1. Introduction

- Background
- Aim of intestacy rules
- This reference
- Outline of this report

BACKGROUND

Testate and intestate succession

1.1 When people die owning property, the property must be distributed according to a preordained scheme. One method is to distribute the property according to the wishes of the deceased as expressed in his or her will. This method of distribution is referred to as testate succession. However, there will be cases where the deceased has not executed a will, or has failed to execute a will that disposes of some or all of his or her property effectively. The property that has not been dealt with effectively by will is usually distributed according to a regime established by statute. This method of distribution is referred to as intestate succession. Intestate succession is the subject of this Report.

When intestacy occurs

1.2 Intestacy occurs when the whole or part of the estate of a deceased person is not disposed of by will.

Total intestacy

1.3 Total intestacy arises in circumstances where the whole of the estate of a deceased person is not disposed of by will, for example, where the deceased:

- failed to make a will;
- failed to make a valid will; or
- made a valid will but all the beneficiaries died before the deceased.

Partial intestacy

1.4 A partial intestacy arises in circumstances where part of the estate of a deceased person is not disposed of effectively by will, for example, where the deceased:

- failed to dispose of the residue of the estate (that is, property that has not otherwise been specifically disposed of) either expressly or impliedly;
- failed to appoint a substitute in the will, and some beneficiaries repudiate or, for other reasons, cannot take (for example, forfeiture); or

- made a gift of the residue and part of the gift fails to take effect.[1]

Distinction between total and partial intestacies

1.5 There was once a distinction between total and partial intestacies for the purposes of administering an estate. Partially intestate estates are now administered, so far as possible, according to the same rules that apply to wholly intestate estates.

1.6 The ACT, WA, SA and NT make statements covering both wholly intestate and partially intestate estates.[2] For example, the ACT's provision states:

> The personal representative of an intestate holds, subject to his or her rights, powers and duties for the purposes of administration, the intestate estate on trust for the persons entitled to it in accordance with this division.[3]

The other jurisdictions, however, maintain separate provisions dealing with total intestacies and partial intestacies. There seem to be two reasons for this distinction: a substantive reason and one relating to statutory construction or interpretation.

1.7 The substantive reason for the distinction is to require the issue to bring into account benefits received under the will. This is the situation, for example, in Tasmania and Victoria, where general provision is made for dealing with intestate estates[4] subject to the bringing into account of any beneficial interests acquired by the issue of the deceased under the will.[5]

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1. This circumstance may be avoided by the National Committee's recommendation concerning the construction of dispositions: NSW Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Report 85, 1998) at para 6.97-6.105. See also *Wills Act 1997* (Vic) s 46(3); *Succession Act 1981* (Qld) s 33P; *Wills Act 2000* (NT) s 41(2).
2. *Administration and Probate Act 1929* (ACT) s 45; *Administration and Probate Act 1969* (NT) s 62; *Administration and Probate Act 1919* (SA) s 72C(1); *Administration Act 1903* (WA) s 13(1).
3. *Administration and Probate Act 1929* (ACT) s 45.
4. *Administration and Probate Act 1935* (Tas) s 44; *Administration and Probate Act 1958* (Vic) s 52. See also *Administration Act 1969* (NZ) s 78 and s 79.
5. *Administration and Probate Act 1935* (Tas) s 47(a); *Administration and Probate Act 1958* (Vic) s 53(a). The Law Reform Committee of SA also recommended this approach in relation to the surviving spouse: Law Reform Committee of South Australia, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 8. This is no longer a relevant concern: See para 13.44-13.49.

1.8 Elsewhere, the distinction has been made for reasons of statutory construction or interpretation. NSW, for example, provides in respect of wholly intestate estates:

> Where a person dies wholly intestate, the real and personal estate of that person shall, subject to the payment of all such funeral and administration expenses, debts and other liabilities as are properly payable out of the estate, be distributed or held in trust in the manner specified in this section…[6]

And, in respect of partially intestate estates:

> Where a person dies having made a will which effectively disposes of only part of the person's estate, [the division], so far as applicable and subject to the modifications specified in subsection (2), shall apply to and in relation to the part of the person's estate that is not disposed of by the will as if the last-mentioned part had comprised the whole of the person's estate. [7]

1.9 In Queensland, general provision is made for distribution according to the rules[8] but separate provision is still made in relation to partial intestacies:

> The executor of the will of an intestate shall hold, subject to the executor's rights and powers for the purposes of administration, the residuary estate of an intestate on trust for the persons entitled to it. [9]

1.10 The modern trend has been to assimilate the administration of partially intestate estates as much as possible to the administration of wholly intestate estates. This is generally consistent with recommendations of the various law reform agencies when such questions are still considered.[10] For example, in 1951, the English Committee on the Law of Intestate Succession favoured applying the same rules to both partial intestacies and total intestacies. The Committee acknowledged that a "partial intestacy" could arise in a vast range of cases:

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6. *Wills, Probate and Administration Act 1898* (NSW) s 61B(1).
7. *Wills, Probate and Administration Act 1898* (NSW) s 61F(1). See also *Administration of Estates Act 1925* (Eng) s 49(1).
8. The Queensland Act states that "the personal representative of a deceased person shall be under a duty to … distribute the estate of the deceased, subject to the administration thereof, as soon as may be": *Succession Act 1981* (Qld) s 52(1)(d).
9. *Succession Act 1981* (Qld) s 38.
10. Law Reform Committee of SA, *Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 8 (subject to the surviving spouse having to account for benefits received under the will). See also Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 88 (where the question was uncontroversial).

> For instance, a man dies partially intestate (i) if he disposes effectively of one chattel, such as a gold watch, and fails to make an effective disposition of the rest of his estate and (ii) if he disposes effectively of the whole of his estate except his gold watch, and the cases lying between these two extremes are unlimited in number and variety.[11]

The Committee considered that any benefit that might result from a separate regime to deal with partial intestacies was "outweighed by the advantage of having simple and comprehensive rules which apply to all cases of intestacy, total or partial".[12]

1.11 The National Committee agrees with this approach and the model law is, therefore, drafted on the basis that there is to be no distinction in the administration of wholly and partially intestate estates.

Incidence of intestacy

1.12 Intestacy would appear to occur quite frequently in Australia. In 1994, in South Australia, 6.44% of applications for grants were made in circumstances of intestacy. In the same year, the rate was believed to be 14% in Queensland, just over 10% in Western Australia, and between 6% and 8% in other jurisdictions.[13]

1.13 In NSW in 2003, of the 23,140 matters dealt with in the Probate Division, 6% involved the grant of letters of administration. In 2002, 46,712 deaths were registered, 22,828 matters were dealt with in the Probate Division, and 6% of these involved the grant of letters of administration. Approximately 20,000 estates per year do not come to the NSW Probate Division. There may be a number of reasons for these estates not being formally administered, including that the deceased's property has been transmitted by other means upon death (for example, by survivorship in the case of property owned jointly with another), or the estate may simply have been administered

11. England and Wales, *Report of the Committee on the Law of Succession* (Cmd 8310, 1951) at para 37.
12. England and Wales, *Report of the Committee on the Law of Succession* (Cmd 8310, 1951) at para 37. The English Law Commission did not treat this as a live issue when it reported in 1989: See England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 16.
13. W A Lee and A A Preece, *Lee's Manual of Queensland Succession Law* (5th edition, LBC Information Services, 2001) at 173.

informally by members of the family or friends.[14] It is not known how many of these estates are intestate.

1.14 In Tasmania in 2005, the level of intestate estates was around 13% of the approximately 2,000 matters that are filed annually in the Probate Registry.[15]

Characteristics of intestates and their estates

1.15 In many cases, a deceased person who is intestate will be an older person, have a surviving spouse who will be in the same age group, and issue who are mature (rather than infants) and no longer dependent on their parents.[16] This is part of a general trend across society. For example, in 1670, the year the Statute of Distributions, which dealt with intestacy, was first enacted, the average life expectancy in England at birth was something in the order of 38.1 years for men and 36.3 years for women.[17] Those who made it to 25 years of age could expect to live, on average, until just after they turned 55.[18] In Australia in 2001-2003, the average life expectancy at birth was 77.8 years for men and 82.8 years for women.[19]

1.16 There is some evidence to suggest that, as a group, those who are intestate die younger than those who die with wills. A sample of probate files from the NSW Probate Registry in 2004 showed that the age at death for those who died with wills ranged from 37 years to 102 years with an average of 81.21 years, while those who died without wills ranged from 28 years to 99 years with an average of 60 years.[20]

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14. See, eg, England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 2.
15. R Walker, *Consultation*. See also Registry, Supreme Court of Tasmania, *Consultation*; K McQueenie, *Consultation*.
16. While some groups in the community may die intestate at a younger age, for example, Indigenous people (who have lower life expectancies than the general population) and young people who are killed in car accidents, these groups are less likely to have substantial assets to be distributed upon death.
17. E A Wrigley, R S Davies, J E Oeppen, R S Scholfield, *English population history from family reconstitution 1580-1837* (Cambridge University Press, 1997) at 308.
18. E A Wrigley, R S Davies, J E Oeppen, R S Scholfield, *English population history from family reconstitution 1580-1837* (Cambridge University Press, 1997) at 282.
19. Australian Bureau of Statistics, *Deaths 2003* (3302.0) at 6.
20. J E Dekker and M V A Howard, *I give, devise and bequeath: an empirical study of testators' choice of beneficiaries* (NSW Law Reform Commission Research Report 13, 2006) at para 3.4 and para 3.29.

1.17 There is also evidence to suggest that intestate estates are, in general, of smaller value than their testate counterparts. A sample of probate files from the NSW Probate Registry in 2004 showed that the average value of the estates of those who died with wills was $774,802, while the estates of those who died without wills had an average value of $213,888.[21] This tendency has also been observed by a number of law reform bodies over the years, including those of Western Australia, England and Wales, and Alberta.[22]

Transmission of property by other means

1.18 Many estates both with and without wills will likely involve property that will not be distributed according to the deceased's will or rules of intestacy. This is because the property has been distributed by other means. For example, property might pass through families by family trusts, or more commonly now by way of jointly-held property and superannuation.[23]

Joint property

1.19 Jointly held property will transmit to the surviving owner without the need for probate. This applies not just to land held subject to a joint tenancy, but to any property held in two or more names such as bank accounts and motor vehicles. Most couples in relationships will hold at least some property as joint tenants.

1.20 The Queensland Law Reform Commission has observed that joint ownership is a "highly efficient mechanism for distributing property upon death without having to resort to the technicalities of succession law".[24]

Superannuation assets

1.21 In the past 15 or 20 years, superannuation funds have taken on an increasing importance to the financial future of most Australians.[25]

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21. J E Dekker and M V A Howard, *I give, devise and bequeath: an empirical study of testators' choice of beneficiaries* (NSW Law Reform Commission Research Report 13, 2006) at para 3.4 and para 3.29.
22. Law Reform Commission of WA, *Distribution on Intestacy* (Project No 34, Part 1, Report, 1973) at para 13 and Appendix 2; England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 30; Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 46-47.
23. See S M Cretney, "Reform of intestacy: the best we can do?" (1995) 111 *Law Quarterly Review* 77 at 91.
24. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 8.
25. See, eg, Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 6-7.

1.22 Superannuation trustees usually distribute superannuation assets in accordance with binding elections or their trusts. It should be noted, however, that in some cases, where there is no obvious beneficiary, the trustees will pay the assets into the deceased estate. Superannuation will come to play an increasing role in disputes over inheritance.[26] In the case of intestacies, superannuation has the potential to alter the balance in the distribution of an estate between the intestate's spouse and issue.[27]

AIM OF INTESTACY RULES

1.23 The rules of distribution on intestacy are, at the most general level, the community's view of what should be done with the estate of a person who has died intestate.[28] The parliaments of the various Australian jurisdictions, as representatives of their communities, have established and amended the rules from time to time. One of the purposes of this Report is to determine the extent to which any proposed scheme of distribution meets the collective requirements of the Australian community.

1.24 In this Report, these questions are brought into sharpest focus when considering the needs of an intestate's spouse or partner and issue (that is, descendants - children, grandchildren and so on). The changing position of the spouse or partner in intestacy law has been one of the consistent themes across most jurisdictions.[29]

Carrying out the presumed intentions of the intestate

1.25 One of the more widely acknowledged aims of intestacy rules is to produce the same result as would have been achieved had the intestate had the foresight, the opportunity, the inclination or the ability to produce a will.[30]

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26. *Sydney Consultation 1*; *Sydney Consultation 2*; Succession Law Section, Queensland Law Society, *Consultation*.
27. *Sydney Consultation 2*; K McQueenie, *Consultation*.
28. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) at 3-4; Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 6, 1974) at 2; W G Briscoe, *The Law Relating to Succession Rights on Intestacy* (Law Reform Commission of Tasmania, Working Paper, 1984) at 2; Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 2; Law Reform Commission of WA, *Distribution on Intestacy* (Project No 34, Part 1, Report, 1973) at para 12; *Sydney Consultation 1*.
29. See para 3.5-3.9 and para 3.26-3.34.
30. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 163; Manitoba Law Reform Commission, *Intestate*

1.26 The rules in the various jurisdictions identify beneficiaries for the estate from among the intestate's family in an order of preference beginning with those to whom the intestate was most closely related – starting with the intestate's spouse and descendants, then parents, brothers and sisters, nephews and nieces, grandparents, uncles and aunts, and finally cousins. Such a distribution scheme will generally suit many people who die intestate with estates that must be administered. However, the rules are not uniform across Australia and there are many differences of detail.

1.27 While the aim of achieving the distribution that an intestate would have wanted is generally desirable, it is important to note that any system that has to cover all situations adequately will not cover individual cases perfectly. Families may not be close in the sense that the legislation assumes. Relatives who appear biologically closer to the intestate may be further away from the intestate's favour than those who are biologically distant. Close family members may not get on. A spouse may become estranged.

1.28 People cannot be forced to make comprehensive wills and may fail to produce a valid will through no fault of their own. It is with this in mind that the rules of intestacy should be standardised and reformed to the extent that will enable them to produce a result that will be fair in most cases.

Establishing the presumed intention

1.29 How one establishes what the intestate might have intended is sometimes fraught with difficulty. There has been some debate about whether the distribution patterns established by those who have actually executed wills should be used to shape the rules for distribution upon intestacy. The Law Commission of England and Wales put it succinctly:

> it seems odd to allow... the half of the population who make wills to dictate what should happen to the property of the other half who do not.[31]

However, wills that have been written are one of the few reliable sources of information about how people actually intend to distribute

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Succession (Report 61, 1985) at 2, 7; Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) at 59; Tasmania, Office of the Public Trustee, *Consultation*; A Dunham, "The Method, Process and Frequency of Wealth Transmission at Death" (1962) 30 *University of Chicago Law Review* 241 at 241.

31. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 32.

their property upon death.[32] Many law reform agencies have carried out surveys of wills in an attempt to discern how people might like their property to be distributed should they die intestate.[33] As part of this project, the NSW Law Reform Commission has carried out an empirical study of matters filed in the Probate Registry of the Supreme Court of New South Wales during a specified period in 2004.[34] The Department for Constitutional Affairs in the UK is also currently carrying out a survey of terms in wills in its probate registries.[35]

1.30 It is also possible that at least some of the people who do not write wills are satisfied with the distribution regime established by the current intestacy rules. Indeed, it can be argued that a decrease in the number of people who execute wills could be taken as an indication of a general endorsement of a particular intestacy regime. However, the National Committee ultimately has no data on which to conclude that there is or is not a general level of endorsement of any particular intestacy regime.

1.31 The rules of intestacy should not be viewed as removing the need for wills, and they should not be seen to be lessening the importance of making a valid will.

Simplicity, clarity and certainty

1.32 Some law reform agencies have stated that one of their principal aims is to make the rules of distribution simple, clear and certain.[36]

32. See England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 32
33. See England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at para 18; Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report 78, 1999) Appendix A; Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report 70, 1983) Appendix F and G.
34. J E Dekker and M V A Howard, *I give, devise and bequeath: an empirical study of testators' choice of beneficiaries* (NSW Law Reform Commission Research Report 13, 2006).
35. England and Wales, Department for Constitutional Affairs, *Administration of Estates: Review of the Statutory Legacy* (CP 11/05, 2005) at 9.
36. England and Wales, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at para 12; Law Reform Commission of WA, *Distribution on Intestacy* (Project No 34, Part 1, Report, 1973) at para 11; Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 163. But see Queensland Law Reform Commission, *Intestacy Rules* (Working Paper 37, 1992) at 2.

This is seen as being beneficial both to lawyers and to members of the public who have to administer the rules.[37]

1.33 The Law Commission of England and Wales recognised that the rules of intestacy:

> should be certain, clear and simple both to understand and to operate. They do not lay down absolute entitlements, because the deceased is always free to make a will leaving his property as he chooses. They operate as a safety net for those who, for one reason or another, have not done this. If the rules can conform to what most people think should happen, so much the better. If they are simple and easy to understand, the more likely it is that people who want their property to go elsewhere will make a will. It is also important to enable estates to be administered quickly and cheaply. The rules should be such that an ordinary layman can easily interpret them and consequently administer them. Also the rules should make it unnecessary for an administrator to have to determine complex or debatable questions of fact.[38]

1.34 While it is desirable to have rules that are as simple as possible, simple rules may also fail to deal with some common circumstances that arise in intestate estates.[39] An appropriate balance is required.

1.35 Several submissions urged the importance of preferring the simple approach wherever possible.[40]

Meeting the needs of family members

1.36 The rules of distribution acknowledge the needs of family members only at the most general level. For example, the provisions relating to the spouse or partner's entitlement to the shared home acknowledge the survivor's need to continue to live in the shared home.[41] The current provisions also generally acknowledge the needs of the issue of an intestate to inherit a share in the estate. However, it can also be argued that the needs of younger issue are not met

37. Manitoba Law Reform Commission, *Intestate Succession* (Report 61, 1985) at 7.
38. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 7.
39. Queensland Law Reform Commission, *Intestacy Rules* (Working Paper 37, 1992) at 2.
40. Trustee Corporations Association of Australia, *Submission* at 1; Law Society of NSW, *Submission* at 1; *Sydney Consultation 2*.
41. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 33.

effectively by receiving a share that is held in trust for them until they turn 18.[42]

1.37 The most important question to be considered at the present time is that of balancing the competing needs of the surviving spouse or partner and the issue of the intestate. There is no doubt that needs of the surviving spouse or partner have become more and more important over time. This is partly a result of changing demographics which make spouses and partners more reliant on the intestate's estate in their later years and the children less reliant. This report therefore considers the surviving spouse or partner as the primary concern of distribution on intestacy. This reflects a trend in most comparable jurisdictions towards giving more recognition to the needs of the surviving spouse or partner.

1.38 The balancing of the competing needs of the surviving spouse or partner and the issue of the intestate is dealt with in Chapter 3 of this report.[43] The question of need is going to be a less relevant concern for categories of relationship beyond that of spouse or partner and issue.[44]

1.39 However, the rules of distribution cannot always meet the needs of family members on the individual level. There will be specific cases where the uniform application of standard rules may produce hardship. Such hardship may be alleviated by an application under family provision legislation.[45] For example, WA specifically acknowledges this problem in its family provision legislation when it states that the court "shall not be bound to assume that the law relating to intestacy makes adequate provision in all cases".[46]

Provision for deserving family members

1.40 Provision for deserving family members is probably the most difficult category to deal with. It is certainly a consideration in relation to the surviving spouse or partner. The surviving spouse or

42. Ontario Law Reform Commission, *Property Subjects* (Study of the Family Law Project, 1967) Vol 3 at 580 (rev).
43. Para 3.19-3.76.
44. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 35.
45. See the proposals of the National Committee for Uniform Succession Laws relating to family provision: National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (Queensland Law Reform Commission, Miscellaneous Paper 28, 1997); and National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004).
46. *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 6(2).

partner can be said to deserve a substantial portion of the intestate estate because of the contribution he or she has made to the relationship with the intestate.

1.41 In Canada, the question of desert has historically had a negative application in that many statutes once contained a provision denying a surviving spouse his or her entitlement on the grounds of marital misconduct, for example, adultery. All Canadian law reform agencies have moved away from such provisions.[47]

1.42 However, beyond the consideration of spouses or partners, desert becomes a harder criterion to apply. The English Law Commission observed that, while a system that acknowledged individuals' contributions to the care of the intestate might be "fairer", it "would be impossible to base a fixed system of distribution on this criterion".[48] The Queensland Law Reform Commission has also observed that fixed systems of distribution cannot "differentiate between deserving and undeserving persons within a class".[49]

1.43 The question of desert or disentitlement of any potential beneficiary is obviously best dealt with by executing a will that distributes an estate taking into account such factors.[50] If the deceased has not written a will, such questions may be dealt with by way of a claim for family provision. In some cases, it is also possible that the beneficiaries may agree amongst themselves to a different distribution in order to achieve a more "just" distribution.[51] Such deeds of variation will, however, be difficult to finalise where there are family tensions or beneficiaries who are under 18.[52]

Interaction with family provision regimes

1.44 There is an important interrelationship between intestacy regimes and family provision regimes. Family provision regimes are

47. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 166.
48. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 35.
49. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 2.
50. Ontario Law Reform Commission, *Family Property Law* (Report on Family Law, Part 4, 1974) at 166; Ontario Law Reform Commission, *Property Subjects* (Study of the Family Law Project, 1967) Vol 3 at 580 (rev).
51. See M B Sussman, J N Cates and D T Smith, *The Family and Inheritance* (Russell Sage Foundation, New York, 1970) at 121-145; Law Reform Commission of WA, *Aboriginal Customary Laws* (Project No 94, Discussion Paper, 2005) at 286. See also para 3.46.
52. N Preston, "A lasting legacy" (2005) 155 *New Law Journal* 1594 at 1596.

important for dealing with individual cases that involve questions about such criteria as need and desert.

1.45 In general, it would be undesirable to use intestacy rules to achieve the aims of family provision. However, by the same token, an intestacy regime that encouraged the making of family provision claims would not be ideal.[53] The English Law Commission considered that it would seem "undesirable" to change the rules of distribution in such a way as to give rise to a greater number of applications for family provision.[54]

THIS REFERENCE

1.46 This Report is part of the work of the National Committee for Uniform Succession Laws.

Work of the National Committee for Uniform Succession Laws

1.47 The Standing Committee of Attorneys General ("SCAG") established the National Committee in 1995 to review the existing State laws relating to succession and to propose model national uniform laws. The Committee comprises representatives from the various jurisdictions in Australia. The Queensland Law Reform Commission is the co-ordinating agency.

1.48 The NSW Attorney General asked the NSW Law Reform Commission to participate in the deliberations of the National Committee under terms of reference that were issued on 5 May 1995:

> To inquire into and report on the existing law and procedure relating to succession and to recommend and draft a model State and Territories law on succession.

1.49 The National Committee has divided the project into different phases, each of which deals with a discrete area of succession law. The areas of law are:

- the law of wills;[55]

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53. Tasmania, Office of the Public Trustee, *Consultation*.
54. England and Wales, Law Commission, *Distribution on Intestacy* (Working Paper 108, 1988) at 37. See also Tasmania, Office of the Public Trustee, *Consultation*.
55. See Queensland Law Reform Commission, *Uniform Succession Laws for Australian States and Territories: The Law of Wills* (Working Paper 46, 1995); NSW Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Issues Paper 10, 1996); National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills* (Queensland Law Reform Commission, Miscellaneous

- family provision (also called "testator's family maintenance");[56]
- administration of estates of deceased persons;[57] and
- intestacy.

This Report is the final stage of the review of the law relating to intestacy.

Issues Paper 26

1.50 In April 2005, the NSW Law Reform Commission published an Issues Paper ("Issues Paper 26") on the law relating to intestacy in all Australian jurisdictions.[58] It invited submissions on these issues and also on any related matters to assist in the framing of a national model bill on intestacy.

Submissions and consultations

1.51 Ten submissions were received in response to Issues Paper 26. Appendix B lists the submissions received. Officers of the Commission

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Paper 29, 1997); Queensland Law Reform Commission, *The Law of Wills* (Report 52, 1997); NSW Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Report 85, 1998) and National Committee for Uniform Succession Laws, *Wills: The Anti-Lapse Rule* (Queensland Law Reform Commission, Report 61, 2006).

56. See Queensland Law Reform Commission, *Uniform Succession Laws for Australian States and Territories: Family Provision* (Working Paper 47, 1995); NSW Law Reform Commission, *Uniform Succession Laws: Family Provision* (Issues Paper 11, 1996); National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (Queensland Law Reform Commission, Miscellaneous Paper 28, 1997); National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004); NSW Law Reform Commission, *Uniform Succession Laws: Family Provision* (Report 110, 2005).
57. See National Committee for Uniform Succession Laws, *Administration of Estates of Deceased Persons* (Queensland Law Reform Commission Miscellaneous Paper 37, 1999); NSW Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons* (Discussion Paper 42, 1999); Queensland Law Reform Commission, *Uniform Succession Laws: Recognition of Interstate and Foreign Grants of Probate and Letters of Administration* (Discussion Paper, WP 55, 2001); NSW Law Reform Commission, *Uniform Succession Laws: Recognition of Interstate and Foreign Grants of Probate and Letters of Administration* (Issues Paper 21, 2002).
58. NSW Law Reform Commission, *Uniform Succession Laws: Intestacy* (Issues Paper 26, 2005).

also conducted consultations with members of the legal profession, academics, and representatives of the courts in Sydney, Brisbane, Melbourne, Adelaide, Perth and Tasmania. Appendix C lists the participants in these consultations.

Research Report 13

1.52 The NSW Law Reform Commission decided that, in framing recommendations relating to intestate estates, it would be useful to obtain information about the characteristics of both testate and intestate estates, and also about how people who make wills choose to distribute their estates. This decision was made in light of studies that have informed recommendations for changes to the law of intestacy in other jurisdictions. These other reviews were considered useful in determining how people who do not write wills might have intended to distribute their property upon death. The study, which was conducted by two Master of Psychology students from the University of NSW, involved a survey of 650 matters filed in the Probate Registry of the Supreme Court of NSW in September 2004. The survey elicited information concerning the demographic characteristics of the deceased persons, the nature of their estates and how they intended their property to be distributed.[59]

OUTLINE OF THIS REPORT

1.53 The recommendations in this Report are arranged as follows. The draft bill, implementing the recommendations, is in Appendix A to this Report.

Spouses and partners

1.54 The following five chapters make recommendations relating to spouses and partners who survive the intestate.

Preliminary issues

1.55 **Chapter 2** deals with questions about the identification and general treatment of spouses and partners, including the requirements for recognition of domestic partners.

General distribution

1.56 **Chapter 3** makes recommendations about the distribution of property when a spouse or partner survives the intestate. A number of

59. J E Dekker and M V A Howard, *I give, devise and bequeath: an empirical study of testators' choice of beneficiaries* (NSW Law Reform Commission Research Report 13, 2006).

scenarios are dealt with, including where a spouse or partner but no issue of the intestate survive; and where a spouse or partner and issue of the intestate survive. In both cases, it is generally proposed that the spouse or partner receive the entire estate. However, where at least some of the issue of the intestate are the issue of another relationship, it is proposed that the estate be shared between the spouse or partner and the issue. The following two chapters deal with the special provisions required in such a case.

Special provisions

1.57 **Chapter 4** details the provisions that are required to ensure that the surviving spouse or partner receives the personal chattels of the intestate, a statutory legacy, and a share of the remainder of the estate. The remaining share is distributed to the issue of the intestate.

Election to obtain other property

1.58 **Chapter 5** details the provisions necessary to allow the surviving spouse or partner to obtain any property from the intestate's estate. The recommendations expand on the more limited provisions that currently allow the surviving spouse or partner to elect to obtain the intestate's interest in the home they shared.

Multiple spouses or partners

1.59 **Chapter 6** makes provision for the distribution of property where the intestate is survived by more than one spouse or partner.

The parent-child relationship

1.60 The parent-child relationship is important to determining the distribution of intestate estates, not only with respect to the intestate's children and their descendants, but also, in some cases, for determining the intestate's ancestors and collateral relatives and their offspring. **Chapter 7** covers issues of identifying and dealing with the parent-child relationship, including the position of children not yet born, step-children, and children who have been adopted by a step-parent.

Distribution to next of kin

1.61 The following chapters deal with the question of distribution to the relatives of the intestate other than the spouse or partner.

Preliminary issues

1.62 **Chapter 8** contends for a *per stirpes* distribution in preference to a *per capita* distribution regime. It also deals with the question of persons who may be entitled to share in a distribution in more than

one capacity and confirms the position that siblings of the whole and half blood should be treated without distinction.

General order of distribution

1.63 **Chapter 9** establishes the general order of distribution to next of kin of the intestate as being to issue first, then parents, then brothers and sisters and their descendants, then grandparents and, finally, aunts and uncles and their children. This chapter fixes the limit for distribution at children of aunts and uncles (that, is first cousins of the intestate) and rejects the idea of treating separately the maternal and paternal sides of the intestate's family.

Bona vacantia

1.64 **Chapter 10** deals with cases where the intestate is survived only by relatives who are more remote than first cousins. It recommends that such estates should continue to be paid to the State or Territory for general purposes. It also recommends the circumstances in which the State or Territory should waive its rights in favour of certain people.

General aspects of distribution

Survivorship

1.65 **Chapter 11** makes recommendations necessary to implement a survivorship period for intestacy beneficiaries so that no one may take who does not survive the intestate by at least 30 days. Provision is also made to prevent such estates falling to *bona vacantia* and to apply the survivorship period to children conceived before but born after the death of the intestate.

Vesting

1.66 **Chapter 12** recommends that a person's share of an estate should vest immediately without the need for them to turn 18 or marry. It also deals with the problems that arise when a potential beneficiary has disclaimed or forfeited his or her entitlement.

Accounting for benefits received

1.67 **Chapter 13** rejects any schemes whereby persons must account for any benefits received from the deceased either before death or, in the case of a partial intestacy, in the deceased's will.

Indigenous people

1.68 It is questionable whether it is appropriate, or always appropriate, for the general law to apply without qualification in cases where an Indigenous[60] person dies intestate. Indigenous concepts of family and time may well be incompatible with the assumptions underlying the general law. If so, the extent to which different distribution rules can, and should, apply arises. **Chapter 14** recommends an alternative regime for the distribution, in appropriate cases, of the intestate estates of Indigenous people.

Miscellaneous provisions

1.69 **Chapter 15** considers the necessity of some miscellaneous provisions, including provisions that define "intestacy", that relate to beneficially interested personal representatives, that construe references to statutes of distribution, heirs and next of kin, and that abolish courtesy and right of dower.

60. In this Report, "Indigenous" refers to Aboriginal people of Australia, and Torres Strait Islanders.