



## Review of the *Inheritance (Family Provision) Act 1972 (SA)*

### Summary list of discussion questions

#### What is the Policy behind family provision in inheritance law? (Fact Sheet 2)

1. Should the purpose of modern family provision laws be to protect dependants and prevent them from becoming dependent on the state?
2. Are there wider purposes or aims that family provision laws should seek to achieve?
3. To what extent should individuals be required to take responsibility, after they die, for the support of surviving family members or other individuals who may be dependent on the deceased financial or otherwise? Does the age of the family member or other dependent matter?
4. Would family provision laws be more acceptable if
  - a. they reflected a person's *legal* responsibility to their dependents when alive?
  - b. they gave more weight to the testator's intentions?

#### Testamentary Freedom (Fact Sheet 3)

1. To what extent should the law fully implement the wishes of the testator (the person who makes the will) as expressed in a valid will?
2. Should there be any exceptions where the law should intervene to improve the fairness of the will?
3. If so, what should the exceptions be where the law should intervene to improve the fairness of the will?

#### Who should be able to make a claim? (Fact Sheet 4)

1. Do you think all or only some family members should be able to make a family provision claim?
2. Is a simple eligibility list (like that proposed by the National Committee) the best solution, or should some categories of family members only be eligible in certain circumstances (such as the NSW approach)?
3. What categories of family members should be eligible *in all circumstances*?
  - a. Current spouses or domestic partners of the deceased?
  - b. Former spouses or domestic partners of the deceased?
  - c. Non-adult children? Natural, adopted or step children?
  - d. Grandchildren?
  - e. Other dependents?
  - f. Other categories - please describe.

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### What further criteria, if any, should apply? (Fact Sheet 5)

1. Is the current South Australian test for eligibility for potential family provision orders (that asks whether the claimant has been left without adequate provision for proper maintenance, education or advancement in life) still appropriate?
2. Should more detailed criteria be applied to those seeking to make family provision claims in South Australia?
3. Is the current South Australian approach, which provides the court with a broad discretion to make an order in favour of an eligible person, appropriate or should the law set out the factors to which the court must and may have regard?
4. Should South Australia require claimants to show dependence on the deceased person? If so, how should 'dependence' be defined?
5. Do you think including a dependence requirement risks encouraging dependence on the deceased person during their lifetime, in order to benefit after their death?

### Timing of claims and costs (Fact Sheet 6)

1. Is the current six month time frame appropriate for family provision claims in South Australia?
2. Is the date of grant of probate an appropriate date from which to commence time limits for making family provision claims, or would the date of death be more appropriate?
3. Is it appropriate for a family provision claim to be precluded by the full distribution of the deceased estate, or should a claim still be able to be made within a reasonable time after death or the grant of probate?
4. Is there a need for any changes in relation to the provisions governing costs in family provision claims and, if so, is it preferable that such change are made by statute, Court Rules or Practice Direction?
5. Should there be a legislative presumption that, in family provision proceedings, an unsuccessful applicant will not receive their costs out of the estate?
6. Could judicial mediation and/or conciliation help to resolve these disputes and avoid costly litigation? If so, what reforms should be made to facilitate this?
7. What should be the role of judicial mediation in helping to resolve these disputes?
8. What further measures might be taken to support the Court in encouraging resolution, discouraging opportunistic claims and addressing legal costs?

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## Notional Estate and Clawback Provisions (Fact Sheet 7)

1. To what extent do people deal with their assets during their life in order to minimise the property that is in their estate and frustrate the operation of family provision laws? What are some examples of this?
2. Should people be entitled to deal with their assets during their lifetime to minimise the property that is in their estate?

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