring the consent and the transaction, including any costs incurring before the election is revoked.

Recommendation 16

The spouse or partner should be liable to require that the personal representative obtain a valuation of the relevant property from a qualified valuer.

The Committee accepts Recommendation 16 of the National Committee on the basis that the electing spouse is required to pay the costs of getting the valuation. Clause 20(3), which is

the implementation of Recommendation 16 of the National Committee, should be amended to reflect the view of the Committee.[28]

Recommendation 17

When the spouse wishes to obtain property that is subject to a charge (being a mortgagee, other charge, encumbrance or lien) at the time of the transfer and the holder of that charge agrees to the spouse assuming the liability, the value of the interest in the relevant property should be the market value of the property, less any amount needed to discharge the liability and, on the transfer of the property, the liability should pass to the spouse and the estate be exonerated from it.
The values should be the value calculated at the death of the intestate.

The Committee accepts Recommendation 17 of the National Committee.

Recommendation 18

The valuer who determines the value of the property should be defined according to the appropriate professional regulation scheme in force in each jurisdiction.

The Committee accepts Recommendation 18 of the National Committee.

However, the Committee notes that there is no requirement in the Northern Territory for valuers to be registered. The Committee recommends that a provision be drafted in the

[28] Subclause 20(3) states:

The personal representatives of an intestate must obtain a valuation from a registered valuer of property forming part of the intestate estate if –

a) *a spouse elects to acquire the property; or*

b) *a spouse asks the personal representative to obtain a valuation to enable the spouse to decide whether to elect to acquire it.*

Intestacy Bill which recognises that, at a minimum, a valuer must be appropriately qualified to value the property.[29]

Recommendation 19

The surviving spouse or partner should be able to provide satisfaction for the interest in the relevant property, first by relying on any share of the intestate estate to which they are entitled and, then, if his or her share is insufficient to cover the value, by paying the difference from other resources that are available to him or her.

The Committee accepts Recommendation 19 of the National Committee.

Recommendation 20

The surviving issue or personal representative should be able to apply to the court to restrict the surviving spouse or partner's right to elect to acquire any property in the estate in situations where the acquisition would be likely to diminish the assets of the intestate or make the administration of the estate substantially more difficult.

The Committee accepts Recommendation 20 of the National Committee.

Recommendation 21

The personal representatives should not sell or otherwise dispose of the property in the estate when:

a) the surviving spouse or partner's election is pending; or

[29] See *Intestacy Bill* - clause 20(3) and clause 4(1) definition of "registered valuer".

b) the surviving spouse or partner has elected to acquire the interest except where:
   i. the proceeds of such a sale are needed as a last resort to satisfy any of the intestate's liabilities;
   ii. the property is perishable or likely to decrease rapidly in value;
   iii. the surviving spouse or partner is also the sole personal representative of the estate;
   iv. the election requires the court's authorisation and in application of the surviving spouse or partner to acquire the relevant property has been refused or the application has been withdrawn; or
c) the surviving spouse or partner has notified the personal representatives in writing that he or she will not elect to obtain any property.

These restrictions should not affect the validity of the sale of any of the intestate's estate.

The Committee accepts Recommendation 21 of the National Committee.

Recommendation 22

Where the spouse or partner is a trustee, express provision should be made that he or she may acquire property from the estate notwithstanding his or her role as trustee.

The Committee accepts Recommendation 22 of the National Committee.

Recommendation 23

Where there is more than one spouse or partner and no descendants of the intestate, or descendants who are also descendants of the surviving spouses and/or partners, each spouse should be entitled to share in the estate.

Where there is more than one spouse or partner and descendants of the intestate from at least one other relationship:

a) each spouse or partner should be entitled to a statutory legacy (rateably if there are insufficient funds) and a share of half the residue of the estate; and
b) each child (or representative) of the intestate should be entitled to an equal share of the remaining half.

The Queensland provisions for distributing an intestate estate where there are multiple spouses and/or partners should be adopted.

The Committee accepts Recommendation 23 of the National Committee.[30]

Recommendation 24

Persons conceived before the death of the intestate but born after should inherit as if they had been born in the intestate's lifetime.

The Committee accepts Recommendation 24 of the National Committee.

Recommendation 25

The model laws should make it clear that persons born after the death of the intestate must have been in the uterus of their mother before the death of the intestate in order to gain any entitlement on intestacy.

The Committee accepts Recommendation 25 of the National Committee.

[30] The Committee commends the way in which Recommendation 23 is reflected in Part 2 division 3. clause 8(3) of the *Intestacy Bill*. .

Recommendation 26

Step Children of the intestate should not be recognised for the purposes of intestacy.

The Committee accepts Recommendation 26 of the National Committee.

Recommendation 27

Where a person has been adopted, the previous family relationships should have no recognition for the purposes of intestacy.

The Committee accepts Recommendation 27 of the National Committee.

Recommendation 28

Distribution to relatives of the intestate should be *per stirpes* in all cases.

The Committee accepts Recommendation 28 of the National Committee.

Recommendation 29

Persons entitled to take in more than one capacity ought to be entitled to take in each capacity.

The Committee accepts Recommendation 29 of the National Committee.[31]

Recommendation 30

The distinction between siblings who have one parent in common and those who have both parents in common should be immaterial for determining entitlements on intestacy.

The Committee accepts Recommendation 30 of the National Committee.

Recommendation 31

Where an intestate is not survived by a spouse or partner, the issue of the intestate should take their share *per stirpes*.

The Committee accepts Recommendation 31 of the National Committee.

Recommendation 32

Where an intestate is not survived by a spouse or partner, or issue, the surviving parents should be entitled to take in equal shares.

The Committee accepts Recommendation 32 of the National Committee.[32]

[31] However, the Committee notes that despite that Recommendation 29 places the context in which the person is entitled to take in the terms of 'shall', clause 33 of the *Intestacy Bill* uses the term 'may'.

[32] The Committee notes that the Recommendation 32 is the current Northern Territory position under the *Administration and Probate Act* (NT).

Recommendation 33

Where an intestate is not survived by a spouse or partner, or issue or parents, the brothers and sisters should be entitled to take.

The Committee accepts Recommendation 33 of the National Committee.

Recommendation 34

The issue of the deceased brothers and sisters should be entitled to take, by representation, their deceased parent's share of the intestate's estate.

The Committee accepts Recommendation 34 of the National Committee.

Recommendation 35

Where an intestate is not survived by a spouse or partner, or issue, or parents, or brothers and sisters, the surviving grandparents should be entitled to take in equal shares.

The Committee accepts Recommendation 35 of the National Committee.

Recommendation 36

Where an intestate is not survived by a spouse or partner, or issue, or parents, brothers and sisters, or grandparents, the aunts and uncles should be entitled to take.

The Committee accepts Recommendation 36 of the National Committee.

Recommendation 37

The children of deceased aunts and uncles should be entitled to take, by representation, their deceased parent's share of the intestate's estate.
No further categories of relative should be entitled beyond the children of deceased aunts and uncles.

The Committee accepts Recommendation 37 of the National Committee and notes the practical need to limit the line of potential persons entitled to take a share of the intestate's estate. However, the Committee also notes that this recommendation may fail to recognise customary kinship relationships held by an indigenous person who has died intestate.

Recommendation 38

Bona Vacantia estates should vest in the relevant State or Territory.

The Committee accepts Recommendation 38 of the National Committee.

Recommendation 39

The responsible Minister should have the discretion, upon application, to make provision out of *bona vacantia* estates for people in the following classes:

a) any dependents of the intestate;
b) any persons having in the opinion of the minister of the Minister a just or moral claim to the grant of the property;
c) any persons or organisations for whom the intestate might reasonably be expected to have made provision;
d) the trustees of any person as mentioned in paragraphs (a) to (c);
e) any other organisation or person.

The Committee accepts Recommendation 39 of the National Committee.

Recommendation 40

A 30-day survivorship period should apply to all persons entitled to take on intestacy.

A 30-day survivorship period should apply to persons born after the death of the intestate but who were *en ventre se mere* at the death.

The 30-day survivorship period should apply where the effect would be that the intestate passes to the Crown as *bona vacantia.*

The Committee accepts Recommendation 40 of the National Committee.[33]

[33] The Committee notes that Recommendation 40 reflects the current provisions of the *Wills Act* (NT).

Recommendation 41

A minor's share in an intestate estate should not be contingent but vest immediately.

The Committee notes that Recommendation 41 is likely to change the current position in Northern Territory where children of minors would not be entitled to take otherwise. However, the Committee also notes that Recommendation 41 creates a practical solution without any apparent disadvantage. Accordingly, the Committee accepts Recommendation 41 of the National Committee.

Recommendation 42

Where the forfeiture rule prevents a person from sharing in the intestate estate or where a person has disclaimed the share to which he or she is otherwise entitled, that person should be deemed to have died before the intestate.

The Committee accepts Recommendation 42 of the National Committee.

Recommendation 43

There should be no provisions that take account of benefits given during the intestate's lifetime.

The Committee accepts Recommendation 43 of the National Committee.

Recommendation 44

There should be no provisions that account for benefits received under the intestate's will.

The Committee accepts Recommendation 44 of the National Committee.

Recommendation 45

A person who claims to be entitled to take an interest in an indigenous person's intestate estate under the customs and traditions of the community or group to which the Indigenous intestate belonged or a personal representative may apply to the Court for an order for distribution of the estate. A plan of distribution of the estate, prepared in accordance with the traditions of the community or group to which the Indigenous person belonged, must accompany the application.

An application must be made within 12 months of the grant of administration. The Court may extend this time subject to any conditions it thinks fit, whether or not the 12 months has expired. No application will be allowed after the intestate estate has been fully distributed according to law.

The Court:

a) may order that the intestate (or part thereof) be distributed in a specified manner;
b) must, in making an order, take into account the traditions of the community or group to which the intestate belonged and the plan of distribution;
c) must not make any order for distribution unless it is satisfied that it would, in all the circumstances, be just.

The Court order may include property which the personal representative distributed

within the 12 month period before he or she had notice of any application. The Court will not disturb any distribution if it was made for the purposes of providing for the maintenance, education or advancement in life of a person who was totally or partially dependent on the intestate immediately before his or her death.

The Committee is of the view that uniform intestacy legislation should create provision for indigenous estates. Such provision should recognise indigenous customary law and traditional methods of distribution in the distribution of the estates of indigenous persons who have died intestate.

The Committee provides in essence acceptance of Recommendation 45 of the National Committee. However, the Committee notes that the effect of Recommendation 45 appears to complicate the administration process involved in the distribution of the estate of an indigenous intestate.

Such complications include:

- the onerous nature of the requirement to present to the court a distribution plan of the intestate's estate. The Committee notes that methods in obtaining instructions from indigenous clients and traditional forms of estate distribution in indigenous society could cause difficulty in justifying to a Court how such a plan was formed;

- traditional concepts of property ownership in indigenous communities may prevent the ability to confidently ascertain ownership of property; and

- distribution of royalties such as mining royalties may also create problems.

The Committee is of the view that these complications should be addressed.

Further to the complications above, the Committee notes that the complicated administrative process does not distinguish between the sizes of estates and significant costs are placed in distribution regardless of the size of the estate. Strain may be placed where the distribution relates to smaller states.

The Committee posits that an alternative process could be fashioned for smaller estates (i.e. a simpler process for the smaller estates). A less formal arrangement through the Public Trustee could be created for smaller estates to avoid the costs created by the distribution provisions.[34] The Court would be called upon where a complication arises.

The Committee recommends that the provisions of the Intestacy Bill be amended so that estates under a prescribed amount are distributed less formally. The provision may for example take the 'less formal' nature of a small claims matter before the Small Claims Court.[35] The Committee notes that some of the criticisms listed above could also be directed to the relevant provisions of the *Administration and Probate Act* (NT).[36]

The Committee also suggests that provisions be created for the estate of an indigenous person who has died intestate to revert in the bona vacantia to the intestate's community (e.g. tribe).

[34] The Committee notes that under the Western Australian *Aboriginal Affairs Planning Authority Act 1972 (WA)* the administration of a qualifying estate of an indigenous person who has died instate vests with the Public Trustee. The Law Reform Commission of Western Australia notes that while this is discriminatory it serves as a community service for indigenous persons. Law Reform Commission of Western Australia, *Aboriginal Customary Laws. Final Report. The Interaction of Western Australian Law with Aboriginal law and culture.* (Project No. 94, September 2006) at 237.

[35] The Committee has requested the Northern Territory Office of Parliament Counsel to draft a provision as requested. The Law Reform Commission of Western Australia has made a similar recommendation with regard to the *Aboriginal Affairs Planning Authority Act 1972* (WA) which places the threshold at estates valued less than $100,000. Law Reform Commission of Western Australia. *Aboriginal Customary Laws. Final Report. The Interaction of Western Australian Law with Aboriginal law and culture.* (Project No. 94, September 2006):

> ***"Recommendation 66***
>
> ***Obligation to administer Aboriginal intestate estates***
>
> *That, as part of its community service role, the Public Trustee be obliged to administer intestate Aboriginal estates valued at less than $100,000 when it is expedient to do so or when the family of the deceased requests it."*

[36] Similar submissions have previously been expressed by the Northern Territory Public Trustee at that time - Committee of Inquiry into Aboriginal Customary Law - Committee of Inquiry into Aboriginal Customary Law, *Background Paper 3: The legal recognition of Aboriginal customary law* (NTLRC 2003).

Recommendation 46

An "intestate" should be defined as a person who dies and either does not leave a will, or leaves a will but does not dispose effectively by will of the whole or part of his or her property.

The Committee accepts Recommendation 46 of the National Committee.

Recommendation 47

There should not be a provision relating to beneficially interested personal representatives.

The Committee accepts Recommendation 47 of the National Committee.

NATIONAL COMMITTEE FOR
UNIFORM SUCCESSION LAWS

REPORT ON FAMILY PROVISION

Preface

Family provision legislation exists in every Australian State and Territory. Generally, family provision legislation aims to ensure that family members of a deceased person receive adequate provision from the estate of the deceased.

In order to achieve the objective of family provision legislation the court is given power to order the distribution or redistribution of an estate outside the intention of the deceased person conveyed through their will. Family provision legislation is therefore a digression from the previous common law attitude which required the court to adhere strictly with the terms of the will and the intention of the deceased.

The power of the court under family provision legislation also extends to the distribution of the estate of a deceased person who has died intestate in line with the adequate provision of family members.

In the Northern Territory, family provision legislation is enacted in the *Family Provisions Act* (NT). The current *Family Provisions Act* (NT) first took shape in its modern form as the *Family Provisions Ordinance 1970.* The *Family Provisions Ordinance 1970* was modelled on the Australian Capital Territory ordinance relating to family provision; it repealed and replaced outdated legislation contained in the *Testator's Family Maintenance Ordinance* of 1929 and 1931.

Other, than consequential amendments related to the transfer of the Northern Territory from the Commonwealth Administration, the *Family Provisions Act* (NT) has not undergone any major changes since its inception. Despite a major overhaul of the *Wills Act* (NT) in 2000[37]

[37] The Northern Territory Law Reform Committee presented the Northern Territory Attorney-General with its report *(Report No.19 - Report on Proposals for the Reform of the Law of Wills in the Northern Territory')* on 1 March 1999. The Report recommended that the Northern Territory adopt the national uniform bill on wills.

which saw the repeal and substitution of the previous legislation on wills with the current *Wills Act 2000* (NT), the *Family Provisions Act* (NT) and the rights under the Act remained largely untouched.

The latest amendments to *Family Provisions Act* (NT) have been in relation to consequential changes following amendments to legislation on defacto relationships[38] and the recognition of same sex defacto relationships.[39]

In 1991 the Standing Committee of Attorneys-General[40] decided to establish the National Committee on Uniform Succession Laws to consider the enactment of uniform succession laws in Australian States and Territories. The National Committee is comprised of representatives from State and Territory law reform agencies and of experts in succession laws. The Queensland Reform Committee coordinated the work of the National Committee at the request of the Queensland Attorney-General.[41]

The National Committee submitted its first report to the Standing Committee of Attorneys General dealing with the law on family provision in December 1997.[42] A supplementary report on family provision was submitted by the National Committee in July 2004.[43] Along with the supplementary report, the National Committee submitted draft model legislation ("the Model Family Provision Legislation") to effect the recommendations outlined in the reports.[44]

Generally, the Model Family Provision Legislation contains the following principles:

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[38] *De Facto Relationships (Miscellaneous Amendments) Act 1991* (No.82, 1991).

[39] *Law Reform (Gender, Sexuality and De Facto Relationships) Act* 2003 (No.1, 2004).

[40]The Standing Committee of Attorneys General comprises of the Attorneys-General from the Commonwealth and from the States and Territories. The Committee is often referred to by its acronym "SCAG".

[41] The National Committee submitted its report on uniform succession laws to the Standing Committee of Attorneys General in February 1996 – National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Uniform Succession Laws: Wills* (Queensland Law Reform Commission, Miscellaneous Paper 15, 1996).

[42] National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provisions* (Queensland Law Reform Commission, Miscellaneous Paper 28, 1997).

[43] National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004).

[44] National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) - Appendix 2 - Model Family Provision Legislation ("Model Family Provision Legislation")

- A family provision order may be sought by:
    - the spouse of the deceased person at the time of the deceased person's death;
    - the de facto partner of the deceased person at the time of the deceased person's death; or
    - a non-adult child of the deceased person.[45]
- Where a deceased person owed a responsibility to a person to provide maintenance, education or advancement in life, that person may apply for a family provision order in respect of the estate of the deceased person.[46]
- A family provision application must be made within 12 months of the death of the deceased person.[47]
- A family provision order may be made in relation to a person's maintenance, education or advancement in life if satisfied that adequate provision was not made. The court may, with regard to the facts known to the court at the time the order is made, make any order for provision required for the maintenance, education or advancement in life of the person for whom the order is made.[48]
- A family provision order may be made in favour of a person to whom a family provision order has previously been made if:
    - there has been a substantial detrimental change in the person's circumstances since the last family provision order was made in relation to that person; or
    - when the last family provision order was made, the evidence did not reveal the existence of certain property and the court would have considered the deceased

[45] Clause 6 - Model Family Provision Legislation

[46] Clause 7 - Model Family Provision Legislation

[47] Clause 9 - Model Family Provision Legislation

[48] Clause 10(1) - Model Family Provision Legislation

person's estate to be substantially greater in value if the existence of the undisclosed property was revealed.[49]

- The Court when determining a family provision application, may in specified circumstances disregard the interests of any other person by whom, or on whose behalf, an application may be made (other than a beneficiary of the deceased person's estate), but who has not made an application. [50]

- The Court may make interim family provision orders in specified circumstances.[51]

- Family provision orders may be made in relation to:

    - a deceased person's estate; or

    - property that is not part of deceased person's estate, or has been distributed, where the property has been designated as a notional estate.[52]

- A family provision order may be made in respect of property which situated in or outside the enacting jurisdiction, regardless of whether the deceased person resided in the enacting jurisdiction at the time of death.[53]

- A person's rights are extinguished to the extent that they are affected by a notional estate order.[54]

- An administrator of an estate will not be liable for the proper distribution of property in any of the following circumstances:

    - if the administrator has complied with notice requirements relating to his or her intention to distribute the estate and the property is distributed not earlier than six months after the deceased person's death and, at the time of distribution, the

[49] Clause 10(3) - Model Family Provision Legislation

[50] Clause 12 - Model Family Provision Legislation

[51] Clause 13 - Model Family Provision Legislation

[52] Clause 14 - Model Family Provision Legislation

[53] Clause 15 - Model Family Provision Legislation. Part 3 of the Model Family Provision Legislation allocates four provisions under which the court may designate specified property as notional estate.

[54] Clause 35 - Model Family Provision Legislation

administrator does not have notice of any application or intended application for a family provision order;

- if the distribution is for the purpose of providing those things immediately necessary for the maintenance, education or advancement in life of a person who was wholly or substantially dependent on the deceased person immediately before his or her death;

- if the distribution is made by the administrator after the person (being of full legal capacity) has notified the administrator in writing that the person either:

  - consents to the distribution; or

  - does not intend to make any application under the Act that would affect the proposed distribution;

- where the administrator received notice of an intended application for family provision, if the distribution is made not earlier than 12 months after the deceased person's death and, at the time the distribution is made, the administrator has not received written notice that an application for provision has been commenced and has not been served with a copy of the application.[55]

[55] Clauses 44 and 45 - Model Family Provision Legislation

Commentary on the Model Family Provision Legislation developed on recommendations of the National Committee

The Northern Territory Law Reform Committee ("the Committee") has considered the recommendations of the National Committee and the terms of the Model Family Provision Legislation.[56] The following is an outline of the Committee's comments on the provisions of the Model Family Provision Legislation.

Clause 1 – 3: Preliminary provisions.

The Committee accepts proposed clauses 1 to 3 of the Model Family Provision Legislation.

The Committee also notes that the definition of 'de facto relationship' should be linked to the *De facto relationships Act* (NT).

Clause 4: Application of Act to deceased persons

The Committee notes that the model legislation may not adequately reflect the administration of small estates in the Northern Territory. The administration of small estates in the Territory is not only restricted to the Public Trustee as envisaged by the model legislation. Despite this, the Committee accepts proposed clause 4 of the Model Family Provision Legislation.

[56] The New South Wales Law Reform Commission has also undertaken a review of the Model Family Provision Legislation – New South Wales. Law Reform Commission. Report No. 110 - *Uniform Succession Laws: Family Provision*. (May 2005). The Committee has taken a similar approach to the New South Wales Law Reform Commission in considering the terms of the Model Family Provision Legislation.

Clause 5: Act Binds Crown

The Committee accepts proposed clause 5 of the Model Family Provision Legislation.

Clause 6: Family members who are entitled to make applications

The Committee notes that the proposed clause 6 is simpler than the current Territory provisions under the *Administration and Probate Act* (NT).

The Committee prefers a wider approach to what relationships are included in the legislation.[57] The wider definition should also include reference to indigenous relationships. The Committee refers to the *Motor Accidents Compensation Act* (NT) and suggests that the provisions of that Act may assist in establishing a definition of indigenous relations.[58]

Notwithstanding, the Committee notes that section 11(2) (m) of the Model Family Provision Legislation states that the court may take into consideration any relevant Aboriginal or Torres

[57] See also Law Reform Commission of Western Australia, *Aboriginal Customary Laws. Final Report. The Interaction of Western Australian Law with Aboriginal law and culture*. (Project No. 94, September 2006) at 241 – 242.

In their Report the Law Reform Commission of Western Australia noted that family provision orders through the *Inheritance (Family and Dependents Provision) Act 1972* (WA) did not adequately recognise kin relationships in indigenous society. In that regard, a person who is in customary law kin relationship with the deceased, who is wholly or partly dependent on the deceased, may not obtain adequate provision. The Law Reform Commission of Western Australia recommended, through Recommendation 71(1), that the list of persons entitled to claim against the estate of an indigenous person be extended to include kin relationship recognised in customary law.

Also noteworthy is Recommendation 71(3) of the Law Reform Commission of Western Australia. The Law Reform Commission of Western Australia recommends that in consultation with the Supreme Court, legislative provision could be created so that proceedings in relation to an intestate estate valued at less than $100,000 (or other prescribed amount) be conducted quickly, with little formality and technicality as possible so as to minimise cost. This recommendation along with Recommendation 66 of the Law Reform Commission of Western Australia follows a concern that the average estate of an indigenous person may be too modest to meet the expense of costs associated with obtaining a family provision order.

[58] *Motor Accidents Compensation Act* (NT) – Section 4, definition of "spouse" and section 37.

Strait Island customary law or other customary law. This provision could be sufficient to take into account customary Aboriginal or Torres Strait Island marriages.[59]

Clause 7: Other family members or persons owed responsibility entitled to make applications.

The Committee accepts proposed clause 7 of the Model Family Provision Legislation.

Clause 8: Applications for person lacking capacity

The Committee accepts proposed clause 8 of the Model Family Provision Legislation.

The appropriate persons to be referenced in the provision are (where those persons may apply to the court for a family provision order or whether a family provision order ought to be made by or on behalf of a person):

1. for the litigation guardian/guardian ad litem/guardian – the Public Guardian under the *Adult Guardianship Act* (NT) or person delegated under the *Adult Guardianship Act*(NT) with the powers of the Public Guardian; adult guardian appointed under the *Adult Guardianship Act* (NT); or a person appointed by the Supreme Court as a litigation guardian pursuant to the *Northern Territory Supreme Court Rules*;

[59] It is also worthy to note section 3(2) the *De facto Relationships Act* (NT) which states:

> *"In this Act –*
>
> *(a) a reference to a de facto partner of an Aboriginal or Torres Strait Islander includes a reference to an Aboriginal or Torres Strait Islander to whom the person is married according to the customs and traditions of the particular community of Aboriginals or Torres Strait Islanders with which either person identifies; and*
>
> *(b) a reference to a de facto relationship includes a reference to the relationship between 2 persons who are de facto partners by virtue of paragraph (a)."*

2. for the equivalent to the public trustee – the Public Trustee appointed under the *Public Trustee Act* (NT) or a person delegated under the *Public Trustee Act* (NT) with the powers of the Public Trustee*;*

3. for the appropriate officer in relation to children in care – the Minister administering the *Community Welfare Act* (NT) or a person delegated under the *Community Welfare Act* (NT) with the powers of the Minister; and

4. for the appropriate officer under mental health legislation – the Minister administering the *Mental Health and Related Services Act* (NT), the Secretary under the *Mental Health and Related Services Act* (NT) or person delegated with the powers of the Minister or Secretary under the *Mental Health and Related Services Act* (NT).

Clause 9: Time limit for applications

The Committee accepts proposed clause 9 of the Model Family Provision Legislation (subject to the comments made in relation to clause 41 of the Model Family Provision Legislation).

The Committee notes that the time to make application under the Model Family Provisions Legislation is after death unlike the current position in the Northern Territory where the time to make application is from when administration is granted.[60] The Committee notes that longer time limits will hold up distribution of the estate whilst shorter time limits should compel people to make applications expediently.[61]

[60] *Family Provision Act (NT)* – Section 9(1)

[61] The Committee notes that discretion is placed in the Model Family Provision Legislation for an extension to be made for legitimate applications with a genuine right to extend.

Clause 10: When family provision order may be made

The Committee accepts proposed clause 10 of the Model Family Provision Legislation.[62]

Clause 11: Matters to be considered by Court

The Committee accepts proposed clause 11 of the Model Family Provision Legislation. However, the Committee generally notes that the provisions indicate the extent to which the Courts are able to effectively rewrite the will in the exercise of their jurisdiction.

Clause 12: Other possible applicants

The Committee notes that proposed clause 12(2) of the Model Family Provision Legislation be limited so that the administrator is required only to serve notices on those entitled in intestacy.[63]

[62] The Committee notes that clause 10 of the Model Family Provision Legislation is similar to the provisions of the *Family Provision Act (NT).*

[63] Clause 12(2) of the Model Family Provisions Legislation states –

"(2) However, the Court may disregard any such interests only if:

(a) notice of the application, and of the Court's power to disregard the interests, is served on the person concerned, in the manner and form prescribed by the regulations [insert reference to prescribing by rules of court, if appropriate for the jurisdiction], or

(b) the Court determines that service of any such notice is unnecessary, unreasonable or impracticable in the circumstances of the case."

The Committee recommends that model clause 12(2) be redrafted as follows:

> '(2)However, the court may disregard any such interests if notice of the application, and of the Court's power to disregard the interests, is served on all persons who would, but for the will, be entitled to take under intestacy.'

Clause 13: Interim family provision orders

The Committee accepts proposed clause 13 of the Model Family Provision Legislation

Clause 14: Property that may be for family provision orders

The Committee accepts proposed clause 14 of the Model Family Provision Legislation.

Clause 15: Orders may affect property in or outside jurisdiction

The Committee accepts proposed clause 15 of the Model Family Provision Legislation.[64]

Clause 16: Nature of Orders

The Committee accepts proposed clause 16 of the Model Family Provision Legislation.

[64] The Committee notes that a family provision order is usually made in the jurisdiction where the deceased is domiciled. It will also be a question of where the bulk of the property is located.

Clause 17: Consequential and ancillary orders

The Committee accepts proposed clause 17 of the Model Family Provision Legislation.

Clause 18: Undertakings to restore property

The Committee accepts proposed clause 18 of the Model Family Provision Legislation.

Clause 19: Payment for exoneration from liability for orders

The Committee accepts proposed clause 19 of the Model Family Provision Legislation.

Clause 20: Effect of order vesting property in estate.

The Committee agrees that should the Northern Territory adopt the Model Family Provision Legislation a provision should be included to apply particular provisions of Northern Territory trust law to an order under proposed clause 17.[65] How such clause is drafted will be at the discretion of Parliamentary Counsel.

The Committee also notes that proposed clause 20 should be made subject to proposed clause 21.

[65] The relevant Northern Territory legislation is the *Trustee Act (NT).*

Clause 21: Variation and revocation of family provision orders.

The Committee accepts proposed clause 21 of the Model Family Provision Legislation.

Clause 22: Variation and revocation of other orders.

The Committee accepts proposed clause 22 of the Model Family Provision Legislation. [66]

Clause 23: Effect of family provision order

The Committee accepts proposed clause 23 of the Model Family Provision Legislation.

Clause 24: Application

The Committee accepts proposed clause 24 of the Model Family Provision Legislation.

[66] While the Committee agrees with clause 22, it notes that the effect of sub clause 22(b) is strange in that it seems to give the court the power to create the will of a deceased. Clause 22 states:

> ***"22 - Variation and revocation of other orders***
>
> *If a family provision order is varied or revoked, the Court may:*
>
> *(a) vary or revoke any other orders made by it as a consequence of, or in relation to, the order to such extent as may be necessary as a result of the variation or revocation, and*
>
> *(b) make such additional orders as may be so necessary."*

Part 3 Notional Estate Orders (note)

The Committee recommends that the body of the notes be transferred into the explanatory memorandum - unless:

- current practice of Parliamentary Counsel is to include the explanatory notes in legislation; and
- that in circumstances of inconsistency, it is clear whether the notes would override the section to which the notes relate or vice-versa.

Clause 25: Definition

The Committee accepts proposed clause 25 of the Model Family Provision Legislation.

Clause 26: Transactions that are relevant property transactions.

The Committee accepts proposed clause 26 of the Model Family Provision Legislation.

Clause 27: Examples of relevant property transactions.

The Committee accepts proposed clause 27 of the Model Family Provision Legislation.

Clause 28: When relevant property transactions take effect.

The Committee accepts proposed clause 28 of the Model Family Provision Legislation.

Clause 29: Notional estate orders may be made only if family provision order or certain costs orders to be made.

The Committee accepts proposed clause 29 of the Model Family Provision Legislation.

Clause 30: Notional estate order may be made where property of estate distributed.

The Committee accepts proposed clause 30 of the Model Family Provision Legislation.

Clause 31: Notional estate order may be made where estate affected by relevant property transaction

The Committee accepts proposed clause 31 of the Model Family Provision Legislation.[67]

Clause 32: Notional estate order may be made where estate affected by subsequent relevant property transaction.

The Committee accepts proposed clause 32 of the Model Family Provision Legislation on the assumption that the case of *Prince v Argue* [2002] NSWSC 1217 has application in the Northern Territory.[68]

[67] The Committee queries the practice of including the notes into the legislation and notes that such matters should be placed into the explanatory memorandum.

Clause 33: Notional estate order may be made where property of deceased transferee's estate held by administrator or distributed

The Committee accepts proposed clause 33 of the Model Family Provision Legislation.

Clause 34: Disadvantage and other matters required before order can be made.

The Committee accepts proposed clause 34 of the Model Family Provision Legislation.[69]

Clause 35: Effect of notional estate order

The Committee accepts proposed clause 35 of the Model Family Provision Legislation.

Clause 36: More than one notional estate order may be made.

The Committee accepts proposed clause 36 of the Model Family Provision Legislation.

[68] For a further discussion on *Prince v Argue* [2002] NSWSC 1217, see the New South Wales. Law Reform Commission. Report No. 110 - *Uniform Succession Laws: Family Provision*. (May 2005) - paragraphs 3.31 to 3.36.

[69] The Committee notes that the current Northern Territory provisions do not take the 'disadvantage' approach taken in the Model Family Provision Legislation. The current Northern Territory position is arguably less fair than the proposed provisions.

Clause 37: Power subject to Division 3.

The Committee accepts proposed clause 37 of the Model Family Provision Legislation.

Clause 38: Variation and revocation of other orders.

The Committee accepts proposed clause 38 of the Model Family Provision Legislation.

Clause 39: Estate must not be sufficient for provision or order as to costs.

The Committee accepts proposed clause 39 of the Model Family Provision Legislation.

Clause 40: Determination of property to be subject to notional estate order.

The Committee accepts proposed clause 40 of the Model Family Provision Legislation.

Clause 41: Restrictions on out of time or additional applications.

The Committee notes that clause 41 is linked to clause 9, accordingly there appears to be an unfettered discretion on the court to allow an application to be made out of time. In such cases questions would arise as to the fairness of allowing notional estate orders to be made particularly where many years have already passed.

The Committee notes that in drafting the Model Family Provision Legislation, the National Committee chose not to include a provision specifically requiring that cause be shown before a court can grant an extension. This decision was made on the basis that an applicant would still be required to satisfy the court that the delay in making the application should be excused. In this regard the National Committee has fallen back on the general law.

The Committee does not agree with the approach taken by the National Committee and recommends that clause 9 be limited if clause 41 is adopted.

Clause 42: Grant of probate or administration.

The Committee accepts proposed clause 42 of the Model Family Provision Legislation.

Clause 43: Substitution of property affected by orders or proposed orders.

The Committee accepts proposed clause 43 of the Model Family Provision Legislation.

Clause 44: Protection of administrator who distributes after giving notice...

The Committee notes that the proposed schedule 1 notice referred to in clause 44 of the Model Family Provision Legislation is different from the current provisions of the *Northern Territory Supreme Court Rules;* to adopt the proposed notice would require amendments to various Northern Territory acts. The Committee recommends that proposed schedule 1 of the Model Family Provision Legislation be adapted to fit in with the terms of the Northern Territory legislation.

Clause 45: Protection of administrator in other circumstances.

The Committee accepts proposed clause 45 of the Model Family Provision Legislation.

Clause 46: release of rights under Act.

The Committee accepts proposed clause 46 of the Model Family Provision Legislation.

Clause 47: Revocation of approval of release.

The Committee accepts proposed clause 47 of the Model Family Provision Legislation.

Clause 48: Court may determine date of death.

The Committee accepts proposed clause 48 of the Model Family Provision Legislation.

Clause 49: Costs

The Committee accepts proposed clause 49 of the Model Family Provision Legislation.

Clause 50: Regulations.

The Committee accepts proposed clause 50 of the Model Family Provision Legislation.

Clause 51: Rules of Court

The Committee accepts proposed clause 51 of the Model Family Provision Legislation.

Conclusion and Summary

Essentially, the Committee acknowledges the benefits of producing uniformity in succession laws between the States and Territories. The Committee has largely accepted the recommendations of the National Committee and provisions of the draft model legislation.

In considering the recommendations of the National Committee and the provisions of the draft model legislation, the Committee has taken the view that minor inconsistencies between the recommendations or the model legislation and Northern Territory legislation will be taken in favour of the recommendation or model legislation. However, there are occasions where the Committee has commented against, or sought a variation to, a recommendation or provision of the model legislation due to situations specific to the Northern Territory which the recommendation or provision fails to recognise.

The following is an outline of the Committee's findings:

The Intestacy Report

The Committee accepts all Recommendations of the National Committee, but makes comments on the following recommendations:

- with regard to Recommendation 1 of the National Committee – smaller estates should be excluded from the need to go through the process required to determine whether the intestate was in a de facto relationship;

- with regard to Recommendation 10 of the National Committee – the wording of the Intestacy Bill is preferred over the wording in Recommendation 10;

- with regard to Recommendation 13 of the National Committee – the Committee notes that amendments to the *Stamp Duty Act* (NT) may need to be considered so that a transfer pursuant to an election is exempted from stamp duty. Likewise with the Committee's comment on Recommendation 10 - the wording of the Intestacy Bill is preferred over the wording in Recommendation 13;

- with regard to Recommendation 15 of the National Committee – the following requirements should be attached to the revocation of an election:

    - the personal representative must make reasonable endeavours to get consent and enable the election to be completed; and

    - the electing spouse or partner is liable for procuring the consent and the transaction, including any costs incurring before the election is revoked;

- with regard to Recommendation 16 of the National Committee – the electing spouse should be required to pay the costs of getting the valuation;

- with regard to Recommendation 18 of the National Committee – a provision should be drafted in the Intestacy Bill which recognises that, at a minimum, a valuer must be appropriately qualified to value the property; and

- with regard to Recommendation 45 of the National Committee –

    - the provisions of the Intestacy Bill should be amended so that estates under a prescribed amount are distributed less formally; and

    - that provisions be created for the estate of an indigenous person who has died intestate to revert in *bona vacantia* to the intestate's community.

The Family Provision Report

The Committee accepts all clauses of the Model Family Provision Legislation but makes comments on the following clauses:

- with regard to clause 6 of the Model Family Provision Legislation – The Committee notes that proposed clause 6 is simpler than the current Territory provisions under the *Administration and Probate Act* (NT). The Committee would prefer a wider approach to what relationships are included within the legislation;

- with regard to clause 9 of the Model Family Provision Legislation – The Committee recommends limiting the scope of clause 9 in that it relates to clause 41 and appears to provide unfettered discretion on the court to allow an application to be made out of time;

- with regard to clause 12 of the Model Family Provision Legislation – The Committee recommends that model clause 12(2) be redrafted as follows:

  '(2)However, the court may disregard any such interests if notice of the application, and of the Court's power to disregard the interests, is served on all persons who would, but for the will, be entitled to take under intestacy.'

- with regard to clause 20 of the Model Family Provision Legislation – The Committee notes that particular provisions of Northern Territory trust law should be applied to an order under proposed clause 17. The Committee also notes that proposed clause 20 should be made subject to proposed clause 21;

- with regard to clause 41 of the Model Family Provision Legislation – The Committee does not agree with the approach taken by the National Committee and recommends that clause 9 be limited (see comment regarding clause 9 above); and

- with regard to clause 44 of the Model Family Provision Legislation – The Committee recommends that proposed schedule 1 of the Model Family Provision Legislation be adapted to fit in with the terms of Northern Territory legislation.