INTESTACY REFORM IN NEW SOUTH WALES AND QUEENSLAND: A CRITICAL EVALUATION OF ASPECTS OF THE UNIFORM SUCCESSION LAWS: INTESTACY REPORT

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I. INTRODUCTION

When a person dies without leaving any will at all, or without leaving an effective and valid will, it is still necessary from a practical and legal perspective to deal with the assets and liabilities which that person has left behind. In this situation, the deceased is known as an intestate and his or her estate is referred to as an intestate estate. Jurisdictions such as New South Wales[1] and Queensland[2] each have formulated and implemented legislative intestacy schemes of distribution which will determine who will receive the intestate's property and on what basis. Such schemes have been developed over a long period of time and have been influenced by assumptions about the importance of spousal and family relationships.

The law of intestacy was extensively examined by the New South Wales Law Reform Commission ('the Commission'), resulting in the publication of the *Uniform Succession Laws: Intestacy Report* ('the Report') [3] in 2007. The Report has recommended a uniform approach to intestacy across Australia, thereby requiring some significant changes to some intestacy regimes.[4]

In the recent past, intestacy law has been dominated by three broad features:[5]

a) Primacy of distribution to the immediate family — the spouse and children;
b) In the absence of a surviving spouse or children, distribution to a pre-set class of next of kin set out in hierarchical order; and
c) In the event that there is no next of kin, a vesting of the estate *bona vacantia* in the state.

This scheme of distribution has been justified on the basis that it is the likely or presumed intention of the vast majority of intestates.[6]

The purpose of this paper is to:

1) Set out and evaluate some of the major proposals of the Report, with some reference to the present law in New South Wales and Queensland; and
2) Identify some major trends in the Report.

It will be argued that although the Commission has retained an approach that accords with the abovementioned three broad bases for intestate distribution, some of its recommendations evidence a community 'climate change', fostering a revision of the law of intestacy. Moreover, the Commission has demonstrated a willingness to adapt the law to take into account the special needs of Indigenous Australians in intestacy matters.

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1 *Probate and Administration Act 1898* (NSW) pt 2 div 2A.

2 *Succession Act 1981* (Qld) pt 3.

3 New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report No 116 (2007).

4 A draft Intestacy Bill 2007(SA) has also been prepared by the South Australian Parliamentary Counsel in 2006. A copy of the Bill is annexed to the New South Wales Law Reform Commission Report, above n 3, 256-274.

5 See, eg, the three broad categories outlined in G L Certoma, *The Law of Succession in New South Wales* (3rd ed, 1997) 34-41.

6 C H Sherrin and R C Bonehill, *The Law and Practice of Intestate Succession* (2nd ed, 1994) 16-17; Gareth Miller, *The Machinery of Succession* (2nd ed, 1996) 19.

II. SPOUSE AND ISSUE: DEFINITIONS

A. Spouses[7]

Until relatively recently, the concept of spouse for intestacy matters was limited to the traditional marriage recognised in Western society.[8] Currently, under the general law, the definition of spouse has expanded to include de facto and same sex relationships.[9] Intestacy legislation recognises the interests of de facto and same sex relationships. In Queensland, the de facto relationship must have existed on a genuine domestic basis within the meaning of s 32DA of the *Acts Interpretation Act 1954* (Qld) or the parties must have lived together as a couple on a genuine domestic basis continuously for two years before the death of the intestate.[10] In New South Wales, a two-year period is stipulated except that there is no required time period when there is no other relationship and no issue.[11]

A situation where the deceased is survived by both a spouse by marriage and a de facto spouse may raise difficult issues. In New South Wales, a de facto partner will only be entitled to the spouse's share of the intestacy if the de facto is the sole partner in a de facto relationship with the intestate and was not a partner in any other relationship at the time of the intestate's death.[12] Moreover, the legislation in New South Wales only allows for either a spouse or a de facto spouse to inherit,[13] while in Queensland the legislation provides for a shared inheritance. The Queensland legislation includes three possible ways to divide the estate: an agreement between the spouse and the de facto;[14] a right for a partner or a personal representative to apply to court for a distribution order;[15] and the statutory power of the personal representative to divide and distribute the estate into equal shares amongst the partners, subject to some special conditions.[16]

The Commission's recommendations reiterated the broad definitions of who would be recognised as a spouse for intestacy purposes. These include a registered relationship under the relevant legislation, a relationship into which a child has been born, or a relationship which has been in existence for at least two years.[17] However, the Commission stopped short of recommending that the model intestacy legislation ought to contain a uniform definition of (de facto) spouse.[18]

The Commission also endorsed the Queensland approach to multiple partners because it could more flexibly deal with a variety of situations.[19]

B. Issue

For the purposes of traditional intestacy law, the issue of the intestate were the nearest lineal descendants of the whole blood.[20] However, those who, for the purposes of distribution in the case of intestacy, constitute the issue of the intestate have now dramatically changed. In both New South Wales and Queensland, parentage may be presumed on a number of bases including marriage,[21] cohabitation,[22] artificial fertilisation procedures,[23] adopted children[24] and children *en ventre sa mere*. [25]

7 For the purposes of this paper, references to spouses will include de facto spouses, unless the context indicates otherwise.
8 See, eg, Sherrin and Bonehill, above n 6, 167-168. Indeed, earlier Australian legislation specifically stated the rights of the 'husband' or 'wife': the original and unamended *Wills Probate and Administration Act 1898* (NSW) s 50.
9 *Property (Relationships) Act 1984* (NSW) s 6; *Acts Interpretation Act 1954* (Qld) s 32DA.
10 *Succession Act 1981* (Qld) ss 5AA(2)(b)(i)-5AA(2)(b)(ii).
11 *Probate and Administration Act 1898* (NSW) s 61B(3B). See also New South Wales Law Reform Commission, above n 3, [2.13]
12 *Probate and Administration Act 1898* (NSW) s 32G(1).
13 *Probate and Administration Act 1898* (NSW) s 61B(3A).
14 *Succession Act 1981* (Qld) s 36(1)(a).
15 *Succession Act 1981* (Qld) s 36(1)(b).
16 *Succession Act 1981* (Qld) s 36(1)(c).
17 New South Wales Law Reform Commission, above n 3, Recommendation 1; xiii, 27.
18 Ibid [2.15], [2.17].
19 Ibid [6.28]; Recommendation 23; xvi, 23.
20 *Re Ross* (1871) LR 13 Eq 286, 293.
21 *Status of Children Act 1996* (NSW) s 9; *Status of Children Act 1978* (Qld) s 18A.

At common law, children related only by marriage were not an entitled party in intestacy[26] and this remains the law in Australia. The attitude towards stepchildren was no doubt informed by the desire to retain assets in the hands of blood-related members of a family. Where stepchildren are adopted by the step-parent, the general position (including Queensland)[27] is that prior family relationships no longer exist. However, in New South Wales, where a biological parent dies and the surviving parent commences a relationship with a person who adopts the child, the property of the deceased parent can still devolve to the child as if the adoption did not take place.[28]

The Commission recommended the retention of the present broader concepts of parentage and issue. Moreover, it considered that it was preferable for the model law to rely on Commonwealth and State law, rather than introducing separate definitional provisions for intestacy purposes.[29]

The Commission retained the concept of children *en ventre sa mere* and determined that the simplest and clearest approach was that only children in the uterus of their mother at the date of the intestate's death ought to be entitled to make a claim as a child.[30] Children from embryos would not constitute issue if they were to be implanted and born after the intestate's death, notwithstanding incontrovertible evidence of paternity.

The Commission refused to change the common law position for stepchildren, arguing that although the number of stepchildren had risen in the community, stepchildren had two natural parents upon which to rely. An entitlement to intestacy of the step-parent would amount to double-dipping and added unnecessary complexity to the law.[31]

The Commission recommended that where a person has been adopted, for intestacy purposes previous family relationships ought not to be recognised.

C. Comment

The Report's treatment of the definition of spouses and issue raises two major issues.

First, throughout the Report, the Commission recognised that one of its aims is to simplify the law by implementing a streamlined and uniform scheme.[32] However, it is questionable whether this will be achieved because the Commission has contended that the definition of spouse and issue is ultimately a decision for the Commonwealth and State legislatures. It could theoretically be possible for two States to adopt identical distribution provisions. However, because of the definition of the parties, the outcome of the distribution process could differ. Second, from a definitional perspective, the Commission accommodates the rights of spouses more than issue. For example, in those cases where the evidence of spousal entitlement is entirely based on cohabitation, the Commission has recommended a relatively short period of two years rather than the period of five years prescribed in one State.[33] However, the Commission has stated that its recommendations would be in addition to the criteria contained in the relevant legislation of each State. For example, s 32DA(2) of the *Acts Interpretation Act 1954* (Qld) specifies certain factors which may be taken into account in order to determine whether persons are living in a de

22 *Status of Children Act 1996* (NSW) s 10; *Status of Children Act 1978* (Qld) s 18E.
23 *Status of Children Act 1996* (NSW) s 14; *Status of Children Act 1978* (Qld) ss 14-17.
24 *Adoption Act 2000* (NSW) s 35; *Adoption of Children Act 1964* (Qld). A wide variety of presumptions are contained in the *Family Law Act 1975* (Cth) ss 69P-69T.
25 *Probate and Administration Act 1898* (NSW) s 61A(3); *Succession Act 1981* (Qld) s 5A.
26 *Re Leach (deceased)* [1985] 2 All ER 754, 759; Sherrin and Bonehill, above n 6, 180; Ken Mackie, 'Stepchildren and Succession' (1997) 16 *University of Tasmania Law Review* 22, 23.
27 *Adoption of Children Act 1964* (Qld) s 28.
28 *Adoption Act 2000* (NSW) s 97.
29 New South Wales Law Reform Commission, above n 3, [7.9].
30 Ibid [7.32] and Recommendation 32; xvii, 158. This is in accord with important decisions on the issue in the sense that embryos which are part of an in-vitro fertilisation program will not constitute issue of an intestate: *Estate of K* (1996) 5 Tas R 365. See also Rosalind Atherton, 'En Ventre Sa Frigidaire: Posthumous Children in the Succession Context' (1999) 19 *Legal Studies* 139, 153-160.
31 New South Wales Law Reform Commission, above n 3, [7.54]; Recommendation 27;xvii, 137.
32 Ibid [1.32], [1.48].
33 Ibid [2.11]-[2.12].

facto relationship. These include, for example: the nature and extent of the common residence;[34] whether or not a sexual relationship exists;[35] the degree of financial independence or interdependence;[36] and the ownership, use and acquisition of property.[37] Such factors, as well as the required two-year period, would determine whether or not a spousal relationship existed for intestacy purposes.

In comparison, the Commission has restricted the definition of issue because it has stopped short of extending the concept of children *en ventre sa mere* or changing the approach to stepchildren.

Indeed, the Commission recommends that adopted children ought not to be able to inherit from biological parents, so as to prevent double-dipping. However, other examples of practical double-dipping could occur under the Report's recommendations. For example, the next of kin of several unmarried and childless aunts who die intestate could acquire assets from different aunts at different times under the intestacy rules.[38] For the Commission, double-dipping only becomes a problem when a double entitlement leads to the potential diminution of the assets which could be acquired by a spouse (or possibly the legally entitled issue of the intestate).

III. SPOUSAL DISTRIBUTION

The centrality of the spouse under the intestacy rules is entrenched by the proposed rules to govern the distribution of the intestate's assets to the spouse.

A. Surviving Spouse and No Issue

In New South Wales[39] and Queensland[40], the surviving spouse will take the whole of the intestate's estate where there is no surviving issue. The Report recommends that this should remain the case.

B. Surviving Spouse and Issue

New South Wales and Queensland deal with the distribution of the estate between the surviving spouse and issue in a similar fashion, although there remain some differences.

In New South Wales,[41] where an intestate leaves a surviving spouse and issue, the method of distribution will depend upon the value of the estate, excluding household chattels. If the value of the estate, excluding household chattels, does not exceed the prescribed amount of $200 000,[42] the spouse will be entitled to the whole of the estate.[43]

If the value of the estate, excluding household chattels, does exceed the prescribed amount, the surviving spouse is entitled to: the household chattels; the prescribed amount plus interest;[44] and one half of the balance of the estate.[45]

Where the estate includes a matrimonial home, the spouse is entitled to appropriate the deceased's interest in the matrimonial home in satisfaction or partial satisfaction of the spouse's share.[46] If the matrimonial home exceeds the value of the share to which the spouse would be entitled, the appropriation of the matrimonial home would still be permitted and the value of the issue's share in the estate would correspondingly decrease.[47]

34 *Acts Interpretation Act 1954* (Qld) s 32DA(2)(a).
35 *Acts Interpretation Act 1954* (Qld) s 32DA(2)(c).
36 *Acts Interpretation Act 1954* (Qld) s 32DA(2)(d).
37 *Acts Interpretation Act 1954* (Qld) s 32DA(2)(e).
38 New South Wales Reform Commission, above n 3, Recommendation 36; xviii, 166.
39 *Probate and Administration Act 1898* (NSW) s 61B(2); Certoma, above n 5, 34.
40 *Succession Act 1981* (Qld) sch 2 pt 1.
41 For a helpful account, see Certoma, above n 5, 34-39.
42 *Probate and Administration Regulation 2003* (NSW).
43 *Probate and Administration Act 1898* (NSW) s 61B(3).
44 Interest is calculated with reference to s 84A of the *Probate and Administration Act 1898* (NSW).
45 *Probate and Administration Act 1898* (NSW) s 61B(3).
46 *Probate and Administration Act 1898* (NSW) a 61D.
47 *Probate and Administration Act 1898* (NSW) s 61B(13)(a).

Complex provisions deal with the exercise of the right of appropriation and the valuation and definition of the matrimonial home.[48]

The term 'household chattels' has been defined both inclusively and exclusively.[49] The intent of the legislature appears to have been to include items of minimal value which would form part of the personalty of most intestates. The problem is that the meaning of some terms is not clear.[50] Some items which form part of the 'inclusive' definition could be valuable and form the bulk of the estate,[51] giving the spouse a windfall.

The Queensland[52] scheme significantly differs from the New South Wales scheme in three ways.

a) Queensland does not differentiate rules for estates below or in excess of a certain value.
b) The statutory legacy is $150 000;[53] and
c) If there is only one surviving spouse and child (or his issue), that spouse is entitled to one half of the intestate's estate. However, when there is more than one surviving child, the spouse will only be entitled to one-third of the intestate's estate.[54]

There are seven central characteristics of the Commission's recommendations.

First, the Commission recommended that where an intestate is survived by a spouse and issue, the spouse ought to be entitled automatically to the whole of the intestate estate, except in cases where the issue, surviving the intestate, are issue from another relationship.[55] Issue from the same relationship would not be entitled to any assets from the intestate's estate.

Second, in those cases when the intestate is survived by issue from another relationship (which the Commission considered were limited), then special rules of entitlement would apply.[56] However, the Commission did not intend that such issue would automatically receive a distribution from the estate.[57]

Third, the Commission avoided the problem of household chattels. It considered the question was one of determining entitlement to the personal property or personal effects of the intestate.[58] Instead, the Commission was influenced by the proposals of the Queensland Law Reform Commission[59] which recommended that an intestate's personalty ought to include all the intestate's assets, except specified items. Following this proposal, the Commission resolved that the intestate's spouse should be entitled to all of the intestate's tangible personal property, excluding: property used for business purposes; banknotes or coins, unless they are part of a collection made in pursuit of a hobby or non-commercial purpose; property held as pledge or some other form of security; property in which the intestate invested in as a hedge against inflation such as gold or diamonds; and interests in land.[60]

Fourth, the Commission considered that the statutory legacy could be justified quite easily because it was intended to remove any financial hardship to which the spouse would otherwise be subject.[61] The Commission determined that the current levels were too low,[62]

48 *Probate and Administration Act 1898* (NSW) s 61E,sch 4. For a helpful outline, see Certoma, above n 5, 35-36, 38.
49 *Probate and Administration Act 1898* (NSW) s 61A(2).
50 Certoma, above n 5, 36-37.
51 Ibid 37.
52 See generally, Alun A Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007), [12.70]-[12.80].
53 *Succession Act 1981* (Qld) sch 2 pt 1 para2(1)(a).
54 *Succession Act 1981* (Qld) sch 2 pt 1 paras 2(2)(a), 2(2)(b).
55 New South Wales Law Reform Commission, above n 1, Recommendation 4; xiii, 52.
56 Ibid ch 4. It is interesting to observe that the Commission referred to the situation as being of limited significance.
57 Ibid [3.53]-[3.76], [4.58].
58 Ibid [4.22].
59 Queensland Law Reform Commission, *Intestacy Rules*, Report No 42 (1993) 40 and the draft *Succession (Intestacy) Amendment Bill 1993* s 35J.
60 New South Wales Law Reform Commission, above n 3, [4.26]-[4.30]; Recommendation 5; xiii, 62.
61 Ibid [4.33].
62 Ibid [4.36].

contending that an increase would ensure that in most cases the surviving spouse would get the whole of the estate.[63] Although the cost of living in Australia differs across States, the Commission determined that a single sum of $350 000, plus 2 per cent interest, ought to apply throughout the country in order to avoid forum shopping.[64]

Fifth, the Commission recommended that '[i]n light of the preference for supporting the surviving spouse',[65] a one-half share of the residue ought to be distributed to the surviving partner regardless of the number of entitled issue from other relationships.[66]

Sixth, the Commission acknowledged the general support for the surviving spouse obtaining an interest in the shared home.[67] However, there were two difficult aspects of the acquisition of the shared home. Automatic acquisition led to unequal treatment of spouses owning a shared home and those who did not, and could mean that issue from another relationship would acquire nothing from the estate.[68] The method of identifying the shared home differed in a variety of jurisdictions and was generally subject to complex residency provisions.[69] The Commission recommended that the surviving spouse should be able to elect to obtain any property in the intestate's estate so long as she could provide satisfaction for its value[70] by relying on her entitlement in the estate and, if the share was insufficient to cover the value, by paying the difference from other sources.[71]

Finally, the Commission addressed the problem of multiple partners. When the surviving issue are the children of the intestate and the surviving spouses, the Commission recommended that the surviving spouses and partners should be entitled to share the entire estate without the need to take into account their children. However, when there are surviving spouse(s), and then issue from different relationships, each spouse would be entitled to a statutory legacy (rateably, if there were insufficient funds) and a share of half the residue of the estate. Each issue would be entitled to an equal share of the remaining half of the estate.[72]

C. Comment

1. Spouse and No Issue

This recommendation of the Commission is not apparently contentious as it is consistent with schemes adopted throughout Australia.[73] It is defensible when the surviving spouse is aged and has lived in a long relationship with the intestate. However, there could be some perceived inequalities in some cases, exacerbated by the definition of an entitled spouse or partner. For example, an intestate may have been assisted by his parents to acquire a home. Later, the intestate began to cohabit with a de facto spouse in the home two years before his death. The de facto spouse would be entitled primarily to the whole of the assets of the estate, notwithstanding the fact that she may not have substantially contributed to its acquisition. It appears unlikely that the parents would be able to rely on family provision legislation unless they could demonstrate dependency.[74]

2. Spouse and Issue

These recommendations significantly contrast with the law in operation in New South Wales and Queensland. The Commission jettisoned the concept of 'household chattels' and the specific right to take an interest in the shared home. Nevertheless, the

63 Ibid [4.58].
64 Ibid [4.59]-[4.60]. See generally, Recommendation 6; xiii-xiv, 71.
65 Ibid [4.78].
66 Ibid [4.78].
67 Ibid [5.12].
68 Ibid [5.13].
69 Ibid [5.24].
70 Ibid [5.21]; Recommendation 9; xiv, 86.
71 Ibid Recommendation 19; xv, 102.
72 Ibid Recommendation 23; xvi, 118.
73 Ibid [3.2].
74 *Family Provision Act 1982* (NSW); *Succession Act 1981* (Qld), Part IV (ss 40-44).

recommendations would further entrench the centrality of the spouse in the overall intestacy scheme, particularly as the entitlement of issue would be severely curtailed.

Surviving spouses would be entitled to the intestate's tangible personal property. Although such personal property would include the intestate's share of the household chattels, it is also likely that tangible personal property would encompass items which were never covered by the definition of household chattels. For example, motor vehicles, boats and aircraft are specifically excluded from the New South Wales and Queensland definitions.[75] These are expensive items which may be used for pleasure and may not be considered business items under the definition of tangible personalty.

The amount of the statutory legacy would increase so that the spouse would be entitled to a greater proportion of the estate. Where the estate was not large, this would mean that the amount for the entitled issue would be significantly reduced or non-existent. Moreover, the spouse would have the ability to purchase additional assets with the statutory legacy.

The residue would be apportioned equally between the spouse and the entitled issue without taking into account the number of issue involved. This does not differ from the current New South Wales approach (except that, in New South Wales, all issue of the intestate would be entitled to a portion of any residue) but it jettisons the differential approach in Queensland.

The spouse would be entitled to make an election to obtain any property belonging to the deceased that does not already form part of the tangible personalty. This recommendation does have merit because disputes about the definition and nature of the deceased's property would not prevent the spouse from exercising proper entitlement. However, it also has the effect of giving the spouse an opportunity to acquire a greater portion and range of the intestate's property by relying on her share of the estate to provide satisfaction. Effectively, the spouse would have first choice over all property in the estate (which is not already tangible personalty).

The Report does not take into account the fact that the spouse may be entitled to valuable assets belonging to the intestate outside the administration process. For example, the spouse and the intestate may have owned valuable assets as joint tenants[76] and the spouse may have been nominated as the beneficiary under a superannuation fund.[77] While these assets have existed in the past, they have been offset by a greater accommodation of issue generally. The Report's omission could reduce the value of the estate without concomitantly reducing the spousal entitlement.

Why has the Commission decided to further favour the spouse? It is submitted that the Commission has responded to a social 'climate change.' In so doing, it has made important assumptions about: who are the spouse and issue; how the spouse will act in regard to the assets before and after death; the alternative legal avenues available to the issue; and community expectations.

Part of the answer lies in the paramount model of the spouse which appears in the Report. The surviving spouse is an older woman who has made financial and non-financial contributions to a longstanding relationship (despite the rules pertaining to de factos). The surviving spouse requires assets for care in older age.[78] This model of a 'typical' spouse has empirical foundation. The population is ageing and the surviving spouse may be older, female, retired and living in a matrimonial home.[79]

In contrast, the surviving issue of the intestate are independent adults, able and expected to care for their interests without relying on the estate.[80] Accordingly, previous

75 *Probate and Administration Act 1898* (NSW) s 61A(2); *Succession Act 1981* (Qld) s 34A(1).

76 See, eg, *Russell v Scott* (1936) 55 CLR 440; Certoma, above n 5, 68; Ken Mackie, *Principles of Australian Succession Law* (2007) 23; Rosalind Atherton and Prue Vines, *Succession: Families, Property and Death* (2nd ed, 2003) 81-84.

77 *Baird v Baird* [1990] 2 WLR 1412; *McFadden v Public Trustee for Victoria* [1981] 1 NSWLR 15; Mackie, above n 76, 20-22.

78 New South Wales Law Reform Commission, above n 3, [3.11], [3.23]-[3.25].

79 Ibid [3.11].

80 Ibid [3.25].

concerns that all children of the intestate ought to be provided for or be treated equally are not so relevant in this situation.[81] Nevertheless, the surviving spouse will ensure that any assets from the intestacy still in existence after her death will be distributed to the issue (presumably under a will). If unusual family circumstances have led to the dependency of an adult child on the intestate, then the child can make an application under the family provision legislation. The Commission contended that community expectations that the spouse ought to be protected, or even inherit everything, could not be ignored.[82]

This model of the intestacy spouse stands in contrast to an earlier one which underpinned spousal distribution to women based on gender rather than age.[83] While widowers were entitled to all of the assets of their spouse,[84] the typical widow was a young woman, incapable of controlling the family assets, yet in need of income. The intestate's children were young and vulnerable. A significant concern was that the widow would remarry and place the family assets beyond reach of the intestate's issue. Accordingly, a compromise was made. The issue inherited two-thirds of the assets while the widow acquired one-third. This distribution applied even when the children were independent adults.[85] However, all children were treated equally.[86] It is arguable that these rules reflected 'presumed intention' and 'community expectations', even if they were discriminately based on gender.

Accordingly, the recommendations in the Report are another step towards implementation of the 'widower' model. However, while the recommendations may be defensibly skewed against adult children and in accord with 'community expectations', the interests of younger children are not adequately protected. It is assumed that the surviving parent will care for them using the intestate's assets. The children will indirectly benefit from the distribution to the spouse.

The position is complicated for children from other relationships. Such children may not benefit directly or indirectly unless the estate is large and/or valuable assets are not quarantined from the administration due to other procedures for devolution. On the other hand, the effect of the recommendations is that if the estate is large enough, all (including adult) children from other relationships may be eligible to share one half of the residue, while children of the current relationship (including minors) will not.

While children of the intestate can make an application under family provision legislation, the procedure can be expensive and divisive. Moreover, the concept of spouse or partner is sufficiently flexible so that a de facto partner of little more than two years' standing could acquire the whole of the estate, while minors from an earlier relationship would acquire nothing.

IV. NEXT OF KIN, *BONA VACANTIA* AND SURVIVORSHIP

A. Next of Kin

When there is no spouse and no issue, then both New South Wales[87] and Queensland[88] follow the general pattern that children, then parents, brothers and sisters, grandparents, aunts and uncles are entitled to the intestate's estate. In New South Wales, the limit of intestate succession is set at the aunts and uncles of the intestate, whereas in Queensland it is the children of the aunts and uncles.[89] Based on the degree of proximity to the intestate, it is considered that this would accord with the presumed intention of an intestate.[90] Both

81 Cf hotchpot for advancements: Miller, above n 6, 25.
82 New South Wales Law Reform Commission, above n 3, [3.26]-[3.34].
83 Miller, above n 6, 18-19.
84 Ibid 19.
85 Ibid.
86 Note hotchpot for advancements: Miller, above n 6, 25. For a modern account, see Mackie, above n 76, 215-217.
87 *Probate and Administration Ac 1898* (NSW) s 61B(7).
88 *Succession Act 1981* (Qld) sch 2 pt 2para 4.
89 *Probate and Administration Act 1898* (NSW) s 61B(6)(e); *Succession Act 1981* (Qld), s 37(1)(c).
90 New South Wales Law Reform Commission, above n 3, [9.3].

jurisdictions have also adopted *per stirpes* rather than *per capita* distribution[91] and avoided the separate treatment of the maternal and paternal branches of the family.[92]

The Report's recommendations retain this basic framework of intestate distribution, preferring to make several relatively minor adjustments so that all siblings would be treated equally.[93] Further, the issue of all siblings[94] and aunts and uncles would share in a *per stirpes* distribution.[95]

B. Bona Vacantia and Survivorship

When there are no surviving next of kin, both jurisdictions take the traditional approach, providing that the state takes by *bona vacantia*.[96] However, both States have provided for a discretionary distribution scheme. In New South Wales, the Crown may provide out of the estate for persons who were dependants or for whom the intestate might reasonably have been expected to make provision.[97] In Queensland, the matter is dealt with as a general power to waive rights in property.[98] A group of persons (more expansive than that in New South Wales) is able to make an application to the relevant Minister for a waiver.

Despite evidence of public support for funds to be given to charities,[99] the Commission rejected this suggestion as too costly and administratively difficult.[100] Instead, it considered that *bona vacantia* estates ought to vest in the state,[101] subject to the broad discretion of the responsible Minister (upon application) to make provision to certain classes: dependants; persons who have a just or moral claim; persons for whom the intestate might reasonably be expected to have made provision; trustees of the first three classes; and any other organisation or person.[102]

However, the recommendations for *bona vacantia* situations would be affected by a 30-day survivorship rule. Presently, New South Wales does not have any survivorship requirement for intestacy purposes.[103] In Queensland, however, if the entitled person does not survive the intestate for a period of 30 days, the estate will be dealt with as if the person had not survived the intestate.[104] The problem is that it could lead to the estate vesting in the state as *bona vacantia*.

The Commission recommended a 30-day survivorship rule[105] in order to avoid multiple administrations and the need to work out the order of death in cases of 'simultaneous' deaths.[106] In order to obviate the perverse effect of the rule, the Commission also recommended that it ought not to apply when it would lead to the estate passing to the Crown as *bona vacantia*.[107]

C. Comment

The recommendations discussed in this section are conservative because the Commission has retained the broad framework for distribution where there is no spouse. In so doing, the Commission has assumed this general kind of distribution is likely to reflect an intestate's

91 Ibid [8.6].
92 Ibid [9.23]. This in significant contrast to New Zealand: [9.24].
93 Ibid Recommendation 30; xvii, 154.
94 Ibid Recommendation 34; xvii, 162. Cf the position in New South Wales regarding siblings 'of the half blood': *Probate and Administration Act 1898* (NSW) s 61B(6).
95 Ibid Recommendation 37; xvii, 173.
96 Ibid [10.1]. *Probate and Administration Act 1898* (NSW) s 61B(7); *Succession Act 1981* (Qld) sch 2 pt 2, para 4.
97 *Probate and Administration Act 1898* (NSW) s 61B(8).
98 *Property Law Act 1974* (Qld) s 20(5).
99 New South Wales Law Reform Commission, above n 3, [10.11].
100 Ibid [10.14].
101 Ibid Recommendation 38; xviii, 180.
102 Ibid Recommendation 39; xviii, 187.
103 Cf, eg, *Succession Act 2006* (NSW) s 35(1) for the situation in respect of wills.
104 *Succession Act 1981* (Qld) s 35(2).
105 New South Wales Law Reform Commission, above n 3, Recommendation 40; xviii, 196.
106 Ibid [11.9].
107 Ibid Recommendation 40; xviii, 196.

intentions and community attitudes. However, this is not necessarily the case in the light of the decline of the collateral or extended family.

However, the recommendations in regard to *bona vacantia* and the 30-day rule make some significant, yet arguably flawed, innovations. First, the estate vests in the state, subject to the exercise of ministerial discretion. Although it is probably cheaper and less time consuming to apply to the Minister, rather than under family provisions legislation, any distribution will be subject to the discretion of the Minister. It cannot be totally certain that governments will be easily persuaded to part with substantial financial windfalls.

Second, much of the language of the discretion is couched in terminology not inconsistent with family provision legislation[108] (rather than presumed intention). The Minister considers whether: there are dependants; there is 'a just or moral claim'; or there are persons for whom the intestate 'might reasonably be expected to have made provision.' The focus is on eligible persons and the definition includes a broad reference to 'any other organisation or person' so that the discretion is not circumscribed.

Despite reference to the intestate's presumed intention elsewhere in the Report as an important issue,[109] the Minister is not required to consider the specific intestate's presumed intention. It is not incumbent on the Minister to investigate whether the intestate did articulate any intention whatsoever, particularly when there was a will later found invalid. Certainly, it would not be appropriate to consider uncritically the terms of a will made invalid due to incapacity[110] or undue influence.[111] However, earlier and invalid wills which could not be salvaged by judicial dispensing powers[112] may nevertheless be helpful. Examples of such exercises exist elsewhere. For example, in regard to court-authorised wills, the court is able to consider the nature and content of previous wills as well as evidence of the incapacitated person's previous wishes.[113] Additionally, the Minister may make provision on the application by any person or organisation. It is arguable that the Minister could exercise this power in favour of someone who has had no connection with the intestate, without transparency of decision-making required under the legislation.

Third, the introduction of the 30-day rule is problematic, particularly when it is co-joined with a 30-day rule for wills. If the sole beneficiary under the will did not survive to take an inheritance under an otherwise valid will, the assets would be dealt with under the intestacy rules. If the sole surviving next of kin did not survive, presumably the estate of that party would still take the assets in order to prevent the state taking them under *bona vacantia*. Arguably, the general survivorship for wills undermines the testamentary intentions of the testator. However, it appears very illogical that the estate of the party who did not survive under the intestacy rules would be protected from the automatic consequences of the survivorship rule, whereas the estate of the clearly intended beneficiary would not.

The attempt to circumvent *bona vacantia* when the person has not satisfied the survivorship requirements serves to heighten the fact that the vesting of *bona vacantia* estates in the state is not popular. It is arguable that the Commission too lightly dismissed, on administrative grounds, suggestions that such funds could be dedicated to charitable purposes. Surely the funds could be set aside from consolidated revenue and distributed annually to a list of statutorily recognised and registered charities.

108 See, eg, *Vigolo v Bostin* (2005) 213 ALR 692; Mackie, above n 75, 226-231.
109 New South Wales Law Reform Commission, above n 3, [1.25]-[1.30].
110 Mackie, above n 75, 39-53.
111 Ibid 62-66.
112 Ibid 96-103. *Succession Act 2006* (NSW) s 8; *Succession Act 1981* (Qld) s 18.
113 See, eg, *Succession Act 2006* (NSW) s 19(2); *Succession Act 1981* (Qld) s 23(f), (g). Note also cy-pres schemes: eg, *Charitable Trusts Act 1993* (NSW) ss 9, 10.

V. INDIGENOUS AUSTRALIANS

A. The Present Situation

The material and discussion above is subject to the special treatment of Indigenous Australians in the Report. The Commission considered the needs of Indigenous Australians separately because there would be occasions where the approach to intestacy distribution would necessitate divergence from the standards set for the rest of the community.[114]

Traditionally, marriage and kinship norms amongst Indigenous Australians have not followed English or Western society.[115] Therefore, it has been difficult and inappropriate to apply strict notions of marriage and lineal descent to the Indigenous population,[116] although in recent times this has been ameliorated by the recognition of de facto relationships and a broadened notion of issue for the purpose of intestate distribution amongst the Australian population generally.[117] In addition, customs may differ between Indigenous groups. Nevertheless, the Commission recognised that a significant number of Indigenous people died intestate.

At present, there are only a few jurisdictions in Australia which make special legislative provision for intestate distribution amongst Indigenous people.[118] Queensland is one of these jurisdictions in which customary marriage is recognised[119] and a separate intestacy regime operates.[120] Simply stated, the distribution regime withdraws control of intestacy matters from the control of the Indigenous people. When an Indigenous person dies intestate and it is difficult to determine who ought to be entitled to the assets, the chief executive of the Aboriginal and Islander Affairs Corporation may determine who is entitled, at his or her discretion, without necessarily complying with customary practices. If the chief executive is unable to make a decision, the proceeds of sale will be applied for the benefit of the Aboriginal and Islander people generally.[121]

B. The Recommendations

The Commission decided that it would be in the best interests of both Indigenous Australians and the uniformity of intestacy law to make provision for the distribution of Indigenous intestate estates.[122] The Commission recommended a special provision for dealing with Indigenous kinship structures in which the distribution of the intestate estate would be in accordance with the particular customs and traditions.[123] Accordingly, where a person claims to be entitled, under customs and traditions, to an interest in an Indigenous person's intestate estate, that person would be able to apply to the Court for an order of distribution of the estate.[124] The application would generally be made within 12 months of the grant of administration and would be accompanied by a plan of distribution prepared in accordance with the traditions of the community to which the Indigenous person belonged. The Court could make an order that the estate be distributed in a specific manner. However, the Court would have to make an order taking into account the traditions of the community or group to which the intestate belonged; and the Court would have to be satisfied that the order was a just one. The Court would be able to include property which had already been distributed by the personal representative within the period before he or she was made aware of the application. However, the Court would not be able to disturb a

114 New South Wales Law Reform Commission, above n 3, ch 14. See also Atherton and Vines, above n 76, 156-157.
115 Ibid [14.3].
116 Ibid [14.3]-[14.4].
117 Ibid [14.15].
118 Ibid [14.16]. These jurisdictions are: Queensland, Northern Territory and Western Australia.
119 Ibid [14.9]; See also *Aboriginals Preservation and Protection Act 1939* (Qld) s 19(2).
120 Ibid [14.17]-[14.22].
121 *Aboriginal Communities (Justice and Land Matters) Act 1984* (Qld) s 60(1); *Community Services (Torres Strait) Act 1984* (Qld) s 183(1).
122 New South Wales Law Reform Commission, above n 3, [14.42]-[14.61].
123 Ibid [14.55]-[14.61]; cf Queensland Law Reform Commission, above n 59, 13.
124 New South Wales Law Reform Commission, above n 3, Recommendation 45; xix, 246.

distribution providing for the maintenance, education or advancement of a person who was totally or partly dependent on the intestate before his or her death. No application would be allowed after the intestate estate had been fully distributed according to law.[125]

C. Comment

According to the Commission, the special provision for Indigenous kinship structures would only apply in a small number of cases because most Indigenous intestate estates would be administered in accordance with the general law.[126] Moreover, broader interpretations of what constitute spouses and children of the intestate may be consistent, or coincide, with customary law, so that a special distribution would be unnecessary. In any event, the Commission contemplated that the provision would be used to identify kinship structures rather than customary methods for dealing with the property of the deceased.[127] However, it is unclear whether this would mean that definitional issues would be determined by customary law, while the distribution of assets would necessarily accord with the general law.

While the recognition of traditional and customary law in specific instances for intestacy purposes can be welcomed, there are two major issues. One is that the application of traditional Indigenous laws ought not to be to the detriment of minors or dependants of the intestate because of their potentially vulnerable condition. Unfortunately, the recommendations do not provide specifically for the protection of minors or dependants except to the extent to which a distribution has already been made to them. However, in light of the centrality of spousal entitlement in the reform recommendations for the general law, it may well be that specific Indigenous kinship patterns and the associated distribution plan may be more, rather than less, favourable to minors and dependants. The other issue is that the Report remains unclear about the extent to which kinship patterns and customary laws are indisputably established for all Indigenous groups so that they could be confidently applied.

VI. CONCLUSION

The Report can be seen as a conservative document.

First, the Commission recommends a broad framework similar to that adopted for intestacy in the past: primary entitlement to the spouse and (some) issue; secondary entitlement for the next of kin; then vesting the estate in the state as *bona vacantia*.

Second, the Commission has made an effort to develop a streamlined and clear system of distribution. It assumes that if the peculiarities of family circumstances require a variation of the common theme, the parties may take action under the family provision legislation.

Third, although the Commission assiduously reviews recommendations for reform throughout parts of the common law world, it often retains the old framework and 'tinkers' with the finer details.

Nevertheless, there are some significant shifts, evidencing that the social and community climate demands change.

One is the recognition of Indigenous kinship structures and customary law, indicating a willingness to take into account different, yet inclusive, ideas of relationship.

Another is the changed definition of the immediate family within the general law. In the past, it was assumed that both the spouse (narrowly defined) and the issue of the spouse and intestate constituted the immediately entitled family. In the Report, the spouse (broadly defined to include relationships outside traditional marriage) is the primarily entitled party, supported by generous and flexible approaches to entitlement. The issue of

125 Ibid.
126 Ibid [14.56].
127 Ibid [14.57].

the intestate are no longer eligible, unless they were born in a relationship with a person other than the current spouse. Indeed, children and issue are otherwise relegated to the second category — the next of kin.[128]

There is also the changing basis of the law. Previously, modern intestacy reform was justified by what was likely to be the disposition of an intestate if he or she had put their mind to making a will. It was assumed that, just as wills were securely based on the intention of the deceased, intestate distribution ought to be validated by intention, albeit presumed. Methods based on discretionary entitlement and views of fairness, propriety or what was 'just' were not adopted.[129] Some references in the Report to community expectations and the language of entitlement signal that future intestacy schemes may also be anchored in, and defended by, perceptions about how an intestate ought to have acted, rather than how she would have acted. The problem is that, like presumed intention, 'community expectations' may not always be a defensible ground for distribution.

128 See, eg, New South Wales Law Reform Commission, above n 3, [9.1]; cf Certoma, above n 5, 34-41. Mackie, above n 76, 211-213, takes an intermediate approach, separating issue for special treatment after spouses and before next of kin.

129 Sherrin and Bonehill, above n 6, 16.