



‘How sharper than a serpent’s tooth it is to have a thankless child.’
William Shakespeare, *King Lear* (Act 1, Scene 4)

South Australian Law Reform Institute

‘Distinguishing between the Deserving and the Undeserving’: Family Provision Laws in South Australia

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the Adelaide University Law School.

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Government of South Australia
Attorney-General's Department



THE LAW SOCIETY
OF SOUTH AUSTRALIA

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Terms of reference

The Attorney-General of South Australia, the Hon John Rau MP, invited the South Australian Law Reform Institute to identify the areas of succession law that were most in need of review in South Australia, to review each area and to recommend reforms. The Institute identified seven topics for review. This Report examines the role and operation of the *Inheritance (Family Provision) Act 1972* (SA).

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Acknowledgements

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Students whose research contributed to this Report as part of the Adelaide University Law School Law Reform course were Nicola Caon, Sarah Fletcher and Asta Hill in 2011; Laura Butler, John Eldridge, Katherine Varsos and Minh Trong Bui in 2013; Isabelle Gatley, Georgia Goodwin, Ben Lu and Sophie Wilksch in 2016; and Giorgia Kinloch, Quentin Moloney, Jemma Potezny and Loretta Foran in 2017.

Helen Wighton, the Hon Tom Gray QC, Louise Scarman, Professor John Williams, Bruce Newey and Amy Teakle provided editorial, proofing and research assistance.

SALRI would like to acknowledge the generous support of the Law Foundation of South Australia in providing funds for research and community consultation for the Institute's review of succession law.

Disclaimer

This Report deals with the law as it was on 31 October 2017 and may not necessarily represent the current law.

Abbreviations and Glossary

Family Provision Laws or Legislation	Legislation creating entitlements to deceased estates based on a family and personal relationship and moral obligations
<i>IFPA</i>	<i>Inheritance (Family Provision) Act 1972</i> (SA)
Model Bill	Draft model legislation to amend the <i>Family Provision Act 1982</i> (NSW), prepared by the National Committee for Uniform Succession Laws (the National Committee). The Model Bill is set out in Queensland Law Reform Commission (National Committee for Uniform Succession Laws), <i>Family Provision: Supplementary Report to the Standing Committee of Attorneys General</i> , Report No 58 (2004) 88 < www.qlrc.qld.gov.au/__data/assets/pdf_file/0010/372529/r58.pdf >
National Committee	National Committee for Uniform Succession Laws, established by the Standing Committee of Attorneys-General of Australia (SCAG) in 1995
National Committee Report	National Committee for Uniform Succession Laws, <i>Family Provision: Report to the Standing Committee of Attorneys General</i> , Miscellaneous Paper No 28 (Queensland Law Reform Committee, December 1997)
National Committee Supplementary Report	National Committee for Uniform Succession Laws, <i>Family Provision: Supplementary Report to the Standing Committee of Attorneys General</i> , Report No 58 (Queensland Law Reform Commission, 2004)
NSWLRC Report	New South Wales Law Reform Commission, <i>Uniform Succession Laws: Family Provision</i> , Report No 110 (2005)
SALRI	South Australian Law Reform Institute
Testamentary freedom	The ability of a person to dispose of their property in a will freely, as they wish and to whom they wish
VLRC Final Report	Victorian Law Reform Commission, <i>Succession Laws</i> , Report No 26 (2013)

Summary of Recommendations

Recommendation 1

SALRI recommends that, at this stage, it is undesirable to pursue national uniform laws in the area of family provision and the Model Bill should not be adopted.

Recommendation 2

SALRI recommends that, although absolute testamentary freedom is inappropriate, a greater focus should be given in law and practice to respecting and preserving testamentary freedom and a testator's will should only be altered by a court in limited circumstances and accordingly a statutory object or guiding principle should be added to the *Inheritance (Family Provision) Act 1972* to provide that in considering any family provision claim a court should, as far as possible or practicable, respect the wishes of the testator.

Recommendation 3

SALRI recommends that the law in South Australia should be strengthened so that greater focus should be given in South Australia to discourage or deter baseless, opportunistic, undeserving or unmeritorious claims under the *Inheritance (Family Provision) Act 1972*.

Recommendation 4

SALRI recommends that a signed written account or statement by a testator should be admissible as a specific exception to the hearsay rule as evidence of the truth of its contents as to the reasons of the testator for the distribution of his or her estate in a will. The weight in any case to be accorded to such a statement is an issue for the court. Where such a statement is adduced, a court shall, in determining what weight, if any, is to be attached to the statement, have regard to all the circumstances from which any inference may reasonably be drawn concerning the accuracy of the matters referred to in the statement. Whilst any model is an issue for drafting preference, SALRI is attracted to the simplicity of the ACT and Northern Territory models.

Recommendation 5

SALRI recommends that the law should not be directed to reducing a claimant's welfare dependency on the State. The ongoing entitlement of a claimant to welfare should be considered a resource of the claimant when determining whether the requirement in s 7 of the *Inheritance (Family Provision) Act 1972* can be satisfied and in determining the amount of the award under the *Inheritance (Family Provision) Act 1972*. With respect to successful claimants, the courts should mitigate, where possible, any adverse effect that an award under the *Inheritance (Family Provision) Act 1972* may have on the claimant's ongoing welfare benefits, so as not to put the claimant in a worse financial position as a result of making a successful claim.

Recommendation 6

SALRI recommends that no distinction should be drawn under the *Inheritance (Family Provision) Act 1972* between testate and intestate estates in relation to the classes of eligibility, or otherwise, for the purposes of family provision and therefore no change to the law is necessary.

Recommendation 7

SALRI recommends that the eligibility of current spouses or partners under the *Inheritance (Family Provision) Act 1972* should remain as it is.

Recommendation 8

SALRI recommends that the eligibility of former spouses and former domestic partners under the *Inheritance (Family Provision) Act 1972* should be restricted to those who receive, or are entitled to receive, maintenance from the deceased and where a former spouse or domestic partner has been party to a financial settlement in the Family Court (or any similar arrangement under State or Territory law), he or she should be ineligible to make a claim under the *Inheritance (Family Provision) Act 1972*.

Recommendation 9

SALRI recommends that the eligibility for non-adult stepchildren under the *Inheritance (Family Provision) Act 1972* should remain as it is.

Recommendation 10

SALRI recommends that the eligibility for children, whether adults or non-adults, under the *Inheritance (Family Provision) Act 1972* should remain as it is.

Recommendation 11

SALRI recommends that the *Inheritance (Family Provision) Act 1972* should be amended to include adult stepchildren as a separate new category of claimant, however the eligibility of adult stepchildren should be restricted to the following circumstances:

- a) the adult stepchild is significantly vulnerable (such as with a physical or intellectual disability);
- b) the adult stepchild substantially contributed to the testator's estate or care;
- c) the adult stepchild was genuinely dependent on the testator at the time of the testator's death; or
- d) the assets accumulated by the adult stepchild's natural parent substantially contributed to the estate of the testator.

Recommendation 12

SALRI recommends that the eligibility of grandchildren under the *Inheritance (Family Provision) Act 1972* should be restricted to either where the grandchild was wholly or partly maintained or was legally entitled to be wholly or partly maintained by the deceased person immediately before their death or where the grandchild's parent pre-deceased the testator.

Recommendation 13

SALRI recommends that the eligibility of parents and siblings under the *Inheritance (Family Provision) Act 1972* should be restricted to only those cases where the court is satisfied that the parent or

sibling cared for, or contributed to the maintenance of, the deceased person immediately before entering into aged care or a similar facility due to the testator being unable to be cared for by the applicant, due to the physical or mental incapacity of either the testator or the applicant or in those situations where the testator dies before entering into aged care or a similar facility, then immediately before their death.

Recommendation 14

SALRI recommends that non-family carers should not be included in the list of eligible claimants in the *Inheritance (Family Provision) Act 1972*.

Recommendation 15

SALRI recommends that s 7 of the *Inheritance (Family Provision) Act 1972* which sets out the requirement that a claimant (one who falls within one of the s 6 eligibility categories) must establish that he or she was left without adequate provision for his or her proper maintenance, education or advancement in life should remain as it is.

Recommendation 16

SALRI recommends that a list of the relevant criteria for a court to have regard to in the determination of a claim under the *Inheritance (Family Provision) Act 1972* has benefit and should be added to the *Inheritance (Family Provision) Act 1972*.

Recommendation 17

SALRI recommends that the list (see Recommendation 16) should be an abbreviated version of the Victorian list criteria in s 91A of the *Administration and Probate Act 1958* (Vic) and should be introduced to the *Inheritance (Family Provision) Act 1972* and at a minimum, the court, in determining any claim, be required to consider the following non-exhaustive factors:

- (1) The reasons the testator acted as they did when making the will;
- (2) The claimant's vulnerability and dependence on the deceased;
- (3) The claimant's contribution to the estate; and
- (4) The claimant's character and conduct.

Recommendation 18

SALRI recommends that the lead item on any list (see Recommendations 16 and 17) should be the views and reasons of the testator, so far as they are ascertainable, for making the dispositions made in their will, or for not making provision or further provision, for a person who is entitled to make an application under the *Inheritance (Family Provision) Act 1972*.

Recommendation 19

SALRI recommends that the current law relating to timing in s 8 of the *Inheritance (Family Provision) Act 1972* should remain as it is.

Recommendation 20

SALRI recommends that s 14(2) of the *Inheritance (Family Provision) Act 1972*, concerned with timing aspects around the liability of administrators after the distribution of the estate, should be repealed.

Recommendation 21

SALRI recommends that r 316 of the *Supreme Court Civil Rules 2006* which allows the summary determination of a claim under the *Inheritance (Family Provision) Act 1972* in respect of an estate less than \$500 000 should remain as it is, but SALRI encourages greater education and use as to this procedure.

Recommendation 22

SALRI recommends (reiterating its earlier view)¹ that, at this stage, the Supreme Court should retain its existing exclusive jurisdiction in relation to the management of estates and the resolution of any succession disputes (including family provision claims under the *Inheritance (Family Provision) Act 1972*) in light of its specialised role, expertise and resources.

Recommendation 23

SALRI recommends that, although there is strong benefit in a robust approach to costs in claims under the *Inheritance (Family Provision) Act 1972* (extending to a default 'loser pays' principle), the current law relating to costs should remain as it is, as the general issue of costs is ill-suited to statutory intervention and it is preferable for this to be left to the courts to address as they deem best through case law, Rules or Practice Directions.

Recommendation 24

SALRI recommends that there should be a legislative provision to provide the court with a specific power to require either applicants commencing claims or beneficiaries defending claims under the *Inheritance (Family Provision) Act 1972* to provide security for costs in an appropriate case where an applicant's claim appears unmeritorious or undeserving (such as where the applicant has been left with adequate provision and/or already possesses ample resources) or where a defendant appears to be unwilling to negotiate when a valid or meritorious claim has been made. Where the court exercises its discretion, the security for costs is to be paid into court by the applicant when the claim is commenced and by the defendant when lodging a defence.

Recommendation 25

SALRI recommends that further measures be taken, building on existing procedures in the Supreme Court, to promote and enhance proactive, robust and timely judicial mediation to contain legal costs, promote the early resolution of valid claims under the *Inheritance (Family Provision) Act 1972* and discourage or deter the continuation of undeserving claims. Such mediation should be carried out by the most appropriate judicial (or other) officer.

¹ SALRI, *Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes*, Final Report 6 (December 2016) 25–26 [2.4.2], 37–38 [3.5.6]–[3.5.8].

Recommendation 26

SALRI specifically recommends that a court process which is to be adapted from the South Australian Statutory Wills jurisdiction under s 7 of the *Wills Act 1936* (SA) should be introduced into the *Inheritance (Family Provision) Act 1972*. This would institute a two-stage process: an application for permission to proceed and, upon that permission being granted, commencing an application for an order under the *Inheritance (Family Provision) Act 1972*. The application to be granted leave to proceed should be supported by a statement (no more than two pages in length) in summary form which addresses the items on an abbreviated version of the list criteria in s 91A of the *Administration and Probate Act 1958* (Vic) (see Recommendations 17 and 18) as well as a short statement including the real and personal assets of the applicant. In proceedings, where the application is not obviously without merit, the leave to proceed can be granted and the substantive application can be heard concurrently.

Recommendation 27

SALRI recommends that notional estates or ‘clawback’ laws for the purposes of family provision should not be introduced into the law in South Australia.

Recommendation 28

SALRI recommends that, subject to funding, research ethics approval, the necessary consultation (especially with Aboriginal communities) and the input of Aboriginal communities, it undertake a future law reform project to examine the various areas where there is tension between current succession laws in South Australia and Aboriginal kinship and customary law and practice (this project to include funeral instructions in a will, the disposal of a deceased’s remains and the resolution of disputes that may arise) and to make appropriate recommendations.

Recommendation 29

SALRI recommends that, subject to appropriate funding, it undertake a future law reform project to examine the role and operation of the current law in South Australia with respect to powers of attorney under the *Powers of Attorney and Agent Act 1984* (to include advance care directives and the *Guardianship and Administration Act 1993* and other linked legislation if appropriate) and with a particular view to addressing any concerns of abuse and exploitation.

Recommendation 30

SALRI accepts that charities have a legitimate interest where a testator has left property to a charity (especially in accordance with the importance in this context of testamentary freedom), but it is unnecessary to include any specific provision relating to charities and SALRI recommends no change to the *Inheritance (Family Provision) Act 1972* in this context.

Recommendation 31

SALRI recommends that after, or at the same time as, any amendments to the *Inheritance Family Provision) Act 1972* (noting SALRI’s earlier Report into Intestacy),² there be consolidation of South

² SALRI, *South Australian Rules of Intestacy*, Final Report 7 (July 2017) 65 [7.14].

Australian succession law legislation into one new *Succession Act* to promote accessibility and ease of reference.

Part 1 – Background

1.1 The South Australian Law Reform Institute

1.1.1 The South Australian Law Reform Institute (SALRI) is an independent non-partisan law reform body based at the University of Adelaide Law School. SALRI conducts inquiries or references into various areas of the law. It is assisted by an expert Advisory Board. The subject of a reference is determined by the SALRI Advisory Board and at the request of other parties such as the South Australian Attorney-General or the Law Society of South Australia (the Law Society). Before coming to its conclusion, SALRI examines the relevant research and it also looks at similar laws and their operation in other jurisdictions. It consults widely with interested parties, experts and the community. SALRI is assisted by its expert Advisory Board. Based on the work and research undertaken during an inquiry, SALRI makes recommendations to the Attorney-General so that the Government and South Australian Parliament can make informed decisions about any appropriate changes to the law. SALRI's recommendations do not necessarily become law. Rather, any decision on accepting and implementing its recommendations is entirely for the Government and South Australian Parliament.

1.1.2 When undertaking its work, SALRI has a number of objectives. These include to identify law reform options that would modernise the law, fix any problems in the law, consolidate areas of overlapping law, remove unnecessary laws, or, where desirable, bring South Australian law into line with the law of other States and Territories.³

1.1.3 SALRI was established in December 2010, under an agreement between the South Australian Attorney-General, the University of Adelaide and the Law Society.⁴ SALRI is based on the Alberta law reform model that is also used for the Tasmanian Law Reform Institute.⁵ SALRI also draws on the work of the Law Reform elective class at the Adelaide Law School.

1.1.4 In 2011, the Attorney-General, the Hon John Rau MP, invited SALRI to identify the areas of succession law that were most in need of review in South Australia, to review each area and to recommend any reforms. It is important that South Australia's succession laws keep up with changing values and conditions and community expectations and the law remains responsive and effective.⁶ SALRI especially identified the rules relating to family inheritance as in need of review, the last systematic review having been almost 50 years ago in 1969.⁷

1.1.5 SALRI's current Report into the role and operation of the *Inheritance (Family Provision) Act 1972* (SA) (the 'IFPA') is part of its wider work into succession law reform in South Australia.

³ The issue of uniformity is especially significant in the context of succession law. See National Committee for Uniform Succession Laws, *Family Provision: Report to the Standing Committee of Attorneys General*, (Miscellaneous Paper No 28) (Queensland Law Reform Committee, December 1997) ii-iii ('National Committee, MP 28'). See further below [2.1.19], [2.1.26].

⁴ Further information about SALRI and its various projects (both past and present) is available at <<https://law.adelaide.edu.au/research/law-reform-institute/>>.

⁵ See Kate Warner, 'Institutional Architecture' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 55, 62–64.

⁶ Victorian Law Reform Commission (VLRC), *Succession Laws*, Final Report 26 (2013) ix (Cummins J) <http://www.lawreform.vic.gov.au/sites/default/files/Succession_Laws_final_report.pdf>.

⁷ Law Reform Committee of South Australia, *Testator's Family Maintenance Act 1918-1943* (1969).

1.1.6 This is a topical issue as laws such as the *IFPA* which allow a relative to challenge their inheritance under a will or the law of intestacy are highly contentious.⁸ Such cases often give rise to great family bitterness and disproportionate legal costs.⁹ A fundamental and as yet unresolved question, as identified by Lady Hale of the English Supreme Court, is the difficulty for a court under the present law to ‘distinguish between the deserving and the undeserving’ claim.¹⁰

1.1.7 Funding was generously provided from the Law Foundation of South Australia for much of the research and consultation necessary for SALRI’s review of succession law (including this Report).

1.1.8 As part of its succession reference, SALRI has identified various topics for review, and is in the process of completing or progressing reports on each of these issues. This work is almost complete and includes:

- Review of Sureties’ Guarantees for Letters of Administration.¹¹
- Wills Register: State Schemes for Storing and Locating Wills.¹²
- Small Estates: Review of the Procedures for Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes in South Australia.¹³
- The law of Intestacy.¹⁴
- Management of the Affairs of a Missing Person.¹⁵
- Who may inspect a Will?¹⁶

1.1.9 Copies of the Papers and Reports mentioned above can be found at <<https://law.adelaide.edu.au/research/law-reform-institute/>>.

1.1.10 SALRI intends in early 2018 to look at the operation of the common law forfeiture rule in cases of homicide, drawing on work of the Victorian Law Reform Commission.¹⁷

1.1.11 The tension between many of the concepts in present English based succession laws in Australia and Aboriginal kinship and customary law and practice has been raised to SALRI in

⁸ See, for example, Ben White et al, ‘Estate Contestation in Australia: An Empirical Study of a Year of Case Law’ (2015) 38 *University of New South Wales Law Journal* 880, 880–881; Richard Ackland, ‘Where there’s a will, there’s a chance for wasteful litigation’, *Sydney Morning Herald* (online), 13 April 2012, <<http://www.smh.com.au/federal-politics/political-opinion/where-theres-a-will-theres-a-chance-for-wastefullitigation-20120412-1wwfk.html>>.

⁹ See, for example, Prue Vines, *Bleak House Revisited? Disproportionality in Family Provision Estate Litigation in New South Wales and Victoria* (Australasian Institute of Judicial Administration, 2011).

¹⁰ *Ilott v Mitson* also known as *Ilott v the Blue Cross and Others* [2017] UKSC 17, [2017] 2 WLR 979, [62].

¹¹ SALRI, Issues Paper 2, *Dead Cert: Sureties’ Guarantees for Letters of Administration* was released in December 2012 and Final Report 2, entitled, *Sureties’ Guarantees for letters of administration* was released in August 2013. See also *Administration and Probate (Removal of Requirement for Surety) Amendment Act 2014* (SA).

¹² SALRI, *Losing It: State Schemes for Storing and Locating Wills*, Issues Paper 6 (July 2014); SALRI, *Losing It: State Schemes for Storing and Locating Wills*, Final Report 5 (2016).

¹³ SALRI, *Small Fry: Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes*, Issues Paper 5 (January 2014). A follow up Consultation Paper was circulated in December 2015. This was followed by SALRI, *Small Fry: Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes*, above n 1.

¹⁴ SALRI, *Cutting the Cake: South Australian Rules of Intestacy*, Issues Paper 7 (December 2015); SALRI, *South Australian Rules of Intestacy*, Final Report 7 (July 2017).

¹⁵ SALRI, *Management of the Affairs of a Missing Person*, Report 8 (July 2017).

¹⁶ SALRI, *Who may Inspect a Will?*, Report 10 (November 2017).

¹⁷ Victorian Law Reform Commission, *The Forfeiture Rule* (September 2014). See also Tasmania Law Reform Institute, *The Forfeiture Rule*, Report No 6 (December 2004). This project will include the rule’s family provision implications.

consultation.¹⁸ SALRI is proposing to examine these issues in a future law reform project and to include in this project the law relating to funeral instructions, the disposal of human remains and the resolution of disputes that may arise. These particular issues have been highlighted to SALRI on more than one occasion in the course of its succession reference and raise particular complexities and sensitivities, especially for Aboriginal communities.¹⁹

1.1.12 The role and operation of advance care directives and powers of attorney and the potential for abuse and exploitation in this context has also been widely raised to SALRI in the course of its succession reference, especially in the context of the present Report.²⁰

1.1.13 SALRI wishes to acknowledge the valuable contributions to the current Report by Nancy Detmold and the late Helen Wighton, the founding Deputy Director of SALRI. Ms Detmold and Ms Wighton conducted extensive research and analysis for this Report and SALRI is grateful for their input and commitment. SALRI also acknowledges the significant contribution of Natalie Williams and the students of the Law Reform class at Adelaide University Law School.

1.1.14 SALRI finally wishes to express its appreciation to the many succession lawyers and members of the community who have generously contributed to this reference and shared their personal, often distressing, experiences of the operation of the current law.

1.2 Inheritance (Family Provision) Act 1972 reference

1.2.1 SALRI's latest reference is topical and one that has relevance for the lives of many South Australians. It investigates whether the current laws that apply to the division of a person's estate upon his or her death are fair and effective and are the most appropriate scheme for 2017 and beyond. These laws are largely contained in the *IFPA* and intestacy legislation.

1.2.2 The concerns about the operation of family provision laws are not confined to South Australia.²¹ As the Victorian Law Reform Commission (VLRC) observed of similar laws in Victoria:

In the course of its reference, the Commission has heard a number of criticisms about the operation of family provision law in Victoria...:

- a belief that the current law encourages opportunistic or non-genuine claims
- the high legal costs in family provision proceedings and the fact that they are often borne by the estate, even where a family provision claim fails
- the settlement of a high proportion of claims that may not otherwise have succeeded at trial
- the fact that, due to the high rate of settlement, the courts have little oversight over costs in family provision matters

¹⁸ See generally Australian Law Reform Commission (ALRC), *Recognition of Aboriginal Customary Laws*, Report No 31 (1986); Lidia Xynas, 'Succession and Indigenous Australians: Addressing Indigenous Customary Law Notions of "Property" and "Kinship" in a Succession Law Context' (2011) 19 *Australian Property Law Journal* 199; Law Reform Commission of Western Australia (LRCWA), *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture*, Final Report (September 2006) 239–241.

¹⁹ See further below Part 9, especially Recommendation 28.

²⁰ See further below [10.2.1]–[10.2.3].

²¹ Similar laws exist in all Australian jurisdictions. See *Family Provision Act 1969* (ACT); *Succession Act 2006* (NSW) ss 55–100; *Family Provision Act* (NT); *Succession Act 1981* (Qld) Part IV; *Testator's Family Maintenance Act 1912* (Tas); *Administration and Probate Act 1958* (Vic) Part IV; *Family Provision Act 1972* (WA).

- the lack of certainty that exists in this jurisdiction and the difficulties experienced by legal practitioners when advising clients about the validity and strength of the claim
- the perception of some members of the public that their will can effectively be challenged by anyone, and that they do not truly have freedom to dispose of their property by will.²²

1.2.3 SALRI has examined these and other issues in relation to family provision laws in a South Australian context. This Report is designed to identify the problems or concerns with the current law, gather the views of the South Australian community about how the law can be improved, and consider alternative options implemented in other Australian jurisdictions. The Report seeks to balance what some have characterised as greed from need and to distinguish the deserving from the undeserving.

1.3 Consultation approach

1.3.1 SALRI is committed to conducting an inclusive and accessible consultation with the South Australian community and all interested parties, including but not confined to the legal profession.²³ Genuine and inclusive consultation is integral to modern law reform.²⁴ As Neil Rees has observed:

Effective community consultation is one of the most important, difficult and time-consuming activities of law reform agencies ... community participation has two major purposes: to gain responses and feedback and to promote a sense of public “ownership” over the process of law reform ... consultation often brings an issue to the attention of the public and creates an expectation that the government will do something about the matter ...²⁵

1.3.2 In collaboration with the Law Society’s Succession Law Committee,²⁶ SALRI conducted its public consultation on its review of the *IFPA* between February 2017 and May 2017. This was facilitated through the release of SALRI’s Background Paper, *Looking after One Another: Review of the*

²² VLRC, *Succession Laws*, above n 6, 99 [6.8].

²³ Michael Kirby, ‘Are We There Yet’ in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 433, 436: ‘The general commitment to involving ordinary citizens — and to consulting far and wide and beyond judges, lawyers and public institutions — undoubtedly played a significant role in the life of the ALRC and other Australian agencies that copied its techniques. The process of widespread consultation was a reminder to the expert participants in the ALRC of the need to step beyond an elitist and purely lawyerly approach to law reform.’ See also Hon Michael Kirby AC CMG: ‘It would not have been possible for that [law reform] task (or many other discharged by the ALRC) to have been performed in a few months worked up by a part-time committee of busy people; and pushed forward with minimum consultation and trivial public and stakeholder engagement. Those who hold to such views should go back and live in the nineteenth century. They have no place in the current more demanding and transparent age. And basically they have a contempt for the right of citizens, including corporate citizens, to have the most modern, well-informed, efficient system of law that the state can reasonably provide’: ‘Changing Fashions and Enduring Values in Law Reform’ (Speech delivered at the Conference on Law Reform on Hong Kong: Does it Need Reform?, University of Hong Kong, Department of Law, 17 September 2011) <<http://www.alrc.gov.au/news-media/2011/changing-fashions-and-enduring-values-law-reform>>.

²⁴ See, for example, Kirby, ‘Changing Fashions and Enduring Values in Law Reform’, above n 23; Roslyn Atkinson, ‘Law Reform and Community Participation’ in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 160–174.

²⁵ Neil Rees, ‘The Birth and Rebirth of Law Reform Agencies’ (Paper presented at Australasian Law Reform Agencies Conference, Vanuatu, 10-12 September 2008) <http://www.lawreform.vic.gov.au/sites/default/files/ALRAC%2BPaper%2B_NeilRees.pdf>.

²⁶ The Law Society Succession Committee unfortunately decided not to provide a submission to this Report on the basis that many of its members had actively contributed to the consultation.

Inheritance (Family Provision) Act 1972 (SA),²⁷ and Fact Sheets,²⁸ and the launch of the SALRI YourSAy online consultation website.²⁹

1.3.3 The State Government's YourSAy site allowed members of the public to complete a short online survey, send SALRI a lengthy written submission or download either the plain English Fact Sheets or the more detailed Background Paper for legal practitioners, both of which set out the main issues and discussion questions. SALRI also prepared a number of videos featuring staff and researchers of SALRI, succession lawyers and the Hon Tom Gray QC which introduced the key issues SALRI was considering and included a range of questions for discussion. These videos were available on the YourSAy website and on YouTube.³⁰ SALRI also presented at the Law Society 2016 Country Update at Wallaroo, Law Society 2017 Forum, the Administrative Law Practitioners Forum and the Law Society CPD. Dr Sylvia Villios and Sarah Moulds conducted several media interviews with radio stations in Adelaide, Riverland and Mt Gambier.

1.3.4 There were four main ways through which the public could be involved:

- (a) filling out the survey on the YourSAy site;
- (b) participating in one of SALRI's community roundtables held in Adelaide, Berri, and Mt Gambier;
- (c) sending SALRI a written submission or letter; or
- (d) requesting a one-on-one meeting with a SALRI team member.

1.3.5 An overview of the consultation data showed strong levels of community engagement.

1.3.6 On 31 March 2017, SALRI hosted a Roundtable for legal experts, including succession lawyers and representatives of the Supreme Court of South Australia, to discuss the discussion questions identified in SALRI's *Background Paper Looking after One Another: Review of the Inheritance (Family Provision) Act 1972* (SA). The Roundtable was conducted at the University of Adelaide with 19 non-SALRI legal practitioners and court attendees.³¹ On 7 April 2017, two separate Roundtables were conducted for legal experts³² and community members in Mt Gambier. Eleven legal practitioners and four community members attended. Similar Roundtables for legal experts³³ and community members were conducted in Berri on 10 April 2017, with six legal practitioners and seven community members in attendance. All the Roundtables were conducted under Chatham House rules. SALRI has also spoken individually to various interested legal practitioners and experts including Professor Gino Dal Pont and Ken Mackie

²⁷ Please see SALRI webpage: <<https://law.adelaide.edu.au/research/law-reform-institute/>> for a full-text copy of the Background Paper, *Looking after One Another: Review of the Inheritance (Family Provision) Act 1972* (SA).

²⁸ Please see SALRI webpage: <<https://law.adelaide.edu.au/research/law-reform-institute/>> for a copy of the Fact Sheets.

²⁹ See YourSAy: Looking After One Another: Family Provision Laws in South Australia <<http://yoursay.sa.gov.au/decisions/looking-after-one-another/about>>.

³⁰ The videos are available at <<https://yoursay.sa.gov.au/decisions/looking-after-one-another/about>> and <<https://www.youtube.com/watch?v=uoZ4dxDRMAI&index=2&list=PLbVNzuvdu2nBH7gzSMWPqNH0tRhjzguV>>.

³¹ The report of this Roundtable is available at: <https://law.adelaide.edu.au/research/law-reform-institute/documents/family_inheritance_legal_experts_roundtable_report_adelaide.pdf>.

³² The report of this Roundtable is available at: <https://law.adelaide.edu.au/research/law-reform-institute/documents/family_inheritance_legal_experts_roundtable_report_mount_gambier.pdf>.

³³ The report of this Roundtable is available at: <https://law.adelaide.edu.au/research/law-reform-institute/documents/family_inheritance_legal_experts_roundtable_report_berri.pdf>.

from the University of Tasmania and the Hon Tom Gray QC. SALRI also received 15 individual submissions, from legal practitioners, academics and the public.

1.3.7 By the end of the consultation period on 15 May 2017, SALRI had received 98 individual responses to the survey. The videos were viewed at relatively high rates, with the 'Full Length' video receiving 170 views. The Background Paper and Fact Sheets had been downloaded on average of 40 times each. The videos had been watched (for at least three seconds) 4 300 times on Facebook while the YourSAy Facebook post received approximately 20 000 views.

1.3.8 SALRI has also conducted follow up consultation in relation to certain issues that emerged with regional and city succession lawyers.

1.3.9 In the preparation of this Report, SALRI has had careful regard to all the various views expressed to it. SALRI is grateful for the time and valuable contributions of all participants who have responded and contributed to this Report. SALRI has also had regard to previous submissions made to it during the course of its wider succession reference. SALRI has also had regard to its initial discussions in relation to issues under the *IFPA* with succession lawyers and practitioners in consultation sessions held at Mount Gambier, Adelaide, Port Lincoln, Berri and Naracoorte on 27 June 2016, 1 August 2016, 17 August 2016, 12 October 2016 and 9 November 2016 respectively, and with staff at the Office of the Public Trustee on 12 September 2016.

1.3.10 The following sections of this Report address a range of specific law reform issues on which the consultation discussion questions were primarily focused. The issues covered are:

- (a) History and policy of the law;
- (b) Testamentary freedom;
- (c) Who should be able to make a claim;
- (d) What further criteria should apply to making a claim;
- (e) Timing of claims;
- (f) Costs and Judicial Mediation;
- (g) Clawback provisions and notional estates;
- (h) Aboriginal succession issues; and
- (i) Other issues.

1.4 Features of family provision laws

1.4.1 Before examining the history, policy, current relevance and application of the present family provision legislation in South Australia, this Report lists what have come to be the standard features of modern Australian family provision laws. Broadly these common features are:

- (a) A family provision claim can be made against any deceased estate, regardless of whether the deceased made a will or not.
- (b) A successful claim overrides the deceased's will as to how and to whom his or her assets should be distributed, and, if the deceased died intestate, (without a will), it overrides the statutory order of distribution for such estates (that order, being based on assumptions as to how people would want their estates distributed in such circumstances).

- (c) A family member who falls within one of the listed relationships with the deceased person (the testator or intestate) may apply for family provision, regardless of whether or not they knew the deceased or depended on him or her for financial support during his or her lifetime. People within this class have the 'automatic status' to apply.
- (d) The moral obligations of a deceased towards such a claimant that are considered under family provision laws stem from family relationships and membership of the family and include considerations of a need for support or for recompense to a claimant for contribution made during the deceased's life to the deceased's welfare or assets, or both.
- (e) For an eligible claimant to succeed, the court must decide if he or she has been left without adequate provision for his or her proper maintenance, education or advancement and if so, whether and what provision should be made for the claimant from the deceased's estate.
- (f) The assets that may be used to satisfy such claims are generally limited to the deceased's estate at death. However, in one jurisdiction, New South Wales, when the assets of that estate are insufficient to meet a family provision claim order, it can draw on other assets (or the 'notional estate') of the deceased, namely assets that were disposed of by the deceased within a certain period before death, if the motive was to avoid obligations under family provision laws or if the time between the transaction and death is within such a short period as to raise a presumption that such a motive existed.

Part 2– History of Family Provision Laws

2.1 The rise and fall of testamentary freedom

2.1.1 The doctrine of testamentary freedom is a relatively new concept.³⁴ Before family provision laws were introduced in the early 20th century, the law of dower gave widows and children a legal entitlement to one-half of the estate for their support and maintenance.³⁵ However, rising individualism, an offshoot of the English laissez-faire liberalism which was in the ascendancy at the time, led to the abolition of the law of dower by 1890, resulting in absolute testamentary freedom for the testator.³⁶

2.1.2 Testamentary freedom is a manifestation of 18th century liberalism.³⁷ It was symbolic, as Professor Ronald Chester has commented, of the ‘shift from feudal to individual conceptions of property in Western society’,³⁸ heralded by the philosopher John Locke.³⁹ In the context of individual property rights, testamentary freedom was considered a logical extension of the ‘natural right’ to dispose of property *inter vivos*.⁴⁰ For John Stuart Mill, ownership of property was incomplete ‘without the power of bestowing it, at death or during life, at the owner’s pleasure’.⁴¹ In the context of family, testamentary power was considered a function of ‘Paternal Jurisdiction’ and a ‘tye on the Obedience of his

³⁴ The relative shortness in English law of the acceptance of absolute testamentary freedom has been noted. In his book on *The Inheritance (Family Provision) Act 1938* (Sweet & Maxwell, 1950), Michael Albery commented: ‘The protection of the rights of the family as an essential unit in society is a primary concern of most systems of law. Complete freedom of testation, as enjoyed under English law for a brief period of 47 years, is therefore by the standards of contemporary jurisprudence an anomaly.’ See also *Ilott v Mitson* [2017] 2 WLR 979, [50].

³⁵ Justice Geoff Lindsay, ‘The TFM Act: Early Days Leading to a 99 Year Centenary’ (Paper presented at Elder Law and Succession Committee, Law Society of New South Wales, 14 October 2015) 3 quoting New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 August 1916, 578 (D R Hall). See, for example, Samantha Renwick, ‘Responsibility’ to Provide: Family Provision Claims in Victoria’ (2013) 18(1) *Deakin Law Review* 159, 161; South Australia, *Parliamentary Debates*, House of Assembly, 3 October 1918, 804 (Archibald Henry Peake); Bruce James Cameron, *Family Protection* (1966) An Encyclopaedia of New Zealand 1966 <<http://www.teara.govt.nz/en/1966/family-protection>>; Rosalind Atherton, ‘New Zealand’s Testator’s Family Maintenance Act of 1900 – the Stouts, the Women’s Movement and the Political Compromise’ (1990) 7(2) *Otago Law Review* 202, 203.

³⁶ Myles McGregor-Lowndes and Frances Hannah, *Every Player Wins a Prize? Family Provision Applications and Bequests to Charity* (Australian Centre for Philanthropy and Non-Profit Studies, Queensland University of Technology, 2008) 9; Lindsay, above n 35, 3 quoting New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 August 1916, 578 (D R Hall). See also Cameron, above n 35; Queensland Law Reform Commission, *Uniform Succession Laws for States and Territories—Family Provision*, Issues Paper No 2 (1995) 3.

³⁷ Rosalind Croucher, ‘Statutory Wills and Testamentary Freedom: Imagining the Testator’s Intention in Anglo-Australian Law’ (2007) 7 *Oxford University Commonwealth Law Journal* 241, 243.

³⁸ Ronald Chester, *Inheritance, Wealth and Society* (Plenum Press, 1982) 11 quoted in Rosalind Atherton, *Family and Property: A History of Testamentary Freedom in NSW with Particular Reference to Widows and Children* (PhD Thesis, University of New South Wales, 1993) 9.

³⁹ Atherton, *Family and Property: A History of Testamentary Freedom in NSW with Particular Reference to Widows and Children*, above n 38, 10.

⁴⁰ Rosalind Croucher, ‘How Free is Free? Testamentary Freedom and the Battle between Family and Property’ (2012) 37 *Australian Journal of Legal Philosophy* 9, 11; Croucher, ‘Statutory Wills and Testamentary Freedom: Imagining the Testator’s Intention in Anglo-Australian Law’, above n 37.

⁴¹ Croucher, ‘How Free is Free? Testamentary Freedom and the Battle between Family and Property’, above n 40, 11.

Children'.⁴² It was a power afforded to men to 'bestow their Estates ... with a more sparing or liberal hand according as the Behaviour of this or that child hath comported with his Will and Humour'.⁴³

2.1.3 The extent of any 'moral claim' to the estate, and the 'moral duty' of the testator to fulfil it, was, in the liberalist view, maintenance and education only to the extent of ensuring women and children could be independent and self-reliant.⁴⁴ For Mill, the testator was compelled to provide for those who would otherwise become a burden on the State.⁴⁵

2.1.4 This liberalist tradition was famously expressed in 1870 by Lord Cockburn CJ in *Banks v Goodfellow*.⁴⁶ Lord Cockburn CJ declared: 'The law of every civilised people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass.'⁴⁷ The Chief Justice perceived the freedom to dispose of property as circumscribed by a 'moral responsibility'.⁴⁸ His Lordship acknowledged that there would be instances where 'caprice ... passion ... the power of new ties ... artful contrivance, or sinister influence' would lead to the neglect of claims that 'ought to be attended to'.⁴⁹ However, Lord Cockburn CJ recognised that the judgment of an individual's moral claim to the estate ought to be entrusted in the testator, for his 'instincts, affections, and common sentiments' would be more reliable, and secure a better disposition of his property, than what could be achieved by the 'inflexible rules of the general law'.⁵⁰

2.1.5 The principle of testamentary freedom dictated that competent adults, typically men (assets at the time were usually held in the name of the husband or father), should be able to dispose of their property by will as they liked and to whomsoever they wished, no matter how arbitrary or capricious.⁵¹ Under this principle, the only way a will would be invalidated was through challenging the testator's testamentary capacity.⁵² This high standard resulted in plainly unjust cases where widows and children were left destitute when testators irresponsibly or arbitrarily exercised their absolute testamentary freedom without ensuring adequate provision for their surviving wives and children in their will⁵³ (in this period there was no adequate social security net as exists now and there was very limited

⁴² Peter Lassett (ed), *John Locke – Two Treatises of Government*, (2nd ed, 1967) 72 quoted in Croucher, 'How Free is Free? Testamentary Freedom and the Battle between Family and Property', above n 40, 12; Croucher, 'Statutory Wills and Testamentary Freedom: Imagining the Testator's Intention in Anglo-Australian Law', above n 40.

⁴³ Peter Lassett (ed), *John Locke – Two Treatises of Government*, (2nd ed, 1967), 72 quoted in Croucher, 'How Free is Free? Testamentary Freedom and the Battle between Family and Property', above n 40, 12.

⁴⁴ Croucher, 'How Free is Free? Testamentary Freedom and the Battle between Family and Property', above n 40, 14.

⁴⁵ J S Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy* (London, 1848) Book V Ch 9 Par 1 cited in Atherton, *Family and Property: A History of Testamentary Freedom in NSW with Particular Reference to Widows and Children*, above n 38, 18.

⁴⁶ (1870) 5 LR QB 459, 563–565.

⁴⁷ *Banks v Goodfellow* (1870) LR 5 QB 549, 563 (Cockburn CJ). See also *Boughton v Knight* (1873) LR 3 P & D 64 (Sir James Hannen P): 'By the law in England everyone is left free to choose the person upon whom he will bestow his property after death entirely unfettered in the selection he may think proper to make. He may disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride, and we must give effect to his will, however much we may condemn the course he has pursued.'

⁴⁸ *Banks v Goodfellow* (1870) LR 5 QB 549, 563 (Cockburn CJ).

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ This classic formulation is examined in Myles McGregor-Lowndes and Frances Hannah, 'Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs' (2009) 17 *Australian Property Law Journal* 62, 63–64.

⁵² Lindsay, above n 35, 3; South Australia, *Parliamentary Debates*, House of Assembly, 3 October 1918, 803 (Archibald Henry Peake).

⁵³ Cameron, above n 35.

opportunity for widows to enter the workforce and support themselves and their dependent children).⁵⁴ This was regarded as a particular problem in the then newly developing, but wealthy, dominions of Australia, New Zealand and Canada.⁵⁵

2.1.6 By the late 19th century, political philosophy had shifted from championing complete individual freedom to a new more progressive principle where the State could, and should, intervene to protect the weaker members of society.⁵⁶ New Zealand was at the forefront of this movement, passing legislation on such issues as pensions, factory conditions, and women's suffrage as well as the *Testator's Family Maintenance Act 1900*⁵⁷ — the first of its kind to provide provision for a testator's family out of the testator's estate.⁵⁸

2.1.7 The New Zealand Act can be viewed as a major 'feminist' reform.⁵⁹ As one commentator observes:

From the point of view of nineteenth century wives, a *Testators' Family Maintenance Act* was a significant mechanism of protection and a recognition of women's rights in their position as widows.... From the point of view of nineteenth century husbands, the introduction of a *Testators' Family Maintenance Act* represented a major step backwards in regard to their testamentary freedom.⁶⁰

2.1.8 This movement soon spread to Australia, with South Australia becoming the second jurisdiction in the world to recognise women's right to vote.⁶¹ As the Australian Parliaments came to recognise both the wives' entitlement to the property due to their contribution in the partnership of marriage,⁶² and the surviving wives' and children's economically vulnerable state,⁶³ family provision law became a necessary social measure to ensure protection of this entitlement.

⁵⁴ See South Australia, *Parliamentary Debates*, House of Assembly, 3 October 1918, 884 (Mr Gunn): 'A man is on an entirely different footing to a woman. When she is married the duties which devolve upon her keep her from earning her own living and she is economically dependent on the man, and she should have some protection when the husband dies, and he should not be able to will his property to whom he chooses [sic] irrespective of the claims of wife and family. The purse of the married couple should be a joint purse.'

⁵⁵ See James Mackintosh, 'Limitations on Free Testamentary Disposition in the British Empire' (1930) 12(1) *Journal of Comparative Legislation and International Law* (3rd Series) 13, 13.

⁵⁶ See Atherton, 'New Zealand's Testator's Family Maintenance Act of 1900 – The Stouts, the Women's Movement and Political Compromise', above n 35, 202–205.

⁵⁷ Renwick, above n 35, 161–162. Sir Robert and Lady Anna Stout were the leaders of the New Zealand movement towards improved family maintenance. Sir Robert Stout made a major contribution to the law in this area, both in his roles as Attorney-General and later as Chief Justice (see, for example, *Allardice v Allardice* (1910) 29 NZLR 959; *Allen v Manchester* [1922] NZLR 218).

⁵⁸ The *Testator's Family Maintenance Act 1900* (NZ) was the first family provision legislation in the common law world. It was directed to the protection of the surviving spouse and the children of the marriage where the deceased had failed his family responsibilities by not leaving them 'due provision' in his will. See further Atherton, 'New Zealand's Testator's Family Maintenance Act of 1900 – the Stouts, the Women's Movement and the Political Compromise', above n 35, 203; Renwick, above n 35, 161.

⁵⁹ Rosalind Atherton, 'Expectation without Right: Testamentary Freedom and the Position of Women in 19th Century New South Wales' (1998) 11 *University of New South Wales Law Journal* 133, 154–156.

⁶⁰ Ibid.

⁶¹ Australian Government, Australian Suffragettes (9 June 2015) Australian Government <<http://www.australia.gov.au/about-australia/australian-story/austn-suffragettes>>.

⁶² 'I think we will recognise that the property of a married couple belongs to the married couple, because both have worked in partnership to produce the result represented in the testator's estate': South Australia, *Parliamentary Debates*, House of Assembly, 3 October 1918, 803, 805 (Archibald Henry Peake, Chief Secretary).

⁶³ South Australia, *Parliamentary Debates*, House of Assembly, 15 October 1918, 884 (John Gunn).

2.1.9 The family provision legislation was conceived in response to the plight of widows and children left destitute when their husbands and fathers abused their testamentary power and failed to make adequate provision for them in their will.⁶⁴ It was intended that such legislation would provide a means of ensuring testators met the needs of their dependent wives and children, thereby ensuring the estate and not the State bore the burden of relief.⁶⁵ As Atherton observes, the legislation was promoted as a measure to ‘alleviate the burden on the public purse’.⁶⁶ Family provision laws were also based on the concept that the cost of maintaining, educating and supporting one’s family, including one’s extended family, was a moral duty that should be borne by the individual, rather than by the State,⁶⁷ and that this could legitimately be achieved by a redistribution of the individual’s estate after his death if it had sufficient assets.

2.1.10 Two notable cases that helped prompt the introduction of such laws in Australia were those of prominent bookmaker, Francis O’Neill, and proprietor of the populist *Truth* newspaper, John Norton, in 1916.⁶⁸ O’Neill left his entire estate to his mistress and illegitimate children, leaving his wife and their child penniless,⁶⁹ while Norton disinherited his wife and son and left the bulk of his estate to his 9-year-old daughter, Joan and ‘niece’, Eva Pannett.⁷⁰ The public outcry over such unjust outcomes paved the way for justifying the revolutionary intrusion of family provision law into testamentary freedom.⁷¹ Family provision laws were introduced into Australia, firstly in Victoria in 1906,⁷² followed by the other states including South Australia in 1918 through the *Testator’s Family Maintenance Act 1918*.⁷³

2.1.11 The *Testator’s Family Maintenance Act 1918* (SA) allowed a court to order payment to be made from the deceased’s estate to the aggrieved spouse or child, despite the testator’s clearly expressed wishes in his (or more rarely her) will to the contrary; for their ‘proper maintenance, education, advancement in life’.⁷⁴ The 1918 Act aimed to achieve the social purpose of preventing destitution of a narrow class of family members who would otherwise need maintenance. Such family provision laws clearly eroded the principle of absolute testamentary freedom.

2.1.12 A fundamental question that has been raised and considered by SALRI in this Report is to what extent do the original rationale and underlying policy of the *Testator’s Family Maintenance Act 1918*

⁶⁴ Virginia Grainer, ‘Is Family Protection a Question of Moral Duty?’ (1994) 24 *Victorian University of Wellington Law Review* 141, 142–144.

⁶⁵ Ibid 142.

⁶⁶ Atherton, *Family and Property: A History of Testamentary Freedom in NSW with Particular Reference to Widows and Children*, above n 38, 150.

⁶⁷ Lindsay, above n 35, 5.

⁶⁸ Ibid 2.

⁶⁹ See *Re O’Neill* (1917) 34 WN (NSW) 72.

⁷⁰ See Michael Cannon, *John Norton (1858–1916)* (1988) *Australian Dictionary of Biography* <<http://adb.anu.edu.au/biography/norton-john-7863>>; Cyril Pearl, *Wild Men of Sydney* (London, 1958) 245 (Appendix I).

⁷¹ Lindsay, above n 35, 2–3.

⁷² *Widows and Young Children Maintenance Act 1906* (Vic).

⁷³ See, for example, Joseph Dainow, ‘Restricted Testation in New Zealand, Australia and Canada’ (1938) 36 *Michigan Law Review* 1107; Lindsay, above n 35, 9. These Acts were generally called Testators Family Maintenance Acts, because they applied only when the deceased had made a valid will (and could be called a ‘testator’) and not when the deceased had died without making a will or had made a will that was invalid or which did not dispose of all his or her assets.

⁷⁴ See, for example, *Testator’s Family Maintenance Act 1918* (SA) s 3. Similar terminology appears in comparable Acts in Australia and elsewhere in the Commonwealth: see Appendix B for a table outlining the key features of family provision laws across Australia.

and its successor legislation, the *IFPA*, remain applicable in the very different circumstances of contemporary South Australia?

2.1.13 There have been many profound social changes in the last 43 years since the last major reform of the Act⁷⁵ (and even longer since the last consideration of the relevant laws by a South Australian law reform body).⁷⁶ Perhaps the most significant has been the increase in the diversity and complexity of family structures and the number of non-traditional nuclear families, particularly blended families. Life expectancy has increased.⁷⁷ There have also been major economic changes with compulsory superannuation, increased participation of women in the paid workforce and an increase in joint ownership of property by spouses. There has been a dramatic increase in property values and even a relatively modest family home now represents a very real asset. ‘Even the most dilapidated of their homes is now worth a fortune.’⁷⁸ A gradual shift in the status of women has meant women are now likely, and capable, of being self-supporting.⁷⁹ As a result of increased longevity, children are typically older, and financially secure, when their parents’ estate is distributed.

2.1.14 Over time, testators’ family maintenance legislation changed to accommodate the evolving and changing nature of the family and family obligations in relation to property owned at death. This can most significantly be seen in the replacement of the 1918 Act with the *IFPA*. While the policy basis of the 1972 Act remains influenced by the original Acts passed in the early 1900s, it now exists in a very different social context, notably a comprehensive social security net and enhanced employment opportunities for women, and so can no longer be said to be solely aimed at preventing the kind of destitution envisaged by the original family provision legislation.

2.1.15 Reflecting this, the current Act is no longer framed in terms of preventing the destitution of close family members who had previously relied on the deceased for financial support, but rather the focus is on providing for a person who could prove (a) some need for financial support in the future or for reward for past contribution to the estate or to the welfare of the deceased and (b) some personal connection to the deceased whether by blood relationship or by coming within a new wider definition of ‘family’ relationship. The change of title itself describes the change of focus of the legislation from maintaining adequate provision to protecting rights of inheritance.⁸⁰

2.1.16 While originally confined to spouses and children,⁸¹ the scope of entitlement in the *IFPA* has been progressively broadened to include former spouses,⁸² stepchildren under the age of 18,⁸³

⁷⁵ See, for example, Grainer, above, n 64, 156–159; SALRI, *Cutting the Cake: South Australian Rules of Intestacy*, above n 14, 14 [19]–[21].

⁷⁶ Law Reform Committee of South Australia, *Testator’s Family Maintenance Act 1918-1943* (1969). See also Law Reform Committee of South Australia, *Intestacy and Wills* (1974).

⁷⁷ See also VLRC, *Succession Laws*, above n 6, ix (Cummins J): ‘Over the past 100 years, the average life expectancy has increased by 25 years. If parents live until children are well into middle age, an inheritance can be transformed from financial assistance that helps the children establish themselves in life into the guarantee of a financially secure retirement. More people are living to a frail age, dependent on others to assist them with their daily decisions and activities and vulnerable to pressure to leave property to those who care for them. They are leaving many more descendants, possibly from two or more relationships, who may feel entitled to a share of their property.’

⁷⁸ Caroline Overington, “Loves Ones” Pose Biggest Threat to Old People’s Assets’, *The Australian* (Sydney) 9–10 September 2017, 17.

⁷⁹ Grainer, above n 64, 157.

⁸⁰ South Australia, *Parliamentary Debates, House of Assembly*, 3 September 1965, 2520 (Frank Jacques Potter).

⁸¹ *Testator’s Family Maintenance Act 1918* (SA) s 3(1).

⁸² Through the *Testator’s Family Maintenance Act Amendment Act 1943* (SA) s 3.

⁸³ *Inheritance (Family Provision) Act 1972* (SA) s 6(g).

‘illegitimate’ children⁸⁴ (or children born outside marriage to use the preferred modern term), adopted children,⁸⁵ grandchildren⁸⁶ and parents.⁸⁷ Subsequent amendments broadened the scope of entitlement to include de facto spouses,⁸⁸ siblings,⁸⁹ domestic partners⁹⁰ and now ‘registered’ partners.⁹¹ These progressive changes, though necessary to reflect changing social values and ideas of family and eligibility, have had the effect of substantially expanding the classes of eligible claimants well beyond the original limited classes of eligibility.

2.1.17 The changes also allow claims to be made in respect of assets passing under the rules of intestacy (which substitutes a standardised order of entitlement to a deceased estate when there is no valid will).⁹²

2.1.18 As prevailing community attitudes and standards have changed over time, there are additional concerns that the present law is outdated. ‘The TFM of today is nothing like it was imagined to be at the outset.’⁹³ It is feared that the application of the current law may neither achieve its original aims nor lead to results that are consistent with present day family structures and situations arising from a lack of clarity as to the contemporary and appropriate social policy rationale of such legislation.⁹⁴ It is said that orders are now often made under family provision laws in favour of claimants in circumstances very different to those originally contemplated to meet the financial needs of families and avoid destitution.⁹⁵

⁸⁴ Through the *Testator’s Family Maintenance Act Amendment Act 1943* (SA) cl 3(b); later amended slightly by *Inheritance (Family Provision) Act Amendment Act 1975* (SA) cl 3.

⁸⁵ *Testator’s Family Maintenance Act Amendment Act 1943* (SA) cl 3(a).

⁸⁶ *Inheritance (Family Provision) Act 1972* (SA) s 6(h).

⁸⁷ *Ibid* s 6(i).

⁸⁸ *Inheritance (Family Provision) Act Amendment Act 1975* (SA) cl 3.

⁸⁹ *Ibid*.

⁹⁰ *Statutes Amendment (Domestic Partners) Act 2006* (SA) pt 47.

⁹¹ See *Relationship Register Act 2016* (SA) s 3; *Statutes Amendment (Registered Relationships) Act 2017* ss 4–6, 11. The Register will have significant impact in this area of the law. See Carly Fisher, ‘To Have and to Hold... After the Cooling Off’, *The Last Testament* (June 2017) 2–3, <http://www.lawsocietysa.asn.au/pdf/lt_june_2017.pdf>. Once the Register comes into operation there are several ways in which it could cause new complications in succession practice. The new Acts affects both the class of claimants under the *Inheritance (Family Provision) Act 1972* and the definition of domestic partner under the *Administration and Probate Act 1919* and many other legislative provisions. Registered partners (who currently need to obtain a declaration under the *Family Relationships Act 1975*) will be immediately eligible to claim under family provision legislation or as a beneficiary under intestacy rules. ‘It adds a layer of complexity to verifying the relationship status of a deceased person who may have had a registered partner’: at 2. There are three particular effects of the Relationship Register. First, a partner in a registered relationship has the automatic right to make a claim under the *IFPA*, regardless of the length of the relationship. Secondly, while a divorced spouse can make a claim under the *IFPA*, a person whose registered relationship has been revoked, has no ability to claim. Thirdly, the child of a domestic partner in a registered relationship who is maintained by the deceased immediately before his or her death, is also entitled to make a claim against the estate, regardless of any time constraints in terms of the length of the relationship. See Julie Redman and Annie Luppino, ‘The Legal Implications of Registering a Relationship pursuant to the Relationships Register Act 2016 (SA)’ (Paper presented at Law Society of South Australia CPD, 18 October 2017) 22.

⁹² See further SALRI, *Cutting the Cake: South Australian Rules of Intestacy*, above n 2.

⁹³ Rosalind Croucher, ‘If we could start again: Re-imagining Family Provision Law in the 21st century’ (Paper presented at the STEP Australia conference, 2–4 August 2017) 2.

⁹⁴ Rosalind Croucher, ‘How Free is Free? Testamentary Freedom and the Battle between Family and Property’, above n 40, 11; Croucher, ‘Statutory Wills and Testamentary Freedom: Imagining the Testator’s Intention in Anglo-Australian Law’, above n 37.

⁹⁵ Grainer, above n 64, 160. See further Croucher, ‘If we could start again: Re-imagining Family Provision Law in the 21st century’, above n 93.

2.1.19 It is also important to note that while they share certain features in common, succession and, in particular, family provision laws around Australia are not uniform.⁹⁶ The need to improve consistency across jurisdictions was noted as early as 1956 by Dixon J: ‘The legislation of the various States is all grounded on the same policy and found its source in New Zealand. Refined distinctions between the Acts are to be avoided.’⁹⁷ The need to improve consistency across jurisdictions was recognised by the then Standing Committee of Attorneys-General,⁹⁸ who in 1995 established a national committee to review Australia’s succession laws (including family provision laws) and to propose uniform legislation. South Australia was ultimately not represented on that committee (thought it had an observer role).

2.1.20 The National Committee submitted a report on family provision to the Standing Committee of Attorneys General in December 1997.⁹⁹ This was followed, in July 2004, by a supplementary report on family provision together with a draft model Bill to implement the two reports.¹⁰⁰

2.1.21 The Model Bill proposed by the Committee for family provision in 2004¹⁰¹ was based on the ‘belief that the scheme should facilitate, and the court determine, what is “just” in all the circumstances.’¹⁰² The Committee explained that the Model Bill sought to give effect to two underlying premises:

- all people with a strong moral claim to a share of the deceased person’s estate should be entitled to apply for provision;¹⁰³
- and that the courts should be able to exercise their discretion to make appropriate decisions regarding an applicant’s entitlement to provision.¹⁰⁴

2.1.22 Despite these laudable aims, there has been little progress in uniform or even consistent national succession laws.¹⁰⁵ There remain significant differences in succession and family provision laws throughout Australia. To date, New South Wales is the only Australian jurisdiction to rely on the Model Bill as the basis for changes, in 2006, to its family provision laws, but it has not followed the Model Bill

⁹⁶ *Coates v National Trustees Executors and Agency Co Ltd* (1956) 95 CLR 494, 517 (Fullagar J) commenting on the various State family provision laws: ‘It is, perhaps, unfortunate that each successive draftsman has thought he could do a little better than any of his predecessors.’

⁹⁷ Ibid 507.

⁹⁸ Now known as the Law, Crime and Community Safety Council.

⁹⁹ National Committee, MP 28, above n 3.

¹⁰⁰ National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General*, Report 58 (Queensland Law Reform Commission, 2004) (‘R 58’).

¹⁰¹ The Family Provision Bill 2004: Queensland Law Reform Commission (National Committee for Uniform Succession Laws), *Family Provision: Supplementary Report to the Standing Committee of Attorneys General*, Report No 58 (2004) 88. The Committee received various reports on family provision laws between 1997 and 2004, and in 2004 proposed draft model laws (the Model Bill) which amended the *Family Provision Act 1982* (NSW).

¹⁰² National Committee, MP 28, above n 3, 2.

¹⁰³ New South Wales Law Reform Commission (NSWLRC), *Uniform Succession Laws: Family Provision*, Report No 110 (2005) (‘NSWLRC Report’) Preface [0.5].

¹⁰⁴ Ibid.

¹⁰⁵ See ‘Australia’s Conflicting and Complex Succession Laws’, *ABC Radio*, 21 September 2010, <<http://www.abc.net.au/radionational/programs/lawreport/australias-complex-and-conflicting-inheritance-laws/2960710>>. This is perhaps unsurprising. The difficulties in achieving uniform, or even consistent, laws across all Australian jurisdictions, especially in a federal system is notable. See generally Brian Opeskin, ‘Law Reform in a Federal System’ (2001) 78 *Australian Law Reform Commission Reform Journal* 29.

in all respects. The NSW changes were based on recommendations by the NSW Law Reform Commission (NSWLRC) in 2005 on the Model Bill.¹⁰⁶

2.1.23 The VLRC also considered the Model Bill in its recent review of family provision laws. The VLRC supported a more restrictive approach than that favoured by the National Committee, and the VLRC's 2013 Report¹⁰⁷ recommended changes which would incorporate only some parts of the Model Bill. Part IV of the *Administration and Probate Act 1958* (Vic) was amended in 2014 to address these recommendations¹⁰⁸ (though the Act differed from the VLRC Report in some respects).¹⁰⁹ Western Australia, Queensland, Tasmania, the Australian Capital Territory and the Northern Territory have not made substantive changes addressing the model, and nor has South Australia.

2.1.24 A table outlining the key features of family provision laws across Australia is provided at Appendix B.

2.1.25 Under its guiding objectives, SALRI is required to consider the case for uniform laws where desirable. The issue featured in SALRI's consultation. One Mt Gambier practitioner, noting many of his clients (typically famers) have assets in both Victoria and South Australia, saw the benefits of consistent succession laws in Australia. Other practitioners said to SALRI that it is now routine for people to hold assets in different Australian jurisdictions.¹¹⁰

2.1.26 The undesirable consequences of different succession laws throughout Australia has been noted.¹¹¹ As the Northern Territory Law Reform Committee explained:

The result has been that while the legislation in the States and Territories clearly originates from mutually agreed principles it differs in local detail. This becomes increasingly inconvenient in a nation where freedom of movement throughout the continent is accepted as the unchallenged and unchallengeable right of any Australian citizen. Large numbers of citizens move from one part of the country to another and the tide increases every year. It becomes incongruous and clumsy to find that if a person has acquired real or personal property, transitory or permanent, in various parts of the country, his estate will be subject to different rules from different regimes.¹¹²

2.1.27 However, it is significant that only limited support was expressed to SALRI in its consultation for uniform (or even consistent) laws in the area of succession and family provision. In this regard, the majority view in consultation drew SALRI's attention to the existing disparities between succession laws throughout Australia and highlighted the advantage of flexibility and that South Australia's succession laws should reflect and meet local circumstances that may well not exist elsewhere. For

¹⁰⁶ The NSWLRC Report, above n 103, sets out the Model Bill clause by clause, commenting on each. It lists all relevant Australian legislation (see 70), and lists relevant cases (see 70). The link to the online version of this Report is <http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_r110toc>.

¹⁰⁷ VLRC, *Succession Laws*, above n 6, 97–136.

¹⁰⁸ See Appendix 6 of the Act (this came into operation on 1 January 2015).

¹⁰⁹ See below [4.3.1]–[4.3.6].

¹¹⁰ It was also noted that an astute testator may acquire or locate his or her assets in a jurisdiction with the most favourable laws in a family provision context.

¹¹¹ Justice Roslyn Atkinson, 'Family Provision in Australia: Addressing Interstate Differences and Family Provision Law Reform' (Address given at the Queensland Law Society Conference on Family Provision, 25 July 2014) 1, 18 <<http://www5.austlii.edu.au/au/journals/QLdJSchol/2014/44.pdf>>; National Committee (MP 28), above n 3, ii–iii; Queensland Law Reform Commission, *Uniform Succession Laws for Australian States and Territories: The Law of Wills*, Issues Paper No 1 WP 46 (June 1995) ii–iii.

¹¹² Northern Territory Law Reform Committee, *A Review of the Recommendations of the National Committee for Uniform Succession Laws and Draft Bills on Intestacy and Family Provision*, 8 <https://justice.nt.gov.au/__data/assets/pdf_file/0019/365212/31-Family-Provisions-and-Intestacy.pdf>.

example, the dramatic difference between house prices in Sydney and Melbourne and Adelaide was often provided as a case in point. The Hon Tom Gray QC remarked that succession laws designed for the problems and issues in Sydney have limited utility for the different circumstances of South Australia. There was very little support for the adoption of the Model Bill.

2.1.28 SALRI's starting point is conformity to national uniformity and consistency. SALRI will only depart from this aim if it is justified to do so, for South Australia's benefit. Based on the consultation and the present significant differences in the relevant laws within Australia, SALRI is not convinced at this time of the benefit of national uniform laws in the area of family provision.¹¹³ SALRI does not support the adoption at this time of the Model Bill in South Australia.

2.1.29 Recommendation:

Recommendation 1

SALRI recommends that, at this stage, it is undesirable to pursue national uniform laws in the area of family provision and the Model Bill should not be adopted.

2.2 Broad policy considerations

2.2.1 Since coming into force, the *IFPA* and similar interstate laws have not always proved effective in striking the right balance between the competing policy interests in this complex area. These laws have become increasingly problematic and contentious.¹¹⁴ As Professor Croucher notes: 'Family provision legislation today is in a muddle. It jumbles up its original logic and dilutes the logic of testamentary freedom.'¹¹⁵ It is stated that family provision laws have increasingly struggled to reconcile need and greed and to distinguish the deserving from the underserving.

2.2.2 The emergence of a culture of 'expectation' or 'entitlement' has been noted.¹¹⁶ In *Penfold v Predny*,¹¹⁷ Hallen J remarked:

In the proceedings, one cannot help but remember what was written by Professor Rosalind Croucher in a speech entitled "Succession Law Reform in NSW – 2011 Update" (which was delivered at the Blue Mountains Annual Law Conference, Katoomba, 17 September 2011) in relation to some claims brought by: "a cohort of independent, self-sufficient 50 and 60 year olds wanting to get more of the pie from their parents, notwithstanding that the parent had made a conscious decision that they had already had enough."¹¹⁸

¹¹³ See also SALRI, *Cutting the Cake: South Australian Rules of Intestacy*, above n 2, 4 Rec 1.

¹¹⁴ See generally Rosalind Croucher, 'Conflicting Narratives in Succession Law – A Review of Recent Cases' (2007) 14 *Australian Property Law Journal* 179; White et al, above n 8, 880–881; McGregor-Lowndes and Hannah (2008), above n 36, 63.

¹¹⁵ Rosalind Croucher, 'Contracts to Leave Property by Will and Family Provision after *Barns v Barns* (2003) 196 ALR 65 — Orthodoxy or Aberration?' (2005) 27(2) *Sydney Law Review* 263, 287.

¹¹⁶ See, for example, Croucher, 'If we could start again: Re-imagining Family Provision Law in the 21st century', above n 93; Shane Rogers, 'Sense of Entitlement at the Fore in Estate-Draining Battle of Wills', *The Australian* (online), 8 April 2015, <<http://www.theaustralian.com.au/business/legal-affairs/sense-of-entitlement-at-the-forein-estatedraining-battle-of-wills/news-story/7fdfe6f25e819b62a86e8fdabcf011c7>>.

¹¹⁷ [2016] NSWSC 472 (21 April 2016).

¹¹⁸ Ibid [6]. See also White et al, above n 8, 902, who adopting a 'conservative approach', still 'identified approximately one-third of the claimants [under family provision laws] that could be regarded as "financially comfortable" adults just wanting more.' See also at 901, 906.

2.2.3 A particular problem in recent years, as Hallen J raises, is that family provision laws have given rise to what has been described as greedy, vexatious or opportunistic claims. That is, claims made by family members who do not appear to be truly dependent on the testator but who seek to challenge his or her will nonetheless. Sometimes these claims are successful (or are settled out of court), but even where they are not successful, they can greatly diminish the value of the testator's estate (particularly when costs are awarded, as they are often are, out of that estate)¹¹⁹ and cause considerable distress and expense to all the parties involved. Some results might also appear to restrict the deceased's testamentary freedom and to defeat the deceased's intentions for inheritance as set out in his or her will from the perspective of the litigants, or fail to clarify or enhance the testator's intentions.

2.2.4 There is a strong perception (as also emerged in SALRI's consultation) that current law and practice erodes testamentary freedom. Various commentators¹²⁰ and studies¹²¹ highlight this finding. Concern has been expressed about the courts' apparent willingness in family provision claims to 'second guess' the testator's moral duties, and legally enforce its own assessment and alter the will.¹²² An analysis of recent South Australian cases reveals that in 22 out of the 23 cases that proceeded to trial, the applicant was successful in increasing their provision.¹²³

2.2.5 These concerns have prompted some commentators to question the significance of making a will.¹²⁴ There is a growing perception amongst the public that a will can be easily challenged and does not afford a testator the ultimate freedom to dispose of their property as they choose¹²⁵ (a theme to also strongly emerge from SALRI's consultation).¹²⁶ In light of the difficulty in ascertaining the content and extent of a particular testator's moral duties, which are inherently subjective, commentators have also expressed concern over the 'moral duty' standard that arises under the *IFPA*¹²⁷ insofar as it results in the testator's perception of his or her moral duties being overruled by a particular judge's assessment

¹¹⁹ See further below [7.2.4]–[7.2.5].

¹²⁰ See, for example, White et al, above n 8, 899; Croucher, 'If we could start again: Re-imagining Family Provision Law in the 21st century', above n 93; Lindsay Ellison SC, 'Family Provision: Double or Nothing – the Two Legged Lottery' (Paper presented at the STEP Australia conference, 2–4 August 2017) 14 [20]–[21], 16–22, [28]–[47].

¹²¹ Cheryl Tilse et al, *Having the Last Word? Will Making and Contestation in Australia* (Project No 10200891, University of Queensland, 2015) 17; Cheryl Tilse et al, *Families and Generational Asset Transfers: Making and Challenging Wills in Contemporary Australia: Review of Public Trustee Files* (Project LP11020089, 2014) 15; McGregor-Lowndes and Hannah (2008), above n 36, 5.

¹²² Grainer, above n 64, 148.

¹²³ See Appendix C. See also SALRI, *Looking After One Another: Family Provision Laws in South Australia*, above n 27, 33. There are a variety of reasons for the success of these claims. They range from addressing the situation of an adult child who has suffered considerable detriment and has made a substantial improvement to the testator's estate but has been left with nothing (see, for example, *Parker v Australian Trustees Executors Ltd* [2016] SASC 64 (1 June 2016)) to perhaps less deserving situations (see, for example, *Bonyer v Wood* (2007) 99 SASR 190; a decision noted in this context in consultation, see below n 305). However, it should be noted that most family provision claims do not proceed to trial. They are settled or not proceeded with so that the cases reported are likely to be the most intractable. That such a proportion of cases proceeding to trial result in more provision for the applicant is understandable; though this is not to dispute the fact that less than meritorious claims are also likely to be settled early to avoid costs pressures and/or the uncertain outcome at trial. The high rate of settlement does not necessarily suggest that the present law is working effectively. See also below [3.3.6], [5.3.12].

¹²⁴ See, for example, VLRC, *Succession Laws*, above n 6, 103 [6.25]–[6.26], 109 [6.58]; Barbara Drury, 'Making Your Last Wishes Everlasting', *Sydney Morning Herald* (online), 16 June 2015, <<http://www.smh.com.au/money/planning/make-your-last-wishes-everlasting-20150610-ghkt37.html>>.

¹²⁵ VLRC, *Succession Laws*, above n 6, 99 [6.8].

¹²⁶ See below [3.4.1]–[3.4.26].

¹²⁷ See, for example, *Allardice v Allardice* (1910) 29 NZLR 956; *Allen v Manchester* [1922] NZLR 218; *Vigolo v Bostin* (2005) 222 CLR 191. See further below [5.3.11]–[5.3.16].

of contemporary community values.¹²⁸ Virginia Grainer, a New Zealand academic, argues that ‘very often the [family provision] regime results in a substitution of the testator’s value judgment with the value judgment ... of the judiciary’.¹²⁹

2.2.6 Some commentators have suggested that these types of ‘opportunistic claims’ reflect an increasingly litigious modern community and/or a ‘culture of entitlement’, particularly among adult children.¹³⁰ Others have suggested that with rising house prices in Australian cities and compulsory superannuation, a large proportion of elderly Australians now die with significant estates that provide a strong incentive for even financially comfortable adult children or estranged family members to contest a testator’s will. Disputes over estates by disgruntled relatives claiming that they have been left with inadequate provision are not confined to ‘wealthy’ estates; even ‘small’ estates are not immune.¹³¹ These themes also emerged in SALRI’s consultation.

2.2.7 The categories of family members who are eligible to make a claim for family provision may no longer reflect the experience of modern families. For example, legitimate questions may be asked about whether a person’s spouse or ex-spouse should be considered an eligible applicant if they are able to secure their own income. Similarly, in complex family arrangements, there can be multiple stepchildren, natural children and children of domestic partners that may have all once have been dependent upon the deceased for care or financial support.

2.2.8 Charities have a strong interest in ensuring that people are able to leave significant portions of their estate to charitable causes without risking challenge by family members who may not share the testator’s charitable wishes. There is particular concern that charities are disadvantaged under present family provision law and practice.¹³²

2.2.9 These various issues and concerns have led both Australian and overseas jurisdictions to examine options for reform of their inheritance laws relating to family provision to adjust the balance between the wishes of the testator, on the one hand, and on the other hand, the need to protect those actually dependent upon a will-maker for economic support at the time of death.¹³³

2.2.10 Some specific policy tensions relate to:

¹²⁸ New Zealand Law Commission (NZLC), *Succession Law: Modernising the Law on Sharing Property on Death*, Report No 39 (1997) 33–34; Grainer, above n 64, 148; Pauline Ridge, ‘Moral Duty, Religious Faith and the Regulation of Testation’ (2005) *University of New South Wales Law Journal* 720, 726–728.

¹²⁹ Grainer, above n 64, 148. See also below [5.3.11]–[5.3.16].

¹³⁰ See Rosalind Croucher, ‘If We Could Start Again: Re-imagining Family Provision Law in the 21st Century’, above n 93, 19; McGregor-Lowndes and Hannah (2008), above n 36, 75–76; Ellison, above n 120.

¹³¹ See, for example, Vine, above n 9; White et al, above n 8, 902; Judith McMullen, ‘Keeping Peace in the Family while you are Resting in Peace: Making Sense of and Preventing Will Contests’ (2006) 8 *Marquette Elder’s Advisor* 61, 61–62.

¹³² See Grainer, above n 64, 150–151, 159–160. See also Frances Hannah and Myles McGregor-Lowndes, *From Testamentary Freedom to Testamentary Duty: Finding the Balance* (Queensland University of Technology, 2008) i: ‘In recent years legal challenges to charitable bequests by testators’ family members have become more common in Australia. Many charities faced with the prospect of a disputed bequest have been reluctant to pursue the matter in the courts. A review of leading reported cases involving charitable bequests in wills reveals that the courts are vigorous in upholding proper family provision as against charitable bequests, portraying this provision as based on moral obligation ... A review of major reported cases shows that charities have been deprived of bequests, or had bequests substantially reduced, as a result of the primacy of family claims.’ SALRI accepts that charities have a legitimate interest in the outcome of wills where a testator has left property to a charity. See further below [10.3.6].

¹³³ See, for example, National Committee (R 58), above n 100; Law Commission (England), *Intestacy and Family Provision Claims on Death*, Law Com No 331 (2011).

- Whether there is an inherent moral duty to provide for one's family upon one's death.
- The rise of inter-family litigation, including the threat of litigation. This can include genuine claims, but also those designed to reduce a beneficiary's share in the deceased's estate. This raises how the law should distinguish between the two.
- How does the law best distinguish deserving claims from undeserving claims?
- Wide eligibility for family provision claims versus testamentary freedom. There is a public perception, as also emerged in SALRI's community consultation, that a will can be readily challenged and concern that family provision laws unduly inhibit the freedom of testators to dispose of their property by will. Whether this perception is accurate, whether all appropriate family members are covered, and whether the right balance has been struck are issues that need to be considered.
- Whether family provision is still necessary having regard to the sophisticated modern welfare state.

2.2.11 To assist the consultation process with the consideration of these issues, a Table of Recent Cases decided under the *IFPA* was provided. This is reproduced at Appendix C.

Part 3 – Testamentary Freedom

3.1 What is testamentary freedom?

3.1.1 A person's right to leave his or her property to whomever they choose is known as 'testamentary freedom'. Galloway JA described this as 'one of the badges of a society that has graduated from primitive conditions and a notable human right'.¹³⁴ Testamentary freedom is a concept that has been described as a fundamental individual right, deeply connected to the right to own and dispose of property when the person is alive. As Lord Cockburn CJ declared: 'The law of every civilised people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass.'¹³⁵

3.1.2 Testamentary freedom has been described as an important civil right with the ownership of property rendered incomplete if lacking the power to also bequest it as the owner wishes.¹³⁶ As the Northern Territory Law Reform Committee explains, '[t]he testator's wishes, expressed in a properly executed will, should be carried out. The dead may have no vote but the living can make sure that a testator governs from the grave, because that is exactly what they want for themselves.'¹³⁷ It is significant that this theme also strongly emerges from the public consultation undertaken by SALRI as part of this Report.¹³⁸

3.1.3 The right to pass property down from one generation to the next in accordance with the views and wishes of the will maker is also viewed a central part of Australian law and Australian culture. In particular, the family home, family farm or family business is something that parents often want to make sure is passed down to their sons and daughters, or have its value shared out amongst the most important people in their lives. Inheritance law has developed a range of rules designed to make sure that this occurs legally and in line with the wishes of the deceased person.

3.1.4 However, both legislators and judges have also recognised that in some circumstances, it may be necessary to dilute the freedom of someone to dispose of their property as they wish and adjust these rules to make sure that deserving or dependent members of the deceased person's family are adequately provided for out of the deceased person's estate. As previously described,¹³⁹ in the late 1800s, dependants included dependent widows and orphans (children), and the laws dealing with family

¹³⁴ *Grey v Harrison* [1997] 2 VR 359, 363.

¹³⁵ *Banks v Goodfellow* (1870) LR 5 QB 549, 563 (Cockburn CJ). The Anglo-Australian concept of testamentary freedom is in contrast to that in many modern legal systems, mostly those descended from Roman law, where complete freedom of testation is unknown. In such systems, members of the family enjoy fixed rights of inheritance to the estate of a deceased, which leave only limited scope for the deceased to make his or her own dispositions. See *Burke v Burke* [2016] NSWCA 195 (13 July 2015), [125]–[126] (Emmett JA). In some systems, consanguinity is preferred to affinity. The claims of descendants of the deceased are favoured over the claims of a surviving spouse. The theory is that the property belongs to the family or lineage rather than to the owner for the time being and should pass down the blood line. See *Ilott v Mitson* [2017] 2 WLR 979, [50]. The Roman law system was briefly noted at the Adelaide Roundtable session, but very little support has been expressed for it to SALRI in consultation. See also below [3.4.7]; n 382; *Burke v Burke* [2016] NSWCA 195 (13 July 2015), [124]–[126].

¹³⁶ See, for example, *Hunter v Hunter* (1987) 8 NSWLR 573, 576; *Bonyer v Wood* (2007) 99 SASR 190, [49]–[50], [53]–[54] (DeBelle, Nyland and Anderson JJ). See also *Hynard v Garros* [2014] SASC 42 (25 March 2014); Grainer, above n 64, 146.

¹³⁷ Northern Territory Law Reform Committee, above n 112, 5.

¹³⁸ See below [3.4.1]–[3.4.26].

¹³⁹ See above [2.1.9].

provision were originally designed to ‘to prevent family dependants being thrown on the world with inadequate provision’.¹⁴⁰

3.1.5 In more modern times, dependents can include children of a first marriage who may be left out of a will, children or stepchildren from a second marriage (increasingly common with modern blended families) or a family member with a physical or intellectual disability who requires ongoing financial support or care. In such circumstances, it may well be up to the State (or the taxpayer) to support that child or dependent person, even if the deceased person was very wealthy, and even if the will does not seem ‘fair’.

3.1.6 The theme of broad, though not absolute, testamentary freedom found by SALRI in its consultation accords with English public opinion. In the recent UK Supreme Court decision of *Ilott*,¹⁴¹ Lady Hale noted that the English Law Commission in a 2011 Report¹⁴² had the benefit of two empirical studies of attitudes towards inheritance ‘under the auspices of the highly respected National Centre for Social Research, the findings of which are of some interest.’¹⁴³ The first study¹⁴⁴ cited by Lady Hale ‘used focus groups from ... “non-traditional” families to explore attitudes towards intestate succession’. It concluded that while there was ‘strong emotional support for testamentary freedom’ in general, this was underlined by an underlying ‘assumption of reasonableness’. It was also accepted that there should be ‘circumstances in which it should be possible to challenge a will’, such as where ‘the will did not reflect the true wishes of the testator’, ‘where his decisions were clearly “unreasonable”: this might be because they were unfair, cutting someone out of a will who had contributed directly or indirectly to the deceased’s wealth or who had earned a share by caring for the deceased while he was alive’. It was also ‘unfair to cut children out of wills because of the contribution they had made to enriching the lives of their parents or to exclude a potential beneficiary who was disabled or vulnerable and the alternative was that the state would have to look after him’.¹⁴⁵

3.1.7 The second study¹⁴⁶ cited by Lady Hale used a combination of qualitative and quantitative approaches to determine respondents’ views on will-making. Three main approaches were found:

... complete testamentary freedom in all circumstances; challenging a will being permitted in some circumstances; and challenging a will being permitted in all circumstances. Some favoured the entitlement of children to challenge based on lineage and expectations. These respondents tended to favour equal distribution amongst descendants. Others favoured an entitlement based on need or providing care for the deceased. The “overriding influence” on those who favoured a right to challenge in all circumstances was the importance of retaining property within the family.¹⁴⁷

¹⁴⁰ *Schaefer v Schubmann* [1972] AC 572, 596 (Lord Simon of Glaisdale).

¹⁴¹ [2017] 2 WLR 979.

¹⁴² Law Commission (England), *Intestacy and Family Claims on Death*, Consultation Paper No 191 (2009); Law Commission (England), above n 133.

¹⁴³ [2017] 2 WLR 979, [53].

¹⁴⁴ Gareth Morrell, Matt Barnard and Robin Legard, *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families* (NatCen, 2009).

¹⁴⁵ [2017] 2 WLR 979, [54]–[56].

¹⁴⁶ Alun Humphrey et al, *Inheritance and the Family: Attitudes to Will-Making and Intestacy* (NatCen, 2010).

¹⁴⁷ [2017] 2 WLR 979, [56].

3.2 Current position – South Australia and other jurisdictions

3.2.1 The present Australian law provides that, ostensibly at least, a court’s power is not a blank cheque for rewriting the will.¹⁴⁸ As Hallen AJ summarised:¹⁴⁹

- The statutory jurisdiction is a “limited disturbance of the right of testamentary disposition”;¹⁵⁰
- It is not appropriate to endeavour to achieve a “fair” disposition of the estate—it is not part of the court’s role to achieve some kind of equity between the various claimants;¹⁵¹
- The court’s role is not to reward or to distribute according to notions of fairness and equity;¹⁵²
- The court’s role goes no further than the making of “adequate” provision for the “proper” maintenance, education and advancement in life of an applicant;
- The court’s task is not to rewrite the testator’s will, only to ensure that adequate provision has been made for proper maintenance, etc;¹⁵³
- The court cannot transgress unnecessarily upon the deceased’s freedom of testation;¹⁵⁴
- The nature and content of what is adequate provision for proper maintenance etc is not fixed or static and reflects contemporary accepted community standards.¹⁵⁵

3.2.2 This approach accords with South Australian authority.¹⁵⁶

3.2.3 This approach also accords with the English judicial approach.¹⁵⁷ The leading test was set out by Oliver J in *In re Coventry*¹⁵⁸ in a passage which has often been cited with approval since (including by Lord Hughes in *Ilott*):¹⁵⁹

It is not the purpose of the Act to provide legacies or rewards for meritorious conduct. Subject to the court’s powers under the Act and to fiscal demands, an Englishman still remains at liberty at his death to dispose of his own property in whatever way he pleases or, if he chooses to do so,

¹⁴⁸ See, for example, *Pontifical Society for the Propagation of the Faith v Scales* (1961–2) 107 CLR 9, 19 (Dixon CJ); *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134, 147 (Gibbs J).

¹⁴⁹ *Andrew v Andrew* [2011] NSWSC 115 (4 March 2011) [66]–[74]. See also Rosalind Croucher, ‘Succession Law Reform in NSW – 2011 Update’ (Speech delivered at the Blue Mountains Annual Law Conference, Katoomba, 17 September 2011), n 48
<http://www.alrc.gov.au/news-media/2011/succession-law-reform-nsw-2011-update#_ftn52>.

¹⁵⁰ *Andrew v Andrew* [2011] NSWSC 115 (4 March 2011), [74] (e), quoting *Hunter v Hunter* (1987) 8 NSWLR 573, 574 (Kirby P, Hope and Priestley JJA agreeing).

¹⁵¹ *Andrew v Andrew* [2011] NSWSC 115 (4 March 2011) [67] referring to Bryson J in *Gorton v Parks* (1989) 17 NSWLR 1, 6.

¹⁵² *Andrew v Andrew* [2011] NSWSC 115 (4 March 2011) [67] referring to Bryson J in *Gorton v Parks* (1989) 17 NSWLR 1, 6.

¹⁵³ *Andrew v Andrew* [2011] NSWSC 115 (4 March 2011) [68] referring to *Cooper v Dungan* (1976) 50 ALJR 539, 542 (Stephen J).

¹⁵⁴ *Andrew v Andrew* [2011] NSWSC 115 (4 March 2011) [69].

¹⁵⁵ *Ibid* [71].

¹⁵⁶ See, for example, *In the Estate of Puckeridge* (1978) 20 SASR 72; *Bonyer v Wood* (2007) 99 SASR 190, 202 [41]; *Butler v Tiburzi* [2016] SASC 108 (26 July 2016), [25].

¹⁵⁷ The English statutory test is slightly different to Australia. To succeed under the *Inheritance (Provision for Family and Dependents) Act 1975* (Eng), an applicant must come within recognised relationships with the deceased and demonstrate an absence of ‘reasonable financial provision’ which (save in the case of spouses or civil partners) means ‘such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance’: at s 1(2)(b).

¹⁵⁸ [1980] Ch 461.

¹⁵⁹ *Ilott v Mitson* [2017] 2 WLR 979, [18].

to leave that disposition to be regulated by the laws of intestate succession. In order to enable the court to interfere with and reform those dispositions it must, in my judgment, be shown, not that the deceased acted unreasonably, but that, looked at objectively, his disposition or lack of disposition produces an unreasonable result in that it does not make any or any greater provision for the applicant — and that means, in the case of an applicant other than a spouse for that applicant's maintenance. It clearly cannot be enough to say that the circumstances are such that if the deceased had made a particular provision for the applicant, that would not have been an unreasonable thing for him to do and therefore it now ought to be done. The court has no carte blanche to reform the deceased's dispositions or those which statute makes of his estate to accord with what the court itself might have thought would be sensible if it had been in the deceased's position.¹⁶⁰

3.2.4 The Supreme Court in *Ilott* went on to reaffirm the significance attached by English law (and the law in Australia is similar) to testamentary freedom. The Supreme Court criticised the Court of Appeal for failing to give sufficient weight to the deceased's very clear and considered wishes to leave her estate to the three charities of her choice and not her adult estranged daughter. It was plain from the deceased's will that the charities were the testator's chosen beneficiary and any award under the English family provision law, the Supreme Court warned, would be at the expense of those whom the testator intended to benefit.

3.3 Issues

3.3.1 The law in Australia has taken as its starting point the idea that only the testator should decide how his or her estate is to be disposed of after their death.¹⁶¹ It has frequently been reiterated that a court's function is not to re-write the will of the testator,¹⁶² even if that will seems inconsistent, unfair, hard to understand or leaves certain family members out.¹⁶³ The common law has developed to include the principle that any power to vary a testator's will is limited to the extent necessary to ensure adequate provision for an applicant and no more.¹⁶⁴ A testator's reasons cannot be ignored unless the evidence does not support such reasons¹⁶⁵ and if no error is shown, courts will only disturb a disposition if there is a 'strong or cogent' case.¹⁶⁶

3.3.2 However, any notion of absolute testamentary freedom is unrealistic. In 1971, the English Law Commission commented:

The principle of absolute freedom of testation is acceptable only if the view were taken that it is more important to be able to dispose of property than to meet natural and legal obligations to the family. We do not believe this view to have any degree of support.¹⁶⁷

3.3.3 It is in this context that legislators in Australia and other common law jurisdictions such as New Zealand and England have adjusted the original common law principles with family provision laws such as the *IFPA*.¹⁶⁸ These laws set out certain circumstances in which a court may vary a testator's

¹⁶⁰ [1980] Ch 461, 474–475.

¹⁶¹ *Barns v Barns* (2003) 214 CLR 169.

¹⁶² *Re Allardice v Allardice* (1910) 29 NZLR 959, 969 (Stout CJ); *Bosch v Perpetual Trustee Co (Ltd)* (1938) 38 SR (NSW) 176, 177–178; *Pontifical Society for the Propagation of the Faith v Scales* (1961–2) 107 CLR 9, 19 (Dixon CJ).

¹⁶³ *Barns v Barns* (2003) 214 CLR 169, [140].

¹⁶⁴ *Hynard v Gavros* [2014] SASC 42 (25 March 2014).

¹⁶⁵ *Wall v Crane* [2009] SASC 382 (16 December 2009).

¹⁶⁶ *Sampson v Sampson & Perpetual Executor Trustee and Agency Co (WA) Ltd* (1945) 70 CLR 576.

¹⁶⁷ Law Commission, *Family Property Law*, Working Paper No 42 (1971) [4.13].

¹⁶⁸ See above [2.1.5]–[2.1.11].

will or entitlement under the law of intestacy where that is necessary to ensure adequate provision for eligible family members. In effect, these laws allow a court to override the will of deceased person or next of kin entitlement under the law of intestacy (subject to certain requirements being met). Often the court is given a relatively broad discretion to alter a will and make orders for certain family members to receive portions of the estate.

3.3.4 There is an increasing perception that in recent years, courts around Australia have become more willing to use family provision laws to override the wishes of testators to provide for eligible family members.¹⁶⁹ One recent study found that across Australia three-quarters of family provision claims are successful.¹⁷⁰

3.3.5 This can occur in various situations such as where the testator leaves a substantial proportion of his or her estate to a charity (as in *Ilott*), excludes children from one relationship in favour of the children from another, excludes one sibling in favour of another, or where the testator's wishes are difficult for family members to understand or explain.

3.3.6 Courts in these cases may be asked to make family provision orders without any knowledge of the wishes of the deceased person, which may have been unknown to his or her family members. In such cases, it is difficult to 'balance' the wishes of the testator with the merits of the family provision claim.

3.3.7 Various South Australian (and indeed interstate)¹⁷¹ cases highlight some of these difficulties.

3.3.8 In *Brennan v Mansfield*,¹⁷² the court found the applicant had a valid moral claim against the testator because the applicant's current lifestyle could not be supported by a bequest of just \$100 000. The court ordered an award of \$1 million out of the testator's \$2.5 million estate, despite the applicant possessing extensive assets worth in excess of \$2 million. In *Hynard v Gavros*,¹⁷³ the court held that it was inappropriate for a testator to prefer the interests of a sibling over a child and awarded 55 per cent of the estate's residue to the applicant, the testator's daughter, although she was in a better financial position than the testator's sibling. In *Wall v Crane*,¹⁷⁴ the testator's exclusion of his daughter because of the financial assistance provided during the testator's lifetime was ignored and the court held that a wise and fair-minded testator, reflecting dispassionately and free from prejudice arising from the estrangement would still make provision for the daughter. This was at the expense of the other two beneficiaries, despite the superior financial position of the applicant and her husband in comparison to the beneficiaries.¹⁷⁵

3.3.9 These and other similar cases have led some commentators to question the significance of making a will when there is a very real chance that the person's considered wishes can be overruled

¹⁶⁹ See, for example, McGregor-Lowndes and Hannah (2008), above n 36, i; Ackland, above n 8; Drury, above n 124.

¹⁷⁰ White et al, above n 8, 899.

¹⁷¹ See Ellison, above n 120, 16–18; *Mead v Lemon* [2015] WASC 71 (26 February 2015).

¹⁷² [2013] SASC 83 (6 June 2013).

¹⁷³ [2014] SASC 42 (25 March 2014).

¹⁷⁴ [2009] SASC 382 (16 December 2009).

¹⁷⁵ See also *Delisio v Santoro* [2002] SASC 65 (27 February 2002). In this case, the testator left his entire estate to one daughter. This daughter did not own any real estate or have any savings and she was in a difficult, if not precarious, financial and health situation. A claim under the *IFPA* was brought by two other daughters and a son. One of the daughters was described by the court to be in a 'reasonably sound financial position': at [135]. She, along with the other claimants, was awarded \$15 000 each.

after they die.¹⁷⁶ This is consistent with the wider concerns and frustration expressed over the apparent dilution in testamentary freedom.¹⁷⁷

3.3.10 As one recent study noted:

In the 108 years since their introduction in New Zealand, family provision laws have had their influence extended through judicial interpretation and active promotion of the priority of family claims on a testator's estate as part of public policy. Testamentary freedom, although never completely dominant in English law, is now seriously challenged in Australia.¹⁷⁸

3.3.11 In other Australian States and Territories, reforms have been recommended that would limit the classes of family members who would be eligible to make a family provision claim and/or impose more narrow criteria as to who is eligible to make a claim.¹⁷⁹

3.3.12 Another issue that arises under the *IFPA* is who bears the burden of welfare. The present law in this area is not entirely clear. One view is that social welfare is immaterial under the *IFPA* and the onus should be on the estate to make adequate and proper provision¹⁸⁰ (consistent with the original rationale of family provision legislation).¹⁸¹ As one lawyer explains: 'Generally speaking, the object of the legislation is that a deceased is compelled to make provision for their dependants and not throw maintenance of dependants on the public purse. However, a wise and just testator may take government support into account, particularly in small estates.'¹⁸²

3.3.13 However, in practice a more nuanced view tends to be adopted. As Bryson J explained in *Whitmont v Lloyd*:¹⁸³

The protection of public funds from claims by indigent persons is not a purpose of Family Provision legislation but they are incidentally protected by the legislation, which was not an Act solely for the protection of private interests and serves public policy... In my opinion, the availability of age pensions and other social benefits is a circumstance which should be regarded, and particularly in smaller estates, it may be appropriate to leave an Applicant wholly or partly dependent on them or to mould the provision made so that their availability is preserved in whole or in part. The acceptance of benefits for which statute law provides is in every way legitimate, involves no social stigma and incurs no disapproval from the court. It is not the court's task to be vigilant, to throw burdens off public funds and onto private estates. Still it is true that the legislation has a public policy purpose and it is not appropriate that where there is wealth within the estate, it should be directed away from the less fortunate and successful of the eligible person

¹⁷⁶ See, for example, Ackland, above n 8; Drury, above n 124; Mark Minarelli and Russell Jones, 'Family Provision Claims in South Australia' (Summer Report, DW Fox Tucker, 2016) 19.

¹⁷⁷ See, for example, Croucher, 'If we could start again: Re-imagining Family Provision Law in the 21st century', above n 93; McGregor-Lowndes and Hannah, 'Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?', above n 51; Ackland, above n 8; Drury, above n 124; Renee Viellaris, 'Kids Fight for Your Cash as Legal Squabbles among Families Eat into Estates', *The Courier Mail* (online), 13 April 2013, <<http://www.couriermail.com.au/news/queensland/kids-fight-for-your-cash-as-legal-squabbles-among-families-eat-into-estates/story-e6freoof-1226619468014>>; Rogers, above n 116.

¹⁷⁸ Hannah and McGregor-Lowndes, *From Testamentary Freedom to Testamentary Duty: Finding the Balance*, above n 132, 1.

¹⁷⁹ See, for example, VLRC, *Succession Laws*, above n 6, recommendations 38–40.

¹⁸⁰ See, for example, *Re: Covich* (1994) 12 FRNZ 608, 612.

¹⁸¹ See above [2.1.9].

¹⁸² Therese Catanzariti, *Disabled Beneficiaries and Eligible Persons* <<http://www.13wentworthselbornechambers.com.au/wp-content/uploads/2016/08/Family-Provision-and-Disabled-Beneficiaries-050313.pdf>>.

¹⁸³ (Unreported, Supreme Court of NSW, Bryson J, 31 July 1995).

so as to enhance their claims to social benefits and maximise the resources of others; the court should not disregard the interest of the public in public funds, which can receive incidental protection from the workings of this legislation. Where wealth is available, it should be used to meet needs for maintenance, education and advancement of eligible persons. The significance of social benefits is related to the available resources.¹⁸⁴

3.3.14 In *Oswell v Jones*,¹⁸⁵ for example, Chesterman J examined some of the issues and options arising for a court where an applicant has a severe disability, and how social security entitlements should be taken into account in assessing family provision claims. The question arose as to whether ‘the relief should be structured so that she (the applicant) continues to enjoy the benefits of pension payments and ancillary benefits, or whether she should be given a lump sum, the whole or a substantial part of the estate, with the consequence that she will lose those benefits.’¹⁸⁶ Chesterman J considered some relevant NSW authorities¹⁸⁷ on the issue of how pension entitlements should be taken into account, and agreed that

the availability of ... pensions and social benefits is a circumstance which should be regarded, and particularly in small estates it may be appropriate to leave an applicant wholly or partly dependent on them or to mould the provision made so that their availability is observed in whole or in part.¹⁸⁸

3.3.15 Chesterman J concluded that, despite the estate being a large estate, there being a lack of competing claims having financial need, and against judicial warnings that it is for the testator to make proper provision rather than the State, the estate was not sufficiently large to make adequate provision for the applicant without regard to the pension and other social security benefits being available. His Honour then went on to fashion provision for the applicant in a way that would retain her social security and related benefits by incorporating a special disability trust into the testator’s will.

3.3.16 This issue was recently considered in the English decision of *Ilott*. The applicant, Mrs Ilott, had made a family provision application under the *Inheritance (Provision for Family and Dependents) Act 1975* (Eng) against her inheritance under her mother’s will. Mrs Ilott had fallen out with her mother and as such, lived her entire adult life without any financial help from her mother. Her mother had died aged 70, leaving her estate of £486 000 to the Blue Cross Animal Welfare Society, the Royal Society for the Protection of Birds and the Royal Society for the Prevention of Cruelty to Animals. She did not leave any provision for her estranged 50-year-old daughter who had five children and lived in financially modest circumstances.

3.3.17 In the original ruling, District Judge Million awarded Mrs Ilott £50 000 under the 1975 English Act.¹⁸⁹ However, on appeal, the Court of Appeal decided in favour of the applicant.¹⁹⁰ The interesting point to note is that the Court of Appeal took into consideration the effect the award of £50 000 would have on her means-tested benefits. Ultimately, the amount to be awarded was calculated to ensure her

¹⁸⁴ See also *Shah v Perpetual Trustee Company* [1981] 7 Fam LR 97 100; *King v White* [1992] 2 VR 417, 424; *Taylor v Farrugia* [2009] NSWSC 801 (5 June 2009), [59].

¹⁸⁵ [2007] QSC 384.

¹⁸⁶ *Ibid* [46].

¹⁸⁷ See especially *Gunawardena v Kanagaratnam Sri Kantha* [2007] NSWSC 151 (2 March 2007).

¹⁸⁸ [2007] QSC 384, [50] citing *Whitmont v Lloyd* (Unreported, Supreme Court of NSW, 31 July 1995, Bryson J) 16 (cited with approval in *King v Foster* (Unreported, Court of Appeal NSW, 7 December 1995, Sheller JA).

¹⁸⁹ *Ilott v Mitson* [2015] 1 FLR 291. It should be noted that the English statutory test is slightly different to Australia. See further above n 157.

¹⁹⁰ *Ilott v Mitson* [2016] 1 All ER 932.

state benefits would continue. The Court of Appeal increased the award to £143 000 so that Mrs Ilott would be able to buy her housing association home, and also gave her an option to take an additional lump sum of £20 000 to meet any additional income needs.

3.3.18 On appeal, however, the Supreme Court held that the Court of Appeal had erred by making an outright award of a sum sufficient to enable Mrs Ilott to purchase her house as the objective of the Act is to ‘import provision to meet the everyday expenses of living’,¹⁹¹ and not to ‘extend to any or everything which would be desirable for the claimant to have.’¹⁹² The Supreme Court restored the trial judge’s original award of £50 000. However, the Supreme Court did not engage in any further discussion on the consideration or burden of welfare benefits.

Hearsay exception

3.3.19 It is not uncommon, in proceedings under the *IFPA* and similar legislation for the material placed before the court to include evidence of written or oral statements made by the testator, typically a statement or explanation by the testator of the reasons why he or she has made the dispositions contained in his or her will. During the course of the hearing of an application for family provision, a question may also arise as to the attitude of the deceased person, during his or her lifetime, towards the applicant. The court may be asked to admit into evidence a statement made by the deceased person about the character and conduct of the applicant. Any such statement might take a number of forms.¹⁹³ It could, for example, be made in writing — such as an affidavit or statutory declaration (as raised in consultation), a letter,¹⁹⁴ a diary entry¹⁹⁵ or the will itself — or it could simply consist of an oral comment made to a third person about an applicant.¹⁹⁶

3.3.20 Because such a statement is made outside the court proceedings in which the issue of the applicant’s conduct arises, its admissibility is subject to often arcane common law rules about the admissibility of hearsay evidence. The High Court has made clear that, despite some authority to the contrary,¹⁹⁷ such statements are caught by the hearsay rule. Gibbs J explained:

It is clear that under the rules of the common law a statement by a testatrix that her son has been guilty of misconduct, and that for that reason she has excluded him from any benefit under her will, is not admissible to prove that the son was in fact guilty of misconduct. What the testatrix said about the son’s conduct is hearsay, and no exception to the rule against hearsay which is recognised by the common law allows the statement to be given in evidence to prove the facts stated.¹⁹⁸

¹⁹¹ *Ilott v Mitson* [2017] 2 WLR 979, [14].

¹⁹² *Ibid.*

¹⁹³ National Committee (R 58), above n 100, 68 [5.70].

¹⁹⁴ *Tausz v Elton* [1974] 2 NSWLR 163, 172–173.

¹⁹⁵ *Ibid* 171–172.

¹⁹⁶ *Ibid* 172; *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134.

¹⁹⁷ See, for example, *Re: Duncan* [1939] VLR 355, 360; *Re: Ruxton* [1946] VLR 334, 335–336; *Re: Paulin* [1950] VR 462. See also Harry Gibbs, ‘Admissibility of Statements by a Testator in Testator’s Family Maintenance Proceedings’ (1953) 2 *University of Queensland Law Journal* 150.

¹⁹⁸ *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134, 149 (Gibbs J, Mason and Aickin JJ agreeing). Gibbs J also clarified the limited use to which such statements could be put: ‘In some jurisdictions, the rules of the common law have been modified by statutory provisions, which allow the court to have regard to evidence as to the reasons given by a testatrix for making the dispositions which she had made by her will. Legislation of that kind has been enacted in the United Kingdom, New Zealand and some parts of Australia. No such legislation has however been enacted in Victoria or indeed in most of the Australian States.

3.3.21 Such a statement may nevertheless be admissible at common law ‘as original evidence to prove the knowledge, motive or other state of mind’ of the deceased, ‘should that be relevant’.¹⁹⁹ If evidence is admitted on this limited basis, it cannot be used for the additional purpose of proving the truth of a fact asserted in the statement.²⁰⁰

3.3.22 Gibbs J (then Harry Gibbs) described the unclear common law position as to the admissibility and use of such statements and noted that family provision legislation ‘had given rise to problems in the law of evidence that as yet remain unsolved, and whose solution could perhaps better be effected by the intervention of the legislature than by the application of the existing principles of the law of evidence’.²⁰¹ Gibbs J referred to the legislative precedent in England in s 1 (7) of the *Inheritance (Family Provision) Act 1938*.

3.3.23 The common law in relation to the admissibility of statements made by a deceased person has now been modified, to varying degrees, by legislation in the States and Territories. There is specific legislative provision allowing the use of statements made by a testator in the ACT,²⁰² the Northern Territory,²⁰³ New South Wales,²⁰⁴ Tasmania,²⁰⁵ Victoria²⁰⁶ and Western Australia.²⁰⁷ The courts must have regard to the testator’s reasons, so far as they may be ascertained, for making, or not making, provision for any person who is eligible to apply for provision. Further, a statement made by a testator setting out his or her reasons for making, or not making, provision for a person may be admitted as evidence of those reasons. There is no such specific provision in South Australia.

Nevertheless, in Australia for many years the courts have admitted evidence of statements made by a testatrix explaining why she made her will as she did. In taking this course, the courts have no doubt been influenced by a desire to be informed of the reasons which actuated the testatrix to make the dispositions she had made, and by the consideration that in cases of this kind a claim is made against the estate of a person who is deceased and can no longer give evidence in support of what she has done. It is doubtful whether, in most cases, such evidence is relevant, but usage justifies its reception. The question is for what purpose it may be used, once admitted. The balance of authority clearly favours the view that it is admissible only to provide some evidence of the reason why the testatrix has disposed of her estate in a particular way, and that it is not admissible to prove that what the testatrix said or believed was true’: at 150.

¹⁹⁹ Ibid.

²⁰⁰ Ibid 149, 153. See also National Committee (R 58), above n 100, 69 [7.72].

²⁰¹ Gibbs, above n 197, 155.

²⁰² *Family Provision Act 1969* (ACT) s 22.

²⁰³ *Family Provision Act* (NT) s 22.

²⁰⁴ *Succession Act 2006* (NSW) s 100 (originally *Family Provision Act 1982* (NSW) s 22).

²⁰⁵ *Testator’s Family Maintenance Act 1912* (Tas) s 8A.

²⁰⁶ *Administration and Probate Act 1958* (Vic) s 94(3).

²⁰⁷ *Family Provision Act 1972* (WA) s 21A.

3.3.24 The ACT and Northern Territory²⁰⁸ Acts are notable for their relative simplicity.²⁰⁹

3.3.25 The Uniform Evidence legislation in the ACT, Northern Territory, New South Wales, Tasmania and Victoria contains relatively liberal general provisions relating to hearsay evidence which could also apply in family provision applications to allow the use of a testator's statement.²¹⁰ South Australia is not a party to the *Uniform Evidence Act*.

3.3.26 The *Evidence Acts* of Queensland²¹¹ and South Australia²¹² also contain general provisions under which certain statements contained in a document made by a deceased person (whether in a will or in another document) may be admitted as evidence of the truth of the facts asserted in the document. However, where a deceased person had simply made comments to another person about the applicant, these provisions would not enable that person to give evidence to prove the truth of those comments.²¹³

3.3.27 The National Committee initially expressed the view that, ideally, the admissibility of evidence relating to the character and conduct of an applicant for family provision 'should be left to the law of evidence and should not be spelt out in the model [family provision] legislation'.²¹⁴ The National Committee's initial view was that each jurisdiction should consider the issue in the light of its own evidence laws.²¹⁵

3.3.28 The National Committee initially recommended that, in the meantime, the model legislation should include a provision to the effect of s 32 of the *Family Provision Act 1982* (NSW).²¹⁶ After further consideration, the National Committee came to the view that the Model Bill should not contain a provision to the effect of s 32 of the *Family Provision Act 1982* (NSW) (now s 100 of the *Succession Act 2006* (NSW)). Rather the question of the admissibility of statements made by a deceased person about the character and conduct of an applicant for family provision should be dealt with under the law of evidence in each jurisdiction, rather than under the Model Bill.²¹⁷

3.3.29 The National Committee observed that inclusion in the Model Bill of a provision to the effect of s 32 of the *Family Provision Act 1982* (NSW) would not of itself result in uniform evidentiary

²⁰⁸ *Family Provision Act* (NT) s 22: 'The Court may have regard to the testator's reasons

- (1) The Court shall, in determining an application for an order under section 8, have regard to the testator's reasons, so far as they are ascertainable, for making the dispositions made by his will, or for not making provision or further provision, as the case may be, for a person who is entitled to make an application under this Act.
- (2) The Court may receive in evidence a statement signed by the testator and purporting to bear the date on which it was signed and to set out reasons for making or not making provision or further provision by the will of the testator for a person as evidence of those reasons.
- (3) Where a statement of a kind referred to in subsection (2) is received in evidence, the Court shall, in determining what weight, if any, ought to be attached to the statement, have regard to all the circumstances from which any inference may reasonably be drawn concerning the accuracy of the matters referred to in the statement.'

²⁰⁹ The ACT provision is similar to the NT model. The NSW and WA models are more elaborate. See below [3.5.10]. The NSW model is set in n 236 below.

²¹⁰ *Uniform Evidence Acts* ss 60, 63. See also National Committee (R 58), above n 100, 73–74, [5.81]–[5.83].

²¹¹ *Evidence Act 1977* (Qld) s 72.

²¹² *Evidence Act 1929* (SA) s 34C.

²¹³ National Committee (R 58), above n 100, 74 [5.84].

²¹⁴ National Committee (MP 28), above n 3, 67.

²¹⁵ Ibid. The National Committee considered it unlikely, however, that jurisdictions that adopted the *Uniform Evidence Act* would need a specific provision in their family provision legislation.

²¹⁶ National Committee (MP 28), above n 3, 67.

²¹⁷ National Committee (R 58), above n 100, 75 [5.87].

provisions for the hearing of family provision applications. By virtue of the relatively wide operation of the general hearsay provisions of the *Uniform Evidence Acts* in the ACT, New South Wales, the Northern Territory, Tasmania and Victoria, more liberal evidence laws would be likely to apply to family provision applications made in those jurisdictions than would apply to similar applications made in the other Australian jurisdictions such as South Australia.²¹⁸

3.3.30 The issue of whether South Australia's law should explicitly allow the admission and use of a testator's statement was often raised in consultation and has been considered by SALRI.

3.4 Consultation data overview

Question 1: Does the law have the balance right?

3.4.1 One view at the Adelaide Roundtable was that the current law largely works well in South Australia and balances the conflicting interests that arise and many of the concerns that have been expressed are more applicable in the very different context of inflated Sydney property prices and legal culture than in South Australia. However, this view was not widespread. Issues such as the perceived legal uncertainty of the current law, the diminution of testamentary freedom, opportunistic and undeserving claims, high legal costs, undue pressure to settle undeserving claims and family stresses were often identified to SALRI in consultation by succession lawyers. Several experienced succession lawyers stated to SALRI that while the present law is not broken, significant reform to the *IFPA* is necessary. Many other succession lawyers went further and accepted that testamentary freedom has been undermined and the views of the testator need to be given greater prominence.

3.4.2 The public view that strongly emerged in consultation was the current law is flawed and does not accord with modern expectations. The problems of legal uncertainty, the undermining of testamentary freedom, opportunistic and undeserving claims, undue pressure to settle such claims, high legal costs and family stresses were again widely noted.

3.4.3 The common experience from the public consultation was that people genuinely don't know what to expect when faced with a family inheritance claim as an executor or beneficiary and proceedings seem to stretch out without end. Some members of the public noted that they are not always given the chance to speak or present evidence — there is a sense that the claimant is given a privileged position by the court even if the rest of the family think that they are 'lying'.

3.4.4 SALRI has been told that not only are claims under the *IFPA* motivated by greed or entitlement, but some claims may also be motivated by malice such as settling a score with the inheriting relative and litigating to diminish the eventual inheritance to leave little to be inherited when the litigation has concluded.

3.4.5 SALRI has widely heard in its consultation from both succession lawyers and the community that the current law in South Australia undermines testamentary freedom and acts as an incentive to bring opportunistic and even vexatious claims. The current law has even been described to SALRI as a charter for greed and entitlement. As one succession lawyer remarked: 'The law has got it wrong. Most disputes I know of are not about providing for family members, they are mostly about the greed of individuals who think it is their right to claim someone else's property through a relationship.' A participant in the Mount Gambier Legal Experts Roundtable robustly noted that 'the current law is too

²¹⁸ Ibid.

welcoming of family provision claims ... I have encountered many clients who bow to a kind of “blackmail”, and “surrender” to unmeritorious or dubious claims to avoid the costs coming out the estate and the estate could not afford the “Rolls Royce” of the court system to resolve ... it is “go away” or “f*** off” money.’

3.4.6 A range of views on the policy interests behind the current law were expressed. Some of the views that came out of the Adelaide Legal Roundtable included ‘the balance has tipped too far’, ‘the current legislation is broken’ and ‘the pendulum has swung too far in interfering with testamentary freedom’. Others expressed a view that it now feels like ‘a free for all’ with a ‘real disconnect between public expectation and reality’ leading to ‘public frustration’. Another lawyer commented that ‘everyone is settling but nobody is happy’ and if it ‘feels like a free for all, what’s the point of making a will’. Others underscored the need to avoid ‘messing around with testators’ freedoms’, and noted that some of the outcomes under the current law seem to ‘fly in the face of what the testator actually wants’. A few lawyers expressed an alternative view that ‘the balance is about right at the moment’ and ‘lawyers think of other ways to get the same result [of achieving testamentary wishes] but at least there is a statutory framework here — testamentary freedom is strong here’.²¹⁹

3.4.7 One succession lawyer drew attention (though without expressing support) to the European system where the law prescribes fixed shares to the inheritance of family members.²²⁰

3.4.8 Professor Dal Pont and Ken Mackie at the University of Tasmania noted to SALRI the importance of testamentary freedom and that current law and practice has eroded this principle.

3.4.9 One issue that was raised in consultation, including by Mr Mackie, was how should the importance of testamentary freedom be recognised and better reflected in the *IFPA*? Terry Evans of Minter Ellison suggested the inclusion of a statutory object or guiding principle in the *IFPA* to provide that in considering any family provision claim a court should, as far as practicable or possible, respect the wishes of the testator. Mr Evans noted that such statutory objects or guiding principles often appear in both State and Commonwealth legislation.

3.4.10 In the Mount Gambier Legal Experts Roundtable, it was noted that testamentary freedom must be preserved in principle and it should not be the role of the law to dictate how to write a will. This was highlighted by an attendee at the Mt Gambier Community Roundtable who explained the public view that it is not worth making a will in South Australia and ‘don’t even bother having a will because it can be so easily contested in court’. The attendees in this Roundtable agreed that courts should be very reluctant to intervene in testators’ wishes.

3.4.11 One succession lawyer described the current law in South Australia as problematic. In his view, testamentary freedom should be respected and in his experience estate related disputes, including family provision claims, lead to emotional stress and financial hardship.

3.4.12 Mr O’Brien, a highly experienced succession lawyer of O’Briens, Solicitors in Berri, commented to SALRI that the core principles of family provision law should be that the testator is free to do as he or she wishes.

²¹⁹ It was noted that any changes to limit the *IFPA* may lead to more claims in equity from creative lawyers.

²²⁰ See also above n 135, below n 382. No support has emerged during SALRI’s consultation for such an approach. The European approach was dismissed when it arose in consultation as undue and paternalistic State interference and as very drastically undermining testamentary freedom.

3.4.13 Despite the range of views, all Roundtables, including Legal Experts and community Roundtables, largely agreed that the notion of testamentary freedom has been diluted in recent years and more weight should be given to respecting and preserving testamentary freedom.

3.4.14 While there were a range of different and contrasting views that came out in the YourSAy surveys, it should be noted that a larger portion of people believed that the present law either does not have the right balance or has got it wrong.

3.4.15 On the YourSAy surveys, with respect to the issue of whether family provision law should be about the rights of the person who wrote the will or about the obligation to provide for dependents, a strong majority of 59 out of 96 (61 per cent) respondents stated that family provision law should be about the rights of the person who wrote the will to leave their property to whomever they wish. In relation to the issue of whether the law should fully implement the wishes of the testator or intervene to improve the fairness of the will, a strong majority of 68 out of 95 respondents (72 per cent) expressly stated that the wishes of the testator should be *fully* implemented, in contrast to the 10 respondents who expressly stated that the law should intervene to improve the fairness of a will.

3.4.16 There were some strong opinions expressed in survey responses. One noted: ‘The law has got it wrong. Most disputes I know of are not about providing for family members, they are mostly about the greed of individuals who think it is their right to claim someone else’s property through a relationship.’ Another response said: ‘If my wishes can be overturned by a court and my wishes cannot be guaranteed then what is the point in me [sic] writing a will? Obviously, myself and many others think long and hard about the beneficiaries and the reasoning behind making family and friends beneficiaries.’ Another response commented: ‘The rights of the person who wrote the will to leave their property to whoever they choose is the only important factor. It is their choice and their wishes must be upheld (assuming it was a valid will without undue influence), whether we like it or not. Otherwise, there would be NO point in writing a will at all.’ Another response said: ‘Most people I encounter are shocked to find that their wills can be overruled by a court and want to stop this from happening. There are so many nasty children and spouses out there who are after just one thing from their relatives, but are able to lie their way through court to claim something they were never meant to receive’. One response bluntly concluded: ‘The legal system sucks in this area.’²²¹

3.4.17 The case examples below were given in consultation and illustrate the concerns over the operation of the present law and the erosion of testamentary freedom.

3.4.18 Case example

One example provided during the consultation involved a situation where a close family member (M) received slightly more favourable treatment than his siblings under his mother’s will, and his brother (L) commenced proceedings under the *Inheritance (Family Provision) Act* (‘IFP Act’). L had far greater independent wealth than M, and M had been the primary carer of the parents throughout their final years. If L’s claim had succeeded, M would have lost his home.

L used the proceedings as a tool for ventilating personal grievances, dating back five decades, against M. Ultimately L discontinued proceedings a couple of weeks prior to trial. M endured three years of the stress and inconvenience associated with litigation, incurring tens of thousands of dollars of legal costs. The relationship between L and M was irreparably damaged, and lasting breaches created between members of L and M’s extended family who were forced to ‘take sides’.

²²¹ See further below [3.4.19]–[3.4.21].

The person involved in this case believed that the current IFP law gives insufficient weight to testamentary freedom and that it did not reflect a commitment to the rights of the testator but rather an opinion that a testator is better placed than a court to determine the most just disposition of their estate.

The person was of the view that 'it is all but impossible to comprehend what is a truly fair disposition in the context of a family. This depends on a myriad of deeply personal and inevitably subjective circumstances. A testator may not (perhaps cannot) be objective about these circumstances; but they are in a position to appreciate the subtle range of factors that make different family members more or less deserving, or more or less needy.'

The person had reservations about the courts' ability to decide whether provision for a particular family member is adequate: 'the court will need to assess these factors through the filter of the rules of evidence and legal argument. This process is liable to blunt the nuances of family circumstances, and more skilful lawyers may be able to present one side of the story as more plausible than another. Court procedure seems ill-suited to determining the truth of such complex personal relationships with any degree of accuracy. It is certainly an extremely expensive, inefficient way of attempting to do so. And, as my family discovered, combing over family history in an adversarial context can become an inherently painful experience, especially for people coming to terms with the loss of a family member.'

3.4.19 Case example

Another person noted his frustrating experience with the current law and his desire for testamentary freedom to be given greater weight: 'My mother passed away 2007. My brother contested her will and the estate and here we are in 2017, 10 years later and he is still fighting my mother's estate. She left a very clear, fair and reasonable will for all involved, yet my brother has been allowed to contest every part of her will, even though he loses each court judgment. Because of his actions the beneficiaries lose and the estate loses and the courts/lawyers are the only ones to benefit. When a person writes their will and has made their wishes very clear it should be left alone. No one should have to go through what we are all because of another's greed. The last ten years I have spent defending my mother's wishes whilst my brother has been continually attacking them. The legal system sucks in this area.'

3.4.20 Case example

Another person knew of someone who had written his will, leaving his house to his son who had cared for him and lived with him until the testator had entered a nursing home. However, his will was disputed by an adopted son from his first wife whom he had been married to for five years many years prior and whom he had no connection to. His son had to sell the house to pay out the adopted son who had his own house.

3.4.21 Case example

Another person discussed their personal situation involving their mother who excluded her eldest sister from her will. Her mother stated in her will the reasons for her decision. Her sister lodged a caveat to prevent probate proceedings. She appointed a solicitor to lodge a claim for the 20 per cent she had been granted in a previous will [from] 2003. The 2009 will had removed her sister's inheritance and distributed the 20 per cent between her three grandchildren (two of them were her eldest sisters' sons). She and her other sister were granted 40 per cent each in both wills. The result was that through their legal representation they decided fighting the claim would result in personal cost to the five beneficiaries and negotiated 13 per cent as the final payment to their eldest sister. The experience was enormously stressful for the beneficiaries and damaged the relationship her and her sister had with their eldest sister: 'My sister and I no longer have contact with our eldest sister. We continue to struggle with the outcome knowing mum's wishes were not followed.'

3.4.22 Apart from the majority view in favour of testamentary freedom expressed in the YourSay surveys, there were several other views expressed. Some people believed that family provision law

should be about the consideration of all the surviving descendants, while another opinion was that due to family dynamics resulting in harsh decisions, family members should have ‘rights’ to their inheritance. Some believed that there should be equitable distribution as a default position, with one view placing the burden of contesting to be on those who believe they deserve a greater portion and another view placing the burden to be on those who don’t believe the others deserve an equal share.

3.4.23 Other individual submissions highlighted the importance of upholding testamentary freedom. One representative response noted: ‘If I go to the trouble to seek legal advice and write a will, it should be presumed that I know what I am doing, that I know my family and its dynamic and that my wishes will be respected unless something really unforeseen happens such as disability or accident.’

3.4.24 One anonymous submission highlighted the frustrations involved:

If someone takes the time and spends the money to prepare a will, it should be respected. If the law allows claims to be made by children who are dissatisfied with their share, then what is the point of drafting a will at all? The current laws generate a strong feeling of frustration. Surely, I am the person that knows my children the best and has the best sense of what is fair — not a court after I am dead and my views cannot be heard.

3.4.25 It was recognised by the Public Trustee in their submission that testamentary freedom is an important tenet of the existing legal framework in South Australia.

3.4.26 In summary, SALRI’s consultation and submissions (especially from the public) found strong support for the importance of testamentary freedom²²² and the perception that it has been unduly diluted.

Question 2: Should there be exceptions where the law should intervene to improve fairness of a will?

3.4.27 There was general acceptance in all Roundtables that testamentary freedom cannot be absolute, and must be balanced with fairness and public interests such as ensuring adequate provision is made for genuine dependents and other particularly vulnerable people.

3.4.28 Participants in the Berri Community Roundtable, Mount Gambier and Berri Legal Experts Roundtables raised examples of undue and unfair influence and it was noted that more and more very old people make wills, including families with stepchildren. In such cases, there is scope for undue influence, where the will may reflect the wishes of the beneficiary and not the testator. It was agreed that there is a real need to ensure the law has the power to qualify testamentary freedom. It was noted that a court should be able to step in and adjust or alter a will to ensure fairness in necessary cases.

3.4.29 Another ‘unfair will’ case raised in the Gambier and Berri Legal Experts Roundtables was where a testator has raised an expectation that led to a material contribution to the estate by a child but that child is then omitted from the will. This is a real problem in practice. The child may have worked on the farm or the fishing boat for his or her life, underpaid or even unpaid, in expectation, encouraged by the deceased that they would inherit the farm or business upon death. In these cases, the view from both the Mt Gambier and Berri succession lawyers was that the child should have the ability to claim

²²² This accord with the English surveys cited by Lady Hale in *Ilott v Mitson* [2017] 2 WLR 979 [53]–[56]. See also above [3.1.6]–[3.1.7].

under the *IFPA*.²²³ Various participants at the Adelaide, Berri and especially Mt Gambier Roundtables suggested that the test in the *IFPA* should be based around the question of if there been a reliance on that promise to the detriment of the child or other claimant. It was noted that the current law does not adequately address this issue.

3.4.30 Some participants likened these cases to the law of equity regarding promissory estoppel.²²⁴ Under this doctrine, where the claimant has relied on a promise to his or her detriment, a remedy is available if the promisor's conduct, in allowing the claimant to rely on the promise, is unconscionable.²²⁵ Mr Westley, a highly experienced Naracoorte succession lawyer especially suggested to SALRI that an adult child (or stepchild) should only be able to claim in a family provision context if they can satisfy a test similar to the equitable notion of promissory estoppel.

3.4.31 The Berri Legal Experts Roundtable also noted that the will itself may be unfair due to poor decisions by the testator. One lawyer noted the example of when second wives 'fly in' and clear out their new husband's estate at the expense of the children of the first wife and that the second wife may have only been on the scene for a relatively short time, say three years.

3.4.32 As noted above, undue influence in the drafting of wills was a major concern identified in both the public surveys and by regional succession lawyers.²²⁶

3.4.33 Case example

One person discussed their personal situation involving their family member who 'tinkered' with their 95-year-old grandmother's will. She spoke of the situation as follows: 'Her original wish was to have her house divided up amongst the surviving children; not the child that was greedy and who forced my grandmother to pay bills and for him to receive the receipts in his name. To then sell the house without family member consent and to keep all the proceeds is also wrong. I wasn't even permitted to purchase the property to keep it in the family.'

3.4.34 Case example

Another case example given involved a person whose mother left her husband as the trustee of her will: 'He had the power to change it. We were given a small amount as her children. He kept the rest. It is stated when he dies he is to split between all us children. He is spending up big and has said he is only leaving money to four out of six children if any left. My mother was on morphine etc when will was done by his lawyer. She was scared of her husband and she told us she hated him. Lawyers couldn't do anything as she had signed. There wasn't enough money in it for them to dig further about her state of mind when signing.'

3.4.35 Case example

Another submission made was from siblings who are contesting a second will that was made by their mother in 2011. The situation was described as follows: 'She had been diagnosed with Alzheimer's in 2005 and the young lawyer did not seek a Document of Testamentary Capacity when her third husband took her to make

²²³ See, for example, *Vigolo v Bostin* (2005) 222 CLR 191; *Morton v Morton* [2012] FamCA 30; *Rodda v Rodda* [2015] SASC 95 (1 July 2015); *Parker v Australian Trustees Executors Ltd* [2016] SASC 64 (1 June 2016).

²²⁴ See *Legione v Hateley* (1983) 152 CLR 406; *Waltons Stores (Interstate) Ltd v Maher & Anor* (1987–1988) 164 CLR 387; *Commonwealth v Verwayen* (1990) 64 ALJR 540.

²²⁵ Ibid. This is a common issue in farming. Mr Macolino, an experienced succession lawyer, explained the situation as part of SALRI's consultation at <<https://www.youtube.com/watch?v=n0ac9Wsqj-8>>.

²²⁶ The issue of undue influence was also raised to SALRI in the drafting and operation of powers of attorney under the *Powers of Attorney and Agent Act 1984* (SA). Mr O'Brien, an experience Berri practitioner, and Mr Macolino, an experienced Adelaide practitioner, highlighted this to SALRI as a real concern. See further below [10.2.1]–[10.2.3].

a new will leaving everything to him. The husband was also her Enduring Power of Attorney and was present all the time the will was being discussed and he answered most of the questions posed to Mum. The lawyer noted that Mum felt ‘put on the spot’ and we feel she was not able, didn’t know and didn’t understand what she was being asked to do.’

3.4.36 Some parties in consultation called for greater protection for those suffering from Alzheimer’s and any other vulnerable persons by including a mandatory Document of Testamentary Capacity.²²⁷

3.4.37 Of those who responded to the YourSAY surveys, approximately half to two-thirds of respondents who indicated they were in favour of testamentary freedom accepted that this freedom cannot be absolute and has to be subject to certain exceptions. For example, in cases where the testator was not of sound mind, was unduly manipulated when signing the will or failed to provide adequate provision for pre-existing dependants, these respondents believed that testamentary freedom should not be the primary concern.

3.4.38 The views received in the YourSAY surveys regarding the definition of ‘dependants’ included dependent minor children, disabled or aged parents, siblings and grandparents; dependent minor stepchildren; dependent children who cannot be supported by the remaining parent; partners who are unable to earn income to support themselves; surviving parents and disabled children fully dependent on the testator, among others. Some respondents in the surveys were of the opinion that ‘dependants’ should not include financially independent adult children or grandchildren, those who have deliberately put themselves into a position of needing help or those who have disqualified themselves due to bad behaviour, or family members who, although in need, do not depend on the deceased for their day to day life.

3.4.39 Other exceptions listed in the YourSAY surveys where testamentary freedom might not apply included exceptional cases and circumstances such as if a will was not written clearly, if adult family members are in genuine need for reasons not of their own making, if malice was proven, to ensure what is bequeathed is equally distributed, to ensure more fairness or if all the estate was left to a charity and dependants were neglected. Some examples were provided of inequitable wills. One response noted: ‘I was excluded from the wills because I was conceived out of wedlock and my father thought that it was my fault that he was forced to marry my mother.’ Another response stated: ‘The deceased provisions for one will favoured the male family members over the female family members and provided for grandchildren for those members of the family who had grandchildren. Personally, I disagree with this, as I see it as inequitable, but it was their wishes. The second will made provisions to family members and also one particular grandchild. Once again, I disagree with this, but it was their wishes.’

3.4.40 The Public Trustee was of the view that any proposed reforms to the *IFPA* should balance testamentary freedom and the desire to reduce the number of non-genuine claims on estates with the need to ensure that processes are fair and do not unduly exclude those family members who have a legitimate claim. In the Public Trustee’s view, testators have a responsibility to provide for direct dependants, particularly when those dependants have a disability or special needs.

²²⁷ SALRI is acutely aware of the acute issue of elder abuse in this context. See generally ALRC, *Elder Abuse — A National Legal Response*, Report No 131 (2017); Overington, above n 78; Parliament of South Australia, *Final Report of the Joint Committee on Matters relating to Elder Abuse* (October 2017).

Question 3: The wishes of the testator

3.4.41 SALRI's consultation examined whether greater weight should be given to the testator's wishes in family provision cases. The general view expressed in consultation was that the wishes of the testator are currently not given adequate weight in family provision claims. Consistent with these views, the consultation highlighted the view that more weight should be placed on the wishes and reasons of the testator.²²⁸

3.4.42 It was suggested to SALRI that many, perhaps most, testators are not acting irrationally, vindictively or harshly but their decisions are the result of mature and calm deliberation. They are reasonable people acting carefully and properly who wish for the instructions in their will to be binding. It was generally agreed across all the Roundtables that the notion of testamentary freedom has been diluted in recent years. A lawyer at the Berri Roundtable noted that under present law and practice it is almost as if the will maker is absent from any proceedings under the *IFPA* and his or her views are wholly discounted. One attendee in the Berri Community Roundtable was involved in an estate dispute with her sibling and expressed her frustration that she was unable to bring evidence about what her father actually wanted to happen to his estate.

3.4.43 There was an acceptance across the Roundtables that, while testamentary freedom cannot be absolute, it was agreed that it should be accorded more weight.

3.4.44 It was suggested at the Mount Gambier Legal Experts Roundtable that one way this could be done is through a statutory declaration or affidavit by the will maker at the time of drafting the will. Some participants noted that this should be admissible as relevant evidence of the will maker's intentions and reasoning in the event of any dispute (the admissibility and status of such a statement under the present law and the implications of the rule against hearsay are not entirely clear and consultation revealed very different views as to the admissibility and use of such statements under the *IFPA* under current law).²²⁹ It was suggested that, especially in light of the complexity and uncertainty of the common law and statutory positions, any such statement should be explicitly admissible under the law of evidence as a statutory exception to the hearsay rule as truth of its contents. It was also discussed that such a specific provision would support a renewed focus on the wishes of the testator.

3.4.45 It was raised by succession lawyers that some testators may use such a statement as an opportunity for an unpersuasive and irrational 'rant' but it was accepted that other testators, especially with the benefit of proper legal advice, would use such a statement as an opportunity for a careful, measured and cogent account of their decision and the reasons for the distribution of their assets in their will. It was accepted that any such statement could not be conclusive in the event of any dispute but it should be material. Ideally it should also be accompanied by other supporting evidence.

3.4.46 The Hon Tom Gray QC supported such a specific provision (though he noted his view that such evidence was already admissible in South Australia in proceedings in the probate jurisdiction that

²²⁸ Several succession lawyers pointed out that there is a procedure for the perpetuation of testimony about the wishes of a testator already available under the *Aged and Infirm Person's Property Act 1940* (SA). The Act allows the evidence to be tested whilst the relevant people are still alive but it has apparently never been used by the legal profession and is an expensive option.

²²⁹ This uncertainty as to the admissibility and use of such statements is not new. Harry Gibbs (later Gibbs CJ of the High Court) as long ago as 1953 commented on this uncertainty: 'The Testator's Family Maintenance legislation has thus given rise to problems in the law of evidence that as yet remain unsolved, and whose solution could perhaps better be effected by the intervention of the legislature than by the application of the existing principles of the law of evidence': Gibbs, above n 197, 155.

are not bound by the rules of evidence).²³⁰ Ms Iwaniw of Moran and Partners, and other Adelaide and regional succession lawyers, also saw the utility of such a provision. A fear expressed by one Adelaide succession lawyer was that such a provision could encourage testators to indulge in unsupported and gratuitous imputations.

3.4.47 The Public Trustee was of the view that rather than giving more weight to the testator's intentions, there should be a balance with the primary aim of family provision law focused on the need to provide for those who are direct and deserving dependants.

3.4.48 One individual submission was by someone who had a strong interest in the topic because he holds strong concern that one of his children, who has a history of drug and alcohol abuse and poor financial management, will contest his will under the *IFPA* upon his death. This individual has written a will excluding this child and he considers it to be his right that these wishes (based on what he considers to be very good reasons) are respected. He further commented: 'If someone takes the time and spends the money to prepare a will, it should be respected. If the law allows claims to be made by children who are dissatisfied with their share, then what is the point of drafting a will at all? The current laws generate a strong feeling of frustration. Surely I am the person that knows my children the best and has the best sense of what is fair — not a court after I am dead and my views cannot be heard.'

3.4.49 Another respondent to the YourSAy surveys commented:

They should be more respectful of the testator's choice many families today are dysfunctional many children go all their lives and never visit or show any care for parents but, when that person dies they can contest their will and usually win no matter how old they are some are past 50 years and claim that their parents should still be supporting them. As an older person who has a will I feel that I have no choice but to leave my savings to relatives as my wishes will only be over-ridden. My only other choice is to dispose of my savings prior to death which since I do not have information as to when that might be would leave me destitute.

Question 4: Burden of welfare and other issues

3.4.50 There was only limited input regarding whether the burden of welfare should be upon the individual rather than the State under the *IFPA*. Mr O'Brien was of the view that the law should not be directed to avoiding possible welfare dependency.

3.4.51 Some people in the YourSAy surveys believed that society should support a dependent person or that the law should not be directed to avoiding possible welfare dependency. One commented: 'It is not about being fair to the State — just because a person may be a burden on the State, it does not mean the deceased is responsible for supporting them after their death. This is a ridiculous concept.' Another response observed that it is 'not fair for someone choosing not to work to get more of the estate than others who have worked hard earning a small to average wage to pay their way'. One person detailed his or her experience of being currently embroiled in a legal challenge because a younger adult sibling believed they were deserving of a greater slice than their equal share of the deceased's parents' home, their argument being that they are on welfare. This person was frustrated with the current law

²³⁰ See also r 316 which provides for claims under the *IFPA* less than \$500 000 to be summarily determined if 'it is in the interests of justice to do so' on the basis of evidence that does not comply with the rules of evidence. See below [7.2.6].

which would allow this sibling, who through ‘their own dodgy conduct’ found themselves worse off financially, potentially get rewarded with a greater amount under the *IFPA*.

3.4.52 Case example

One example provided concerned an individual whose friend’s family were torn apart by a successful claim by one of the three siblings for more of their deceased parent’s estate. The friend commented: ‘This was done as she was on welfare but the siblings are also aware of many things not declared which would have changed the settlement.’

3.4.53 In contrast, other respondents believed that it was not fair for taxpayers to cover dependants who are not covered by their own families. One anonymous respondent believed that family provision legislation should be limited to the purpose of protecting dependants and preventing them from becoming dependent on the State. One respondent to the YourSAy surveys commented: ‘Family provision laws should be solely about the person who wrote the will to leave their property to whoever they choose. My belief is that this should only be altered when the family members leaves ALL their money and or property to a charity, and leaves the rest of their dependants penniless and dependent on the State.’

3.4.54 The Public Trustee was of the view that current inheritance provision laws should take into account the modern welfare income policies where individuals are provided for through other public policy avenues.

3.5 The Institute’s views

Has the law got the balance right?

3.5.1 SALRI agrees with the view of the English Law Commission in 1971 that ‘the principle of absolute freedom of testation is acceptable only if the view were taken that it is more important to be able to dispose of property than to meet natural and legal obligations to the family [and] we do not believe this view to have any degree of support.’²³¹ This view also strongly emerged in SALRI’s consultation. Whilst there was strong support for respecting testamentary freedom, it was acknowledged that this cannot be absolute.

3.5.2 While SALRI agrees with the English Law Commission that the notion of absolute testamentary freedom is unrealistic, SALRI considers that a central premise of any reform to the present law must be to promote and strengthen the concept of testamentary freedom. SALRI accepts that the current law does not have the right balance and recommends that greater focus should be given to respecting or preserving testamentary freedom. This underlying principle will guide further recommendations in this Report.

3.5.3 SALRI notes the question raised in consultation, including by Mr Mackie, as to how should the importance of respecting and preserving testamentary freedom be recognised and better reflected in the *IFPA*? SALRI notes the suggestion of Mr Evans of Minter Ellison that a statutory object or guiding principle should be added to the *IFPA* to provide that in considering any family provision claim a court should, as far as practicable or possible, respect the wishes of the testator. Such statutory objects or guiding principles often appear in both State (see, for example, ss 4 to 9 of the *Children and Young Persons (Safety) Act 2017* (SA), s 8 of the *South Australian Civil and Administrative Tribunal Act 2013* (SA) and s 3(1)

²³¹ Law Commission, above n 167, [4.13].

of the *Young Offenders Act 1993* (SA)) and Commonwealth legislation (see, for example, s 2A of the *Administrative Appeals Tribunal Act 1975* (Cth) and s 43 of the *Family Law Act 1975* (Cth)).

3.5.4 SALRI supports the inclusion of a statutory object or guiding principle in the *IFPA* to provide that in considering any family provision claim a court should, as far as practicable or possible, respect the wishes of the testator. Such a statement would not be conclusive. A court would still be able in an appropriate case to find in favour of a deserving claim under the *IFPA*. However, the inclusion of such a statutory object or guiding principle reflects the strong view related to SALRI in consultation of the importance of testamentary freedom and would serve to support and reinforce this principle which has been eroded over recent years.

The wishes of the testator

3.5.5 SALRI agrees with the general view expressed in the consultation that under current law and practice, the testator's wishes are either absent or discounted and that inadequate weight is accorded to the wishes of the testator. Testators are likely to be reasonable people acting carefully and properly who wish the instructions in their will to be binding. The consultation data has shown a clear and strong preference for greater weight to be given to a testator's wishes.

3.5.6 SALRI notes wider research which supports the findings of the consultation that current law and practice has eroded testamentary freedom.²³² It is significant that the South Australian survey finds 22 out of the 23 family succession claims to make it to trial were successful.²³³

3.5.7 SALRI sees the benefit (particularly in light of the complexity and uncertainty as to the current law) of a specific legislative provision to make it clear that a statement made by a testator explaining the reasons for the distribution in his or her will should be expressly admissible as an exception to the hearsay rule as evidence of the truth of its contents. Such a statement also accords with the theme of strengthening the focus on testamentary freedom.

3.5.8 SALRI agrees with the reasoning of the Mt Gambier Roundtable in relation to a specific law to expressly provide, or at least clarify, that a signed written account by a testator should be admissible as an exception to the hearsay rule as evidence of the reasons of the testator for the distribution in his or her will. Any such statement would not be a substitute for the will as to the testator's intentions but would augment and support the will. Such a statement should be taken into account in any claim under the *IFPA*. Any such statement should be material, with a court to place such weight upon it as is appropriate. Such a law supports the focus on testamentary freedom. The Berri Roundtable, the Hon Tom Gray QC and Ken Mackie also supported this proposal. It is significant that such specific laws exist in New South Wales, Victoria, Western Australia, Tasmania, the Northern Territory and the ACT.

3.5.9 SALRI notes that the fear of such statements being used as a means to 'rant' and make irrational and gratuitous imputations and inflame family tensions but considers that this is not a valid objection to the introduction of such a provision. Any such statement will be unlikely to be accorded any

²³² See, for example, Ellison, above n 120, 16–18; McGregor-Lowndes and Hannah, 'Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?' 'Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?', above n 51; Tilse et al, *Having the Last Word? Will Making and Contestation in Australia*, above n 121, 17; Tilse et al, *Families and Generational Asset Transfers: Making and Challenging Wills in Contemporary Australia: Review of Public Trustee Files*, above n 121, 15; See also White et al, above n 8, 899.

²³³ See above [2.2.4] (especially n 123). See also below [5.3.12].

substantial weight by a court²³⁴ and it is a role for legal advice, as discussed at the Mt Gambier Roundtable and echoed by Ms Iwaniw, to assist testators in formulating such a statement.

3.5.10 SALRI notes that while the models in the Northern Territory and the ACT (and Tasmania) are concise and straightforward,²³⁵ the models in New South Wales and Western Australia in contrast are lengthy, if not elaborate.²³⁶ Though this is ultimately an issue for drafting preference, SALRI is attracted to the simplicity and clarity of the Northern Territory and ACT models.

²³⁴ See, for example, the situation in *Parker v Australian Trustees Executors Ltd* [2016] SASC 64 (1 June 2016) where the testator told him his estate planner he did not want three of his children to have “a f.....g cent”. He was given advice about the family provisions of the Act. Consistent with his general behaviour the testator remained obstinate: at [97]. Lovell J accorded little weight to the testator’s reasons.

²³⁵ The Victorian model is perhaps too brief. Ken Mackie in consultation favoured the ACT model.

²³⁶ See the NSW Model: *Family Provision Act 1982* (NSW) s 32 (‘Evidence’) –

- (1) In this section:
document includes any record of information.
statement includes any representation of fact whether or not in writing.
- (2) In any proceedings under this Act, evidence of a statement made by a deceased person shall, subject to this section, be admissible as evidence of any fact stated therein of which direct oral evidence by the deceased person would, if the person were able to give that evidence, be admissible.
- (3) Subject to subsection (4) and unless the Court otherwise orders, where a statement was made by a deceased person during the person’s lifetime otherwise than in a document, no evidence other than direct testimony (including oral evidence, evidence by affidavit and evidence taken before a commissioner or other person authorised to receive evidence for the purpose of the proceedings) by a person who heard or otherwise perceived the statement being made shall be admissible for the purpose of proving it.
- (4) Where a statement was made by a deceased person during the person’s lifetime while giving oral evidence in a legal proceeding (being a civil or criminal proceeding or inquiry in which evidence is or may be given, or an arbitration), the statement may be approved in any manner authorised by the Court.
- (5) Where a statement made by a deceased person during the person’s lifetime was contained in a document, the statement may be proved by the production of the document or, whether or not the document is still in existence, by leave of the Court, by the production of a copy of the document, or of the material part of the document, authenticated in such manner as the Court may approve.
- (6) Where, under this section, a person proposes to tender, or tenders, evidence of a statement contained in a document, the Court may require that any other document relating to the statement be produced and, in default, may reject the evidence or, if it has been received, exclude it.
- (7) For the purpose of determining questions of admissibility of a statement under this section, the Court may draw any reasonable inference from the circumstances in which the statement was made or from any other circumstances including, in the case of a statement contained in a document, the form or content of the document.
- (8) In estimating the weight, if any, to be attached to evidence of a statement tendered for admission or admitted under this section, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, including the recency or otherwise, at the time when the deceased person made the statement, of any relevant matter dealt with in the statement and the presence or absence of any incentive for the deceased person to conceal or misrepresent any relevant matter in the statement.
- (9) Subject to subsection (11), where evidence of a statement of a deceased person is admitted under this section, evidence is admissible for the purpose of destroying or supporting the credibility of the deceased person.
- (10) Subject to subsection (11), where evidence of a statement of a deceased person is admitted under this section, evidence is admissible for the purpose of showing that the statement is inconsistent with another statement made at any time by the deceased person.
- (11) No evidence of a matter is admissible under subsection (9) or (10) in relation to a statement of a deceased person where, if the deceased person had been called as a witness and had denied the matter in cross-examination, evidence would not be admissible if adduced by the cross-examining party.
- (12) This section applies notwithstanding:
 - (a) the rules against hearsay,
 - (b) (Repealed)

3.5.11 SALRI considers that a signed written account or statement by a testator should be admissible in any proceedings under the *IFPA* as a specific exception to the hearsay rule as evidence of the truth of its contents as to the testator's reasons for the distribution of his or her estate in the will. The weight to be accorded to any such statement is for the court. Where such a statement is adduced, a court should, in determining the weight to be attached to the statement, have regard to all the circumstances from which any inference may reasonably be drawn concerning the accuracy of the matters referred to in the statement. The wishes of the testator should be known to court and that the beneficiaries of the testator should also be given the opportunity to present evidence of the nature of the key relationships within the family.

3.5.12 There is a view that any statement of the testator should be admissible and its form (whether oral or written) should go its weight and not its admissibility. However, SALRI is cautious about the misuse of oral statements and wishes to avoid the situation of feuding relatives seeking to adduce purported oral statements made by a testator explaining the reasons of the testator in including or not including certain relatives. SALRI therefore suggests that statements admissible under any legislative exception to the hearsay rule should be confined to a written and signed statement by the testator.

Should there be exceptions where the law should intervene to improve fairness of a will?

3.5.13 There will be circumstances when a will is manifestly unfair, perhaps for circumstances beyond the control of the testator. Many examples of unfair wills were provided in consultation.

3.5.14 However, whilst testamentary freedom cannot be an absolute proposition, SALRI reiterates its previous view that it should nevertheless be a strong underlying premise. SALRI also notes the strong theme from its community feedback in favour of broad, though not absolute, testamentary freedom.

Burden of welfare and other issues

3.5.15 The consultation data showed conflicting views over who should bear the burden of welfare. SALRI is of the view that the policy considerations underlying family provision law should be based on protecting testamentary freedom and that the law should not be directed to reducing a claimant's welfare dependency on the State. SALRI agrees with the view of the New Zealand Law Commission (NZLC) that 'protecting the welfare purse should not, however, be the first object of the laws of succession'.²³⁷

3.5.16 The ongoing entitlement of a claimant to welfare, should be considered a resource of the claimant when determining whether the requirement in s 7 of the *IFPA* can be satisfied and in determining the amount of any award under the *IFPA*. SALRI considers with respect to successful claimants, the courts should mitigate any adverse effect that an award under the *IFPA* may have on the claimant's ongoing welfare benefits, so as not to put the claimant in a worse financial position as a result of making a successful claim. Mr Mackie in consultation supported this approach.

and notwithstanding that a statement is in such a form that it would not be admissible if given as oral testimony, but does not make admissible a statement of a deceased person which is otherwise inadmissible.

(13) The exceptions to the rules against hearsay set out in this section are in addition to the exceptions to the hearsay rule set out in the *Evidence Act 1995*.

²³⁷ NZLC, *Succession Law: Testamentary Claims*, Preliminary Paper No 24 (1996), 14 [53]. See also at 13–14 [47]–[51].

3.5.17 Recommendations:

Recommendation 2

SALRI recommends that, although absolute testamentary freedom is inappropriate, a greater focus should be given in law and practice to respecting and preserving testamentary freedom and a testator's will should only be altered by a court in limited circumstances and accordingly a statutory object or guiding principle should be added to the *Inheritance (Family Provision) Act 1972* to provide that in considering any family provision claim a court should, as far as possible or practicable, respect the wishes of the testator.

Recommendation 3

SALRI recommends that the law in South Australia should be strengthened so that greater focus should be given in South Australia to discourage or deter baseless, opportunistic, undeserving or unmeritorious claims under the *Inheritance (Family Provision) Act 1972*.

Recommendation 4

SALRI recommends that a signed written account or statement by a testator should be admissible as a specific exception to the hearsay rule as evidence of the truth of its contents as to the reasons of the testator for the distribution of his or her estate in a will. The weight in any case to be accorded to such a statement is an issue for the court. Where such a statement is adduced, a court shall, in determining what weight, if any, is to be attached to the statement, have regard to all the circumstances from which any inference may reasonably be drawn concerning the accuracy of the matters referred to in the statement. Whilst any model is an issue for drafting preference, SALRI is attracted to the simplicity of the ACT and Northern Territory models.

Recommendation 5

SALRI recommends that the law should not be directed to reducing a claimant's welfare dependency on the State. The ongoing entitlement of a claimant to welfare should be considered a resource of the claimant when determining whether the requirement in s 7 of the *Inheritance (Family Provision) Act 1972* can be satisfied and in determining the amount of the award under the *Inheritance (Family Provision) Act 1972*. With respect to successful claimants, the courts should mitigate, where possible, any adverse effect that an award under the *Inheritance (Family Provision) Act 1972* may have on the claimant's ongoing welfare benefits, so as not to put the claimant in a worse financial position as a result of making a successful claim.

Part 4 – Who should be able to make a Claim?

4.1 Current position in South Australia

4.1.1 A relatively wide class of persons are eligible under s 6 of the *IFPA* to make a claim. This includes the deceased person's child, grandchild, husband or wife, ex husband or wife, or domestic partner or ex domestic partner (this includes heterosexual or non-heterosexual couples who live together for at least three years or have a child together or who have registered their relationship). A parent or sibling of the deceased person may also be able to make a claim, provided he or she also satisfies the court that they cared for, or contributed to the maintenance of, the deceased person during his or her lifetime. Similarly, a stepchild of the deceased person may be able to make a claim, but only if the deceased person was practically or legally responsible for the stepchild's care.

4.1.2 As discussed below, a person in these categories will not be automatically entitled under the *IFPA* to receive part of the deceased person's estate. They must first meet the other criteria prescribed by the Act.

4.1.3 A number of law reform questions arise from these categories of eligible family members. Some of these are outlined below.

4.2 Position in other jurisdictions

4.2.1 Efforts have been made by law reform bodies around Australia to develop a standard list of categories of eligibility to make a family provision application. For example, the National Committee for Uniform Succession Laws has suggested that the list should only include the following family members:

- (a) a person who was the wife or husband of the deceased person at the time of the deceased person's death
- (b) a person who was the de facto partner (similar to 'domestic partner' in South Australia) of the deceased person at the time of the deceased person's death
- (c) a non-adult child of the deceased person (defined as a person who was under the age of 18 at the time of the deceased person's death; including natural and adopted children, but not stepchildren)
- (d) a person to whom the deceased person owed a responsibility to provide maintenance, education or advancement in life.²³⁸

4.2.2 A broader approach has been taken in New South Wales, where, in addition to the list above, the following are included:

- (a) grandchildren of the deceased person;
- (b) a member of the deceased person's household who was, at any time, wholly or partly dependent on the deceased person; and

²³⁸ National Committee (MP 28), above n 3, 26.

- (c) a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death.

4.2.3 However, under the NSW model, a court may only make an order in favour of this second group of applicants if there are 'factors warranting the making of the application' and

at the time when the court is considering the application, adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made has not been made by the will of the deceased person, or by the operation of the intestacy rules in relation to the estate of the deceased person, or both.²³⁹

4.2.4 As a result of the recommendations in the VLRC Final Report, Victoria modified its approach in 2014 (the relevant legislation came into operation on 1 January 2015). The new model is set out in the rewritten Part IV of the *Administration and Probate Act 1958* (Vic). There is a new definition of 'eligible person' in s 90. This definition gives automatic status to claim to current spouses or domestic partners; children (including adopted), stepchildren and any person who for a substantial period of the deceased's life, believed deceased was a parent and was treated as such providing that the stepchild or other person was under 18 or a full-time student or a disabled child; former spouse/domestic partner if at the time of the deceased's death, they could have taken proceedings under the *Family Law Act 1975* (Cth); a child/stepchild not already included; and a person who for a substantial period of deceased's life, believed the deceased was a parent and was treated as such.

4.2.5 All other eligible persons (from sub ss (h) to (k) of s 90)) have to meet further criteria of dependence (s 91(2)(b)) and all claimants must demonstrate the deceased had a moral duty to provide for the claimant's proper maintenance and support (s 91(2)(c)) and that the distribution of the deceased's estate fails to make adequate provision for such (s 91(2)(d)). There are also criteria to be satisfied in determining the amount of provision to be made (s 91(4)), and these incorporate different criteria depending on the claimant's category of 'eligible person'.

4.2.6 Section 91A, reproduced at Appendix D, sets out the factors which must be considered by a court in making a family provision order.

4.2.7 An overview of the list of eligible claimants in all Australian jurisdictions can be found in Appendix B.

4.3 Issues

4.3.1 The increasing complexity and diversity of modern families and relationships raises major implications in formulating an accepted list of categories of eligible persons who can make a family provision claim. Issues have arisen as to whether the current list under the *IFPA* is too broad in including allowing applicants who, from the public's view, may not have a moral claim upon the testator's estate. The problem of opportunistic and vexatious claims is also argued to arise from the current broad list of eligibility.

4.3.2 A comparison of the list of eligible claimants in the *IFPA* with those listed in the National Bill and VLRC model shows that the *IFPA* is broader in some ways, especially in relation to the category of children.

²³⁹ *Succession Act 2006* (NSW) s 59. See also at s 57.

4.3.3 As set out above, the National Bill formulated by the National Committee for Uniform Succession Laws limits the list of eligible claimants to current spouses, current de facto partners, and children under the age of 18 (including natural and adopted children but not stepchildren). These family members are automatically entitled to make family provision applications. Family members or persons outside this category are eligible to make a claim only if they can prove that the deceased person owed them a responsibility to provide maintenance, education or advancement in life. To determine whether such a person is eligible, there is a list of criteria set out which the court may take into account.

4.3.4 It can be seen that the National Bill is much stricter in the list of family members who are automatically eligible to apply. It is broader in that it allows a separate general criteria-based category. This would allow applications to be made by family members or people who might not necessarily fall within one of the specific categories found in the *IFPA* but who might nevertheless have a legitimate claim.

4.3.5 Based on the recommendations of the VLRC, the Justice Legislation Amendment (Succession and Surrogacy) Bill 2014 came before the Victorian Parliament. It sought to amend, among other Acts, the definition of an ‘eligible person’ under s 90 of the *Administration and Probate Act 1958*.²⁴⁰ Eligible persons were defined to only include the deceased’s children and stepchildren under 18 (and full-time students up to the age of 25), children with a disability, spouses or domestic partners at the time of death, and former spouses and partners who have not had recourse to the *Family Law Act 1975*.²⁴¹ For other applicants (such as adult children or stepchildren, registered caring partners, grandchildren and other members of the deceased’s household at the time of the deceased’s death), the court would also need to be satisfied that they were financially wholly or partly dependent on the deceased at the time of the deceased’s death.²⁴² The proposed amendments went far beyond any other jurisdiction in Australia and beyond what was recommended by the VLRC and applied an ever stricter test than that for ‘adult sons’ in the early 1900s. This Bill would have restricted a range of family members who would be automatically eligible under the *IFPA*.

4.3.6 It is significant that the VLRC recommendation did not incorporate the view of the National Committee²⁴³ and others²⁴⁴ to shift adult children by moving them *out* of the status-list and into the circumstances list. The Bill was subject to extensive lobbying by the Law Institute of Victoria and amended during its passage through Parliament to its current form.²⁴⁵ Section 57 of the Victorian Act retains children as a status category.²⁴⁶

4.3.7 The specific issues discussed below arise from the following categories of eligible claimants: children (particularly adult children and stepchildren), spouses (including current and former spouses) and other categories such as grandchildren, parents and carers.

²⁴⁰ Justice Legislation Amendment (Succession and Surrogacy) Bill 2014 (Vic) cl 3.

²⁴¹ Victoria, *Parliamentary Debates*, Legislative Council, 20 August 2014, 2617 (E J O’Donohue).

²⁴² *Ibid*.

²⁴³ National Committee (R 58), above n 100.

²⁴⁴ Professor Croucher notes that this is consistent with recommendations she put to the Victorian Attorney-General in an Expert Report she wrote for the Law Reform Advisory Council in 1994, that the legislation in relation to children ought to be restricted principally to the case of dependency during minority or to the completion of education. See Croucher, ‘Succession Law Reform in NSW – 2011 Update’, above n 149.

²⁴⁵ Nancy Collins, ‘Family Matters’ (2015) 89(3) *Law Institute Journal* 30.

²⁴⁶ See above [4.2.4].

Spouses

4.3.8 The main issue on the position of spouses is whether former spouses should be eligible to claim. Under the *IFPA*, former spouses and former domestic partners are automatically eligible to make a claim. In Victoria, former spouses and domestic partners are only eligible to make a claim if at the time of the deceased's death, they could have taken proceedings under the *Family Law Act 1975* (Cth).²⁴⁷ In Western Australia and Tasmania, the former spouse or domestic partner must have been receiving or entitled to be receiving maintenance from the deceased at the time of the deceased's death to be eligible.²⁴⁸ Similarly, in the Northern Territory, the former spouse or de facto partner must have been maintained by the deceased before the deceased's death.²⁴⁹ New South Wales allows a former spouse but not a former de facto partner to make a claim.²⁵⁰ In the ACT, former spouses, former civil union partners, former civil partners and former domestic partners (if they were in a relationships with the deceased for two years or more continuously) are eligible to apply. Queensland allows former spouses and former civil partners to make a claim but only if they have not remarried or entered into a civil partnership with another person before the deceased's death and were receiving, or were entitled to receive, maintenance from the deceased at the time of the deceased's death.²⁵¹

4.3.9 It would appear from a comparison of other Australian jurisdictions that the *IFPA* is broader than many of the comparable laws found in the other jurisdictions, with the exception of the ACT and New South Wales (in relation to former spouses).²⁵²

Adult Children

4.3.10 The position of adult children in family provision claims has proved one of the most difficult issues for SALRI in its current reference with diverse and diverging views expressed. This reflects a longstanding debate as to the position of adult children. As Professor Croucher notes:

Exactly what should be the right approach has troubled law reformers ever since TFM legislation was first proposed. Solicitors have their own collections of horror stories in this arena. The initial proponents of TFM in New Zealand were greatly concerned for wives, heartlessly omitted from their husbands' wills, and many personal stories were clearly in the background. Such stories continued to fill in the narrative of family provision reform, such as the work that led to the introduction of the *Family Provision Act 1982* (NSW). Adult children continue to fill the cases—reported and unreported. So who *should* be eligible to apply?²⁵³

4.3.11 Under the *IFPA*, adult children who are competent and self-supporting and all other adult children are automatically eligible to make a family provision claim, just like children under the age of 18.

4.3.12 As mentioned previously, the National Committee in 1997 recommended that adult children should *not* be automatically eligible, but should fall within a broad category of persons 'for whom the

²⁴⁷ *Administration and Probate Act 1958* (Vic) s 90 (e).

²⁴⁸ *Family Provision Act 1972* (WA) s 7(1)(b); *Testator's Family Maintenance Act 1912* (Tas) ss 3A(d), (e).

²⁴⁹ *Family Provision Act* s 7(1).

²⁵⁰ *Succession Act 2006* s 57(1)(d).

²⁵¹ *Succession Act 1981* ss 41(1), 5AA.

²⁵² See Appendix B for an overview of the laws relating to the rights of former spouses and domestic partners.

²⁵³ See Croucher, 'Succession Law Reform in NSW – 2011 Update', above n 149.

deceased person had a responsibility to make provision for the person's maintenance, education or advancement in life'.²⁵⁴ This has not been accepted in any jurisdiction.

4.3.13 In comparison to the relevant laws in other jurisdictions, Victoria stands out as the one jurisdiction that differs slightly in their law regarding adult children. In Victoria, adult children and adult stepchildren are also automatically eligible to make a family provision claim.²⁵⁵ However, when determining the amount of provision to be made, the court must take into account the degree to which the adult child or stepchild is not capable, by reasonable means, of providing adequately for their own proper maintenance and support.²⁵⁶ An overview of the laws relating to the eligibility of adult children in all Australian jurisdictions can be found in Appendix B.

4.3.14 Both South Australian and interstate²⁵⁷ courts have granted claims by adult independently-living children under the *IFPA* despite their having had no contact with or having been estranged from the deceased for many years, not having helped the deceased financially and not having contributed to the deceased's care; and despite the deceased having, by will, excluded the claimant from inheriting for precisely those reasons. Such claims have been granted even when the effect was to diminish the provision from the estate for the intended beneficiaries.²⁵⁸

4.3.15 A review of the cases under the *IFPA* in South Australia to proceed to trial from 2000 until 2016 reveals that a large proportion of applicants (18 out of 23 cases) were competent adult children between the ages of 42 and 76.²⁵⁹ Among these 18 cases, there is evidence that a portion were made up of financially independent adult children. For example:

- (a) In *Fennell v Aberne*,²⁶⁰ one of the plaintiffs had enjoyed long-term employment and accumulated reasonable assets, was receiving a permanent pension, and his wife was securely employed. Another plaintiff was more financially successful with a secure well paid job and an estate bigger than the testator's estate. However, the Supreme Court still found that both plaintiffs had been left without adequate provision and awarded them \$10 000 each out of a \$162 659 estate.
- (b) In *Hellwig v Carr*,²⁶¹ Withers J doubted whether the testator's failure to provide was sufficient to find jurisdiction due to the plaintiff's wealthy position. However, his Honour departed from the testator's wishes and still awarded the plaintiff \$7 500 out of the \$130 000 estate for the purpose of meeting any unexpected contingencies.

²⁵⁴ National Committee (R 58), above n 100, 4.

²⁵⁵ *Administration and Probate Act 1958* (Vic) ss 90(f)–(g).

²⁵⁶ *Ibid* s 91(4)(c).

²⁵⁷ Ellison, above n 120, 16–18 [28]–[38].

²⁵⁸ See, for example, *Smythe v Smythe* [2010] SASC 319 (18 November 2010), a case in which a large part of a small deceased estate (left to the testator's other two close and carer adult children) was distributed to an estranged retired adult child who had no recent dependence on the testator, had made no contribution to her assets or care and had been carefully and rationally excluded from inheriting for these reasons in the will. The main justification for this decision was that the claimant had serious health problems and, albeit through his own incompetence, was in an unstable financial position. See, however, the different result reached in *Uglesic v Uglesic & Anor* [2010] SASC 215 (16 July 2010), in which, in similar circumstances, an estranged retired adult child was denied any distribution from the deceased's estate, the only real difference being that the claimant had actively refused financial help to the testator. See also *Drioli v Rover* [2005] SASC 395 (14 October 2005), a case where two adult daughters, estranged for over 36 years after their father divorced their mother while they were in their teens, successfully claimed against their father's estate (he having left all his estate to his widow (second wife) of 34 odd years).

²⁵⁹ See Appendix C for an overview of cases decided under the South Australian Act from 2000 to 2016.

²⁶⁰ [2005] SASC 280 (22 July 2005). See in particular at [50]–[56].

²⁶¹ [2009] SASC 117 (1 May 2009) [69] (Withers J).

4.3.16 The above outcomes are consistent with empirical studies and public trustee reviews which estimate that over half of family provision claims were brought by competent adult children, most between the ages of 45 and 70.²⁶² In 2015, Professor Ben White et al, from the University of Queensland reviewed all publicly available succession law judgments in Australia during a 12-month period. Of the sample size chosen for the study, 52 per cent of the claims made were by adult children with no incapacity. The success rate in these cases was 69 per cent and over 80 per cent for children when the estate was over \$1 million. Taking a conservative approach, the study identified approximately one-third of the claimants could be regarded as ‘financially comfortable adults just wanting more’.²⁶³ In 2008²⁶⁴ and then in 2009,²⁶⁵ two Queensland academics, McGregor-Lowndes and Hannah examined family provision laws in Australia and other jurisdictions.²⁶⁶ They argued that there are few impediments to adult children making a family provision claim and that it has become easier to succeed in these claims over time.²⁶⁷

4.3.17 More recent reviews by law reform bodies of family provision laws have recommended that adult children should not be appropriate applicants for family provision. The NZLC pointed to anomalies in the *Family Provision Act 1955* (NZ), stating:

Claims by adult children under the *Family Provision Act 1955* are often made on the basis not of need but on the basis that the will-maker breached an undefined moral duty. This regime is indefensible because will-makers cannot determine and comply with its requirements in advance, and because it may disregard moral imperatives of the will-maker that are not shared by whichever judge is called upon to decide the claim. Will-makers, during their lifetime, are required by law to provide economic support only to certain children under 19.²⁶⁸

4.3.18 The NZLC recommended that only children, as defined, should be entitled to make a ‘support claim’ under family provision legislation. Adult children should be denied the right of claim in all but three situations:

- (a) Where adult, independent children have conferred valuable benefits on a parent during the parent’s lifetime;
- (b) Where there is genuine need, and it is possible to meet the claim without unfairness to other beneficiaries, to allow periodic payments to the adult child to alleviate their need (designated a ‘needs claim’ for a ‘needs award’); or
- (c) Where what is sought by the adult child is no more than a memento or keepsake of modest value.²⁶⁹

4.3.19 The issue is whether competent adult children should be given automatic eligibility or whether they should be subject to a further criterion of dependence first. Regarding this point, the VLRC

²⁶² Drury, above n 124. Tilse et al, *Having the Last Word? Will Making and Contestation in Australia*, above n 121, 3, 17; Tilse et al, *Families and Generational Asset Transfers: Making and Challenging Wills in Contemporary Australia: Review of Public Trustee Files*, above n 121, 7; White et al, above n 8, 896.

²⁶³ White et al, above n 8, 901.

²⁶⁴ McGregor-Lowndes and Hannah (2008), above n 36.

²⁶⁵ McGregor-Lowndes and Hannah, ‘Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?’, above n 51.

²⁶⁶ McGregor-Lowndes and Hannah (2008), above n 36.

²⁶⁷ McGregor-Lowndes and Hannah, ‘Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?’, above n 51.

²⁶⁸ NZLC, *A Succession (Adjustment) Act: Modernising the Law on Sharing Property on Death*, Report 39 (1997) [4] (‘R 39’).

²⁶⁹ These recommendations are yet to be implemented in New Zealand.

expressed concern that an additional criterion of dependence could encourage a culture of ‘bludging off’ wealthy parents or grandparents in order to satisfy a dependency test upon their death.²⁷⁰

4.3.20 The ability of adult children to be eligible automatically to make a family provision claim is contentious. Some commentators have highlighted the unsatisfactorily high incidences of claims made by financially secure adult children.²⁷¹ Others have said that the inclusion of adult, self-sufficient children is contrary to the policy aims of family provision laws.²⁷² It is argued, for example, that the ongoing obligations in marriage-like relationships should remain distinct from the obligations to children which should end once they are self-supporting.²⁷³

4.3.21 The notion of automatic eligibility for financially secure adult children is questionable. The community is likely to only expect parents to provide a financial buffer for adult children when they fall on hard times or if they lack the resources to meet ill health or advancing years.²⁷⁴ This suggests the need for a further criterion of need or dependency for competent adult children.²⁷⁵

4.3.22 The effect of the current law according to Professor Croucher is a ‘blueprint for bludging’.²⁷⁶ She asserts: ‘So we will continue to get cases of independent, self-sufficient 50 and 60 year olds wanting to get more of the pie from their parents, notwithstanding that the parent had made a conscious decision that they had already had enough and/or did not deserve more (or even anything).’²⁷⁷ Research supports this position. White et al, for example, highlight independent ‘financially comfortable’ adult claimants.²⁷⁸

Stepchildren

4.3.23 Under the *IFPA*, stepchildren are excluded from making a family provision claim unless they were maintained or entitled to be maintained by the deceased immediately before his or her death.²⁷⁹ This position is the same in the Northern Territory, the ACT, New South Wales and Western Australia. Accordingly, in these jurisdictions, those children that are raised in the home of a stepparent, where the

²⁷⁰ VLRC, *Succession Laws: Family Provision*, Consultation Paper No 12 (2013) 34 [2.95] quoting Rosalind Croucher, ‘Conflicting Narratives’, above n 114, 200.

²⁷¹ See, for example, Justice R N Chesterman, ‘Does Morality Have a Place in Applications for Family Provision brought pursuant to s41 of the *Succession Act 1981*’ (Speech delivered at the QLS Annual Succession Law Conference, Sunshine Coast, 1 November 2008) 15, <<http://archive.sclqld.org.au/judgepub/2008/chesterman011108.pdf>>; Renwick, above n 35, 173; McGregor-Lowndes and Hannah, ‘Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?’, above n 51, 78; White et al, above n 8, 901–902, 904; Croucher, ‘Succession Law Reform in NSW – 2011 Update’, above n 149.

²⁷² Croucher, ‘If we could start again: Re-imagining Family Provision Law in the 21st century’, above n 93, 19; Ellison, above n 120, 14, 18.

²⁷³ *Fennell v Aberne* [2005] SASC 280 (22 July 2005) [40] (Withers J) citing *In re Sinnott* [1948] VLR 279, 280 (Fullagar J).

²⁷⁴ *Parker v Australian Executor Trustees Ltd* [2016] SASC 64 (1 June 2016) [28] (Lovell J) citing *Taylor v Farrugia* [2009] NSWSC 801 (5 June 2009) [57]–[58] (Brereton J) and *MacGregor v MacGregor* [2003] WASC 169 (28 August 2003) [179] (Templemen J). See also *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134, 147 (Gibbs CJ) cited in *Fennell v Aberne* [2005] SASC 280 (22 July 2005) [13] (Withers J).

²⁷⁵ See also Renwick, above n 35, 161; Atherton, ‘New Zealand’s Testator’s Family Maintenance Act of 1900 – the Stouts, the Women’s Movement and the Political Compromise’, above n 35, 205.

²⁷⁶ Croucher, ‘Conflicting Narratives’, above n 114, 200.

²⁷⁷ Ibid.

²⁷⁸ White et al, above n 8, 901–902, 906. ‘Taking a conservative approach, we identified approximately one-third of the claimants that could be regarded as “financially comfortable adults just wanting more”’: at 901–902.

²⁷⁹ *IFPA* s 6.

relationship between the stepparent and child was as that of a parent-child relationship at the time of the stepparent's death, will be eligible.

4.3.24 However, in the case of independent adult stepchildren where dependency on the stepparent cannot be shown, they have no status to claim under the *IFPA*. There is no duty in such circumstances which extends to the stepparent. These stepchildren will have no recourse in cases involving blended families where the child's natural parent remarries and then predeceases their second (or more) spouse to whom they have left their assets, who then makes a will leaving no provision for their stepchildren. In this situation, a large proportion of the stepparent's estate may have been amassed by the child's natural parent. This situation is specifically provided for in Western Australia, where the stepchild is eligible if the deceased received or is entitled to receive property from the estate of the stepchild's parent above the prescribed value.²⁸⁰

4.3.25 Given modern complex and blended families, legitimate questions can be raised over this restriction on stepchildren and instead whether in such circumstances stepchildren should be given equal ranking with natural or adopted children under the *IFPA*. A consistent (though not universal) view relayed in consultation to SALRI was that, given modern blended families, no distinction should be drawn between natural children and stepchildren. This is the position in Victoria, Queensland and Tasmania, where stepchildren are not required to prove dependency in order to be eligible.

4.3.26 In these jurisdictions, if a child's father or mother remarries at any stage in their life, including when the child is an independent adult, they are eligible to make a claim even if the child may never have lived in the same household as that stepparent and had never been dependent on the stepparent. In these States, a review of the case law shows that if it can be established that the deceased's estate was derived from the efforts of the stepchild's natural parents, then the stepchild will often be successful, even in those instances where they did not share a close personal relationship with the stepparent.²⁸¹

4.3.27 In Queensland, the definition of a 'stepchild' is limited to a person who is a child of the deceased's spouse and if the marriage, civil partnership or de facto relationship between the deceased and the stepchild's parent has not ended. The relationship between the stepchild and stepparent does not stop merely because the stepchild's parent had died or the deceased person had remarried or entered into a civil partnership or de facto relationship after the stepchild's parent's death, as long as the marriage, civil partnership or de facto relationship between the stepchild's parent and deceased had subsisted until the death of the stepchild's parent.²⁸²

4.3.28 An overview of the laws relating to the eligibility of stepchildren in all Australian jurisdictions can be found in Appendix B.

Other categories

Grandchildren, parents and others

4.3.29 With the rise of complex family arrangements and major changes to family obligations and ties, other issues have risen over the recognition of relationships outside the traditional nuclear family

²⁸⁰ *Family Provision Act 1972* (WA) s 7(1)(e).

²⁸¹ See, for example, *McKenzie v Topp* [2004] VSC 90 (30 March 2004); *James v Day* [2004] VSC 290 917 August 2004); *Keets v Marks* [2005] VSC 172 (20 May 2005).

²⁸² *Succession Act 1981* (Qld) s 40A.

model. This may include obligations to parents, grandchildren, carers, members of the deceased's household or anyone who had a close personal relationship with the deceased.

4.3.30 Under the *IFPA*, grandchildren are automatically eligible to apply.²⁸³ Parents and siblings are only eligible if they cared for, or contributed to the maintenance of the deceased during his or her lifetime.²⁸⁴ In Western Australia, parents are eligible if the deceased admitted to the relationship and if it was established in the lifetime.²⁸⁵ In the Northern Territory and the ACT, grandchildren are eligible if their parent who was the deceased's child had predeceased the deceased, or if the grandchild was not maintained by a parent or parents before the deceased's death.²⁸⁶ Parents are eligible if they were maintained by the deceased immediately before deceased's death or if the deceased was not survived by spouses, partners or children.²⁸⁷ In Queensland, parents are only eligible if they were maintained or supported by the deceased.²⁸⁸

4.3.31 In contrast, Victoria adopts a broader approach allowing registered caring partners, grandchildren, a member of the deceased's household and a spouse or domestic partner of the deceased's child (where the child dies within one year of the deceased's death) to make a family provision claim.²⁸⁹ However, these applicants must also prove that they have been wholly or partially dependent on the deceased for maintenance and support.²⁹⁰ Similarly, in New South Wales, a dependent grandchild, a dependent member of the deceased's household and a person in a close personal relationship with the deceased at the time of the deceased's death may apply.²⁹¹

4.3.32 However, such an extension to non-family carers raises concerns of exploitation. As Professor Croucher notes, '[h]ow many of you are familiar with the scenario of a paid carer becoming particularly "close" to a vulnerable and increasingly frail older person? This is a particular area that, in my view is ripe for abuse.'²⁹² This concern was also expressed to SALRI in consultation, notably at the Berri Legal roundtable.

4.3.33 The issue of extending the categories of eligibility to recognise Aboriginal kinship has been raised.²⁹³ SALRI accepts this is a valid suggestion but considers that this raises complex issues and requires further research and consultation, notably with Aboriginal communities.²⁹⁴

Intestacy

4.3.34 It was also raised with SALRI by the Law Society that given the variety of possible situations, and the fact that the deceased did not exercise his or her own decision making capacity by making a will, it might be appropriate to broaden the class of persons who are eligible to bring an action under

²⁸³ *IFPA* s 6(h).

²⁸⁴ *Ibid* ss 6(i), (j).

²⁸⁵ *Family Provision Act 1972* (WA) s 7(1)(f).

²⁸⁶ *Family Provision Act* (NT) s 7(1)(e); *Family Provision Act 1969* (ACT) s 7(1)(e).

²⁸⁷ *Family Provision Act* (NT) s 7(1)(f); *Family Provision Act 1969* (ACT) s 7(1)(f).

²⁸⁸ *Succession Act 1981* (Qld) ss 41(1), 40.

²⁸⁹ *Administration and Probate Act 1958* (Vic) ss 90(h)–(k).

²⁹⁰ *Ibid* s 91(2)(b).

²⁹¹ *Succession Act 2006* (NSW) ss 57(1)(e), (f).

²⁹² Croucher, 'Succession Law Reform in NSW – 2011 Update', above n 149.

²⁹³ See, for example, LRCWA, above n 18. See further below Part 9.

²⁹⁴ See below [9.4.2].

the *IFPA* in an intestate estate as compared to a testate estate.²⁹⁵ In other words, a wider class of eligibility may be appropriate where the deceased has not left a valid will and his or her estate falls for distribution under the law of intestacy. In an intestate estate, the class of potential claimants might, for example, include any person for whom the deceased owed a moral obligation to provide. The Law Society noted ‘this value judgment is more appropriately exercised by the court in the context of the specific circumstances of each case’.²⁹⁶

4.3.35 In the *Estate of Bridges (deceased)*,²⁹⁷ Bray CJ, in relation to family provision claims, explained the purposes of the family provision legislation, especially in relation to intestacy:

In the case of an intestacy, as much as in the case of a will, it seems to me that Parliament has indicated its intention that the scheme of things set up by a testator in his will, or by the law of the State in the event of intestacy, shall be interfered with so far as is necessary to make adequate provision for the proper maintenance, education and advancement of the claimants specified in the Act, but no further. It is true that when the persons entitled on intestacy are the surviving spouse and legitimate children of the deceased as opposed to collateral relations the speculation that the deceased may have intended to die intestate may have more cogency, but nevertheless I repeat that I think the correct approach is as I have said. I think that Parliament no more intended to grant an unlimited liberty to recast dispositions resulting from the law of intestacy on moral grounds than it did to give a similar liberty to recast dispositions made by will.²⁹⁸

4.3.36 This approach was also adopted by the National Committee.²⁹⁹ It referred to the notion of the ‘fictional will’ and cited the comment of Lucas J in *Re: Russell* that the fact that the distribution is statutory rather than through operation of a will ‘is not a fact which assumes any particular importance’.³⁰⁰ This approach was supported by the NSWLRC which made the following comments in relation to the interaction of intestacy with family provision laws:

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. 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.³⁰¹

4.3.37 SALRI agrees with the comments of Bray CJ and the approach of the National Committee and the NSWLRC and does not support different classes of eligibility (or indeed any other test) for family provision in relation to an intestate estate. It is logical and consistent for family provision law to be the same with respect to both testate and intestate estates. It is significant that for the purposes of family provision, no Australian jurisdiction distinguishes between those estates governed by a will and those

²⁹⁵ SALRI, *Cutting the Cake: South Australian Rules of Intestacy*, above n 2, Recommendation 51: ‘The Institute’s forthcoming review of the *Family Provision Act* should include consideration of whether the classes of people who may apply for provision, or greater provision, from the estate under this Act should be different in some respects for intestate than for testate estates.’

²⁹⁶ Law Society, Submission to *Cutting the Cake – South Australian Rules of Intestacy*, 25 August 2016, 3 [16], <http://www.lawsocietysa.asn.au/pdf/Submissions/L%20250816_Cutting%20the%20Cake%20-%20South%20Australian%20Rules.pdf>. See also at 3, 5.

²⁹⁷ (1975) 12 SASSR 1.

²⁹⁸ Ibid. See also *Re: Russell* [1970] QWN 22, 56.

²⁹⁹ National Committee, (MP 28), above n 3, 2–3.

³⁰⁰ [1970] QWN 22, 56.

³⁰¹ NSWLRC (National Committee for Uniform Succession Laws), *Uniform Succession Laws: Intestacy*, Report No 116 (2007) 12, citing Office of the Public Trustee (Tasmania), *Consultation and England and Wales, Law Commission, Distribution on Intestacy*, Working Paper 108 (1988) 37.

governed by the statutory rules of intestacy. When a strong underlying theme is the need for the law in this area to be as simple and clear as possible,³⁰² it would cause complications to have one regime for family provision in intestacy and one where there is a valid will. An especially acute problem would arise in a partially intestate estate where only part of a will is valid. This would require two different regimes to apply in any *IFPA* proceedings relating to the one estate.

4.4 Consultation data overview

Scope of who can make a claim is too broad

4.4.1 It was raised at the Roundtables that the scope of who can claim and whether it is too wide and the bar for a claim under the *IFPA* has been lowered too far.

4.4.2 Participants at the Adelaide Legal Experts Roundtable noted the view within the community that under the current law, ‘every player wins a prize’ due to the success of what has been described as ‘opportunistic claims’. One lawyer at the Adelaide session recommended to ‘keep the criteria tight. Very complex and subtle modern families. Federal Parliament have looked at extending to all sorts of applicants (relationships) with complicated legal obligations. This is not going to get easier. For whatever reason, that description (eligibility criteria) has been exploited and it needs to be tightened.’ Other succession lawyers, both city and regional, shared this view. A participant in the Mount Gambier Legal Experts Roundtable noted that ‘the current law is too welcoming of family provision claims ... I have encountered many clients who bow to a kind of “blackmail”, and “surrender” to unmeritorious or dubious claims to avoid the costs coming out the estate and the estate could not afford the ‘Rolls Royce’ of the court system to resolve it.’

4.4.3 Participants at the Berri Community Roundtable shared the view that the current South Australian law does not protect the vulnerable, as claims under the *IFPA* are brought by family members who are already financially secure. Mr O’Brien, a highly experienced Berri lawyer, referred to an ‘increasing sense of expectation’. A few respondents from the YourSay surveys were of a similar view. One commented that ‘inheritance always seems to bring out the worst in people and can destroy many family units and relationships.’ Another response noted: ‘I find people act like vultures when there is something for free at stake, particularly money. We had it in our family, as I’m sure many people would have had. For some people, enough is never enough. They have a more, more, more, me, me, me attitude to everything about their lives.’

4.4.4 However, at the Adelaide Legal Experts Roundtable, some support was expressed for the current South Australian law in that it is sufficiently flexible to properly take into consideration the different circumstances of particular claimants. Representatives of the Supreme Court emphasised that currently s 6 of the *IFPA* ‘only lets you put your hand up’. Claimants must then satisfy the criteria in s 7 of the *IFPA*. There was a view in the Adelaide consultation that the current law in South Australia adequately reflects the conflicting interests and largely works well in practice and that the problems of greedy or opportunistic claims maybe overstated. It was noted that of the 6000 odd grants of probate each year in South Australia, there are ‘only’ 100–200 family provision claims lodged under the *IFPA*. It was further noted that the overwhelming majority of these claims are settled long before progressing to trial.

³⁰² See further below [5.5.2], [10.4.1]–[10.4.3].

4.4.5 Other Adelaide succession lawyers were wary of any change to the present law owing to the practical difficulties of changing the law. One lawyer noted it was ‘hard to change [the] wording of [the] legislation. Dependency problematic. How do you define “need” etc. When you try to change the legislative wording so that it is more limited, it will probably lead to odd outcomes.’ Another lawyer urged: ‘Don’t change criteria as it has been there for hundreds of years. If you change the criteria, you change the basis of the legislation — the moral obligation.’

4.4.6 However, other succession lawyers, notably at the Mt Gambier and Berri consultation sessions, did not share this view. There was a strong view that the present law is not working as effectively as it should. It was noted to SALRI that it is misplaced to assess the effectiveness of the current law by reference to the existing number of claims and/or the high rate of settlement. Indeed, it was said that this points to the problems of current law and practice. Ms Iwaniw, of Moran and Partners, for example, emphasised that the fact that so many claims can be brought under the *IFPA* only to be settled, highlights that the present law is not working effectively.

4.4.7 Another popular view was to leave the current list of eligible claimants (in s 6 of the *IFPA*) in place and tighten the other legal criteria that apply to determining a claim.

4.4.8 The Public Trustee also agreed that the present scope of eligibility is too broad and considered that only those family members who can demonstrate dependency provides a sound basis for who can make a claim. The Public Trustee suggested that the *IFPA* should include an eligibility list as well as having regard to certain family members in certain circumstances and this list of eligible claimants should be prescriptive. All categories, including current spouses or domestic partners, former spouses or domestic partners, non-adult children, grandchildren and other dependents, should only be eligible if they were dependent on the testator at the time of their death. The Public Trustee thought that narrowing the categories of who can claim and the circumstances in which they can claim will discourage opportunistic claims and address legal costs.

Spouses

4.4.9 There was agreement amongst succession lawyers that current spouses or domestic partners should be automatically eligible under the *IFPA* to make a claim as current spouses or partners have a higher moral claim to the testator’s estate as compared to other potential claimants.

4.4.10 In the YourSAy surveys, among the people who held that current spouses and partners should be included in the list of eligible applicants, one view was to limit current spouses and partners to those who were financially dependent on the testator and another view was to limit them to those who were caring for children under the age of 18. One person expressed frustration with the current law: ‘My partner lives with his father and his father is leaving everything to him. However, his father has a partner of over 15 years, who does not live with him, who I know will contest the will because she is a gold digger. How is it fair that she [will] get a share of the will if that is not his father’s wishes? She won’t leave a dime to him if she dies first.’

Former spouses and partners

4.4.11 At the Berri Legal Experts Roundtable, participants discussed the complications arising from including or excluding former spouses. It was generally agreed that there is no reason why a former spouse should be able to claim after they have received a financial settlement through the Family Court. This theme was repeated by several experienced Adelaide and regional succession lawyers and Mr Mackie. It was considered that a former spouse, whether married or de facto, who had received a

financial settlement through the Family Court (or any similar arrangement under State or Territory law), should be ineligible to make a claim under the *IFPA*. It was noted the purpose of such a financial settlement was to enable the parties to make a ‘clean break’ and it is illogical to then allow that spouse to make a claim, potentially many years later, under the *IFPA*. At the Berri Roundtable, Mr O’Brien highlighted the example of an already well provided for ex-wife who made a family provision claim against her deceased ex-husband and the claim was reluctantly settled to avoid costs and distress.

4.4.12 A greater portion of people disagreed on the YourSAy surveys with the inclusion of former spouses and partners in comparison to those who agreed. Of those who did agree, one view was to limit it to former spouses and partners who were financially dependent on the testator, or who were provided for during the testator’s life. Another view was to include former spouses or partners if a property settlement did not occur at the time of the separation. One person suggested considering whether a will should be made void, where partners separate for a long period without any intention of getting back together and have not updated their wills accordingly. This person said: ‘My parents did this and when my mother passed away, it created unnecessary tension between siblings and my father until he relinquished his claim on mum’s estate, which she had established after the split. She had never sought a property settlement when she left, so she never received anything apart from her personal belongings.’

Children

4.4.13 It was agreed by succession lawyers in consultation that at least children under the age of 18 should be automatically eligible to make a claim under the *IFPA*.

4.4.14 One-third of those who responded in the YourSAy surveys expressly stated that children should be in the list of eligible applicants. Of these, children were further qualified to include, among others, minors or those below 18 or 26, those who were financially dependent on the testator at the time of the testator’s death, genetically proven or biological children, and children who significantly contributed to testator’s wealth or well-being.

Adult children

4.4.15 There was much discussion and indeed disagreement during consultation as to how best to cater for adult children under the *IFPA*. It was one of the main issues considered by SALRI.

4.4.16 Participants at the Adelaide Legal Experts Roundtable recognised that, while many complex, questionable or undeserving claims arise from those made by adult children, in some cases these claims are genuine and should be permitted under the law. Furthermore, some attendees pointed to the existing two-stage process³⁰³ under the *IFPA* and the judicial decision maker as sufficient to preclude undeserving claims. One said: ‘I don’t support restricting adult children from making a claim or excluding them because of all the arrangements out there which can be used to avoid inheritance claims. There are also circumstances where a testator is being capricious and ultimately, it sits on the judge’s shoulders to determine whether the claimant is able to receive from the estate.’ Another commented: ‘I don’t see any reason to restrict or change categories as the people in the fringes will be dealt with in the second step.’ Another lawyer said: ‘Most adult children who make claims are on the dole.’³⁰⁴ They will be covered by the 2nd jurisdictional question regarding whether they have been left without

³⁰³ See further below [5.1.1]–[5.1.4].

³⁰⁴ This assertion is challenged by SALRI’s consultation elsewhere.

adequate provision. This is not about fairness.’ Another said it was ‘silly’ to exclude adult children and ‘the eligibility categories are perfect as they are. Solution is merit and the current two stage test.’ Another attendee remarked: ‘Section 6 [of the *IFPA*] only lets you put your hand up’ and it was not a problem as there are only 100 family provision claims out of a total of annual 6000 probate claims.

4.4.17 In his submission, Mr Daenke, an experienced Adelaide succession lawyer, opposed restricting the eligibility of adult children, stating: ‘It is not possible to draw an arbitrary line through one class of potential beneficiary or claimant.’

4.4.18 The Hon Tom Gray QC was of view that claims by independent and financially secure adult children are more of a concern in New South Wales and that these claims are not so prevalent in South Australia.

4.4.19 However, there was also recognition at the Adelaide Roundtable that there should be a stricter approach to claims by adult children where the adult child is financially secure. One lawyer said: ‘I have done many matters for adult children who don’t have a disability, have not contributed to assets and who I think should be able to claim because they had real needs. I think there should be a tightening of adult children’s claims where the adult child is financially secure and as commented by someone else *Bonyer v Wood*³⁰⁵ originally did this but then the claimant was provided with provision on appeal. It is this case which I think went too far with an adult child who had her own assets.’³⁰⁶

4.4.20 This view was shared with the participants at the Mt Gambier Legal Experts Roundtable, with some participants feeling that adult children as a general class should be removed altogether. The real problem of unjustified or opportunist claims by adult children under the *IFPA* was emphasised by attendees.

4.4.21 The problem of vindictive claims by adult children was also raised (as it was elsewhere).³⁰⁷ These are claims not motivated by greed but by a desire to settle family scores (typically against other siblings) and diminish the estate. One lawyer described this as: ‘If I can’t get it, I will make sure nobody else does.’ Prue Vines also observed of such claims (usually disputes between siblings and those between adult children of a former marriage and a subsequent partner of the deceased) where: ‘Emotions run high in such situations and there is a risk that litigation may be used as a weapon for vendetta. Several lawyers spoke of clients who said they didn’t care if the entire estate was used up in litigation, as long as the other claimant didn’t get anything’.³⁰⁸

4.4.22 Participants at the Mt Gambier Legal Experts Roundtable agreed that adult children should only be eligible to claim under the *IFPA* if they are (a) particularly vulnerable (for example with a physical or intellectual disability) and/or (b) significantly contributed to the value of the estate to their

³⁰⁵ *Bonyer v Wood* (2007) 99 SASR 190. An adult daughter sought provision under s 7 of the *IFPA* where the deceased had left 2/3 of her estate to charities and her siblings and their families. The trial judge (see [2006] SASC 96 (6 April 2006)), Duggan J found that the applicant was able to maintain and advance herself from her own resources and had not been left with inadequate provision for her proper maintenance, education and advancement. He dismissed the claim. The Court of Appeal overturned this finding and held that the failure of Duggan J to consider whether the applicant had a ‘moral claim’ was a ‘serious omission’, especially given the substantial provision made by the deceased to charities and her siblings. The claimant was successful.

³⁰⁶ Several succession lawyers said to SALRI in consultation that the original approach of Duggan J in *Bonyer v Wood* [2006] SASC 96 (6 April 2006) was to be preferred and had his findings being upheld on appeal, many of the subsequent problems of undeserving claims under the *IFPA* that have arisen may not have.

³⁰⁷ See further, Heather Conway, ‘Where There’s a Will... Law and Emotion in Sibling Inheritance Disputes’ in Heather Conway and John Stannard (eds), *The Emotional Dynamics of Law and Legal Discourse* (Hart Publishing, 2016) 35–57.

³⁰⁸ Vines, above n 9, [3.18].

detriment (drawing on the concept of promissory estoppel). One attendee gave the example of a son that may have worked his father's crayfish or abalone license as a deck hand for decades while the father 'lives it up on Harvey Bay'. Meanwhile the license has increased in value from \$300 to \$75 000. It was felt that this son should be able to make a claim against the estate.³⁰⁹

4.4.23 Participants at the Berri Legal Experts Roundtable also noted the problem of undeserving claims by adult children but agreed that adult children should continue to be eligible to claim, although views were mixed as to whether additional criteria should apply.

4.4.24 Ms Iwaniw and several experienced succession lawyers accepted the real problem of unjustified or opportunistic claims by often independent adult children but stated that imposing additional criteria or fixed categories upon adult children under the *IFPA* was misplaced and risked precluding genuine and deserving claims by adult children. It was felt that adult children should continue to be eligible as a class to claim. Ms Iwaniw noted that the problems that often arise in farming estates (such as the *Rodda v Rodda* situation) do not necessarily translate to other estates.³¹⁰

4.4.25 One of the views expressed in the YourSAy surveys was that adult children who have reasonable means to be financially independent should not be allowed to claim. One respondent commented on his experiences with adult children: 'As a legal practitioner I have been involved in innumerable situations where greedy adult children seek further provision from an estate. Often spurious claims are aided and abetted by lawyers who are aware that costs will be borne by the estate so they will not face a disgruntled client. Often dubious claims are settled for no other reason than economic expediency. These cases would not get up if legal firms did not provide pro bono because there is a guarantee pool of money to be had.' Another response said: 'Children over the age of 21-25 should not be depending on "their ship to come in" when parents die.' Another person said that 'as far as fairness is concerned — adult children must be responsible for themselves.'

4.4.26 Case example

One case example provided concerned a nephew who commented that his uncle was given a small inheritance, when his grandfather preferred not to, only because he was advised that if he didn't, he could contest the will. He expressed the view that 'no one has the right to go against another's wishes, especially when they are made with a clear mind.'

4.4.27 Case example

Another example given concerned a husband whose wife was involved in the mediation of her father's will. He described the scenario as follows: 'His [the testator's] attitude was that the eldest son should inherit the whole rural property and the financial issues that went with that. This involved three other siblings. The eldest son (who was not the eldest child) wished to comply with his father's will but it was mediated that he would split up the will in to four equal parts with each of the other children receiving a one fourth share. A wholly unnecessary conflict created by a father whose attitude to his property was his alone to decide.'

4.4.28 A restricted approach to adult children was also highlighted in an individual submission received from Greg Anastasi, the founder of the 'Change *Family Provision Act*' website. He suggested replacing 'child' with 'non-adult child or a child that significantly contributed to the testator's wealth or

³⁰⁹ The case of *Rodda v Rodda* [2015] SASC 95 (1 July 2015) was noted to SALRI as an example of this not uncommon situation in practice. See also *Vigolo v Bostin* (2005) 222 CLR 191; *Parker v Australian Trustees Executors Ltd* [2016] SASC 64 (1 June 2016).

³¹⁰ See also *Vigolo v Bostin* (2005) 222 CLR 191; *Parker v Australian Trustees Executors Ltd* [2016] SASC 64 (1 June 2016) [115]. See further below [10.1.1]–[10.1.6].

wellbeing'. Mr Anastasi pointed out that this last clause would be interpreted to cover situations like the 'farmer's son' or the 'caring child' situation.

4.4.29 In another individual submission, the person supported the view that adult children should not be able to claim except in very narrow circumstances such as disability. This person was also very concerned about a test that focuses on the adult child's reliance on the deceased, as he viewed this as a way for the child who has made poor choices in his or her life to benefit from the hard work of parents, at the expense of other hard working children. This view was shared by others in the YourSAy surveys. One response noted: 'The law should not falsely create an entitled class eg: I don't have to provide for myself because I can claim a greater share of my parents' estate if I am unemployed etc. example — who is entitled to judge a sibling who seems to be a carer for the purposes of entitlement or claiming against an estate but were abusing, manipulating, isolating and skimming funds.'

Stepchildren

4.4.30 There was general agreement across the Roundtables that stepchildren are a 'huge issue' in practice that 'comes up all the time'. Indeed, the role of stepchildren under the *IFPA* raised one of the most difficult questions in consultation.

4.4.31 It was agreed that it is important to provide some kind of qualified protection; a 'bit of a safety net' for stepchildren, as one Mt Gambier lawyer observed.

4.4.32 Participants in the Mt Gambier Legal Experts Roundtable noted a particular example of a stepchild who was eligible to make a family provision claim in Queensland but not in South Australia. While there was general agreement of the need to make some provision for stepchildren, it was also noted that it would be a 'perverse result' if a stepchild ended up with more rights under the *IFPA* than a natural child. A number of participants at the Adelaide Legal Experts Roundtable expressed the view that adult children of a deceased spouse (stepchildren) should also be able to claim where surviving spouse receives assets which both (deceased) spouses contributed to.

4.4.33 Similarly, Thomas Rymill, a highly experienced Mt Gambier succession lawyer, was of the view that stepchildren should be given an ability to claim against a stepparent under the *IFPA*, but the court has to be satisfied that at some time, the estate of the stepparent was significantly enhanced by a transfer of property or assets from the parent of the stepchildren. Mr Rymill described: 'I remember a classic example where the father and his new bride had moved to Queensland, and if it were not for the Queensland law then the children in South Australia would have not been able to bring a TFM claim.'

4.4.34 Participants in the Mt Gambier Roundtables were of the view that, although not without problems and there would be 'hard' cases, adult stepchildren should be treated in the same way as adult children, and thus a stricter test based on dependency, promise/contribution/detriment and vulnerability should apply to both classes.

4.4.35 David Hopkins (Partner in Brown & Associates) describes his own experiences dealing with cases involving stepchildren:

Perhaps one of the saddest things which I see in succession practice is the children of first marriages being left deeply hurt and financially disadvantaged due to the poorly thought through estate planning arrangements put into place by such children's parent and the parent's second spouse, and such children being unable to bring claims under the current drafting of the *Inheritance (Family Provision) Act*.

In the situations to which I refer, such children have usually been brought up in an unhappy/broken home in the first place. They may not necessarily have been neglected or anything like that by their parents, but it is quite understandable and normal that such children's parents' focus will usually be upon ensuring their marriage to their second spouse "works" (for want of a better word), particularly after the failure (for whatever reason) of the parent's first marriage. The parent and the second spouse may have an understanding between them that the second spouse will make provision for the parent's children in the second spouse's will. However, such understandings are often (quite naively) based on "trust", and may in fact reflect a reluctance of the parent to have the confronting but necessary conversation with the second spouse and to make the specific arrangements (such as restructuring ownership or preparing mutual wills agreements) which are required to guarantee the children an inheritance.

I have seen numerous cases such as the above. The parent dies with only a small personal estate with the majority of assets vesting in or passing to the second spouse. There is little point in the children bringing a claim under the *Inheritance (Family Provision) Act* due to the estate being small in size. Furthermore, such children are reliant on the second spouse making provision for them in his or her own will, such that there is a strong disincentive for the children to bring a claim against their own parent's estate. These situations (which any estate lawyer will confirm are becoming more and more commonplace) are devastating for the children, who are often left genuinely emotionally wounded and bitter, as well as significantly financially disadvantaged, simply because they were unlucky enough to be born into a broken family. Often such situations are the final insult to children who have already suffered many years of hurt and financial disadvantage due to their parents divorcing and building new lives with a new partner and a new family.

4.4.36 The scenario above described by Mr Hopkins came up regularly in consultation.³¹¹

4.4.37 There was a difference in consultation between those succession practitioners who accepted that, sometimes reluctantly, no distinction should be drawn under the *IFPA* between adult natural children and adult stepchildren given the prevalence of modern blended families (as Mr Daenke noted, 'we are living in a world of blended families') and those succession practitioners who suggested that a valid distinction should be drawn under the *IFPA* between adult natural children and adult stepchildren, despite the prevalence of modern blended families. Ms Iwaniw and several experienced Adelaide succession lawyers (who all agreed the current law arguably went too far in allowing undeserving claims) stated to SALRI different considerations arise under the *IFPA* between adult natural children and adult stepchildren. It was considered that, providing there was a limited ability for adult stepchildren to claim under the *IFPA* in truly deserving situations, the *IFPA* should provide for different criteria between adult natural children and adult stepchildren. Ms Iwaniw and the several experienced Adelaide succession lawyers identified where the adult stepchild is significantly vulnerable (such as with a physical or intellectual disability); the adult stepchild significantly contributed to the testator's wealth or wellbeing; the adult stepchild was genuinely dependent on the testator at the time of the testator's death or the adult stepchild's natural parent significantly contributed to the estate of the testator (this is designed to capture the scenario described by Mr Hopkins).

4.4.38 A few respondents to the YourSAy surveys were of the view that stepchildren should not be included. One respondent commented: 'It's outrageous that people in their 50's and 60's contest the will of a deceased parent, particularly if that person is the progeny of a very early marriage, long since

³¹¹ This accords with research. Vines notes that family provision disputes are most likely to be pursued vigorously in this situation and the disputes between siblings and children of a former marriage and a subsequent partner of the deceased are the 'fiercest': Vines, above n 9, 14. See also at 31–32; White et al, above n 8, 902.

annulled. The person has no relationship to the deceased, has supported himself, or been supported by other means for decades, and is not dependent on the estate of the deceased. In this case the deceased has the right to leave his estate to whomever he chooses, as he has no responsibility to support the person thinking to cash in on the death of someone who is essentially a complete stranger.’

4.4.39 Of those who agreed on the YourSay surveys that stepchildren should be included on the list, one view was to limit their eligibility to those who were partly or wholly financially dependent on the testator at the time of the testator’s death. Another view was to limit eligible stepchildren to those whose estate of the stepparent was significantly enhanced by a transfer of property or assets from the parent of the stepchildren.³¹²

4.4.40 Case example

One example provided of a blended family situation was described as follows: ‘After my father died the estate was all passed to my ‘step mother’ who was supposed to ‘split it equally with her two children and us when she died’. This was never going to happen. She had a boyfriend, changed the locks on our family home, gave his car to her son, and invested my dad’s money into his business, within a week of him dying. When I finally had the courage to ask her about the will and what would be put in place to look after our part of the estate she just laughed and said it was all hers. We did take her to court but she was very nasty and lied a lot about being unable to work etc (working now of course) and didn’t declare life insurance for super and we ended up getting a small pay out (which wasn’t what we wanted as we just wanted to secure something for when she died). She sold all of our family things and now she has remarried, our father’s money will all get passed to her children (who he didn’t even like) and the new husband’s family. My dad loved my brother and I so much but unfortunately he trusted her with a very poorly written will which she was able to take advantage of.’

4.4.41 Case example

A similar situation was described in another submission: ‘My father died young and married to his second wife had a very loose will saying on event of death it goes to the other party and on the event of their death it gets split between his kids and her kids. Realistically, being that she was still young and had a boyfriend within weeks of my dad’s death, we knew that she would marry and our share would dissolve. We asked to legally protect our share until she died but she would not, so we were forced to go to court.’

Grandchildren, grandparents, parents and siblings

4.4.42 Participants at the Berri Legal Experts Roundtable were of the general view that the inclusion of grandchildren should be subject to limitations.

4.4.43 Several experienced Adelaide succession lawyers stated to SALRI their view that that the current test of eligibility requiring either the parent or sibling to satisfy a court that they cared for, or contributed to the maintenance of, the deceased person during their lifetime is too broad and risked abuse. These practitioners noted a recent trend of claims under the *IFPA* by a sibling against a deceased sibling and the unsupported, even vexatious nature, of these claims. The requirement in the view of these succession lawyers should be that the parent or sibling cared for, or contributed to the maintenance of, the deceased person immediately before their death.

³¹² See *Family Provision Act 1972* (WA) s 7(1)(d).

4.4.44 Eight people in the surveys agreed that siblings should be included. Of these, the following restrictions to this eligibility were: financial dependence on the testator, testator had no children, a lesser priority compared to children or if there is an exceptional case of illness/disability/injury that wasn't known at the time the will was executed.

4.4.45 Among those YourSAy respondents who agreed that grandchildren should be included on the list, some of them restricted this eligibility to grandchildren who can prove financial dependence on the testator. Other restrictions were if the grandchildren's parents were deceased and even if so, grandchildren should have lesser priority in comparison to children.

4.4.46 Case example

One example provided in the consultation concerned a child of a testator who was affected as a result of a family provision claim made against the estate by his nieces and nephews (the grandchildren of the testator). The situation was described as follows: 'In my situation, I have lived in a house on the deceased person's farm for over twenty years, I have maintained buildings, fences, windmills etc. I have never received any income from the property, I have my own small business which only had a gross income of \$20k last financial year. Now, because of the current laws, I have my deceased sister's three children, all who have had families and own houses, wanting to have a share of my father's estate. I have no money to buy them out, they are not mentioned in the will, but are being forced to make a claim by their father. The court will grant them a percentage of the estate. The farm will have to be sold, my percentage will only cover the cost of a house to buy, as I currently still live on the farm. There will be no cash left over for myself, so I have to rely on \$20k per year from my business. My sister's three kids already have places to live plus will receive over \$100k each from the estate. This will all eventuate from the current family provision laws.'

4.4.47 Case example

This can be contrasted with another case example provided which described a situation where the person who made the submission believed that the grandchild should be eligible to make a claim under the Act. The case concerned a client who was one of six children. Each child had a different father. The client who was one of these children had no hope in life apart from their grandfather. The submission noted that 'This is an example of a case where it would be appropriate for a grandchild to make a claim due to the difficult circumstances.'

4.4.48 Among those who agreed in the surveys that grandparents should be included among the list of eligible claimants, one view was to only allow grandparents who must have been reasonably dependent on testator and even if so, they should have a lesser priority compared to children. Another view was to limit this eligibility to grandparents who have raised a child to adulthood, with no or limited assistance from the deceased grandchildren's living parents. It was noted 'in the case of grandchildren, there should be some close connection between the testator and grandchild, eg: the parent of the grandchild died and the grandparents actively looked after the grandchild.'

4.4.49 This view was repeated by the Legal Services Commission. It submitted:

In both Aboriginal and non-Aboriginal families, grandparents sometimes step into the role of parent, providing emotional and financial support for grandchildren. A grandparent who has raised a child to adulthood, with no or limited assistance from the deceased grandchild's living parents, should have the ability to claim against the grandchild's estate.³¹³

4.4.50 Among those who responded to the surveys who thought that parents should be eligible to make a claim, four people believed this eligibility should be restricted to the following: financial

³¹³ See further below [9.1.2]–[9.1.5], [9.3.1]–[9.3.13] for discussion of the Aboriginal aspect of family and kinship.

dependence, the testator had no children, in financial hardship or dependence with no other family members around and a lesser priority compared to children.

Other categories

4.4.51 At the Berri Legal Experts Roundtable, attendees discussed whether carers (such as a non-close relative who would be otherwise ineligible to claim) should be eligible to make a family provision claim. Such claims have been previously possible in Victoria.³¹⁴ The Berri Legal Roundtable was opposed to including carers, stating that they had seen many examples of a carer of a person with a cognitive impairment, especially dementia, whose assets had substantially decreased since the carer was involved. Including non-family carers as eligible claimants was seen to ‘invite abuse’. The Berri participants agreed that carers should be ineligible.

4.4.52 Seventeen people who responded to the surveys indicated they believed that, generally, ‘dependants’ should be eligible, including within the term those who were financially dependent on the testator or disabled and relying on the testator’s support. Other suggestions of eligible claimants in the YourSAy surveys include long term carers, but only if no children are involved; business associates, and family members involved in businesses, those who can clearly prove they have substantially contributed to the acquisition of the estate’s value.

4.4.53 The Legal Services Commission pointed out that the definition of ‘family’ for many Aboriginal people is much broader than immediate blood relatives and founded on kinship rather than familial relationships. This can also be the case for many of the diverse migrant groups in South Australia. What constitutes a person’s ‘immediate family’ can be highly variable, even in the modern Australian nuclear family. The Legal Services Commission suggested an alternative approach, by replacing the present list of eligible claimants in the *IFPA* with a series of characteristics, including: whole or part dependence on the testator; significant contribution by the claimant to the testator’s health, happiness, wellbeing or financial security; the testator making an obvious and genuine mistake in excluding the claimant; the use of undue influence to persuade the testator to exclude the claimant; the claimant received a significant gift or benefit from the testator prior to date of testator’s final will and the testator left a comprehensive and credible explanation as to why the claimant was excluded.

4.5 The Institute’s views

Scope is too broad

4.5.1 SALRI accepts the general consultation view that the general provisions in some respects are too broad. Although there was a view expressed in consultation that the current provisions are working effectively due to the ‘limited’ number of family provision claims in the Supreme Court (100–200 out of 6000 probate claims) and the large proportion of claims settled out of court, SALRI is unconvinced of this view as proof that the current provisions are in fact sufficient.³¹⁵ SALRI notes the strong theme from consultation that the present law is problematic and too expansive in scope.

³¹⁴ Prior to 2015, the Victorian Act allowed anyone to whom the deceased ‘had a responsibility to provide for’ to claim. The NSW Act also allows claims from someone in a ‘close personal relationship’ with the deceased (*Succession Act 2006* (NSW) ss 3(3), 57).

³¹⁵ See above [4.4.6]. See also below [7.3.5].

Spouses

Current spouses or partners

4.5.2 SALRI's view accords with that expressed in consultation in that current spouses or partners have a higher moral claim to the testator's estate as compared to other eligible claimants. SALRI agrees that the eligibility of current spouses or domestic partners should remain as it is.

Former spouses or partners

4.5.3 SALRI agrees with the view expressed in consultation that it is inappropriate to allow a former spouse (whether married or de facto) who has received a financial settlement through the Family Court (or any similar arrangement under State or Territory law), to make a family provision claim. The rationale of a financial settlement is to make a clean and complete financial break and it is illogical to allow a former spouse who has been a party to such a settlement to retain the ability to make a claim under the *IFPA*.

4.5.4 A comparison of the *IFPA* with the relevant laws in other jurisdictions revealed that the *IFPA* is much broader than many other jurisdictions. The general consultation view was against the eligibility of former spouses and partners.

Children

Adult children

4.5.5 SALRI considers that the present automatic eligibility for children under the age of 18 is obvious and appropriate. There was no real disagreement with this position in consultation.

4.5.6 SALRI has carefully considered the often difficult situation of adult children under the *IFPA*. With respect to independent adult children, SALRI is of the view that, whilst legitimate concerns were raised during consultation with respect to this category of claimant (consistent with wider research and commentary),³¹⁶ it would be problematic to restrict the circumstances in which adult children are able to make a claim under the *IFPA*. SALRI accepts that there is a real risk that imposing restrictions on the eligibility for adult children may create injustice in those cases where the testator should have made adequate provision for the child, but the adult child is ineligible to make a claim by the limited circumstances suggested. Imposing restrictions on the eligibility for adult children leads to the real risk of precluding deserving claims. Further, restricting eligibility for adult children may in some situations encourage dependency.

4.5.7 SALRI therefore accepts that it is preferable that the *IFPA* remains as it is with respect to adult children and they remain eligible as a class and without any specific criteria.

4.5.8 SALRI is of the view that the courts should be able to preclude or deter vexatious, greedy and opportunistic claims by adult children if a greater number of these cases appear before the courts. Further, SALRI's recommendations with respect to the tighter criteria (notably to accord priority to the views of the testator)³¹⁷ and the changes to court processes discussed later in this Report,³¹⁸ if

³¹⁶ Croucher, 'If we could start again: Re-imagining Family Provision Law in the 21st century', above n 93.

³¹⁷ See above [3.5.4]–[3.5.5]. See below [5.5.6].

³¹⁸ See below [7.8.12], Rec 26.

implemented, will also act as a disincentive and deterrent to these claims being made. Solicitors will be able to provide frank and informed advice at an early point in the process.

Stepchildren

4.5.9 The present law in South Australia allows stepchildren to make a claim if they were either wholly or partly maintained or were legally entitled to be wholly or partly maintained by the deceased person immediately before their death. This would generally apply to minor stepchildren. Adult stepchildren are currently excluded from being able to make a claim under the *IFPA*.

4.5.10 SALRI notes that the position of adult stepchildren is difficult. Indeed, it was probably the most difficult issue raised in consultation and one where there was no consensus.

4.5.11 SALRI accepts some of the problems and anomalies that result which were expressed during the consultation. SALRI also recognises the issue that independent adult stepchildren face in situations where the child's natural parent remarries and predeceases their stepparent, who then makes a will leaving no provision for their stepchildren, even though a large proportion of the stepparent's estate may have been amassed by the child's natural parent. SALRI is aware of the view, as expressed by many in consultation, that it may be viewed as inappropriate to draw a distinction between adult natural and stepchildren given the prevalence of modern blended families.

4.5.12 SALRI considers that, reflecting the view of some parties in consultation, a valid distinction can be drawn between adult natural children and stepchildren. In this regard, it is significant to note that several Australian jurisdictions (as well as South Australia under the present law) retain different criteria for adult natural children and stepchildren, namely the ACT, the Northern Territory, New South Wales and Western Australia.³¹⁹

4.5.13 SALRI considers that adult stepchildren should be eligible in certain circumstances to make a claim. However, SALRI is of the view that the present automatic eligibility for adult children to make a claim is inappropriate for stepchildren. There should be exceptions to allow adult stepchildren the eligibility to make a claim under the *IFPA* but only in limited circumstances. This view came out strongly in the consultation responses. SALRI considers that this approach best reconciles the conflicting interests in this difficult area. Ken Mackie supported this approach in consultation as 'stating the preferred position with precision'.

4.5.14 SALRI considers that the present law should be changed to include adult stepchildren as a separate new category of eligible claimant in the *IFPA*. However, eligibility of adult stepchildren should be restricted to the following circumstances:

³¹⁹ In these jurisdictions where stepchildren are treated in a different manner to natural children, the position is the same as presently exists in South Australia and a dependency test is applied to stepchildren. Accordingly, in these jurisdictions, those children that are raised in the home of a stepparent — treating them as a parent and the stepparent treating them as a child — will be eligible applicants provided that this relationship existed at the time of the stepparent's death. However, where the stepchild cannot demonstrate dependency on the stepparent, for example in the case of independent adult stepchildren, the relevant family provision laws consider the natural parents of the children to be responsible for those children and there is no moral or other duty which extends to the stepparent. The law in these jurisdictions provides no recourse to those cases involving blended families where the child's parent remarries and then predeceases their second (or more) spouse to whom they have left their assets, who then makes a will leaving no provision for their stepchildren. In this situation, a large proportion of the stepparent's estate may have been accumulated by their natural parents.

1. The adult stepchild is significantly vulnerable (such as with a physical or intellectual disability);
2. The adult stepchild significantly contributed to the testator's wealth or wellbeing;
3. The adult stepchild was genuinely dependent on the testator at the time of the testator's death;
or,
4. The assets accumulated by the adult stepchild's natural parent significantly increased or contributed to the estate of the testator.

Grandchildren, parents, siblings and other categories

4.5.15 SALRI is of the view that, consistent with the views of several experienced Adelaide succession lawyers, grandchildren should be eligible to make a claim but the present automatic eligibility for grandchildren to make a claim is inappropriate. It is too wide. There should be exceptions to allow grandchildren the eligibility to claim in limited circumstances. This would include where the grandchild was maintained wholly or partly or was legally entitled to be maintained wholly or partly by the deceased person immediately before their death. This will cover situations where the grandparent had provided significant care and support to a grandchild or raised a grandchild to adulthood, with no or limited assistance from the deceased's grandchildren living parents. Another limited situation would be where the grandchild's parent pre-deceased the testator.

4.5.16 In relation to parents and siblings, SALRI is of the view that the current test of eligibility requiring the parent or sibling to satisfy the court that they cared for, or contributed to the maintenance of, the deceased person during their lifetime is too broad. The requirement should be that the parent or sibling cared for, or contributed to the maintenance of, the deceased person immediately before their death. SALRI notes this reflects the views it received in consultation.

4.5.17 SALRI accepts the view raised by an experienced Adelaide succession lawyer that 'immediately' should be qualified in the case of parents or siblings who cared for, or contributed to the maintenance of, the testator immediately before entering into aged care or a similar facility due to the testator being unable to be cared for by the applicant, due to the physical or mental incapacity of either the testator or the applicant.

4.5.18 SALRI accepts that, especially noting the wider context of concerns of elder abuse,³²⁰ an extension of the eligibility under the *IFPA* to include non-family carers is unwarranted. SALRI accepts the commitment and valuable role performed by non-family carers in society,³²¹ but extending the eligibility to make a family provision claim to a non-family carer as a 'close personal relationship' is inappropriate and might even further widen the door to inappropriate and greedy family provision claims. SALRI notes the fears of exploitation expressed by the Berri Roundtable, especially the considered input of Mr O'Brien.

³²⁰ See, for example, ALRC, *Elder Abuse — A National Legal Response*, above n 227; Rae Kaspiew, Rachel Carson and Helen Rhoades, *Elder Abuse* (Research Report No 35) (Australian Institute of Family Studies, 2016); Parliament of South Australia, *Elder Abuse*, above n 227.

³²¹ See *Carers Recognition Act 2005* (SA).

4.5.19 Recommendations:

Recommendation 6

SALRI recommends that no distinction should be drawn under the *Inheritance (Family Provision) Act 1972* between testate and intestate estates in relation to the classes of eligibility, or otherwise, for the purposes of family provision and therefore no change to the law is necessary.

Recommendation 7

SALRI recommends that the eligibility of current spouses or partners under the *Inheritance (Family Provision) Act 1972* should remain as it is.

Recommendation 8

SALRI recommends that the eligibility of former spouses and former domestic partners under the *Inheritance (Family Provision) Act 1972* should be restricted to those who receive, or are entitled to receive, maintenance from the deceased and where a former spouse or domestic partner has been party to a financial settlement in the Family Court (or any similar arrangement under State or Territory law), he or she should be ineligible to make a claim under the *Inheritance (Family Provision) Act 1972*.

Recommendation 9

SALRI recommends that the eligibility for non-adult stepchildren under the *Inheritance (Family Provision) Act 1972* should remain as it is.

Recommendation 10

SALRI recommends that the eligibility for children, whether adults or non-adults, under the *Inheritance (Family Provision) Act 1972* should remain as it is.

Recommendation 11

SALRI recommends that the *Inheritance (Family Provision) Act 1972* should be amended to include adult stepchildren as a separate new category of claimant, however the eligibility of adult stepchildren should be restricted to the following circumstances:

- a) the adult stepchild is significantly vulnerable (such as with a physical or intellectual disability);
- b) the adult stepchild substantially contributed to the testator's estate or care;
- c) the adult stepchild was genuinely dependent on the testator at the time of the testator's death; or
- d) the assets accumulated by the adult stepchild's natural parent substantially contributed to the estate of the testator.

Recommendation 12

SALRI recommends that the eligibility of grandchildren under the *Inheritance (Family Provision) Act 1972* should be restricted to either where the grandchild was wholly or partly maintained or was legally entitled to be wholly or partly maintained by the deceased person immediately before their death or where the grandchild's parent pre-deceased the testator.

Recommendation 13

SALRI recommends that the eligibility of parents and siblings under the *Inheritance (Family Provision) Act 1972* should be restricted to only those cases where the court is satisfied that the parent or sibling cared for, or contributed to the maintenance of, the deceased person immediately before entering into aged care or a similar facility due to the testator being unable to be cared for by the applicant, due to the physical or mental incapacity of either the testator or the applicant or in those situations where the testator dies before entering into aged care or a similar facility, then immediately before their death.

Recommendation 14

SALRI recommends that non-family carers should not be included in the list of eligible claimants in the *Inheritance (Family Provision) Act 1972*.

Part 5 Should Any Further Criteria Apply?

5.1 Current position in South Australia

5.1.1 Family provision laws like the *IFPA* were originally designed to ensure that a deceased person did not leave dependent family members inadequately provided for and dependent on the State in breach of a family duty or obligation.³²² For this reason, the idea of ‘dependence’ lies at the policy heart of family provision laws³²³ and is reflected in South Australia in s 7 of the *IFPA*. This provision requires a claimant (who falls within one of the s 6 categories) to show that he or she was ‘left without adequate provision for his or her proper maintenance, education or advancement in life’.

5.1.2 If this threshold is met, then the court may (but does not have to) make an order that the claimant receive a proportion of the deceased person’s estate to provide for the claimant’s maintenance, education or advancement in life.

5.1.3 The High Court has described this as ‘two-stage’ process.³²⁴ The first step is to determine whether the claimant has been left without ‘adequate provision’ for his or her ‘proper maintenance, education or advancement in life’. These terms are not defined in the Act, and the meaning has to be understood by looking at the various cases in which the courts have considered these terms.

5.1.4 If the answer is ‘yes’ to the first question, the second step is for the court to decide what ‘adequate provision’ will be. This involves having regard to all relevant circumstances in the individual case, which could include the relationship between the deceased person and the claimant, and the deceased person and his or her other family members who may be provided for in the will. It could also involve looking at the property and income of the claimant, and/or the size of the deceased’s estate. Adequate provision for proper maintenance and support is relative to all the circumstances of the case. The court’s discretion under the *IFPA* is wide: ‘The legislation is remedial in nature and has been construed to give the most complete remedy which the [statutory] phraseology will permit.’³²⁵

5.2 Position in other jurisdictions

5.2.1 Efforts have been made by law reform bodies around Australia to develop standard eligibility criteria to apply to family provision claims and to set out in detail the factors to which the court should have regard when exercising its discretion to make an order.

5.2.2 Victoria, for example, takes a more restrictive approach than South Australia. Under the Victorian *Administration of Probate Act 1958*, in order to be eligible for a family provision order, an eligible family member must also satisfy the court that at the time of death, the deceased had a moral duty to provide for his or her proper maintenance and support.

³²² See above [2.1.9].

³²³ See also the reference to ‘moral responsibility’ in *Banks v Goodfellow* (1870) 5 LR QB 549, 563–565.

³²⁴ See, for example, *Singer v Berghouse* (1994) 181 CLR 201, 209–210. See also *Kozłowski v Kozłowski* [2013] SASCFC 112 (18 October 2013) [36]–[38]; *Parker v Australian Trustees Executors Ltd* [2016] SASC 64 (1 June 2016) [18]–[21]. Though in practice ‘there is in most cases a very large degree of overlap between the two stages’ (*Ilott v Mitson* [2017] 2 WLR 979, [23]).

³²⁵ *Parker v Australian Trustees Executors Ltd* [2016] SASC 64 (1 June 2016) [17] (Lovell J) citing *Worlidge & Anor v Doddridge & Ors* (1957) 97 CLR 1, 9.

5.2.3 When considering whether to make an order under the Victorian Act, the court must take into account the following factors (set out in s 91A):

- the degree to which, at the time of death, the deceased had a moral duty to provide for the claimant; and
- the degree to which the distribution of the deceased's estate fails to make adequate provision for the proper maintenance and support of the claimant; and
- in the case of certain categories of family members, such as adult children and step children, the degree to which the claimant is not capable, by reasonable means, of providing for his or herself.

5.2.4 In addition, the Victorian Act provides that the court may have regard to a range of factors (set out in ss 91 and 91A) including:

- the deceased person's reasons for making the dispositions he or she did in the will;
- any other evidence of the deceased's intentions in relation to providing (or not providing) for certain family members;
- any family or other relationship between the deceased and the claimant, including the nature of the relationship; and if relevant, the length of the relationship;
- any physical, mental or intellectual disability of any eligible family member or any beneficiary of the estate;
- the financial resources, including earning capacity, and the financial needs at the time of the hearing and for the foreseeable future of any eligible family members or any beneficiary of the estate;
- any contribution of the claimant in building up the estate or taking care of the deceased or his or her family;
- the character and conduct of the claimant or any other person.

5.2.5 Similar lists can be found in the New South Wales and ACT family provision laws.³²⁶

5.2.6 Section 91A of the Victorian Act is reproduced at Appendix D.

5.3 Issues

Does the current test need to be changed?

5.3.1 The broad discretion in *IFPA*'s two-stage process has led some commentators to take the view that in practice these laws have given way to a culture of entitlement among family members, rather

³²⁶ *Succession Act 2006* (NSW) ss 60(1)–(2); *Family Provision Act 1969* (ACT) s 8(3).

than a need to demonstrate genuine dependency.³²⁷ Rather than real need, the focus is on what is a family member's 'share'.³²⁸

5.3.2 Some of these perceptions have arisen from the court's interpretation of the words 'adequate' and 'proper' and approach to the concept of moral duty or obligation.³²⁹ These terms have become increasingly problematic.

5.3.3 The court's approach to whether the applicant has been left without 'adequate provision for proper maintenance, education and advancement in life' has depended on whether emphasis is placed on the following distinct³³⁰ but relative terms:³³¹ 'adequate' or 'proper'.³³²

5.3.4 The distinction between the terms 'adequate' and 'proper' was explained by the Privy Council in the following oft quoted terms:

The amount to be provided is not to be measured solely by the need of maintenance. It would be so if the court were concerned merely with adequacy. But the court has to consider what is proper maintenance and therefore the property left by the testator has to be taken into consideration ... Where, therefore, the testator's estate is a large one the court will be justified in such a case in making provision to meet contingencies that might have to be disregarded where the estate is small.³³³

5.3.5 Emphasis on 'adequacy' suggests an objective consideration of the applicant's financial need to determine the basic or minimum level of support necessary to live a sustainable lifestyle without being a burden on the State.³³⁴ What is adequate may not be proper in regard to the applicant's station in life and testator's wealth.³³⁵ Emphasis on 'proper' on the other hand suggests an 'ethical' or 'moral' approach,³³⁶ requiring a more subjective consideration of matters such as the size of the estate,³³⁷ the applicant's 'station in life'³³⁸ and the applicant's conduct.³³⁹ An applicant need not show that he or she

³²⁷ See for example, Atherton, *Family and Property: A History of Testamentary Freedom in NSW with Particular Reference to Widows and Children*, above n 38, 10; Croucher, 'How Free is Free? Testamentary Freedom and the Battle between Family and Property', above n 40.

³²⁸ Atherton, *Family and Property: A History of Testamentary Freedom in NSW with Particular Reference to Widows and Children*, above n 38, 422–427.

³²⁹ 'Maintenance' means a continuity of pre-existing state of affairs, while 'support' and 'advancement in life' similarly imply a provision beyond bare need or the necessities of life. See *Vigolo v Bostin* (2005) 221 CLR 191, 228–229 [115] (Callinan and Heydon JJ) cited in *Pizimolas v Pizimolas & Zannis* [2010] SASC 158 (28 May 2010) [69] (Kourakis J).

³³⁰ *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, 476.

³³¹ *Butler v Tiburzi* [2016] SASC 108 (26 July 2016) [20] (Lovell J).

³³² Atherton, *Family and Property: A History of Testamentary Freedom in NSW with Particular Reference to Widows and Children*, above n 38, 208.

³³³ *Bosch v Perpetual Trustee Company Ltd* [1938] AC 463, 478.

³³⁴ See, for example, *Worlidge v Doddridge* (1957) 97 CLR 1, 16 (Kitto J); Chesterman, above n 271, 15; Renwick, above n 35, 173; McGregor-Lowndes and Hannah, 'Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs', above n 51, 78; Croucher, 'Succession Law Reform in NSW – 2011 Update', above n 149.

³³⁵ *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, 476 cited in *Butler v Tiburzi* [2016] SASC 108 (26 July 2016) [18] (Lovell J).

³³⁶ *Hynard v Gavros* [2014] SASC 42 (25 March 2014) [30] (Master Dart).

³³⁷ *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, 476.

³³⁸ Mill, above n 45, Book II Ch 2 Par 3.

³³⁹ Atherton, *Family and Property: A History of Testamentary Freedom in NSW with Particular Reference to Widows and Children*, above n 38, 208; *Worlidge v Doddridge* (1957) 97 CLR 1, 16 (Kitto J).

is in necessitous circumstances in order to succeed. It is not just provision ‘for the bread and butter of life, but for a little of the cheese or jam’.³⁴⁰

5.3.6 In assessing what is ‘proper’, the courts have adopted the ‘moral duty’ approach.³⁴¹ This formulation was explained by Salmond J in *Allen v Manchester*³⁴² in the following terms:

The Act is ... designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.³⁴³

5.3.7 This statement was approved by the Privy Council in *Bosch v Perpetual Trustee Co*³⁴⁴ which in the ‘classical statement’³⁴⁵ of the law to be applied stated:

in every case the court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father.³⁴⁶

5.3.8 The High Court of Australia, despite some dissenting views,³⁴⁷ has approved and adopted this moral value test.³⁴⁸ As Gleeson CJ said: ‘Courts have found consideration of moral claim and moral duty to be valuable currency. It remains of value and should not be discarded.’³⁴⁹ The standard therefore to be applied under the *IFPA* is that of a ‘wise and just testator’ acting in line with contemporary community values.³⁵⁰ A review of recent case law reveals that Australian courts have placed increasing emphasis on the ‘ethical approach’, with considerations of ‘moral duty’ at the forefront of the court’s reasoning process.³⁵¹

³⁴⁰ *Blore v Lang* (1960) 104 CLR 124, 135 (Fullagar and Menzies JJ). It is ‘something more than a provision to keep the wolf from the door, it should at least be sufficient to keep the wolf from pattering round the house or lurking in some outhouse in the back yard’: *King v White* [1992] 2 VR 417, 425, citing *Re Harris (Deceased)* (1936) SASR 497, 501.

³⁴¹ See, for example, *Re Allardice: Allardice v Allardice* (1910) 29 NZLR 959; *Allen v Manchester* [1922] NZLR 218, 220–221; *Bosch v Perpetual Trustee Co (Ltd)* [1938] AC 463, 479; *Hughes v National Trustees, Executors and Agency Company of Australasia Ltd* (1979) 143 CLR 134, 147; *Collicoat v McMillan* [1999] 3 VR 803, 819–820; *Vigolo v Bostin* (2005) 213 ALR 692; *Kozłowski v Kozłowski* [2013] SASC 57 (24 April 2013).

³⁴² (1922) NZLR 218.

³⁴³ *Ibid* 220–221.

³⁴⁴ [1938] AC 463.

³⁴⁵ *Hughes v National Trustees, Executors and Agency Company of Australasia Ltd* (1979) 143 CLR 134, 147 (Gibbs J).

³⁴⁶ [1938] AC 463, 478–479.

³⁴⁷ See, for example, *Hughes v National Trustees, Executors and Agency Company of Australasia Ltd* (1979) 143 CLR 134, 159–160 (Murphy J); *Coates v National Trustees Executors and Agency Ltd* (1956) 95 CLR 494, 523–524 (Fullagar J); *Singer v Berghouse (No 2)* (1994) 181 CLR 201, 209 (Mason CJ, Deane and McHugh JJ). See also *Drioli v Rover* [2005] SASC 395 (14 October 2005) [134] (Perry ACJ). See further Chesterman, above n 271, 15.

³⁴⁸ See, for example, *Coates v National Trustees Executors and Agency Ltd* (1956) 95 CLR 494, 509 (Dixon CJ), 512 (Williams J), 516 (Webb J) and 526 (Kitto J); *The Pontifical Society for the Advancement of Faith and St Charles Seminary Perth v Scales* (1962) 107 CLR 9; *Goodman v Windeyer* (1980) 144 CLR 490; *Vigolo v Bostin* (2005) 213 ALR 692. See further Chesterman, above n 271, 1–14.

³⁴⁹ *Vigolo v Bostin* (2005) 213 ALR 692, 700 [25]. See also at 719 [113], 721 [121] (Callinan and Heydon JJ).

³⁵⁰ See, for example, *Goodman v Windeyer* (1980) 144 CLR 490, 502; *Vigolo v Bostin* (2005) 213 ALR 692; *Parker v Australian Trustees Executors Ltd* [2016] SASC 64 (1 June 2016) [24].

³⁵¹ Grainer, above n 64, 144.

5.3.9 In *Brennan v Mansfield*,³⁵² for example, despite acknowledging the applicant's extensive assets of up to \$2.11 million, substantial salary and generous pension (all of which would be capable of supporting the applicant's current lifestyle), the court still found that the testator's bequest of \$100 000 was inadequate to support the lifestyle to which the applicant had become accustomed. The applicant was awarded \$1 million from the testator's \$2.5 million estate with an additional \$900 000 from the residue of the deceased's estate. In *Bonyer v Wood*³⁵³ and *Haynard v Gavros*,³⁵⁴ the courts held that bequeathing a larger portion to a sibling and charity than to a child was held to be a failure of moral duty because a testator should owe a stronger moral obligation to her children over siblings and charity.³⁵⁵ This moral obligation persists even if the applicant is in financially secure circumstances.³⁵⁶

5.3.10 The word 'proper' has been interpreted as including this question of whether the testator had a 'moral duty' to provide for the applicant.³⁵⁷ Despite the absence of the words 'moral duty' or 'moral obligation' in the *IFPA*, the concept of moral duty or obligation has become an important element in the South Australian courts' reasoning process in family provision claims.³⁵⁸

5.3.11 A review of judicial cases indicates that courts may have taken the concept of moral duty beyond what many commentators and members in the community would consider to be appropriate. For example, courts have found breaches of moral duties solely upon the testator's own neglect or disinterest in the applicants during their childhood.³⁵⁹ In *Drioli v Rover*,³⁶⁰ for example, the court found that despite the lack of contact, the testator's self-supporting daughters had a moral claim because more could have been expected from the testator, especially during the early years when the daughters moved out into marriage and child raising.³⁶¹

5.3.12 The above analysis suggests that when a liberal interpretation of what is 'proper' and what is within a 'moral duty' is adopted, courts may be willing to interfere with a testator's wishes, thus almost guaranteeing applicants a high chance of success once they are eligible. An analysis of recent South Australian cases shows that 22 out of 23 cases were successful at increasing the amount of provision awarded.³⁶² A recent study found a 74 per cent success rate in judicial case reviews and 77 per cent success rate in Public Trustee file reviews across Australia.³⁶³

5.3.13 The emphasis on the 'ethical approach' and the moral duty standard on the one hand has given courts great flexibility in its assessment of family provision applications, but on the other hand has

³⁵² [2013] SASC 83 (6 June 2013).

³⁵³ (2007) 99 SASR 190.

³⁵⁴ [2014] SASC 42 (25 March 2014).

³⁵⁵ *Bonyer v Wood* (2007) 99 SASR 190, [49]–[50], [53]–[54] (Debelle, Nyland and Anderson JJ). See also *Hynard v Gavros* [2014] SASC 42 (25 March 2014); Grainer, above n 64, 146.

³⁵⁶ Grainer, above n 64, 145.

³⁵⁷ *Vigolo v Bostin* (2005) 221 CLR 191, 228–231 (Callinan and Heydon JJ) cited in *Kozłowski v Kozłowski* [2013] SASC 57 (24 April 2013) [24] (Peek J).

³⁵⁸ See, for example, *Vigolo v Bostin* (2005) 221 CLR 191, 204–205 (Gleeson CJ) (cited in *Kozłowski v Kozłowski* [2013] SASC 57 (24 April 2013) [23] (Peek J)); *Bonyer v Woods* (2007) 99 SASR 190, [44]; *Kozłowski v Kozłowski* [2013] SASCFC 112 (18 October 2013) [41]–[46]; *Parker v Australian Trustee Executors Ltd* [2016] SASC 64 (1 June 2016). See also Chesterman, above n 271; Grainer, above n 64, 144.

³⁵⁹ Grainer, above n 64, 144.

³⁶⁰ [2005] SASC 395 (14 October 2005).

³⁶¹ *Ibid* [157]–[159] (Perry ACJ).

³⁶² See Appendix C for an overview of cases decided under the South Australian Act from 2000 to 2016. See also above [2.2.4] (especially n 123), [3.5.6].

³⁶³ Tilse et al, *Having the Last Word? Will Making and Contestation in Australia*, above n 121, 3, 17.

shifted the focus away from the basic needs of an applicant to a broader notion of needs relating to what is ‘proper’.³⁶⁴ As a result, the interests of the applicant are frequently favoured over those of a testator and testamentary freedom is diluted.³⁶⁵

5.3.14 The moral duty concept under the *IFPA* and similar legislation causes difficulties.³⁶⁶ It has been criticised as an unwarranted and unhelpful gloss that distracts from the statutory language and the legislative scheme.³⁶⁷ The moral duty concept has been criticised as ‘unsatisfactory and inappropriate’,³⁶⁸ ‘fundamentally flawed’,³⁶⁹ ‘problematic in a pluralist and multicultural society’³⁷⁰ and as ‘too vague to ensure that the purpose, meaning and effect of the law are clearly communicated’.³⁷¹ It is said there is ‘a danger of injustice’ when judges applying the moral value test under family provision law ‘make assumptions regarding the content of community standards without clearly articulating the bases on which these assumptions are made and without referring to supporting evidence’.³⁷²

5.3.15 There is particular concern that the moral duty concept may be applied with regard to the moral views of a judge which may well not reflect contemporary society.³⁷³ As Perry ACJ observed:

I tend to think that in the pluralist, multicultural society in which we now live, it is difficult to identify a single, commonly accepted set of moral precepts. Differing cultural, religious and other beliefs and practices may well give rise to quite different but honestly held views as to what may be regarded as the appropriate manner in which a testator should make provision for his family.³⁷⁴

³⁶⁴ Atherton, *Family and Property: A History of Testamentary Freedom in NSW with Particular Reference to Widows and Children*, above n 38, 249.

³⁶⁵ See, for example, Nicola Peart, ‘New Zealand Succession Law: Subverting Reasonable Expectation’ (2008) 37 *Common Law World Review* 356; Richard Sutton and Nicola Peart, ‘Testamentary Claims by Adult Children: The Agony of the “Wise and Just” Testator’ (2013) 10 *Otago Law Review* 385.

³⁶⁶ See, for example, Sutton and Peart, above n 365; Sutton, above n 365; NZLC, *Succession Law: Testamentary Claims*, above n 237, 13–14 [47]–[51]; Grainer, above n 64; Rosalind Atherton, ‘The Concept of Moral Duty in the Law of Family Provision – A Gloss or Critical Understanding?’ (2000) 6 *Australian Journal of Legal History* 5; Ridge, above n 128.

³⁶⁷ See, for example, *Coates v National Trustees Executors and Agency Company Ltd* (1956) 95 CLR 494, 512, 522–523 (Fullagar J); *Hughes v National Trustees, Executors and Agency Company of Australasia Ltd* (1979) 143 CLR 134, 159–160 (Murphy J); *Goodman v Windeyer & Ors* (1980) 144 CLR 490, 504–505 (Murphy J); *Singer v Berghouse (No 2)* (1994) 181 CLR 201, 209 (Mason CJ, Deane and McHugh JJ); Grainer, above n 64, 738.

³⁶⁸ Grainer, above n 64, 161.

³⁶⁹ Ridge, above n 128, 739.

³⁷⁰ *Ibid* 738.

³⁷¹ NZLC, *Succession Law: Testamentary Claims*, above n 237, 14 [50].

³⁷² Ridge, above n 128, 728. See also Sutton and Peart, above n 365. Ken Mackie in consultation viewed the moral duty concept as an ‘unnecessary gloss’ and ‘nebulous’ and deciding family provision claims by reference to ‘contemporary community standards (whatever they may be)’ as especially problematic. A study of recent negligence cases in the High Court found that the judges made assumptions about ‘the nature of contemporary Australian society and contemporary Australian social values’ that were generally unsupported by social scientific evidence and that were sometimes incorrect: Ridge, above n 128, 728, citing Kylie Burns, ‘The Way the World Is: Social Facts in High Court Negligence Cases’ (2004) 12 *Torts Law Journal* 215, 227.

³⁷³ Ridge, above n 128, 728; Grainer, above n 64, 148.

³⁷⁴ *Drioli v Rover* [2005] SASC 395 (14 October 2005) [144]. See also: ‘The courts’ present powers are broad and discretionary. This might have been acceptable when people had a common (if gendered and monocultural) vision of the family. But we now accept that families are different and should not be treated all in the same way. They differ in their ethnic and cultural backgrounds ... We now believe that the value systems of a prevailing culture or a particular type of family should not be applied indiscriminately to others who do not share that system’: NZLC, *Succession Law: Testamentary Claims*, above n 237, 2.

5.3.16 The NZLC has questioned whether modern family provision laws should be designed to enforce testators' 'moral' duties, and to protect the 'public purse'.³⁷⁵ The emphasis on the 'ethical approach' and moral duty is viewed as providing courts great breadth and flexibility in determining applications and unwisely drawing the focus away from the basic needs of the applicant to a broader notion of needs relating to what is 'proper'.³⁷⁶ As a result, the interests of the claimant may well be favoured over those of the testator and testamentary freedom is undermined. In an effort to limit the scope of such inroads into testamentary freedom, some commentators have suggested that the basis for determination should be on the needs of dependants, with emphasis placed on notions of 'adequacy' and 'maintenance' instead of 'proper'.³⁷⁷ To clarify the law in terms of dependence, some commentators (including the Alberta Law Reform Institute) have gone as far as to suggest a re-casting of the formula and to remove the problematic word 'proper' altogether.³⁷⁸

How should the test be changed?

5.3.17 One option, as raised by the Alberta Law Reform Institute, is to remove the problematic word 'proper' and emphasise the word 'adequate'. While this may reduce the problem of opportunistic and unjustified claims, it is uncertain whether this option will effectively deal with the variety of issues that come before the court. One of the issues discussed above was the situation of independent adult children who should be allowed to claim based on their contribution to the testator's wealth or care. Based on the test of 'adequacy', they may not be able to make a claim. However, taking the word 'proper' with its moral and ethical aspects, these adult children may have a claim on the estate due to their contributions.

5.3.18 Other jurisdictions have varied in the tests used. Victoria, New South Wales and the ACT are the only States to include a statutory list of criteria for the courts to consider when determining whether to make a family provision order.³⁷⁹ The recommended National Bill also had a statutory list of factors which the court may consider when determining whether a person is able to make a claim under the general criteria based category. All other jurisdictions (Western Australia, the Northern Territory, Tasmania and Queensland) have a similar test to that of South Australia. In Tasmania, the ACT, the Northern Territory and New South Wales, the court also has the ability to consider the testator's reasons for making the disposition.³⁸⁰ This criterion is mandatory in Victoria.

5.3.19 Another issue is whether the test should be further defined or restricted to provide greater guidance to the courts. In this context, SALRI notes the recent insightful comments of Lady Hale highlighting the difficulty for a court under the present general law to 'distinguish between the deserving and the undeserving' in the English case of *Ilott v Mitson*.³⁸¹ The Supreme Court 'regretted' that the Law

³⁷⁵ NZLC, *Succession Law: Testamentary Claims*, above n 237, 5.

³⁷⁶ Atherton, *Family and Property: A History of Testamentary Freedom in NSW with Particular Reference to Widows and Children*, above n 38, 249.

³⁷⁷ Grainer, above n 64, 141; Hannah and McGregor-Lowndes, *From Testamentary Freedom to Testamentary Duty: Finding the Balance*, above n 132, 21.

³⁷⁸ See, for example, Alberta Institute of Law Research and Reform, *Family Relief*, Report No 29 (1978) 25–26; Atherton, *Family and Property: A History of Testamentary Freedom in NSW with Particular Reference to Widows and Children*, above n 38, 426–427.

³⁷⁹ *Family Provision Act 1969* (ACT) s 8(2); *Succession Act 2006* (NSW) s 60(2); *Administration and Probate Act 1958* (Vic) s 91A.

³⁸⁰ See above [3.3.19]–[3.3.30].

³⁸¹ *Ilott v Mitson* [2017] 2 WLR 979, [62].

Reform Commission and Parliament had not provided the court with more detail in terms of the criteria that should be applied when determining family provision claims. Lady Hale emphasised:

the unsatisfactory state of the present law, giving as it does no guidance as to the factors to be taken into account in deciding whether an adult child is deserving or undeserving of reasonable maintenance. I regret that the Law Commission did not reconsider the fundamental principles underlying such claims when last they dealt with this topic in 2011.³⁸²

What factors should the courts consider?

5.3.20 As mentioned above, there are varying lists of factors set out in the family provision laws of Victoria, New South Wales and the ACT. Victoria is unique in making it compulsory for the court to consider the deceased's will and the deceased's reasons for making dispositions and intentions for providing for the applicant. Otherwise, all the lists include the following factors: the relationship between the deceased and the applicant; the size and nature of the estate; the financial resources of the applicant and beneficiaries; the deceased's obligations to the applicant and other beneficiaries; any physical, mental or intellectual disability of the applicant or beneficiary; the applicant's age; the applicant's contribution to the deceased's estate or welfare; any benefits previously given by the deceased to the applicant or beneficiary; the applicant's character or conduct; the effect of a family provision order on beneficiaries; whether the applicant was maintained by the deceased before the deceased's death; the financial circumstances of a person the applicant is cohabitating with; whether the applicant is liable to be supported by another and any other relevant matter.

5.3.21 The National Bill and the NSW Act also include as a relevant factor in any family provision claim (though not in the classes of eligible applicants), any relevant Aboriginal or Torres Strait Islander

³⁸² Ibid [66]. See also *Burke v Burke* [2016] NSWCA 195 (13 July 2015), [124]–[125] (Emmett JA): ‘The *Succession Act* itself, in s 60(2), lays down criteria in very broad terms, leaving a very wide discretion for the Court. It might have been preferable for the legislature to be more specific.’ Emmett JA noted that the ‘the somewhat amorphous’ statutory criteria might be unfavourable compared (at least in part) with the specific causes for the disinheritance of children laid down by the Roman Emperor Justinian in Ch III of Novel 115, enacted in AD 542 which provided: “Therefore we order that no father or mother, grandfather or grandmother, great-grandfather or great-grandmother shall, under any circumstances, forget to mention their son, daughter, or other descendants in their wills, or disinherit them unless they have left them, by donation, legacy, or trust, or in some other way, the shares to which they are entitled by law; or it has been proved that their children are ungrateful, and have expressly stated the instances of their ingratitude in their wills.” Novel 115 then set out the only 14 grounds upon which descendants should be considered ungrateful: no other basis of ingratitude could be relied upon. The 14 grounds of ingratitude might be summarised as follows: “(1) the child has laid violent hands upon parents; (2) the child has heaped gross insults upon parents; (3) the child has brought criminal accusations against parents for offences that did not involve the Emperor or the State; (4) the child is a malefactor or consorts with malefactors; (5) the child has attempted the life of his parents; (6) the child, being a son, has criminal intercourse with his step-mother or his father’s concubine; (7) the child, being a son, has acted as informer against his parents and has subjected them to great expense; (8) the child who has the capacity to do so refuses a request by an ill parent to provide security for the debts of the parent; (9) the child, being a son, prevents his parents from making a will; (10) the child, being a son, continues to associate with actors or gladiators, contrary to the wishes of his parent, unless that is the profession of the parent; (11) the child, being a daughter, refuses to be married and prefers to lead a life of debauchery, where the parent desires to provide the daughter with a husband and bestow a dowry; (12) the child fails to treat a parent who has become insane with the proper respect and care (assuming the parent is subsequently cured of insanity); (13) the child does not pay a ransom demanded by the captors of a parent retained in captivity; (14) the child does not acknowledge the Catholic faith and does not commune in the church where the true religion is taught and where the doctrines of the holy Councils of Nicaea, Constantinople, Ephesus and Chalcedon are accepted.” *Burke v Burke* [2016] NSWCA 195 (13 July 2015), [125]–[126] (Emmett JA). See also above [3.4.7].

customary law or practice.³⁸³ SALRI considers that it is premature to make any recommendation on this particular point without further research and consultation, notably with Aboriginal communities.³⁸⁴

Should South Australia adopt a list?

5.3.22 South Australia does not have a list of factors for the court to consider in determining a claim under the *IFPA*. As previously discussed, courts do consider a range of factors in family provision cases through an interpretation of the words ‘proper’ and ‘adequate’.³⁸⁵ However, the court is not bound to consider any particular factor over another.

5.3.23 One option for reform is to introduce a list of factors to the *IFPA* that the court must have regard to, such as that set out in s 91A of the Victorian Act.

5.4 Consultation data overview

Question 1: Does the current test need to be changed?

5.4.1 There was general support in the Adelaide Legal Experts Roundtable for retaining the two-staged approach (that is the list of eligible claimants in s 6 of the *IFPA* and the legal criteria to be applied in s 7 of the Act). However, mixed views were expressed on the merits of reforming the current test in s 7. Participants at the Adelaide Legal Experts Roundtable noted that complex family arrangements and new categories of legally recognised relationships are likely to make the challenges of determining meritorious family provision claims increasingly difficult. On this basis, there was some support for clarifying and tightening the existing criteria in s 7 of the Act. One submission highlighted that ‘the extremely broad discretion given to the court under the “two stage” process is inappropriate because it invites costly, opportunistic litigation that can be detrimental to family members and beneficiaries other than the claimant’.

5.4.2 However, others noted that it would be hard to improve on the current wording, as the introduction of new terms would also be open to interpretation and could lead to odd outcomes. It could also detract from the policy interests behind the legislation. For example, some participants noted that if all claimants were required to show proof of dependence, it could lead to a miscarriage of the will-making process. It was stated by some participants that the courts can be trusted to sensibly exercise their existing broad discretion under the *IFPA*.

5.4.3 The Public Trustee was of the view that the current test for eligibility is still appropriate. The Public Trustee was against any formal requirements to show dependence on the deceased as this could inadvertently limit those who are genuinely dependent but do not fall within the categories outlined. This view was shared by Greg Anastasi in his submission, who considered that a court already has the ability to assess where the need is, and overly strict criteria would unduly interfere with the court’s ability to assess the need on its merits.

³⁸³ National Committee (MP 28), above n 3, 21–23. See also *Eatts v Gundy* [2014] QCA 309 (28 November 2014).

³⁸⁴ SALRI proposes to examine this and other Indigenous succession issues in a future law reform project. See further below [9.4.4].

³⁸⁵ See above [5.3.2]–[5.3.15].

Question 2: How should the test be changed?

5.4.4 One anonymous individual submission believed that the *IFPA* should be limited to the purpose of protecting dependants, that it should achieve this by adopting relatively narrow, non-evaluative criteria based on need rather than adequacy of provision, contrary to the broad discretion given under the ‘two-stage’ process. This view is similar to that of Mr O’Brien who suggests there is scope to amend the *IFPA* to put greater weight on need of any claimant.

5.4.5 Several succession lawyers and estate practitioners complained to SALRI of the perceived uncertainty of the present law and the difficulty of providing accurate advice to clients about the likely outcome of a claim under the *IFPA*. It was likened to a ‘lottery’.³⁸⁶ There was a view that the uncertainty and unpredictability as to the outcome should a claim progress to trial (combined with the fear of the costs coming out of the estate, especially in a small estate)³⁸⁷ places strong pressures to settle, even seemingly tenuous or unjustified claims.

5.4.6 Different views were expressed to SALRI about the current test and the inclusion of both ‘adequate’ and ‘proper’. The Adelaide Roundtable noted the longstanding nature of the test and viewed it as well understood and effective and supported retention of both ‘adequate’ and ‘proper’. Ms Iwaniw and several experienced succession lawyers noted to SALRI that the current test is well established and understood and opposed discarding or changing it and noted that the solution to addressing opportunistic claims and strengthening testamentary freedom lies elsewhere.

5.4.7 The Mt Gambier Legal Roundtable in contrast noted that the current test is outdated and imprecise. One lawyer noted the current test is too uncertain and ‘peoples’ eyes glaze over’ when trying to explain to clients and it is not easy for lay people to understand it.

5.4.8 Different views were expressed about the clarity and accessibility of the current law. Some participants expressed the view that the current test works well in practice and is already well understood from 100 years of case law. It was noted that members of the public can always seek legal advice. However, others saw reform as necessary and beneficial, particularly to add clarity to the provision of advice at the wills drafting stage and to help deter opportunistic claims. For these participants, specifying the criteria to be applied in greater detail would help to ensure that the law is clear and accessible to the public. One participant highlighted the importance that the law should be clear and readily accessible and noted that members of the public now often will conduct their own research about the law and it is not ideal to expect the public to trawl through a century of case law. This theme also emerged from SALRI’s Mt Gambier and Berri consultations. Several Adelaide succession lawyers also saw the benefit in better clarity and accessibility of the law.

5.4.9 A view expressed by some attendees at the Adelaide Roundtable is that the current law affords adequate clarity and certainty and a list of factors under the *IFPA* is unnecessary, even unhelpful. However, the Mt Gambier and Berri Legal Roundtables disagreed with this proposition and saw positive value in a list of the relevant factors to be applied (though with the qualification that it should not be too long or complex). The participants saw particular benefit for lawyers who had to advise their clients as to their legal position. The list approach was supported on the basis that it would help discussions between lawyers and their clients at the wills drafting stage as a preventative measure for

³⁸⁶ Lindsay Ellison SC has likened the present law to a ‘two legged lottery’: Ellison, above n 120, 1, 22. See also VLRC, *Succession Laws*, above n 6, 102 [6.21]–[6.22].

³⁸⁷ See above [3.4.1]–[3.4.5], [3.4.21], [4.4.2], [4.4.6].

future disputes. SALRI notes the example of Mr DeGaris, a highly experienced lawyer in Mount Gambier, who uses the Victorian list in his discussions with clients. Mr Daenke in his submission noted s 91A of the Victorian Act and viewed it ‘of some assistance to both practitioners and to clients’ for the list of relevant factors to be set out in the *IFPA*.

5.4.10 In discussion with Ms Iwaniw of Moran and Partners and various regional and Adelaide succession lawyers, the value of such a list was discussed. Such a list of the relevant factors which is required to be considered in any claim under the *IFPA* would not just guide and assist a court in determining any claim but would also assist both succession lawyers and estate practitioners and will makers in preparing wills and making informed decisions on the distribution of property and for potential claimants and their legal advisers in considering whether to make any claim under the *IFPA*. It was also noted, including by the Hon Tom Gray QC, that such a list would be useful for the purposes of introducing the court process, especially involving any application for permission to proceed with a claim under the *IFPA* (as discussed later in the Report).³⁸⁸

Question 3: What factors should the courts consider?

5.4.11 With respect to the issue of what further criteria or factors the court should consider, the most common factor cited in the YourSay surveys was the relationship between the claimant and the testator. This included considering other issues such as estrangement and disentitling conduct. One person wanted to exclude a son from the will, having been cut off from any contact with the son and granddaughters, and was distressed to know that the son will be able overturn it.

5.4.12 Mr O’Brien did not believe that provision should be made for those who are in self-inflicted necessitous circumstances or have disqualified themselves from possible provision by bad behaviour.

5.4.13 Case example

Ideas of fairness are in the eye of the beholder. An estate divided in to 12^{ths} and shared out among three children — two get 4 12^{ths} each one gets 1 12th, her husband and each of her children get 1 12th. She fought this and got 6 12^{ths} overall because she saw it as ‘unfair’ although her behaviour led to the provision.

5.4.14 Case example

In my view, the court should consider the factors listed, especially the nature of the relationship. My parents are still alive but some of my siblings have nothing to do with either of my parents and yet they will benefit from the estate simply because my parents have been told that this is the requirement. If I am the primary carer why should my time, effort and energy not be considered more valuable than those who have not spoken to my parents in nearly 40 years?

5.4.15 Other common factors expressed in the YourSay surveys included testamentary freedom of the deceased foremost; financial dependence or how dependants were provided for or supported during the testator’s life (such as young children or those with a disability); the financial status of the applicant and ability to generate own income; size and value of estate; and equal division of estate.

5.4.16 It is significant that a large proportion of people in the surveys expressly stated that there should be no list or criteria for the following reasons: the wishes of the deceased should be the only criteria, it limits the court, and will it require evidence to be led on each, thus increasing costs.

³⁸⁸ See below [7.7.29], [7.8.12].

Question 4: Should South Australia adopt a list?

5.4.17 There were mixed views on implementing a Victorian style list in the *IFPA*. At the Adelaide Legal Experts Roundtable, some participants saw the Victorian list approach as an unnecessary and an unhelpful distraction that could drive up costs. These participants expressed the view that the current test works well in practice and is already well understood from 100 years of case law. Furthermore, a list could unnecessarily curtail the discretion of the court, risk limiting the breadth of inquiry and could give rise to a mechanical approach. Some also expressed concern at the Victorian model which incorporated ‘moral duty’ as a test for determining eligibility on the grounds that this could ‘open the floodgates’ for claims. However, other participants saw reform as necessary and beneficial, particularly to add clarity to the provision of informed advice at the will drafting stage and to help deter opportunistic claims. For these participants, specifying the criteria to be applied in greater detail would help to ensure that the law is be clear and accessible to the community.

5.4.18 This view was shared with the participants at the Mt Gambier Legal Experts Roundtable and Community Roundtables who saw benefits in a list and agreed that there is a need to reframe the criteria in a list form for a family provision claim under the *IFPA*. Section 91A of the *Administration and Probate Act 1958* (Vic) was viewed as a good starting point. The two Roundtables stated that, at a minimum, the law should specifically require consideration of (1) the reasons the testator acted as they did when drafting the will, (2) the claimant’s vulnerability and dependence on the deceased, (3) the claimant’s contribution to the estate, (4) whether a promise was made, and relied upon to detriment and (5) the character and conduct of the claimant.

5.4.19 It was noted, for example, that setting out the criteria in a more detailed way, like the Victorian approach, would help when advising people about estate planning and when advising people who are making a will or seeking to make a family provision claim.

5.4.20 Participants at the Berri Legal Experts Roundtable saw the benefit of a list of the relevant factors under the *IFPA* but were of a mixed view about the Victorian list. Some attendees favoured all or parts of the Victorian list to criteria applying to claims under the *IFPA*, and others considered the Victorian model to raise additional problems and confusion, thus giving rise to higher costs. For example, one participant said that they ‘have some problems with the Victorian model. It includes ten dot points — lawyers could spend big money on each of these dot points in preparing affidavits and it could drive up costs even more.’ Others saw merit in the Victorian approach, particularly in so far as it included a stronger focus to the importance on the testator’s views — which is particularly evident in the first three criteria in s 91A (1) of the Victorian Act. The other criteria in s 91A(2) were viewed as less desirable in that they risked increasing costs.

5.4.21 Some participants favoured the middle ground between the South Australian and Victorian tests. It was noted that the first several Victorian factors, especially requiring regard to the views and reasoning of the testator, was an appropriate balance. This would ensure courts, succession lawyers, estate practitioners, testators and potential claimants were aware of the main factors a court would consider. The Mt Gambier lawyers also saw real benefit in this approach.

5.4.22 Participants at the Berri Community Roundtable noted the difficulties in understanding court processes. One attendee, in particular, who was a practising accountant, supported the Victorian approach of specifying a range of criteria for the court to take into account when determining family provision claims as in his view, this would enable financial planners to give clear advice in making wills and alert them to pitfalls.

5.4.23 One anonymous individual submission stated that there is a need for a common-sense approach that focuses the court's attention on the wishes of the testator, and supported the Victorian approach of allowing evidence of the testator's wishes being considered. For example, such evidence could include statements made by the testator at the time of drafting the will providing reasons for drafting the will and/or evidence provided by other children about the relationship between the deceased and family members.³⁸⁹

5.5 The Institute's views

5.5.1 SALRI is of the view that, although there are criticisms of the current approach, the two-staged approach in the *IFPA* (that is the list of eligible claimants in s 6 of the Act and then the legal criteria to be applied in s 7 of the Act)³⁹⁰ should remain as it is. SALRI accepts that the current law in s 7 of the *IFPA* setting out the requirement that a claimant (who falls within one of the s 6 categories) must show that he or she was left without 'adequate provision for his or her proper maintenance, education or advancement in life' is not without difficulty (especially the concept of 'moral' duty or obligation). However, SALRI notes that the test is well established and to discard the existing test, including the use of the term 'proper', represents a drastic departure from a century of authority and practice. SALRI also considers that this test should not be changed or restricted as this may result in unintended consequences and injustice. For example, a restricted test may not be broad enough to include claimants the testator had a moral or ethical duty to provide for. SALRI's view is that the court should retain a broad discretion in determining whether the legal criteria to be applied in s 7 of the Act can be satisfied.

5.5.2 SALRI respectfully disagrees with the view raised in consultation that the law is well known to lawyers and statutory guidance is unnecessary, even unhelpful. SALRI strongly sees the need for accessibility of the law, especially a law such as the *IFPA*. It reflects modern views of accountability and community participation in law reform and the legal system.³⁹¹ Members of the public, as one lawyer noted at the Adelaide roundtable, increasingly conduct their own legal research. It is vital that the law, especially in an area as important as family inheritance, is clear and accessible. The present law is neither. Rather it is scattered across technical legal texts and a century worth of case law.

5.5.3 SALRI is of the view that greater clarity and guidance is required than is afforded under the present law. SALRI notes the clear view presented in consultation and in the view of Lady Hale in *Holt* and concludes that there is real benefit in the introduction of a statutory non-exhaustive list of criteria for a court to have to consider in determining any family provision claim. SALRI considers that the introduction of an abbreviated version of the Victorian list to the *IFPA* would serve a valuable purpose to courts, lawyers and the community by allowing the law to be more accessible and clearer.

5.5.4 Such a list would guide and assist a court in considering and determining any claim under the *IFPA* and require certain key factors (notably the testator's wishes) to be taken into account. Such a list would also be, as raised in consultation by succession lawyers, of real assistance and value to succession lawyers, other practitioners and the community in preparing and making wills and considering whether to make a claim under the *IFPA*. SALRI also considers that a list of this nature would be very useful

³⁸⁹ See also above [5.2.4].

³⁹⁰ See above [5.1.1]–[5.1.4] for an explanation of the current two stage process.

³⁹¹ See, for example, Atkinson, above n 24, 160–165; Kirby, 'Are We There Yet', above n 23, 434–436. See also above n 23.

for the purposes introducing the court process, especially involving an application for permission to proceed with a claim (as discussed later in the Report).³⁹²

5.5.5 SALRI accepts that too lengthy a list, as noted at the Berri Roundtable, may prove unhelpful. However, SALRI considers that an abbreviated version of the Victorian list criteria set out in s 91A of the *Administration and Probate Act 1958* has real benefits and should be introduced into the *IFPA*. At a minimum, such a list should (not ‘may’ as in New South Wales)³⁹³ require consideration of the reasons the testator acted as they did when drafting the will; the claimant’s vulnerability and dependence on the deceased; the claimant’s contribution to the estate and the claimant’s character and conduct. This list would set out the key factors to be taken into account under the *IFPA* but it would be non-exhaustive and would allow a court to consider any further relevant factor that may arise.

5.5.6 Based on the underlying principle of testamentary freedom, SALRI’s view is that the lead factor in any list should be the views and reasoning of the testator, so far as they are ascertainable, for making the dispositions in his or her will, or for not making provision or further provision, for a person who is entitled to make an application under the Act. This view accords with the strong view expressed from the public consultation that the wishes of the testator should be the primary consideration. It would also augment and support Recommendation 2 as to the inclusion of a statutory object to the *IFPA* that in considering any family provision claim, a court should seek as far as possible or practicable, to give effect to the wishes of the testator.

5.5.7 Recommendations:

Recommendation 15

SALRI recommends that s 7 of the *Inheritance (Family Provision) Act 1972* which sets out the requirement that a claimant (one who falls within one of the s 6 eligibility categories) must establish that he or she was left without adequate provision for his or her proper maintenance, education or advancement in life should remain as it is.

Recommendation 16

SALRI recommends that a list of the relevant criteria for a court to have regard to in the determination of a claim under the *Inheritance (Family Provision) Act 1972* has benefit and should be added to the *Inheritance (Family Provision) Act 1972*.

Recommendation 17

SALRI recommends that the list (see Recommendation 16) should be an abbreviated version of the Victorian list criteria in s 91A of the *Administration and Probate Act 1958* (Vic) and should be introduced to the *Inheritance (Family Provision) Act 1972* and at a minimum, the court, in determining any claim, be required to consider the following non-exhaustive factors:

- (1) The reasons the testator acted as they did when drafting the will;
- (2) The claimant’s vulnerability and dependence on the deceased;
- (3) The claimant’s contribution to the estate, and
- (4) The claimant’s character and conduct.

³⁹² See further below [7.7.29], [7.8.12].

³⁹³ *Succession Act 2006* (NSW) s 60(1) (‘may have regard to’), s 60(2) (‘may be considered’).

Recommendation 18

SALRI recommends that the lead item on any list (see Recommendations 16 and 17) should be the views and reasons of the testator, so far as they are ascertainable, for making the dispositions made in their will, or for not making provision or further provision, for a person who is entitled to make an application under the *Inheritance (Family Provision) Act 1972*.

Part 6 – Timing of Claims

6.1 Current position in South Australia

6.1.1 Under s 8(1) of the *IFPA*, the general rule is that a claim for family provision must be made within six months from the date of the grant of probate or letters of administration.

6.1.2 Sections 8(2) and (3) provide for an extension of time. The discretion to grant an extension is expressed in unqualified terms but it will not be granted as a matter of course. According to *Re Traeger*,³⁹⁴ an applicant must show a sufficiently weighty reason for not taking proceedings within the usual time limit and that reason must be considered in relation to the expectation created in the minds of other persons entitled to the estate that by the expiration of the prescribed period without any application having been made they will receive their full share. In *Traeger*, the reasons for the delay were a change of circumstances (the applicant had hoped to maintain herself out of what she had been left in the will), efforts to negotiate a private settlement with the other beneficiaries and part of the reason also was simply oversight by her solicitor. The court had no difficulty in granting an extension particularly in view of the fact that the application was only slightly out of time (so length of delay is obviously another relevant factor).

6.1.3 In *Neil v Nott* in 1994, the applicant was four months out of time when he applied for an extension. The Victorian Supreme Court at first instance refused to grant an extension.³⁹⁵ The Full Court dismissed his appeal. The High Court³⁹⁶ unanimously allowed the appeal and held that given the applicant's circumstances, it would require a substantial reason to refuse him four months' indulgence.

6.1.4 Section 8(4) requires an application for an extension of time to be made before the final distribution of the estate. In *Easterbrook v Young*,³⁹⁷ the application was made by the widow of the intestate deceased after the administrator had got in the estate and completed all duties of administration and so held the property as trustee for the beneficiaries ready for distribution to them. There was a line of authority holding that 'final distribution' for the purpose of the legislation had occurred as soon as this happened.³⁹⁸ The NSW Supreme Court refused the application on this basis. On appeal, the High Court overruled these earlier cases and granted the extension. Although the High Court said as a matter of strict law, once the personal representative had completed the duties and assented to the distribution of the estate and therefore held it on trust for the beneficiaries, the estate belonged to those beneficiaries, the legislation should be interpreted in the light of its clear policy of enabling the court to order provision to be paid out of the property held by the personal representative. That view was reinforced by the clear reference to actual distribution in s 8(5).

6.1.5 Section 8(5) protects estate already distributed from an application on extended time (all the estate, even those parts distributed, is available for an application within time).

³⁹⁴ [1948] SASR 248.

³⁹⁵ The applicant conducted his own case and seems to have annoyed the trial judge. The applicant was a solicitor but had lost interest, taken a job as a cleaner and lived in a caravan. See *Neil v Nott* (1994) 121 ALR 148. The High Court noted that the applicant's 'misconceived advocacy has been the cause of his difficulties thus far': at [14].

³⁹⁶ *Neil v Nott* (1994) 121 ALR 148.

³⁹⁷ (1977) 136 CLR 308.

³⁹⁸ See, for example, *Public Trustee v Kidd* [1931] NZLR 1; *Donohue v Public Trustee* [1933] NZLR 477; *Riechelmann v Donkin* [1966] Qd R 96; *Re: McPhail* [1971] VR 534.

6.2 Position in other jurisdictions

6.2.1 Different time frames apply in other States and Territories in Australia.³⁹⁹ For example, the ACT, Northern Territory and New South Wales providing twelve months to make a claim, whereas only three months is provided in Tasmania.

6.2.2 Most States and Territories measure the time period for family provision applications as starting from the date of the grant of probate or administration, except New South Wales and Queensland, where time begins to run at the date of the death of the testator.

6.2.3 A court has the power to extend the time limit for making an application in all Australian jurisdictions, and will consider each individual case on its merits, having regard to matters including the strength of the claim, the length of the time delay, the amount of estate which remains undistributed and the motives of the applicant in applying for an extension of time.

6.3 Issues

Question 1: Is the six months' time frame appropriate?

6.3.1 The main issue arising over the current time frame is whether it should be extended, taking into account the difficult emotional period after a testator's death. An extension of time is able to be granted, provided the final distribution of the estate has not been made.

6.3.2 The National Committee for Uniform Succession Laws recommended that an application for provision should be made no later than 12 months after the date of the death of the deceased person.⁴⁰⁰ In contrast, the VLRC considered that the period of six months from the date of the grant of representation struck an appropriate balance between providing notice to interested persons and efficiency.⁴⁰¹

Question 2: Applications for extensions of time

6.3.3 Seeking an extension of time may be of limited practical benefit in South Australia. This is because once the deceased's estate has been fully distributed (that is, transferred to each of the beneficiaries in the will) after the six months from grant of probate, a person is precluded from making a family provision claim. Typically, the distribution of a deceased's estate will occur relatively soon after the grant of probate. This type of restriction does not apply in New South Wales or Western Australia. One of the issues concerned with timing is whether it is appropriate for a family provision claim to be precluded by the full distribution of the deceased's estate.

³⁹⁹ *Family Provision Act 1969* (ACT) s 9(1) (12 months after grant of probate); *Family Provision Act 1970* (NT) s 9(1) (12 months after grant of probate); *Succession Act 2006* (NSW) s 58(2) (12 months after the date of death of the testator); *Succession Act 1981* (Qld) s 41(8) (nine months after date of death of the testator); *Inheritance (Family Provision) Act 1972* (SA) s 8(1) (six months after grant of probate); *Testator's Family Maintenance Act 1912* (Tas) s 11 (three months after grant of probate); *Administration and Probate Act 1958* (Vic) s 99 (six months after grant of probate); *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 7(2) (six months after grant of probate).

⁴⁰⁰ See Model Bill clause 9 (reproduced at Appendix A). See also Queensland Law Reform Commission (National Committee for Uniform Succession Laws) *Family Provision: Supplementary Report to the Standing Committee of Attorneys General*, Report No 58 (2004) i, 55 [5.18].

⁴⁰¹ VLRC, *Succession Laws*, above n 6, 134 [6.193].

Question 3: Reforming s 14(2) of the IFPA

6.3.4 Section 14 of the Act concerns the liability of administrators after the distribution of the estate. Section 14(2) provides that notice of the claim shall lapse and be incapable of being renewed unless, before the expiration of three months after the administrator receives notice of the claim, a copy of an application by the claimant has been served on the administrator. There is some ambiguity with respect to how s 14(2) interrelates with s 8 of the *IFPA*. In that regard, one interpretation is that s 14(2) increases the timeframe for making claims by an additional three months after the administrator receives a notice of the claim if notice is given toward the end of the six month period or reduces the six month time frame if notice is given early. This interpretation would result in claims for family provision being allowed anywhere from three to up to nine months from the date of the grant of probate or letters of administration depending on when notice is given. Another interpretation is that s 14(2) has no effect and the six month time limit applies regardless of notification of intent to claim. One of the issues raised during the consultation is whether s 14(2) should be repealed to remove the ambiguity concerning time limits.

6.4 Consultation data overview

6.4.1 At the Adelaide Legal Experts Roundtable, there was no strong support for an extension of the time period from six to twelve months, although there was general agreement that some adjustments should be made to the current rules and provisions governing the timing of family provision claims. For example, a number of participants supported commencing the prescribed six month time period from the date at which the claim was filed with the court, rather than when it was served. This could help overcome difficulties associated with identifying and contacting executors. Others suggested having six months to file rather than six months to serve, since an unscrupulous executor could avoid service for some time.

6.4.2 Participants at the Berri Legal Experts Roundtable briefly discussed the issue of timing noting that a proactive and robust approach to mediation and conciliation could be further supported if the rules around timing were changed to a 12 month period, or even ‘six months or until after the matter has been heard by a Master’. Mr O’Brien opposed interfering with the current timelines as there is no reason why the dispute should be extended as relationships will not improve with the passage of time.

6.4.3 On the issue of whether the current six month time frame for making family provision claims is appropriate, a majority of 27 people in the surveys said yes. Four people were of the view that it should be longer while six people agreed it should be shorter. Reasons to make it shorter were that three months is sufficient, the time frame should be minimal, and estate should be distributed for beneficiaries who may need the money to live on.

6.4.4 Case example

One of the case examples given was described as follows: ‘In my case, my daughter has proven herself incapable of mediation and conciliation. During the divorce and the property settlement afterwards, the security had to be called to remove her from the building on more than one attempt. She seemed oblivious to keeping down costs ... happy to keep shooting herself in the foot. The situation was worsened because they took more than two years to attempt settlement and lost the “free kick” provisions of which they could have availed themselves. I would love to think that six months could be enough, but as a widow of five years, things are still pretty raw in the first year. Could lead to sense of “being rushed” to settle ... or being left to simmer and go toxic.’

6.4.5 The Legal Services Commission, in their submission, suggested that due to varying cultural practices relating to mourning protocols, it would be beneficial to undertake further research in order to determine whether the relatively short time limit of six months is sufficient for our diverse community. Similarly, one anonymous submission linked opportunistic claims with the current timing: ‘common experience shows this is a time when emotions run high, family relationships become strained, and individuals may not be acting as rationally as usual. Combine this frame of mind with the well-known emotional and psychological effects of litigation, and you have a recipe for an ugly, hard-fought battle.’

6.4.6 The Public Trustee supported the current six month time frame and were of the opinion that commencing time limits from the date of death is not appropriate because some estates involve death in circumstances ‘on or about’ and procedurally probate provides a reference point from which the estate is to be administered.

Applications for extensions of time

6.4.7 On the second issue of whether it is appropriate for a family provision claim to be precluded by the full distribution of the estate, five people agreed that it is appropriate. One comment noted: ‘I think that the full distribution of assets should preclude claims so the system needs to be run well so that distribution doesn’t drag on too long.’ Another said: ‘Claimants should not be permitted much scope to delay legal proceedings where an estate otherwise would be ready for distribution.’ In contrast, three people were of the view that it was inappropriate, as no distribution should be made prior to claims being finalised, and especially when the claim is made within the time limits and the claim is advanced in a reasonably timely manner by the claimants and by their legal representatives. One person commented: ‘Not being informed as to where/when my step-father died meant that I could not seek any claim on his estate. It all went to his nephews and nieces, who had nothing to do with him during my childhood and only sought him out when he moved into his mother’s house after failing health and impending death.’

6.4.8 The Public Trustee was of the view that it is appropriate to preclude claims after a suitable period of time has been provided in which to make a claim (six months currently).

Other issues

6.4.9 There was also strong support for amendment of s 14(2) of the *IFPA* which provides for time frames around the liability of administrators after the distribution of the estate. For example, some participants noted that, with respect to s 14(2), it is unclear whether or not the three month notification period operates to extend the six month time limit (if notification is given toward the end of that period), or to reduce the six month limit (if notice is given early), or if it has no effect and the six month time limit applies regardless of notification of intent to claim. Ms Iwaniw described the current provision as ‘idiotic’ and stated that it ‘doesn’t work’.

6.4.10 Other procedural issues were raised, especially by representatives of the Supreme Court, in consultation.

6.4.11 One suggestion was to expand the scope of r 316 of the *Supreme Court Civil Rules 2006*. This rule allows claims under the *IFPA* if ‘there are reasonable grounds on which to conclude that the net estate of the deceased that will be available for distribution will be less than \$500 000’ and ‘it is in the interests of justice to do so’. In such circumstances, the Supreme Court may determine an inheritance claim ‘summarily’, meaning the action can be determined by a Master of the Court on the basis of

evidence that does not conform with the rules of evidence — the primary object being the minimisation of costs and the expeditious, but just, resolution of the action. SALRI has heard that this procedure is comparatively rarely used.

6.5 The Institute's views

6.5.1 Based on the views in consultation, SALRI is not persuaded that the present law relating to timing under the *IFPA* needs to be changed. However, consultation with the legal profession has clearly identified that s 14(2) of the Act is creating ambiguity and difficulty, and succession practitioners are unsure as to how the three month time period in s14(2) operates along with s 8. SALRI considers that the provisions in s 8 deal with timing issues sufficiently and s 14(2) is unnecessary and does not serve any clear purpose under the Act.

6.5.2 SALRI sees the benefit of the summary procedure in r 316 for the determination of claims under the *IFPA*, especially in the context of small estates. Rule 316 should help address costs and provide the parties with a means for their views to be heard and considered (a theme highlighted by Ms Iwaniw). However, very few views were expressed in consultation about extending the scope of r 316. SALRI notes the recurring difficulty in defining a 'small estate'.⁴⁰² The Law Society has previously supported \$500 000 as the threshold for a small estate.⁴⁰³ Given these factors, SALRI considers that it is inappropriate to express any view on expanding the existing \$500 000 jurisdiction for the purposes of r 316 but rather encourages greater education and use of this procedure.

6.5.3 Recommendations:

Recommendation 19

SALRI recommends that the current law relating to timing in s 8 of the *Inheritance (Family Provision) Act 1972* should remain as it is.

Recommendation 20

SALRI recommends that s 14(2) of the *Inheritance (Family Provision) Act 1972*, concerned with timing aspects around the liability of administrators after the distribution of the estate, should be repealed.

Recommendation 21

SALRI recommends that r 316 of the *Supreme Court Civil Rules 2006* which allows the summary determination of a claim under the *Inheritance (Family Provision) Act 1972* in respect of an estate less than \$500 000 should remain as it is, but SALRI encourages greater education and use as to this procedure.

⁴⁰² See also SALRI, above n 1, 30 [3.3.5]–[3.3.7].

⁴⁰³ See below n 476.

Part 7 – Costs and Court Processes

7.1 Current position – South Australia and other jurisdictions

Costs in South Australia in general and probate⁴⁰⁴

7.1.1 The overarching proposition in civil proceedings is that costs are in the court’s discretion. This position is ‘firmly embedded’⁴⁰⁵ in the *Supreme Court Act 1935* (SA) and r 263 of the *Supreme Court Civil Rules 2006*. ‘The discretion is unfettered, but must be exercised judicially.’⁴⁰⁶ As a general rule, a successful litigant is entitled to an order that costs follow the event.⁴⁰⁷ Supplementary Rule 195 of the 2014 *Supreme Court Supplementary Rules* is intended to operate consistently with r 263 of the *Supreme Court Civil Rules 2006*. An order modifying the operation of both rules may be made by a court in an appropriate case if it is just to do so.

7.1.2 There are two well recognised exceptions to the general ‘loser pays’ costs rule in probate cases. As Sir JP Wilde in 1863 in the English Probate Court case of *Mitchell v Gard*⁴⁰⁸ outlined:

It is the function of this Court to investigate the execution of a will and the capacity of the maker, and having done so, to ascertain and declare what is the will of the testator. If fair circumstances of doubt or suspicion arise to obscure this question, a judicial inquiry is in a manner forced upon it. Those who are instrumental in bringing about and subserving this inquiry are not wholly in the wrong, even if they do not succeed ... the Court deduces the two following rules for its future guidance: first, if the cause of litigation takes its origin in the fault of the testator or those interested in the residue, the cost may properly be paid out of the estate; secondly, if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent.⁴⁰⁹

7.1.3 The reference to the testator’s fault, as Kourakis CJ notes, is puzzling.⁴¹⁰ Rather, the focus should always remain on the conduct of the litigants.⁴¹¹ For the purposes of the costs discretion, a party may be at fault by litigating without merit, but responsibility for that should not be placed on the testator who, obviously enough, plays no part in the litigation⁴¹² (and is not before the court to explain his or her reasoning).

⁴⁰⁴ SALRI has drawn heavily on the helpful overview of the law provided by Kourakis CJ in *Roche v Roche and Anor* (No 2) [2017] SASC 75 (5 June 2017).

⁴⁰⁵ *Ibid* [5].

⁴⁰⁶ *Copping v ANZ McCaughan Ltd* (1995) 63 SASR 523, 527–528 (King CJ, Mohr and Nyland JJ agreeing).

⁴⁰⁷ *Supreme Court Civil Rules 2006* r 263(1).

⁴⁰⁸ *Mitchell & Anor v Gard & Anor* (1863) 3 Sw & Tr 275.

⁴⁰⁹ *Ibid* 277–278.

⁴¹⁰ *Roche v Roche* (No 2) [2017] SASC 75 (5 June 2017) [8].

⁴¹¹ *Ibid*.

⁴¹² *Ibid*.

7.1.4 The exceptions established in *Mitchell* were later approved and applied by the High Court of Australia in 1962 in *Middlebrook v Middlebrook*.⁴¹³ In 2012, the principles affirmed in *Middlebrook* were applied by the South Australian Full Court in *Hall v Carney & Ors (No 2)*.⁴¹⁴

7.1.5 The probate costs rule may be in need of re-evaluation. In 2014, in the South Australian case of *Fidler v Burgess*⁴¹⁵ (even though the parties in this case had agreed that the costs of and incidental to the proceedings of both parties be paid out of the deceased's estate on a party/party basis), the Chief Justice observed: 'The probate costs rule is arguably anachronistic in modern times in which there is a greater concern with the need for proportionality in litigation. It may soon be necessary to reconsider it.'⁴¹⁶ There have been subsequent judicial warnings that the probate exceptions might be invoked more sparingly and a stricter approach to costs adopted.⁴¹⁷

7.1.6 In *Roche*, Kourakis CJ observed:

The underlying rationale for departing from the ordinary rule in some testamentary capacity cases remains. The risk that an aged, infirm or vulnerable testator will be manipulated in private, and away from independent scrutiny, to execute a testamentary document has subsisted through the ages. However, its relative importance as a costs consideration has been diminished by contemporary social conditions and professional practices. The expansion of public aged residential care has reduced the physical isolation of the aged. Medical care by general practitioners is readily available and the degree of specialist intervention and referrals for pathological testing is more extensive. Aged persons are not as confined and are more socially active than they once were. Record keeping by professionals is more detailed and their notes more readily accessible. Audio-visual records are more common. Nonetheless, invoking this Court's testamentary jurisdiction may sometimes be sufficiently warranted to depart from the ordinary rule even if the challenge to testamentary competence ultimately fails. Cases in which a testator, suffering a material cognitive impairment has made a Will, particularly one which departs from previous testamentary dispositions, whilst under the close care of a potential beneficiary or beneficiaries, with no or very little independent evidence of capacity, are examples. A person will not be penalised for invoking this Court's supervisory jurisdiction in probate when the circumstances call for an investigation into the validity of a testamentary document. However, a person who challenges a testamentary disposition will risk an adverse costs order for persisting in an unmeritorious action after the discovery of evidential material which largely dispels any reasonable concerns. If a party ignores the weight of that evidential material and prosecutes an ultimately unmeritorious case to trial, the usual order that costs follow the event will be made.

⁴¹³ (1962) 36 ALJR 216. Dixon CJ explained: 'No doubt in probate suits the *prima facie* rule is that, as in other litigation, costs follow the event. But in probate suits there are considerations which more readily affect the application of this rule than in most other forms of litigation... There are in the present case circumstances which would naturally lead the caveator to think that an investigation of the validity of his father's last will was justified. If this case were judged on its general circumstances only, I think that adequate reasons would be seen for entertaining some doubt as to the validity of the will. It is only as a result of investigations that the reasons for finding affirmatively in favour of the testator's testamentary capacity distinctly appear. In these circumstances, the proper course is to apply the principle enunciated by Sir Gorrell Barnes P [in *Spiers v English*] that "if the circumstances lead reasonably to an investigation of the matter then the costs may be left to be borne by those who have incurred them": at 217. See also *Boughton v Knight* (1873) LR 3 P & D 64; *Twist v Tye* [1902] P 92; *Re Hodges*; *Shorter v Hodges* (1988) 14 NSWLR 698, 709; *Spiers v English* [1907] P 122.

⁴¹⁴ [2012] SASCFC 105 917 (September 2012).

⁴¹⁵ [2014] SASC 98 (7 August 2014).

⁴¹⁶ *Ibid* [65].

⁴¹⁷ See, for example, *Harkness v Harkness (No 2)* [2012] NSWSC 35 (2 February 2012); *Barbon v Tessar (No 20)* [2015] VSC 597 (30 October 2015); *In the Estate of Frances Ponikvar (Deceased) (No 2)* [2016] SASC 166 (4 November 2016).

Exceptions from the ordinary order will not be made to allow beneficiaries a forum in which to air family disputes with impunity.⁴¹⁸

7.1.7 The Chief Justice's comments, developing on those in *Burgess*, foreshadow a stricter judicial approach to costs.⁴¹⁹ It remains to be seen whether this view is the beginning of a major change in approach on costs in probate cases.

7.2 Costs and family provision

7.2.1 The court under the *IFPA* 'may make such order as to the costs of any proceeding under this Act as it considers just'.⁴²⁰ The costs rules that apply are those that apply to any civil claim⁴²¹ (as discussed above) because the *IFPA* does not contain costs provisions specific to family provision claims. Despite this, the kinds of costs orders that courts have made in family provision cases have often been different from the orders that they have made in other kinds of civil claim.

7.2.2 In *Singer v Berghouse (No 2)*,⁴²² for example, Gaudron J confirmed the then usual costs practice in this area of practice:

Family provision cases stand apart from cases in which costs follow the event. Leaving aside cases under the [then *Family Provision Act 1982* (NSW)] which, in s 33, make special provision in that regard, costs in family provision cases generally depend on the overall justice of the case. It is not uncommon, in the case of unsuccessful applicants, for no order to be made as to costs, particularly if it would have a detrimental effect on the applicants' financial position. And there may even be circumstances in which it is appropriate for an unsuccessful party to have his or her costs paid out of the estate.⁴²³

7.2.3 Hallen J of the NSW Supreme Court has confirmed (and arguably strengthened) these principles and has warned family provision litigants and their lawyers in no uncertain terms that any notion that the costs (including those of an unsuccessful claimant) will automatically come out of the estate is 'thoroughly discredited'.⁴²⁴ His Honour further comments:

(d) Parties should not assume that this type of litigation can be pursued, safe in the belief that costs will be paid out of the estate: *Carey v Robson (No 2)* [2009] NSWSC 1199; *Forsyth v Sinclair (No 2)* [2010] VSCA 195. It is now much more common than it previously was for an unsuccessful applicant to be ordered to pay the defendant's costs of the proceedings (*Lillis v Lillis* [2010] NSWSC 359 at [23]) and be disallowed his, or her, own costs.

(e) Where, as here, the issue is whether the unsuccessful applicant should bear the costs of the successful Defendant, s 98 of the *Civil Procedure Act*, and the rules quoted above, will apply, and, in the absence of some good reason to the contrary, there should be an order that the costs of

⁴¹⁸ [2017] SASC 75 (5 June 2017) [17]–[18].

⁴¹⁹ [2014] SASC 98 (7 August 2014) [57]–[65].

⁴²⁰ *Inheritance (Family Provision) Act 1972 (SA)* s 9(8).

⁴²¹ *Supreme Court Civil Rules 2006* (SA).

⁴²² (1993) 114 ALR 521.

⁴²³ *Ibid* 522.

⁴²⁴ *Harkness v Harkness (No 2)* [2012] NSWSC 35 (2 February 2012), [18]. See also *In the Estate of Frances Ponikvar (Deceased) (No 2)* [2016] SASC 166 (4 November 2016); *Hinderry v Hinderry (No 2)* [2016] NSWSC 1577 (9 November 2016); *Penfold v Predny* [2016] NSWSC 472 (21 April 2016), [161]–[167]; *Meres v Meres (No 2)* [2017] NSWSC 523 (4 May 2017).

the successful defendant be paid by the unsuccessful plaintiff: *Moussa v Moussa* [2006] NSWSC 509 at [5].

(f) An unsuccessful plaintiff will, usually, be ordered to pay costs where the claim was frivolous, vexatious, made with no reasonable prospects of success, or where she, or he, has been guilty of some improper conduct in the course of the proceedings: *Re Sitch* (No 2) [2005] VSC 383.

(g) In small estates particularly, the court should be careful not to foster the proposition that obstinacy and unreasonableness will not result in an order for costs: *Dobb v Hacket* (1993) 10 WAR 532, at 540.

...

(i) In exercising its discretion in relation to costs, the court will have regard to “the overall justice of the case”: *Jvanich v Kennedy* (No 2). The “overall justice of the case” is “not remote from costs following the event”. However, the court may be more willing to depart from the general principle in proceedings for a family provision order than in other types of case: *Moussa v Moussa*; *Carey v Robson* (No 2); *Bartkus v Bartkus* [2010] NSWSC 889 at [24].

...

(k) There are also other circumstances that may lead the court to order payment out of the estate of the costs of an unsuccessful Plaintiff. The court may allow an unsuccessful plaintiff costs out of the estate, if in all the circumstances the case was meritorious, reasonable or “borderline”: *McDougall v Rogers*; *Estate of James Rogers*; *Re Bodman* [1972] Qd R 281; *Shearer v The Public Trustee* (NSWSC, Young J, 21 April 1998, unreported).⁴²⁵

7.2.4 However, there remains a strong concern that such warnings have gone unheeded in practice and a court may well order costs against the deceased estate for unsuccessful family provision claims. In addition, the costs of the executor or administrator of the estate (who plays a necessary but essentially neutral role), who often has to defend a family provision claim, will ordinarily come from the deceased estate. In some cases, even settling early will not prevent the costs involved having an unfair effect on the beneficiaries of the estate as the costs of the administrator and the other parties are likely to be paid out of the estate.

7.2.5 It is stated that current practices as to costs in family provision claims, far from discouraging opportunist or speculative claims, may actually encourage such claims.⁴²⁶ SALRI has been told in consultation that the regular practice remains that the costs of all parties (including the claimant) come out of the estate in the likely event that a claim is settled (the terms of any settlement generally have this as one of the terms).

7.2.6 The South Australian rules of court relating to proceedings under the *IFPA* also give powers to the court to determine claims with an estimated value below \$500 000 summarily⁴²⁷ where ‘it is in the interests of justice to do so’ and to make costs orders against parties who could have used this procedure but did not do so and thereby incurred avoidable costs.⁴²⁸ The primary object of a family provision order made summarily is ‘the minimisation of costs and an expeditious but just resolution of the action’.⁴²⁹

⁴²⁵ Ibid.

⁴²⁶ VLRC, *Succession Laws*, above n 6, 100 [6.10], 100–102 [6.13]–[6.20].

⁴²⁷ *Supreme Court Civil Rules 2006* r 312(12).

⁴²⁸ Ibid r 312(13).

⁴²⁹ Ibid r 312(12A)(d).

7.3 Issues

7.3.1 There is a strong public interest in promoting access to justice and addressing high legal costs, including in succession disputes. The need to address high legal costs and develop more flexible, efficient and effective ways to progress and resolve civil disputes, especially succession disputes, in South Australia and elsewhere,⁴³⁰ has been widely raised.⁴³¹ SALRI has previously discussed this point elsewhere.⁴³² There have been particular concerns about the potentially high and disproportionate costs in resolving succession disputes.⁴³³ The importance of addressing legal costs and supporting and promoting access to justice for all parties in the resolution of succession disputes (especially for small estates) is obvious. The professional role of lawyers involved in succession disputes and advising clients is important in both promoting access to justice and addressing legal costs.

7.3.2 There is also concern about what are perceived as greedy and opportunistic claims (which inevitably receive media attention) and perceptions that there is more value in continuing to litigate rather than to settle a family provision claim. Claims brought or treated this way disrupt the administration of the deceased's estate, and have the potential to cause family disharmony and high legal costs, particularly if the claim does end up in court. It was also pointed out to SALRI in consultation that the nature and number of claims does not demonstrate that the current law is working well. It was emphasised that the high settlement rate of family provision claims in South Australia, far from indicating that the current system is working, actually suggests the contrary as the unpredictability of the current law, inroads into testamentary freedom and high legal costs all compel settlement of claims, even if they appear tenuous or opportunistic.

7.3.3 For many commentators and lawyers who express concern that the current family provision laws have shifted too far in favour of opportunistic family members, and too far away from preserving testator's intentions, costs is a critical issue.⁴³⁴ If the costs associated with a person making a claim for

⁴³⁰ 'It is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court': *Access to Justice: Final Report* (HMSO, July 1996) 2 [2] <<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/contents.htm>>.

⁴³¹ See, for example, Chief Justice Tom Bathurst, 'Opening Address' (Speech delivered at the 2011 Advanced Alternative Dispute Resolution Workshop, Sydney, 13 August 2011) <<http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bathurst/bathurst130811.pdf>>; Chris Merritt, 'Middle Australia excluded as court costs put "justice out of reach"', *The Australian* (online), 18 May 2012 <<http://www.theaustralian.com.au/business/legal-affairs/middle-australiaexcluded-as-court-costs-put-justice-out-of-reach/story-e6fgr97x-1226359315208>>; Candice Keller, 'Justice beyond the Mean of Most as Legal Costs Double', *The Advertiser* (online), 15 July 2012, <<http://www.adelaidenow.com.au/news/southaustralia/justice-beyond-the-means-of-most-as-legal-costs-double/story-e6frea83-1226426669650>>; Community Law Australia, *Unaffordable and Out of Reach: the Problem of Access to Justice* (Community Law Australia, 2012); Miles Kemp, 'DIY Justice as South Australian Legal Costs too much of many', *The Advertiser* (online), 21 October 2013, <<http://www.adelaidenow.com.au/news/south-australia/diy-justice-as-south-australian-legal-costs-too-much-formany/story-fni6uo1m-1226743505317>>.

⁴³² SALRI, above n 1, 35 [3.4.21].

⁴³³ See, for example, *Sherborne Estate (No 2): Vanvalen v Neaves* (2005) 65 NSWLR 268, [16], [27]–[28]; Vines, above n 9; Justice P A Bergin, 'Executors/Trustees and Mandatory Mediations' (Paper presented at the proceedings of the Society of Trust and Estate Practitioners in the Banco Court of the NSW Supreme Court, 25 November 2009) [6]–[9] <<http://www.supremecourt.justice.nsw.gov.au>>; Viellaris, above n 177.

⁴³⁴ See, for example, VLRC, *Succession Laws*, above n 6, 100 [6.10], 100–102 [6.13]–[6.20]; Tilse et al, *Having the Last Word? Will Making and Contestation in Australia*, above n 121, 17; Drury, above n 124.

family provision come out of the deceased's estate (which they generally do in practice), there is encouragement for eligible family members to make a claim, even if they do not have strong grounds (or could be described as a 'speculative claim').

7.3.4 For example, imagine an adult son who was estranged from his mother for 10 years before his mother's death and was excluded from his mother's will, which instead left the mother's entire estate to her daughter who faithfully cared for her in old age. The adult son may even be financially comfortable. If the costs come out of the deceased mother's estate, this son could still make a claim for family provision under the *IFPA* without any financial risk to himself. Even if the son's claim is weak or tenuous, the daughter or the executor of the mother's estate may well decide to settle the son's claim (sometimes known as 'go away money') with the costs of all parties coming out of the estate, rather than risk the stress and uncertainty of taking the claim to court with the potential of a large costs award later down the track.

7.3.5 The financial side of running a dispute for any length of time often plays a large factor in the parties reaching a compromise.⁴³⁵ Even without the cost pressures, 'litigation fatigue' is often observed by lawyers whereby the sheer length of time a case takes to resolve, often accompanied by the emotional stresses of the action, often lead to the parties resolving the dispute on their own terms without the need for the court to determine the matter.⁴³⁶ All too often, the stress and large costs of a case going to court, and the uncertain outcome, are such that the claim will be settled out of court, even if the claim may seem greedy or unfounded. Succession lawyers have confirmed to SALRI in consultation that this is a strong theme in claims under the *IFPA*. The high rate of settlement of family provision claims does not suggest that current law and practice is working effectively (in fact it suggests the opposite).

7.3.6 If the case proceeds to court, and even if the claimant is ultimately unsuccessful and ordered to pay their own costs, the estate will usually still be reduced by the costs associated with the 'personal representative' (that is the executor original or administrator of the will) in defending the claim.

7.3.7 Other costs related issues have been described as 'disproportionate costs'. That is, circumstances where a successful claim for family provision is made, and a proportion of the estate ordered to the eligible family member along with a large costs order which also comes out of the estate. This can leave very little in the estate for those family members or other beneficiaries originally provided for by the testator. This is a particular theme in small estates where the legal costs can prove prohibitive.

7.3.8 A study by Professor Prue Vines of similar family provision litigation in New South Wales and Victoria revealed that it is dogged by disproportionate costs, often greatly depleting the estate:

Unsurprisingly, the smaller the estate the more likely disproportionate costs were to be found. The factors which appeared to contribute to this included the failure of mediation, excessive trial length, higher level lawyers than necessary, and possibly a perception that costs of litigation would be taken out of the estate ... The greatest disproportion in costs was most likely to be found where the litigation was amongst siblings; the next greatest was where the litigation was between the children of the first spouse and a second spouse.⁴³⁷

⁴³⁵ See, Tilse et al, *Having the Last Word? Will Making and Contestation in Australia*, above n 121, 17–18; VLRC, *Succession Laws*, above n 6, 99 [6.8], 100–102 [6.13]–[6.20].

⁴³⁶ See, for example, Tilse et al, *Having the Last Word? Will Making and Contestation in Australia*, above n 121, 17–18; VLRC, *Succession Laws*, above n 6, 102–103 [6.23]–[6.24]; McGregor-Lowndes and Hannah, 'Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs', above n 51, 63.

⁴³⁷ Vines, above n 9, ix.

7.3.9 Hallen AJ has also noted the particular problem of high costs in family provision disputes, especially in small estates. In *Smith v Smith (No 2)*,⁴³⁸ his Honour exhorted:

I commend to parties involved in proceedings in which a family provision order is sought, that every effort, particularly in a relatively small estate, as this one is, to conduct negotiations frankly and openly, to try to resolve the proceedings, and if there are issues or concerns about an offer that has been made, to raise any issues at the first convenient opportunity with the offeror's solicitors, so that any ambiguities, or other concerns, can be resolved. The Court should be able to see that the parties have considered what is being offered in a sensible, practical, and commercial way.⁴³⁹

7.3.10 A somewhat different view about costs was expressed by the VLRC. The VLRC Report commented that 'at the general level dealt with in this chapter, the Commission considers that costs rules in their application to succession proceedings are working satisfactorily and do not require legislative amendment [and] the Commission has received no submission expressing a contrary view.'⁴⁴⁰ This view is perhaps surprising, given that concerns about high costs in family succession cases had been expressed to the VLRC.⁴⁴¹

7.3.11 One further issue is whether costs should be the subject of legislation or left to the courts.

7.3.12 In this context, New South Wales has a specific legislative provision covering costs in family provision proceedings. Section 99(1) of the *Succession Act 2006* (NSW) provides that a court may order that the costs in family provision proceedings 'in relation to the estate or notional estate of a deceased person (including costs in connection with mediation) be paid out of the estate or notional estate, or both, in such manner, as the Court thinks fit'. The section further provides that regulations 'may make provision for or with respect to the costs in connection with proceedings under this Chapter, including the fixing of the maximum costs for legal services that may be paid out of the estate or notional estate of a deceased person.'

7.3.13 There is no specific legislative provision in South Australia relating to costs under the *IFPA*.⁴⁴²

7.3.14 The VLRC did not support statutory intervention in this area. It concluded that: 'The judges are privy to the legal and factual details and nuances of each case that comes before them. They are best placed to apply the costs rules in the exercise of their discretion. They are also best placed to improve or clarify, as necessary, current costs rules or practices.'⁴⁴³ The Hon Tom Gray QC made a similar point in consultation.

7.4 Mediation and conciliation

7.4.1 A vital part of the solution to the wide concerns around costs, and the effect that costs may well have on a potential claimant's decision to commence or pursue a claim, lies in reforms that further encourage and support mediation and conciliation as means of resolving inheritance disputes, ideally at an early stage before costs have mounted. The Hon Tom Gray QC and many succession lawyers highlighted to SALRI in consultation the benefit of proactive and robust judicial mediation, preferably

⁴³⁸ [2011] NSWSC 1105.

⁴³⁹ Ibid [77].

⁴⁴⁰ VLRC, *Succession Laws*, above n 6, 215 [10.20]–[10.21].

⁴⁴¹ Ibid [10.21]. See also at: 100 [6.10], 100–102 [6.13]–[6.20].

⁴⁴² The same applies in the ACT, the Northern Territory, Tasmania, Queensland, Victoria and Western Australia.

⁴⁴³ VLRC, *Succession Laws*, above n 6, 215 [10.21]. See also at 119–120 [6.107]–[6.11.5], Recs 41–43, 120–121.

at an early stage, to contain costs, support the early resolution of potentially valid claims and discourage the continuance of speculative or underserving claims.

7.4.2 The role and benefits of conciliation and mediation and judicial involvement in such procedures in resolving civil disputes has been often noted.⁴⁴⁴ These benefits extend to succession disputes. Proactive judicial mediation has proved ‘highly effective’ in resolving family provision disputes in New South Wales.⁴⁴⁵ Even reluctant, if not unwilling, litigants can benefit from mediation.⁴⁴⁶ As Chief Justice Bathurst notes of recent experience, ‘non-consenting parties can, in fact, become willing participants in the mediation process and participate in constructive and successful outcomes.’⁴⁴⁷

7.4.3 However, SALRI notes from consultation that judicial views and practices differ as to the appropriateness of judicial officers taking part in mediation. It is significant that not all judicial officers share the enthusiasm of Chief Justice Bathurst and others for judicial mediation and view it as inconsistent with the performance of their judicial role. Not all judicial officers feel comfortable to take part in mediation in proceedings before them. As Professor Vicki Waye of the University of South Australia notes: ‘The practice of ADR by judicial officers during the course of proceedings is highly

⁴⁴⁴ See, for example, Judge Margaret Sidis, ‘Judicial Mediation in the District Court’ (2006) 18(9) *Judicial Officers’ Bulletin* 74; Madame Justice Louise Otis and Eric Reiter, ‘Mediation by Judges: A New Phenomenon in the Transformation of Justice’ (2006) 6 *Pepperdine Dispute Resolution Law Journal* 351; Justice Bruce DeBelle, ‘Should Judges Act as Mediators?’ (Speech delivered at the Institute of Arbitrators and Mediators Australia Conference, Adelaide, 1–3 June 2007); Chief Justice James Spigelman, ‘Mediation and the Court’ (2001) 39(2) *Law Society Journal* 63; Chief Justice Marilyn Warren, ‘Should Judges be Mediators’, Supreme and Federal Court Judges’ Conference, Canberra, 27 January 2010) <<http://www.austlii.edu.au/au/journals/VicJSchol/2010/1.pdf>>; Chief Justice Marilyn Warren, ‘Should Judges Be Mediators?’ (2010) 21 *Australian Dispute Resolution Journal* 77; Bruce DeBelle, ‘Alternative Dispute Resolution’ in Tom Gray, Martin Hinton and David Caruso (eds), *Essays in Advocacy* (Barr Smith Press, 2012) 291; Chief Justice T Bathurst, ‘The Role of the Courts in the Changing Dispute Resolution Landscape’ (2012) 35 *University of New South Wales Law Journal* 870. Chief Justice Spigelman describes successful mediation as measured in more than savings in money and time: ‘The opportunity of achieving participant satisfaction, early resolution and just outcomes are relevant and important reasons for referring matters to mediation’: Chief Justice James Spigelman, ‘Address to the LEADR Dinner’ (Speech delivered at LEADR Dinner, Sydney, 9 November 2000) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman_speeches_2000.pdf>. Mediation as practiced by Australian judicial officers does not involve a judge behaving in the same manner as a privately appointed mediator may behave as judges, unlike private counterparts, are bound to observe due process and to uphold the dignity and impartiality of their role and should not caucus or confer with the parties on an individual basis. See Vicki Waye, ‘The Role of Judges and the Courts in Encouraging the Use of Alternative Dispute Resolution in Australia’ (Paper presented at the International Seminar in Relationships between ADR & Judicial Proceedings, Beijing, China 26 November 2009) <http://search.ror.unisa.edu.au/record/UNISA_ALMA51108992210001831/media/digital/open/991591096901831/12143237940001831/13143234840001831/pdf>.

⁴⁴⁵ Justice P Bergin, ‘The Objectives, Scope and Focus of Mediation legislation in Australia’ (Paper presented at the ‘Mediate First’ Conference, Hong Kong, 11 May 2012), 9 [23] <<http://www.austlii.edu.au/au/journals/NSWJSchol/2012/24.pdf>>. Bergin J notes: ‘In 2010 and 2011, the Supreme Court of New South Wales referred a total of 933 family provision disputes to court-annexed mediation. Of these, 531 (56.9%) settled at mediation. In addition, the parties were still attempting to reach a negotiated settlement in 242 cases (25.9%), leaving only 160 cases (17.1%) in which the parties conclusively decided not to settle at the end of mediation’: at 9 [23].

⁴⁴⁶ ‘There have been significant successes in court-referred mediation schemes. Statistics from the NSW Supreme Court evidence significant success in court annexed mediation. In 2009, almost 60% of cases referred to a mediation program in NSW settled during mediation. A report from Victoria in the same year found that the 43.2% of cases surveyed that were referred to mediation finalised the dispute, along with another 27.4 per cent that settled through negotiation; only 7% were resolved at trial. These figures demonstrate that there are instances in which the nature of the dispute and attitudes of the parties make an order to attend mediation fruitful, even where the parties do not consent’: Bathurst, above n 444, 876. There has been similar success in South Australia SALRI was told in consultation.

⁴⁴⁷ Bathurst, above n 444, 876.

controversial in Australia where the formalist ideal of the court providing a reasoned judgment comprising the objective determination of legal rights and obligations is not only a long standing historical and cultural tradition but also constitutionally protected.⁴⁴⁸

7.5 Alternative options for costs

7.5.1 There has been concern about existing practices in relation to costs in succession cases.⁴⁴⁹ A range of law reform options have been identified to help alleviate the above concerns relating to costs in family provision claims.

7.5.2 One approach is to adopt a simple ‘loser pays’ rule, which would mean that an unsuccessful claimant would bear the costs of both parties to the proceedings. This would provide a disincentive to those otherwise considering speculative or opportunist claims, but it may be too harsh for those claimants who are genuinely deserving or may genuinely consider that they have a dependency on the deceased, such as adult children with disabilities, but to whom the court ultimately declines to exercise its discretion in favour.

7.5.3 Another approach is to make family provision claims ‘no cost’, however this is likely to encourage, rather than discourage, speculative and opportunistic claims and could place considerable pressure on the administration of justice in the courts.

7.5.4 A hybrid approach has been pursued in Victoria, which has a specific provision to protect ‘personal representatives’ of the estate such as executors or administrators from costs orders in family provision claims (see s 99A of the *Administration and Probate Act 1958* (Vic)). This provision goes some way towards protecting the deceased estate from unfounded or speculative claims and would allow personal representatives to resist settlement offers in favour of a final outcome in court.

7.6 National Committee and costs

7.6.1 The National Committee stated that the issue of costs in family provision cases is ‘extremely sensitive’.⁴⁵⁰ It noted that costs in small estates are ‘often prohibitive’ and the concern that persons who may be formally eligible to apply, ‘but who may have no justifiable claim, can use their formal eligibility to threaten action as a means of forcing a beneficiary to settle out of court for fear of the costs’.⁴⁵¹ The National Committee noted that only New South Wales⁴⁵² and Victoria⁴⁵³ made partial legislative provision for costs in family succession claims but it is clear that courts in all jurisdictions possess other powers to make appropriate orders as to costs.⁴⁵⁴

⁴⁴⁸ Waye, above n 444, 10. Waye lists several concerns of judicial involvement in mediation: at 10–11.

⁴⁴⁹ See, for example, *Fielder v Burgess* [2014] SASC 98 (7 August 2014) (Kourakis CJ) [62]–[65].

⁴⁵⁰ National Committee (MP 28), above n 3, 134.

⁴⁵¹ Ibid 135.

⁴⁵² *Succession Act 2006* (NSW) s 99 (formerly *Family Provision Act 1982* (NSW) s 33).

⁴⁵³ *Administration and Probate Act 1958* (Vic) s 97. The *Wills Act 1997* (Vic) amended s 97 of the *Administration and Probate Act 1958* (Vic) to allow a court to make any order as to costs in family provision proceedings ‘that is, in the court’s opinion, just’. A court was also entitled to order the costs of the application to be met by the applicant if satisfied that the family provision claim had been made ‘frivolously, vexatiously or with no reasonable prospect of success’. This provision has since been repealed. The VLRC noted the view in consultation that this provision had proved ineffectual and, quoting the Law Institute of Victoria, was ‘rarely enforced by the courts’: VLRC, *Succession Laws*, above n 6, 118 [6.105]. See also at 119–120 [6.107]–[6.11.5].

⁴⁵⁴ National Committee (MP 28), above n 3, 135.

7.6.2 The National Committee did not support a specific legislative provision covering costs in family provision proceedings⁴⁵⁵ and considered that costs in family provision was outside the remit of its reference. It concluded:

The National Committee is of the view that the model legislation should not include specific reference to costs but that each jurisdiction should be strongly encouraged to consider the most appropriate method for reducing the costs to the estate and the costs of parties of applications for family provision. Courts currently have the ability to award costs against unworthy applicants even though this is not specified in the legislation. However, pre-trial procedures to reduce costs and to encourage settlements should be promoted to deter those matters from going to court. It might also be considered appropriate in some jurisdictions to have the Registrar of the Court handle minor matters or matters involving estates valued at less than a certain amount. Again, this is a procedural matter which would not be appropriate to insert in the model legislation.⁴⁵⁶

7.7 Consultation data overview

Question 1: Is the current approach working?

7.7.1 SALRI has been widely informed in its consultation that, whatever case law, Rules or Practice Directions might strictly provide, the general rule⁴⁵⁷ is that costs (including of the claimant) will come out of the estate in relation to claims under the *IFPA*, especially where such cases are settled (as the vast majority are) and a term of settlement is that all costs, including those of the claimant, come out of the estate.⁴⁵⁸ Participants at the various Roundtables noted that this practice also encourages speculative and greedy claims and even acts as an ‘incentive’ to bring such claims. This accords with research. As Professor Vines also notes: ‘The argument that taking costs out of the estate encourages wasteful litigation is commonly accepted.’⁴⁵⁹

7.7.2 It was asserted by some participants at the Adelaide Roundtable that there are ‘only a small percentage of cases where the judge makes a cost order because most cases settle [and are] therefore not a huge issue’. The small number of claims made each year therefore indicates that the current system is largely working well and the problem of greedy or opportunistic claims should not be overstated.

7.7.3 However, other succession practitioners, notably at Berri and Mt Gambier, disagreed with this view and said that this confidence that the current system is working well is misplaced. There was a clear view that the fear of the costs coming out of the estate (combined with the uncertainty and unpredictability of the outcome should a claim progress to trial)⁴⁶⁰ places strong pressures to settle, even seemingly tenuous or unfounded claims. Participants at the Berri Roundtables particularly noted that the current approach to costs is plainly not working. One attendee remarked: ‘It’s go away money nine times out of 10 as the beneficiaries can’t risk going to trial.’

⁴⁵⁵ The National Committee subsequently noted that it remained ‘generally of the view that the court should retain an unfettered discretion in relation to awarding costs in family provision proceedings’: National Committee (R 58), above n 100, 76 [5.89].

⁴⁵⁶ National Committee (MP 28), above n 3, 139.

⁴⁵⁷ Indeed, a succession lawyer in initial consultation advised SALRI that this happens in ‘99.9%’ of cases.

⁴⁵⁸ Though it was noted that the NSW Supreme Court has very recently been taking a stricter loser pays approach. *Harkness v Harkness (No 2)* [2012] NSWSC 35 (2 February 2012), [18]. See above [7.2.3].

⁴⁵⁹ Vines, above n 9, 34.

⁴⁶⁰ See, for example, VLRC, *Succession Laws*, above n 6, 102 [6.21]–[6.22].

7.7.4 One attendee at the Berri Community Roundtable, who had been involved in a family provision case, highlighted how complex and stressful it has been and had paid \$100 000 to make the claim ‘go away’. The claimant was ‘very rich’ and greed was the motivation. For this attendee, the current law leads to ‘a lot of injustice in my experience, it is very distressing.’

7.7.5 There was wide support from succession lawyers for the proposition that costs should ordinarily follow the event as the current system is perceived as not working and beneficiaries cannot risk going to trial.⁴⁶¹ A rural accountant involved in estate planning also emphasised the point. Another lawyer noted that ‘the historical reason for costs coming out of estate was to anticipate the five-year-old orphan but given the development of the law, costs should usually follow the cause.’ Another lawyer said that ‘costs are a real problem’ and ‘there is an incentive to make a claim where costs come out of the estate.’ Another lawyer referred to ‘the general feeling in the community is that unfair settlements are happening before going anywhere near a court.’

7.7.6 Mr O’Brien was also of the view that the current costs regime is inappropriate:

I see claims which are, in my view, morally wrong and not supported by facts of substance, having to be settled purely and simply on the basis of costs which would be payable by the estate. I think the normal costs award provisions should prevail other than in the case where the judicial officer considers that there are compelling grounds for overturning that principle.

7.7.7 Greg Anastasi similarly believed that more than 75 per cent of cases settle out of court due to fear of costs. He suggested that every challenged will under the *IFPA* for 12 months be documented in order to inform how bad the situation is.

7.7.8 Several people on the YourSAy surveys expressed their frustration and disappointment with the current law. One respondent said: ‘Claims invariably have one winner, the legal profession. One loser, the rightful person who should have been the beneficiary of the will. One no worse off, the person(s) litigating for a share of the estate, often the beneficiary losing is a satisfactory outcome from their perspective.’ Another person noted that ‘individual perceptions of “entitlement” seem to be weaving its way into the fabric mindset of current social mores: with too many dreamers seeking the resultant magic carpet ride. Why not if the fare is covered.’

7.7.9 Case example

Once example provided was described as follows: ‘my husband of 20 years left leaving me with teenage boys. I took out a loan and paid him 100K in settlement. He divorced me and remarried a very wealthy woman. He died of cancer a few months following their marriage and overseas honeymoon. They had made wills before the wedding to protect her considerable wealth. He had a life insurance policy app. 800k. He left this to our two boys. His wife contested the will. If she had no money as we did, I would believe it would be fair for her to be included. Her assets tabled to our lawyers stated she was a multi-millionaire. While lawyers are making \$550 an hour and to take the matter to court can cost \$15 000 a day. The wife was calling the shots. The estate would pay. We chose to pay her off. She also got all his superannuation. The lawyers and barrister still go paid well over \$100k. Her father was the executor of the will and he skimmed \$20 000 from the estate for costs. The boys finally got about \$200K, the lawyers and the wife got the rest. It seems like the person contesting the will can’t lose. I think if people want to contest a will it should not come out of the estate. That would deter many greedy people.

⁴⁶¹ Though there are indications of a stricter approach also in South Australia. In *Roche v Roche and Anor (No 2)* [2017] SASC 75 (5 June 2017), Kourakis CJ held that the plaintiff was to pay the defendants’ costs of the action on a party/party basis and the defendants were to pay the plaintiff’s costs thrown away by reasons of late disclosure.

7.7.10 Case example

Another case example provided was that of an 80-year-old millionaire on a second marriage who received \$150 000 but still instigated proceedings against her deceased husband's estate. This included a 200 page affidavit and generated excessive costs.

Question 2: Preferred alternatives

7.7.11 There was a shared view across all the Roundtables that there should be a far stronger approach to costs to avoid the perception that making a family provision claim carries no risk of costs. There was strong support for a shift towards a 'loser pay' costs model to discourage or deter dubious or speculative claims. There was strong support for a presumption or, at least a starting point, that unsuccessful claimants should bear both their costs and of the other parties.

7.7.12 Participants at the Berri Roundtables agreed that the message should be that you will be up for your own costs if you are making a claim. There was also strong support (including at the Adelaide roundtable) for mandatory minimum mediation of family provision disputes to try and avoid escalating costs and/or agree to costs orders early in the proceedings.

7.7.13 Participants also acknowledged the need for the court to retain a broad discretion. It was noted that it may not always be appropriate for costs to follow the event. For example, sometimes there may be unusual events where the executor may not have acted properly. Thus, while continuing to provide courts with a wide discretion on the question of costs, there was an acceptance that the default position is that the loser pays, and executor is paid on an indemnity basis. Other participants at the Adelaide Legal Experts Roundtable warned of the need to be aware that the principle of testamentary freedom can sit uncomfortably with the idea of 'loser pays' costs. This is because one key party — the testator — is absent and therefore it can only be the claimant or the beneficiary that 'loses'. From the perspective of the beneficiary, costs orders could be seen as unfair, even when a successful claim has been made, as they did not make the will.

7.7.14 One issue that received only limited feedback in consultation was whether it was preferable for a stricter approach and any criteria for costs in family provision cases to be the subject of legislation (as perhaps in New South Wales)⁴⁶² or left to the courts, whether in the form of Rules, Practice Direction or a leading case. The Hon Tom Gray QC was of the view that it is preferable for costs to be left to the discretion of the courts. A number of experienced succession lawyers shared this view.

7.7.15 The Adelaide Roundtable expressed caution for statutory intervention in this area and preferred to leave the issue of costs, especially in a family provision context, to the courts. There was also some support at the Adelaide Legal Experts Roundtable for specific family provision claim rules relating to costs being developed. For example, some participants noted that the current mechanism in the Court Rules relating to filing offers is difficult to apply to family provision matters, because the relief sought may not be strictly financial. This is because a family provision order operates as a codicil to the will, and a claimant might be seeking some non-financial relief, such as having a life interest or other trust rendered less restrictive so that it meets their needs more appropriately. For these participants, if the rules relating to filing offers can be framed to include the range of relief sought in family provision claims, a party could file offers early and thereby put the other side 'at risk' on costs. This would be

⁴⁶² *Succession Act 2006* (NSW) s 99.

particularly useful in dealing with those matters where the plaintiffs have no stake in the outcome because they have little or no provision in the will and little risk that they will bear costs.

7.7.16 In the YourSAY surveys, a range of views were expressed regarding costs, with the majority view being that costs should be awarded against litigants or claimants. Among these, one view was that parties challenging the estate should be prepared to cover costs in the event their claim is rejected and another view was that unsuccessful claimants should contribute towards the costs of the successful litigants.

7.7.17 Other alternative views in the surveys include: costs should not be borne by the estate; costs should follow the event and costs should not follow the event. At least two people expressed the view that costs should come out of the estate. There was also concern that legal costs can prohibit some people from making a justifiable claim. One person who had been in this situation said: ‘The costs are enormous and it is hard to talk to a lawyer without thinking about the clock and the cost mounting up. Very unsatisfactory. I have also found the process very overwhelming.’

7.7.18 The Public Trustee suggested imposing cost consequence on unsuccessful complainants as a way of discouraging opportunistic claims and addressing legal costs. Mr Anastasi was of the view that, despite the appeal of suggesting costs to always follow the event, the reality is that judges cannot help themselves but award undeserving but needy plaintiffs a successful claim just to avoid a damaging cost outcome. He suggested a form of cost capping. Mr O’Brien suggested implementing normal costs award provisions (that is loser pays) except when there are compelling grounds to overturn that principle.

7.7.19 It was accepted in consultation that executors acting responsibly should be protected and the usual rule should be their costs are borne by the estate. In South Australia, the role of executors is to be neutral and their costs are ordinarily minimal.

7.7.20 Different views were expressed about the role of legal practice and culture in the context of costs. A consistent view expressed at the Adelaide Roundtable and amongst other experienced succession lawyers was that South Australian succession lawyers are overwhelmingly responsible and professional⁴⁶³ and provide accurate advice and the problems of inappropriate legal advice and culture, excessive legal costs and greedy and vexatious claims often seen in family provision claims in Sydney are largely absent in South Australia.⁴⁶⁴

7.7.21 Other parties were less sanguine. Some lawyers at the Adelaide Roundtable noted the increasing number of inexperienced lawyers now ‘dabbling’ in succession law and unwittingly running up legal costs.⁴⁶⁵ One highly experienced Adelaide succession lawyer noted the problem of having to assist

⁴⁶³ See also *Smith v Smith* [2016] NSWSC 1077 (9 August 2016) [1]–[3]. ‘[A] strictly adversarial approach to the presentation of a party’s case must sometimes be tempered. Counsel’s duty to the court requires them, where necessary, to restrain the enthusiasms of the client and to confine their evidence to what is legally necessary, whatever misapprehensions the client may have about the utility or the relevance of that evidence. In all cases, to a greater or lesser degree, the efficient administration of justice depends upon this co-operation and collaboration. Ultimately this is in the client’s best interest. It is more likely to ensure that a just result is reached — sooner and with less expense’: *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822, (26 July 2010) [22] (Pembroke J). Hallen J has noted the particular application of this to both solicitors and barristers in family provision litigation: *Smith v Smith* [2016] NSWSC 1077 (9 August 2016) [3].

⁴⁶⁴ In relation to the potential significance of legal culture in this context see White et al, above n 8, 905.

⁴⁶⁵ One experienced succession lawyer remarked to SALRI: ‘Unfortunately, this area of the law is now being swamped by many practitioners who are refugees from personal injury law. In the past, the overwhelming majority of claims in this area were dealt with by experienced practitioners in this area who between themselves would weed out unmeritorious claims. However, with many practitioners coming into this area with little or no experience of how

inexperienced lawyers on the other side to navigate the system. Mr O'Brien noted to SALRI the example of a claim under the *IFPA* he had received supported by a 250 page affidavit and the inordinate cost of preparing such an item. John Williamson from ASW Lawyers suggested approaching this issue through changing lawyers' mentality: 'I think practitioners have a duty to provide robust advice to clients even if it is not what they want to hear. I work in this area and the number of times I see opposing practitioners providing advice that is no more than barracking for their clients is disturbing. Matters usually settle on a basis that could be achieved at the outset without the costs and delays if robust advice had been given.'

7.7.22 To address the problem of undeserving or opportunistic claims (especially to deter or discourage such claims in the first place) and costs coming from the estate and to ensure that the *IFPA* is used for its proper purpose of providing relief for family members who are genuinely left without adequate provision in the deceased's will (or under the rules of intestacy), one suggestion that SALRI received was a legislative provision to provide the court with a specific power to require either applicants commencing claims or beneficiaries defending claims under the *IFPA* to provide security for costs in an appropriate case where an applicant's claim appears undeserving (such as where the applicant has been left with adequate provision and/or already possesses ample resources) or where a defendant appears to be unwilling to negotiate when a valid or meritorious claim has been made. Where the court exercises its discretion, the security for costs should be paid into court by the applicant when the claim is commenced and by the defendant when lodging a defence.

Question 3: Should mediation play a greater role?

7.7.23 The benefit of judicial mediation in resolving succession disputes and preventing unnecessary costs has been noted⁴⁶⁶ (though it must be noted that judicial views and practices differ).

7.7.24 There was some hesitation expressed over mediation. One practitioner observed: 'Mandatory mediation is not going to make much difference — do it anyway in practice. Sometimes it takes too long to go to mediation because information from one party is not forthcoming. In this case, the court should order that information be provided.' In Berri, some attendees with personal experiences were of the view that 'settlement conferences can be a complete waste of time if not everyone comes, and if not everyone is willing to compromise'. Mr Rymill of Mt Gambier and Mr Westley of Naracoorte and Ms Iwaniw noted to SALRI that mediation in itself can be ineffectual and proactive, robust and early judicial involvement is crucial.

7.7.25 However, generally, there was strong support across the Roundtables for a greater and more robust role for judicial mediation with many participants agreeing that strict costs rules can be a blunt instrument in family provision claims.

7.7.26 It was noted that in practice, nearly all family provision claims settle before reaching court. Representatives from the court at the Adelaide Legal Experts Roundtable explained that in their experience, around 50 per cent of claims settle at settlement conferences. Participants agreed that the use of mediation in this area was very common, and strongly supported by reputable solicitors practising in this field. Judicial led mediation was also seen as highly desirable, and also occurring particularly among reputable solicitors practising in this field. The Hon Tom Gray QC noted the benefit of active judicial mediation in addressing costs, promoting effectiveness and discouraging undeserving

these claims are conducted or indeed what the law is, and the need for them to find some work to do means that inevitably there are more unmeritorious claims getting further along the path than they would have in the past.'

⁴⁶⁶ Vines, above n 9, 31–32.

claims. However, it was noted at both the Adelaide and Mt Gambier Legal Experts Roundtable that under the current approach, costs escalate swiftly and the existing settlement conference after the issue of proceedings comes ‘too little, too late.’ For example, it was noted that at the time of the settlement conference costs could already be at \$45 000. Although beneficial, judicially ordered conciliation was viewed as too late. These practitioners expressed the view that a settlement conference needs to happen earlier, when the parties can still avoid the large costs consequences associated with filing fees etc.

7.7.27 There was support from many succession lawyers for an expedited early hearing before the existing settlement conferences and before formal proceedings are commenced with a robust judicial conciliation role to try and resolve the dispute before costs mount and proceedings are commenced. Proceedings can only be commenced after this initial effort at resolution. It was pointed out to SALRI that there is a need for swift, effective and cost-effective procedures featuring early, proactive and robust judicial mediation outside existing procedures, similar perhaps to the Family Court model (though there was a difference of opinion about if such a system would work best under the *IFPA* as a stage before formally issuing proceedings or as a stage to gain leave to issue formal proceedings).⁴⁶⁷

7.7.28 For example, some participants at the Mt Gambier Legal Experts Roundtable noted that there is a need for a preliminary stage at the outset to try and resolve the dispute before proceedings are issued. A robust conciliation type approach by the Master at this stage would be valuable, ‘banging heads together’ as one party in consultation described. This could include warnings as to costs if the claim is unsuccessful. A claimant would not be able to issue proceedings under the *IFPA* until this stage had been tried and had not worked and a certificate to this effect would be required.⁴⁶⁸ Such a scheme was viewed as having particular advantages in relation to small estates but it was noted that its utility would be of general application. There was strong support for this model (both from Mt Gambier succession lawyers and elsewhere, including several experienced Adelaide succession lawyers and Ms Iwaniw).⁴⁶⁹

7.7.29 The Hon Tom Gray QC suggested the possibility of using the court process under the South Australian Statutory Wills jurisdiction as a framework that could be introduced into the *IFPA*. This would contemplate a two-stage process: an application for permission to proceed and, upon that permission being granted, an application for an order under the *IFPA*. The leave to proceed application will provide a useful mechanism by which baseless or unmeritorious applications will be screened out and where costs can be reduced. Mr Gray QC suggested that the application for leave to proceed could be supported by a two-page statement in summary form which addresses the items on the list similar to that in s 91A of the Victorian Act as well as a short statement including the real and personal assets of the applicant. Mr Gray emphasised that elaborate pleadings at this stage were unnecessary and unhelpful and brevity was essential. Ms Iwaniw made a similar suggestion to SALRI and highlighted that the parties and their lawyers ‘usually know pretty early on, what it is all about’.

7.7.30 Mr Gray QC, Ms Iwaniw and various Adelaide and regional succession lawyers discussed the value of such a hearing for all claims under the *IFPA* (and not just for small estates).

7.7.31 Participants discussed the importance of early exchange and full disclosure of information between parties at the earliest possible date so that practitioners can give more informed advice ahead of mediation. For example, one participant noted that the current test is supposed to be about ‘adequate

⁴⁶⁷ SALRI considers such a system would work best under the *IFPA* as a stage to seek leave before formally issuing proceedings. See below [7.8.12].

⁴⁶⁸ This model draws on the NSW model.

⁴⁶⁹ There was also discussion about the fees of such a hearing.

provision for the person's maintenance' but the court doesn't have proper disclosure processes in place. Claimants don't have to set out their full income and maintenance details. This is very different to the Family Court process. It was suggested that there ought to be a requirement that both claimant and residual beneficiaries be required to file a Family Court-like financial statement when resolving these disputes. This would also assist in addressing problems with delays in mediation arising from one party not providing important information to the other. However, there was also some concern about requiring beneficiaries to undertake disclosure. Some participants noted that you should protect the beneficiary from this requirement to avoid rising costs.

7.7.32 It was emphasised that any early stage procedure should not become bogged down in detailed or elaborate pleadings or the purpose and value of such a procedure will be undermined.

7.7.33 Participants at the Mt Gambier Legal Experts Roundtable also discussed the option of a two-tier system. It was suggested that one tier would be the 'off the shelf' will, where the *IFPA* applies. The other tier could be a will prepared after a family conference and with sound legal advice, that could be certified and then exempt from the *IFPA*.

7.7.34 In response to the issue of whether mediation should play a greater role, a majority of 27 people on the YourSAy surveys who commented on this issue agreed that it should. Among these, one view was to impose mediation at an early stage to contain costs and another view recommended exhausting all mediation options before undertaking any further legal process.

7.7.35 In contrast, 12 people highlighted that mediation does not always work, giving reasons that include: 'it can be very inflammatory and make matters worse'; 'it only works if participants are willing — if participants are not prepared to be fair, it can sometimes prolong the process and further push up costs'; 'only effective where the playing ground is even'; 'people may not be able to see past the greed or it may mean nothing to them' or 'it still costs a fortune'. One other view was that courts are not the best forum to hold mediation as there needs to be an inquisitorial approach. It was also suggested that 'a second look [of the will] by a third party should likely lead to a balanced result — there must be a clear stop and review before only extremely unfair cases could proceed to court'.

7.7.36 The Public Trustee and the Legal Services Commission also strongly supported the mandated use of conciliation and mediation in all types of testamentary disputes (including claims under the *IFPA*) as an alternative to lengthy, expensive, and destructive litigation.

Question 4: The issue of small estates

7.7.37 SALRI notes the strong view expressed to it in its consultation that the size or value of an estate does not necessarily denote its complexity or the likelihood of litigation.⁴⁷⁰ Indeed, it has been pointed out to SALRI that some of the most difficult estates to administer and intractable succession disputes that arise are not in relation to large estates, but small estates. This theme also emerges from

⁴⁷⁰ SALRI, above n 1, 27 [3.1.3].

wider research.⁴⁷¹ As one study notes, '[t]o a large degree, the data indicates that smaller estates generate at least as much, if not more, controversy than large estates.'⁴⁷²

7.7.38 There was general support across the Roundtables for a streamlined approach to settlement conferences with respect to family provision claims arising in the context of small estates. Participants highlighted the need for special rules to apply to 'small' estates.

7.7.39 A recurring problem, reflecting earlier research by SALRI,⁴⁷³ is the difficulty in defining a 'small' estate. For example, some legal practitioners explained that there may never be grant of probate in estates of up to \$350 000. Participants at the Mt Gambier and Adelaide Legal Experts Roundtable agreed that 'small estate' should be defined as something around \$500 000. The Law Society has previously also identified \$500 000 as the upper limit of a small estate.⁴⁷⁴

7.7.40 A number of participants highlighted particular concerns associated with family provision claims involving small estates. There was a recurring concern in such estates that legal costs can all too easily prove 'prohibitive'. One suggestion expressed at the Mt Gambier Legal Experts Roundtable was for claims under the *IFPA* relating to small estates; a claim should be able to be brought before the Magistrates Court or the South Australian Civil and Administrative Appeals Tribunal in preference to the Supreme Court as when the Supreme Court is involved, costs escalate.⁴⁷⁵ Others suggested that there is a need to define 'small estates' and provide more power to the Registrar to facilitate conferences and get an early resolution. Another suggested that the Supreme Court could introduce a clear process for 'notice of offer' for family inheritance claims.

7.7.41 There was support from many succession lawyers in consultation for an expedited early hearing before the existing settlement conferences and before formal proceedings are commenced under the *IFPA* with a robust judicial conciliation role to try and resolve the dispute before costs mount and proceedings are commenced. This could also include warnings about the cost implications if a claim should proceed to trial and be denied. Proceedings can only be commenced after this initial effort at resolution. The benefits of this approach to small estates were emphasised.

7.7.42 A Family Court style conciliation method with full disclosure requirements (though opinion on this point was divided) was also raised. It was noted this could prove very useful and would help reduce costs.

7.7.43 Representatives from the Supreme Court noted that there are existing processes, such as simplified summary trial processes, that can be utilised to deal with small estates. Some participants at the Berri Legal Experts Roundtable raised practical questions such as: how do you ensure all relevant

⁴⁷¹ See, for example, Jeffrey Schoenblum, 'Will Contests: An Empirical Study' (1987) 22 *Real Property, Probate and Trust Journal* 607; Vines, above n 9; Tilse, et al, *Having the Last Word? Will Making and Contestation in Australia*, above n 121, 17; Shane Rodgers, 'Today, where there's a will, there's a way to fight over it', *The Australian* (online), 10 April 2015 <<http://www.theaustralian.com.au/business/legalaffairs/today-where-theres-a-will-theres-a-way-to-fight-over-it/news-story/759dd1c335c4fe78ab068bc930a990a2>>.

⁴⁷² Schoenblum, above n 471, 615.

⁴⁷³ SALRI, above n 1, 29–30 [3.3.1]–[3.3.7].

⁴⁷⁴ Law Society, *Submission on Administration of Small Deceased Estates and Resolution of Minor Succession Disputes*, 16 May 2014, 2 <https://www.lawsocietysa.asn.au/submissions/140516_Administration_of_Small_Deceased_Estates_and_Resolution_of_Minor_Succession_Disputes.pdf>.

⁴⁷⁵ See also SALRI, above n 1, 25–26 [2.4.2], 37–38 [3.5.6]–[3.5.8]. SALRI also received a few comments about the perceived rigidity of the practices at the Supreme Court in adding to pressures on costs. See also at: 25 [2.4.2].

parties have been notified? Other participants also suggested allowing those involved in claims of larger estates to be able to ‘opt in’ to these streamlined processes.

7.7.44 The former South East Community Legal Service also raised the issue of very small estates where the assets are under \$20 000 and it is unnecessary and unrealistic to involve the Supreme Court. It was explained that there is not enough to pay the costs in these cases. It was noted that such very small estates can prove as emotional as larger estates and the items and issues at stake as important. The South East Community Legal Service explained that there is a need for a simplified procedure to make decisions without fear of consequences and grant of authority to distribute the estate swiftly and effectively. For example, this could be based on models currently employed by banks for small estates under \$50 000. This could include an expedited grant of probate to enable swift and flexible disposal of vehicles, chattels, etc and make decisions without fear of authority.

7.7.45 Jurisdictional reform with small estates is also supported by the Legal Services Commission and the Law Society⁴⁷⁶ based on the value of the estate or the claim.

7.8 The Institute’s views

7.8.1 Legal practitioners who practise in the area of succession law provide advice on many potential claims for family provision. They advise on the drafting of wills. They advise on the possibility of a claim under the *IFPA* and the means to reduce or avoid such claims.⁴⁷⁷ They help clients to reach settlement of any claims under the *IFPA* by negotiation. They advise on the prospects of success or if there appears little or no basis for a claim. They advise on costs. They assist the final resolution of claims under the *IFPA*, both pre-trial and at trial.

7.8.2 Anecdotal evidence from both practitioners and the Supreme Court of South Australia is that most family provision claims do not proceed to trial. The records of the South Australian Supreme Court show that there were about 320 claims lodged pursuant to the *IFPA* over the previous five years.

7.8.3 SALRI notes the view from both its consultation and elsewhere⁴⁷⁸ that current law and practice as to costs in family provision claims is not as effective as it could be and, far from discouraging opportunistic or speculative claims, may actually encourage such claims. SALRI considers that a stricter rule as to costs is applicable in succession cases. It notes the clear trend in that direction expressed in New South Wales⁴⁷⁹ and by Kourakis CJ as outlined above.⁴⁸⁰ SALRI supports the stricter approach to unsuccessful family provision claims and a default loser pays costs principle, especially to deal with the costs brought about by an undeserving claim. SALRI supports the robust view of Hallen J of the NSW Supreme Court that any notion that the costs (including those of an unsuccessful claimant) will come out of the estate should be ‘thoroughly discredited’.⁴⁸¹ SALRI notes that s 9(8) of the *IFPA* allowing a court to make any order for costs ‘as it considers just’ provides little, if any, guidance.

⁴⁷⁶ Law Society, Submission to *Cutting the Cake — South Australian Rules of Intestacy*, above n 296, 1–2.

⁴⁷⁷ The importance of proper legal advice in this context is crucial. See below n 508. See also above [7.7.20]–[7.7.21].

⁴⁷⁸ See, for example, VLRC, *Succession Laws*, above n 6, 100 [6.10], 100–102 [6.13]–[6.20]; Vines, above n 9, [34].

⁴⁷⁹ See, for example, *Penfold v Predny* [2016] NSWSC 472 (21 April 2016), [161]–[167]; *Meres v Meres (No 2)* [2017] NSWSC 523 (4 May 2017).

⁴⁸⁰ See *Fielder v Burgess* [2014] SASC 98 (7 August 2014) (Kourakis CJ) [62]–[65]. In *Roche*, Kourakis CJ held that the plaintiff was to pay the defendants’ costs of the action on a party/party basis and the defendants were to pay the plaintiff’s costs thrown away by reasons of late disclosure.

⁴⁸¹ *Harkness v Harkness (No 2)* [2012] NSWSC 35 (2 February 2012), [18].

7.8.4 However, SALRI agrees with the views of the VLRC⁴⁸² and the Adelaide Roundtable that, although there is strong benefit in a robust approach to costs in family provision claims (notably a default loser pays costs rule), the general issue of costs is ill-suited to statutory intervention and it is preferable for this to be left to the courts to address through case law, Rules or Practice Direction. SALRI does not support, at this stage, a specific legislative provision such as that in New South Wales.⁴⁸³

7.8.5 However, SALRI considers one legislative provision with respect to a specific aspect of costs under the *IFPA* would be of benefit. SALRI notes from its consultation and research that a major problem is that the costs of any claim and the costs of persons (beneficiaries) defending such claims are generally paid from the deceased's estate. Potential claimants and the beneficiaries of the estate under the will (or entitled under the rules of intestacy) may well consider that they will not have to bear any costs whether or not their claim (or defence) succeeds. The only possible detriment will be to the ultimate value of the estate which is left for distribution after all the costs are paid. SALRI has been informed in consultation (and supported by other research) that this encourages opportunistic and unmeritorious claims (or potentially defences by beneficiaries where a claim may have merit), but the parties see no purpose in negotiating or settling early as they are at no risk of personal loss. To further address the problem of undeserving or opportunistic claims (especially to deter or discourage such claims) and costs coming from the estate and to ensure that the *IFPA* is used for its proper purpose of providing relief for family members who are genuinely left without adequate provision in the deceased's will (or under the rules of intestacy), it was suggested that the court should have a specific power to require either applicants commencing claims or beneficiaries defending claims under the *IFPA* to provide security for costs in an appropriate case where an applicant's claim appears without merit (such as where the applicant has been left with adequate provision and/or already possesses ample resources) or where a defendant appears to be unwilling to negotiate when a valid or meritorious claim has been made. Where the court exercises its discretion, the security for costs should be paid into court by the applicant when the claim is commenced and by the defendant when lodging a defence. SALRI supports this suggestion and considers that it will support its other recommendations.

Mediation and Conciliation

7.8.6 Very little support was expressed for transferring the existing exclusive role of the Supreme Court under the *IFPA* or extending this jurisdiction to other courts. SALRI has previously considered the role of the Supreme Court and other options in relation to succession, but in its previous consultation found little support, notably from the Law Society⁴⁸⁴ and the Chief Justice,⁴⁸⁵ for transferring the Supreme Court's existing succession jurisdiction (including claims under the *IFPA*) in light of its specialised role, resources and expertise.⁴⁸⁶ SALRI reiterates its previous reasoning and conclusion⁴⁸⁷ that the Supreme Court, at this stage, should retain its exclusive jurisdiction with respect to the management of estates and the resolution of such disputes (including claims under the *IFPA*) in light of its specialised role, expertise and resources. It is unrealistic to confer this specialised jurisdiction

⁴⁸² VLRC, *Succession Laws*, above n 6, 215 [10.21].

⁴⁸³ *Succession Act 2006* (NSW) s 99. SALRI also does not support a statutory costs model such as the former Victorian model in s 97 of the *Administration and Probate Act 1958*. See further above n 453.

⁴⁸⁴ Law Society, *Submission on Administration of Small Deceased Estates and Resolution of Minor Succession Disputes*, above n 474, 2.

⁴⁸⁵ Letter from Chief Justice to SALRI dated 29 September 2016.

⁴⁸⁶ SALRI, above n 1, 30–33 [3.4.2]–[3.4.12], 38 [3.5.8].

⁴⁸⁷ *Ibid* 25–26 [2.4.2], 37–38 [3.5.6]–[3.5.8].

on alternatives such as the Magistrates Court or the South Australian Civil and Administrative Tribunal. It follows that any procedural changes in relation to succession claims should be at the Supreme Court.

7.8.7 SALRI supports the focus on mediation in relation to claims under the *IFPA*, particularly for smaller estates. SALRI has previously noted the benefit of existing judicial mediation in a succession context.⁴⁸⁸

7.8.8 Both Judges and Masters in South Australia are already actively involved in mediation and seeking to resolve succession disputes, especially in small estates. The Supreme Court encourages the settlement of claims under the *IFPA* and assists parties to achieve settlement. The Supreme Court conducts many mediations in succession estate disputes and such mediation is swiftly available and has a very high success rate.⁴⁸⁹

7.8.9 Providing options for disputes to be resolved through mandated mediation or conciliation could be a vehicle to address some of concerns relating to costs. There may be procedural and other changes which might further facilitate the cost effective and timely resolution of succession law disputes (including claims under the *IFPA*).

7.8.10 There was almost universal support expressed in consultation for an active, even robust, judicial role in mediation and for further moves in this direction (though it was noted that any additional resources should be provided for the Supreme Court).⁴⁹⁰ There was strong support for this active judicial mediation to be conducted at an early stage. One succession lawyer described the value to ‘nip it in the bud at an early stage’.

7.8.11 SALRI notes the wide support expressed in consultation for early and proactive judicial mediation in family provision claims. SALRI further notes the role and benefits of early and proactive judicial mediation and the view of the Hon Tom Gray QC and others that such judicial mediation is effective (and also avoids the additional expense to the parties of having to utilise a private mediator) and consistent with the judicial role. However, SALRI also notes that views and practices differ amongst judicial officers as to the appropriate role for judicial officers to take in mediation in proceedings before them and that not all judicial officers may feel comfortable to take part in judicial mediation in proceedings before them. SALRI would not wish to be prescriptive as to how such mediation should be most effectively carried out. It may be that a particular judge (or judges) is best placed to carry out that role. It may be that the role of judicial mediation would be better performed by a Master than a judge (this could be especially applicable in proceedings under the *IFPA*). It may be that a private mediator is preferable in a particular case. SALRI suggests that further measures be taken, building on existing procedures in the Supreme Court, to promote and enhance proactive, robust and timely judicial mediation to contain legal costs, promote the early resolution of valid claims under the *IFPA* and discourage or deter the continuation of undeserving claims. Such mediation should be carried out by the most appropriate judicial (or other) officer.

7.8.12 SALRI agrees with the suggestion made by Hon Tom Gray QC in relation to introducing a court process that is to be adapted from the South Australian Statutory Wills jurisdiction. SALRI is of the view that the introduction of a two-stage process requiring a grant of leave to proceed as a preliminary step will provide a mechanism by which baseless or unmeritorious applications will be

⁴⁸⁸ Ibid 33–37 [3.4.13]–[3.5.4].

⁴⁸⁹ Letter from Chief Justice to SALRI dated 29 September 2016.

⁴⁹⁰ It is necessary that the Supreme Court has the resources to perform this role.

screened out and costs thereby be reduced.⁴⁹¹ Such an application need not be a lengthy or elaborate ‘War and Peace’ item, in fact the opposite. SALRI agrees with the Hon Tom Gray QC that the application to be granted leave to proceed be supported by a two-page statement in summary form which addresses the items on an abbreviated version of the Victorian list criteria in s 91A of the Victorian Act (Recommendation 13) as well as a short statement disclosing the real and personal assets of the applicant. SALRI notes that, as suggested in consultation, the benefits of such a procedural hearing (accompanied by a proactive judicial approach in mediation) is not confined to small estates and is of general application.

7.8.13 Recommendations:

Recommendation 22

SALRI recommends (reiterating its earlier view)⁴⁹² that, at this stage, the Supreme Court should retain its existing exclusive jurisdiction in relation to the management of estates and the resolution of any succession disputes (including family provision claims under the *Inheritance (Family Provision) Act 1972*) in light of its specialised role, expertise and resources.

Recommendation 23

SALRI recommends that, although there is strong benefit in a robust approach to costs in claims under the *Inheritance (Family Provision) Act 1972* (extending to a default ‘loser pays’ principle), the current law relating to costs should remain as it is, as the general issue of costs is ill-suited to statutory intervention and it is preferable for this to be left to the courts to address as they deem best through case law, Rules or Practice Direction.

Recommendation 24

SALRI recommends that there should be a legislative provision to provide the court with a specific power to require either applicants commencing claims or beneficiaries defending claims under the *Inheritance (Family Provision) Act 1972* to provide security for costs in an appropriate case where an applicant’s claim appears unmeritorious or undeserving (such as where the applicant has been left with adequate provision and/or already possesses ample resources) or where a defendant appears to be unwilling to negotiate when a valid or meritorious claim has been made. Where the court exercises its discretion, the security for costs is to be paid into court by the applicant when the claim is commenced and by the defendant when lodging a defence.

⁴⁹¹ The Statutory Wills regime is set out in s 7 of the *Wills Act 1936* (SA). See further *Re: Linley Joy Dennis* [2014] SASC 158 (31 October 2014); *In the Matter of Shaun Arthur Pickles* [2013] SASC 175 (6 November 2013); *Re Manley* [2013] SASC 98 927 June 2013); *In the Matter of Martina Pieternella De Jager* [2012] SASC 236 (21 December 2012); *In the Matter of Grace Geraldine Brown* [2009] SASC 345 (11 November 2009); *Griffin v Boardman* [2009] SASC 315 (2 October 2009); *Re Rak* (2009) LSJS 263; *Jeavons v Chapman* (No 2) (2009) 260 LSJS 260; *Hoffman v Waters* (2007) 98 SASR 500; *Bryant v Blake* (2004) 237 LSJS 23; *Public Trustee v Phillips* [2004] SASC 142 (28 May 2004). See *In the Matter of Shaun Arthur Pickles* [2013] SASC 175 (6 November 2013) [13] for an example of an unmeritorious claim.

⁴⁹² SALRI, above n 1, 25–26 [2.4.2], 37–38 [3.5.6]–[3.5.8].

Recommendation 25

SALRI recommends that further measures be taken, building on existing procedures in the Supreme Court, to promote and enhance proactive, robust and timely judicial mediation to contain legal costs, promote the early resolution of valid claims under the *Inheritance (Family Provision) Act 1972* and discourage or deter the continuation of undeserving claims. Such mediation should be carried out by the most appropriate judicial (or other) officer.

Recommendation 26

SALRI specifically recommends that a court process which is to be adapted from the South Australian Statutory Wills jurisdiction under s7 of the *Wills Act 1936* (SA) should be introduced into the *Inheritance (Family Provision) Act 1972*. This would institute a two-stage process: an application for permission to proceed and, upon that permission being granted, commencing an application for an order under the *Inheritance (Family Provision) Act 1972*. The application to be granted leave to proceed should be supported by a statement (no more than two pages in length) in summary form which addresses the items on an abbreviated version of the list criteria in s 91A of the *Administration and Probate Act 1958* (Vic) (see Recommendations 17 and 18) as well as a short statement including the real and personal assets of the applicant. In proceedings, where the application is not obviously without merit, the leave to proceed can be granted and the substantive application can be heard concurrently.

Part 8 – Clawback Provisions and Notional Estate

8.1 Current position in South Australia and other jurisdictions

What is a 'notional estate' and what do 'clawback' provisions do?

8.1.1 In most States and Territories, including South Australia, it is possible to avoid the application of family provision laws such as the *IFPA* if, before the person dies, he or she gives away, or otherwise disposes of, his or her property.⁴⁹³ The VLRC was 'told that people commonly deal with their property before they die so that little of it remains in their estate and the way in which they choose to distribute their property cannot be challenged under family provision legislation.'⁴⁹⁴ This effectively means that well advised testators, typically those with resources and access to specialist professional advice, enjoy testamentary freedom and can avoid the application of family provision laws. Such arrangements are, in the absence of any contrary legislation, perfectly legal.

8.1.2 However, the law is able to address such arrangements and treat property that was disposed of prior to death in order to avoid family provision claims, as part of the person's estate when they die. These are often called 'notional estate' laws. The NSWLRC recommended the introduction of such laws in 1977.⁴⁹⁵ It was concerned that the effectiveness of family provision laws was undermined if property could be dealt with in such a way as to evade family provision legislation. The NSWLRC saw 'little value in a family provision statute if it is inefficient because it can be deliberately, and easily, evaded'.⁴⁹⁶ The Commission explained:

If it [family provision legislation] does not contain provisions directed at some common arrangements of property, it will not concern those with the means and the determination to obtain and follow expert advice; only the poor and inert will be affected by it. The Act... can be evaded. Property can be put outside its application in a variety of ways and often without difficulty.⁴⁹⁷

8.1.3 The NSW Parliament subsequently introduced such laws in 1982.⁴⁹⁸ The National Committee expressed its support for the NSW model.⁴⁹⁹

8.1.4 The NSW family provision law allow a court to treat property that was disposed of prior to death in order to avoid family provision claims as part of the person's estate when they died. In other words, a house or car or shares given to a son by his father could be included by the court as part of the father's 'notional estate' when making family provision orders in favour of another son after the father's death if the deceased's estate is otherwise insufficient to satisfy the intended family provision order. So, too, could more complex transactions like shifting property into superannuation, setting up family trusts and holding property as a joint tenant with another person.

⁴⁹³ See, for example, Sylvia Villios, 'Will drafting – clarifying the scope of the duty owed by a solicitor to a client and to the intended beneficiaries in Australia' (2016) 19(2) *Legal Ethics* 328.

⁴⁹⁴ VLRC, *Succession Laws: Family Provision*, above n 270, 30 [2.69].

⁴⁹⁵ NSWLRC, *Report into the Testator's Family Maintenance and Guardianship of Infants Act 1916*, Report 28 (1977). Some of these means are set out by the National Committee (MP 28), above n 3, 90–92.

⁴⁹⁶ NSWLRC (1977), above n 495, [2.22.10].

⁴⁹⁷ *Ibid* [2.22.2].

⁴⁹⁸ *Family Provision Act 1982* (NSW) Part 2 Div 2 now *Succession Act 2006* (NSW) Part 3.3.

⁴⁹⁹ National Committee (MP 28), above n 3, 93–94.

8.1.5 The NSW laws are also sometimes called ‘clawback’ provisions or ‘anti-avoidance’ provisions because their purpose is to allow the court to ‘claw back’ property disposed of by a testator in his or her lifetime or where a testator fails to take a step to ensure that property over which a testator has control in his or her lifetime becomes an asset of his or her estate. Such laws need to strike a careful balance between making it ‘very difficult, even for a very determined person to prevent a family provision order being made in respect of her or his estate’ and not impeding the normal lifetime activities of people or the normal administration of estates.⁵⁰⁰

8.1.6 Under the NSW law, the person who received the property from the person prior to death will no longer have any rights to that property, if the court orders that it be used in the satisfaction of a successful family provision claim. However, the court must consider a range of factors before it makes orders concerning a deceased person’s notional estate, including having regards to the importance of not interfering with reasonable expectations in relation to property, the substantial justice and merits involved in making or refusing to make an order, and any other relevant matters.

8.1.7 The NSW model also sets out in some detail what types of property transactions fall under the umbrella of ‘notional estate’ under s 22(1) of the *Family Provision Act 1982* (NSW). The time when a prescribed transaction takes effect is an important consideration.

8.1.8 The NSW notional estate or clawback laws can be viewed as a drastic inroad into the concept of testamentary freedom, extending even to transactions entered into during the testator’s lifetime.

8.2 Issues

Should South Australia consider clawback provisions as part of its family provision laws?

8.2.1 The National Committee has recommended that provisions be implemented based on the previous NSW clawback laws⁵⁰¹ to ensure that the primary object of the family provision laws (that is, to provide for dependent family members) cannot be frustrated by testators disposing of their property immediately prior to their death. The National Committee accepted that the NSW notional estate and clawback laws were ‘complicated and not easy to understand’⁵⁰² but asserted that the NSW laws ‘form an efficient and effective means of ensuring that certain objectives are met.’⁵⁰³ The National Committee said that the NSW laws work well in practice.⁵⁰⁴

8.2.2 However, other law reform agencies and commentators are less positive of the NSW laws.⁵⁰⁵ The VLRC in its consultation received mixed views about the way in which people should be permitted to deal with their property while they are still alive. In its review of family provision laws in Victoria,

⁵⁰⁰ National Committee (MP 28), above n 3, 80.

⁵⁰¹ *Family Provision Act 1982* (NSW) ss 21–29, now replaced by the *Succession Act 2006* (NSW) Pt 3.3.

⁵⁰² SALRI considers this to be something of an understatement.

⁵⁰³ National Committee (MP 28), above n 3, 80.

⁵⁰⁴ Ibid 87. See also at 93–94.

⁵⁰⁵ See, for example, Atherton, *Family and Property: A History of Testamentary Freedom in NSW with Particular Reference to Widows and Children*, above n 38, 442–445; Rosalind Croucher, ‘Law Reform as Personalities, Politics and Pragmatics’ (2007) 11 *Legal History* 1, 21–23; Croucher, ‘How Free is Free? Testamentary Freedom and the Battle between Family and Property’, above n 40, 20–22; Queensland Law Reform Commission, *Report on the Law Relating to Succession*, Report No 22 (1978) 29; VLRC, *Succession Laws: Family Provision*, above n 270, 32 [2.80]–[2.83], 33 [2.88]–[2.93]; Renwick, above n 35, 183.

the VLRC noted that '[t]here are many reasons why a person may deal with their property in a certain way during their lifetime, including to minimise tax and to provide for their family during their lifetime. The Commission does not have any evidence that people are dealing with their assets during their lifetime in order to deprive their family of provision or inheritance.'⁵⁰⁶ The VLRC was unconvinced in the absence of clear evidence to the contrary of the need for a NSW style law.⁵⁰⁷

8.2.3 With the greater general longevity of the population, older family members often wish to benefit their descendants during their lifetime — an opportunity not available when people typically died at a much younger age. Making provision for family and dependants when they most need it, and when a testator has the desire and the enhanced ability to do so with the enjoyment of greater wealth and security, (eg: superannuation), is something many people do. This can be considered a form of family provision, albeit rewarding the family earlier rather than later. Gifts made by a testator during his or her lifetime to family are taken into account in family provision litigation.

8.2.4 Placing legislative curbs on beneficence and charitable giving in a person's lifetime through notional estate provisions might be viewed as an unacceptable intrusion into legitimate private financial planning and management and one which would create uncertainty about otherwise unexceptionable transactions due to the possibility of clawback.

8.2.5 If such a transaction were prompted by the use of undue influence or if it involved unconscionable dealings with the assets of a person, then it can be set aside under existing laws, outside the family provision legislation.

8.3 Consultation data overview

Question 1: Should the IFPA apply to notional estates?

8.3.1 A range of views were expressed, but most participants across the Roundtables were opposed to the introduction of NSW style notional estate or clawback regime in South Australia.

8.3.2 For example, some participants expressed the view that introducing notional estates would further undermine testamentary freedom. One succession lawyer remarked: 'Why should a person not be free to set up or distribute their assets as they wished in their lifetime?' Others described it as 'dangerous' and 'giving rise to more complexity and encourage more litigation ... there would be lots more to fight over'. Other attendees pointed out that if there is property that is off the table right from the start, then people know where they stand and will hopefully be less like to go through with a protracted claim.

8.3.3 Professor Dal Pont at the University of Tasmania and the Hon Tom Gray QC, leading succession law experts, expressed their opposition to SALRI of such laws. The erudite Professor Dal Pont views such laws as an unwelcome intrusion upon testamentary freedom. The Hon Tom Gray QC noted that such laws not only intrude upon testamentary freedom but they suffer from the fundamental defect that the person who entered into the transactions during his or her lifetime, namely the testator, is not present to provide her or his explanation about such transactions (this is different to where such laws are considered in the financial context of a divorce through the Family Court or in bankruptcy

⁵⁰⁶ VLRC, *Succession Laws: Family Provision*, above n 270, 33 [2.89].

⁵⁰⁷ Ibid 33 [2.92].

proceedings). There may be a host of valid reasons for the testator entering into such arrangements during his or her lifetime other than seeking to defeat a future family provision claim

8.3.4 Legal practitioners at the Adelaide Legal Experts Roundtable noted that competent lawyers will continue to identify options for their clients to preserve their testamentary wishes regardless of family provision laws, for example through the use of trusts and through careful will drafting. It was also noted at both Adelaide and Mount Gambier Legal Experts Roundtables the reality is that testamentary freedom is far more accessible for the rich and resourceful, who can get proper legal advice and protect their estate from family provision claims.⁵⁰⁸ However, this is not necessarily available to ‘regular’ South Australians with small estates such as a modest family home.

8.3.5 However, some participants saw merit in the NSW approach, noting for example, that if all the assets are distributed before death, hardship may be caused to a spouse. A few participants noted that all assets are ‘up for grabs’ in divorce proceedings before the Family Court and for consistency and fairness a similar approach should apply in a family provision context, ‘[w]hy should there be a difference between family court and estate court? Keep it consistent.’ One succession lawyer noted that in some cases, ‘millions of dollars in trust and you can’t touch the trust.’ The lawyer explained: ‘In a case I had, the second wife nursed the deceased through cancer and he provided her only with a life interest in the house. Notional estates are dangerous as it leads to more claims. There needs to be a weighing up. Testators put their money in trusts to avoid claims but there is some unfairness if can’t get to it: [the] Family Court can attack trusts and superannuation if [a party is] still alive but can’t get it if after death. There would be a lot more matters in court if we bring in notional estates.’ Another participant noted that notional estate is not a bad idea as a principle of fairness, ‘why should someone be able to hide everything away from genuine claimants?’ However, it was also noted that unless the *IFPA* is reformed to ensure that the threshold for claims is high, including notional estate in the Act could add to the current problems relating to unjustified and opportunistic claims.

8.3.6 Participants at the Mt Gambier Legal Experts Roundtable also discussed the issue of jointly held property, noting that there is a real opportunity for community education about the meaning of joint tenants and tenants in common. This is particularly important for blended families, and couples in a second marriage.

8.3.7 In response to the issue of whether the *IFPA* should apply to notional estates, the overwhelming majority, 55 out of 89 people, on the YourSAy surveys said no, while 10 people agreed that it should and two people were unsure. Common reasons provided for why the *IFPA* should not apply to notional estates were: people are entitled to dispose of their assets as they see fit and at any time; inheritance is not a right that family members deserve; this is the only option to ensure the testator’s wishes are complied with and this gift giving by the testator makes later distribution easier.

8.3.8 Some examples were given in responses. One person noted: ‘My mother was apparently thinking of disposing some of her assets prior to her death and if she knew then what has transpired after her death she would have wished she had.’ Another response commented: ‘The person should be able to dispose of money or assets as they see fit, during their lifetime. Taking the “dead” to court to claim any remaining assets or recouping from other family members is greed.’ Another response said: ‘I would do this if I thought my wishes would not be honoured, it is not anyone’s right to dispute a

⁵⁰⁸ A theme expressed by both Berri and Mt Gambier succession lawyers was the need for testators to carefully consider their wills and of the importance of proper and informed legal advice in drafting wills and avoiding potential claims under the *IFPA*. The challenge in providing such informed advice on a standard \$300 will was noted. See further *Badenach v Calvart* (2016) 257 CLR 440; Villios, above n 493.

legal will.’ Another person said: ‘Where in the law does it say that one cannot rightfully acquit [dispose] resources acquired by fair means in one’s lifetime?’ Another respondent said: ‘I know many people who put their houses into joint names, or create family trusts, or structure “granny-flat” arrangements, in order to overcome looming family provision issues. No, the law absolutely should not attempt to claw-back these assets. We do not want NSW style of notional estates.’ Another response said: ‘Absolutely these strategies are in place. I specialise in them. I get to speak with the clients while they are alive and they can use non-estate assets to bypass estate provisions. The law should not be able to interfere with this and it will create huge costs to use forensic accounting to try and find assets which have been shifted. It will make the system more costly and complex than it already is’.

8.3.9 Case example

One person has provided several examples of how notional estates occurs: ‘In my experience, assets are often disposed of during life, but not for the purpose of frustrating the operation of family provision laws. I have seen it done when there is concern about the stability of a marriage and it is seen as necessary to ensure the viability of a family business. When a farm has been handed down through generations, there is often a very strong attachment to the land, rather like, and I believe as strong as it is for Aboriginal people to their ancestral lands. Various measures are taken in an attempt to keep the land in the family and in the hands of the member of the family thought most likely to look after it and pass it on to the next generation. Assets are sometimes transferred during life to a member of the family who has worked for little reward in the business or on the property for a long time in recognition of that person’s contribution to the business and family. Sometimes a member of the family, often a son (and his wife and children), are prepared to accept serious disadvantages of doing so on the promise that he or she will ultimately become the owner of the business/land. Sometimes assets are transferred during life in recognition of the fact that a member of the family have made sacrifices to look after an aged, disabled or sick member of the family for a long time. In my opinion, arrangements that people choose to make should be respected and not interfered with in the absence of proof that the disposal of the asset was brought about by fraud, coercion or unconscionable conduct. I see no reason to regard these arrangements.’

8.3.10 Greg Anastasi remarked that it is common for people to dispose of their assets during their lifetime in order to minimise the property in their estate. He said: ‘Those with large enough estates and the forethought regularly create trusts to control the distribution of their wealth. Those without those resources may distribute their wealth prior to death. Unfortunately, this exposes many to elder abuse as they may place their trust with those that take advantage.’⁵⁰⁹

8.3.11 Several persons stated that the notional estate concept should be confined to stepchildren. In such cases, the natural parent’s estate be deemed to still exist in the form of a notional estate. This view is supported by two individual submissions by David Hopkins (Partner at Brown & Associates) and Thomas Rymill of Mt Gambier. They noted the real problem of adult stepchildren under the *IFPA*⁵¹⁰ and suggested notional estate as one of the ways for stepchildren to seek redress when left without any provision and without any standing to bring a claim under the *IFPA*.

Question 2: Superannuation and trusts

8.3.12 Some attendees at the Adelaide and Mt Gambier Legal Expert Roundtables supported the inclusion of superannuation and trusts as part of a person’s testamentary estate and noted that there

⁵⁰⁹ This is a valid concern. People typically now have larger estates owing to increased longevity, superannuation and dramatic increases in property values. It may be that a testator has already made provision for a potential claimant under the *IFPA* during the testator’s lifetime.

⁵¹⁰ See above [4.4.32]–[4.4.41].

appears to be an inconsistency between approaches in the Family Court and that of the family provision laws. For example, in divorce proceedings, the Family Court can attack trusts and superannuation, however these assets are not part of the estate for the purposes of family provision claims.

8.3.13 However, others pointed to the very different context between Family Court and family provision claims. It was noted that this is a case of comparing ‘apples and oranges’ and are dissimilar in purpose and therefore the argument for consistency is misplaced. Some participants also highlighted the potential unfairness that arises from the distribution of superannuation funds, but expressed the view that the NSW approach to national estate and clawback is too broad. There was also reluctance to include trusts in notional estate. One participant warned that one must remember that trusts are an independent legal entity, so the idea of going behind or undoing a valid trust is very problematic.

Question 3: Equalising non-estate testamentary gifts

8.3.14 Some participants at the Roundtable noted that an alternative option would be for the court to only consider the testators’ notional estate when non-estate assets have passed to beneficiaries outside of the estate. In this way, the first part of the test could be to ascertain if there were non-estate assets distributed to beneficiaries upon the death of the testator and if the answer to that question is ‘yes’, then you use the notional estate for the purposes of the *IFPA*.

8.3.15 This view was also raised in the surveys; one survey noted ‘the law needs to take into account the assistance/cash already received when there is an inheritance dispute’. An example of such a situation was given by a respondent in the YourSAy surveys: ‘I do know of a case where a son was given a business during his father’s lifetime with the full knowledge and understanding of all family members that this was in lieu of inheriting — then he tore the family apart by still claiming. Months and years of heartache and a permanent rift. The system needs to be able to nip things like this in the bud.’

8.3.16 Mr O’Brien highlighted the importance of taking into account benefits that have been received during the lifetime of the deceased, this being a regular issue in farming families where: ‘historically, sons have done very well at the expense of daughters; and family memories of perceived unfairness seem to run deeper and longer than in other cases’. This was a recurring theme expressed in consultation by rural and regional lawyers.

8.3.17 The possibility of requiring that the value of proprietary interests acquired by the spouse/partner by survivorship to jointly owned property be set off against the spouse’s preferential legacy was also raised in consultation. *Kozłowski v Kozłowski* was noted as a case that highlights the inappropriateness of not doing so.⁵¹¹

8.4 The Institute’s views

8.4.1 SALRI is not persuaded of the case for introducing NSW style notional estate and clawback laws in South Australia. The relevant laws are complicated. SALRI finds the reasoning of the VLRC convincing. It also accepts the views presented in consultation that NSW style notional estate or clawback laws are very problematic in terms of both policy and practice and would especially undermine the concept of testamentary freedom. SALRI notes that when a strong theme of both its consultation and wider research is the importance of enhancing testamentary freedom and reducing a court’s ability

⁵¹¹ [2013] SASC 57 (24 April 2013).

to intervene, it would be inconsistent to introduce NSW style notional estate or clawback laws in South Australia.

8.4.2 Recommendation:

Recommendation 27

SALRI recommends that notional estates or ‘clawback’ laws for the purposes of family provision should not be introduced into the law in South Australia.

Part 9 – Aboriginal Succession Issues

9.1 Overview

9.1.1 The tension between the current English based succession laws in Australia and Aboriginal kinship rules and customary law and practice has been often highlighted.⁵¹² SALRI previously raised these issues in the context of intestacy, namely the law that applies in providing for the distribution of the estate when a person dies without a valid will or with a valid will that does not dispose of the whole estate⁵¹³ (this is a particular problem in Aboriginal communities and many, if not most, Aboriginal people are reported to die intestate without making a will).⁵¹⁴ SALRI in its Intestacy Report noted that while there are many Aboriginal people who have little estate, comprising items such as a motor vehicle, perhaps a firearm and a few personal items;⁵¹⁵ some Aboriginal people leave estates of considerable

⁵¹² See, for example, Xynas, above n 18, 207–212; NSWLRC, *Intestacy*, above n 301, 228–229 [14.3]–[14.4]; Queensland Law Reform Commission, *A Review of the Law in relation to the Final Disposal of a Dead Body*, Report No 69 (2011) 146 [6.34]; ALRC, *Recognition of Aboriginal Customary Laws*, above n 18, [337]. ‘While communal ownership remains the dominant paradigm in Aboriginal society in relation to cultural property and to land the subject of claim under native title, contemporary Aboriginal people have, for the most part, accepted the cash economy and there would appear to be greater opportunities for the individual accumulation of material possessions... Many Aboriginal people appeared to accept “white” inheritance practices in relation to personal and real property; however, “customs surrounding the inheritance of intellectual property, kinship obligations, sacred objects and cultural custodianship remained significant to most Aboriginal people consulted on this matter”’: LRCWA, above n 18, 233.

⁵¹³ SALRI, above n 2, 58–61 [7.8.1]–[7.8.11]. An Australia-wide survey indicates that 66 per cent of South Australian people over the age of 18 years make a will. Tilse et al, *Families and Generational Asset Transfers: Making and Challenging Wills in Contemporary Australia*, above n 121, 7.

⁵¹⁴ Xynas, above n 18, 207–212; ALRC, *The Recognition of Aboriginal Customary Laws*, above n 18, [333], n 17; NSWLRC, *Intestacy*, above n 301, 229 [14.6]; VLRC, *Succession Laws*, above n 6, 93 [5.161]; Rosalind Atherton and Prue Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, LexisNexis Butterworths, 2003) 32. In its submission to the Queensland Law Reform Commission, the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd noted that ‘[w]hile there is a considerable push by our office in consultation with the Public Trustee to address the unavailability of services to provide advice regarding wills to rural and remote communities, most Aboriginal and Torres Strait Islander people [still] die without a valid will’: Queensland Law Reform Commission, above n 512, 146, n 31. Prue Vines and others (including both the ALRM and the South Australian Public Trustee have suggested to SALRI that a simple and practical way to address the underlying problem of intestacy is to attempt to increase the rate of will-making among Aboriginal people. Such a development, as Vines explains, brings wider benefits: ‘By allowing the testator to spell out their own intentions in relation to a range of property rights and obligations, wills can ensure that Aboriginal customary law obligations will be clearly recognised and given legal force for the purposes of the common law. ... The drafting of wills which encompass a proper understanding of Indigenous kinship arrangements would allow those relationships to be protected by the common law in [a] manner consistent with the wishes of the deceased. It would also pre-empt potential disputes over burial rights through the appointment of an executor’: Prue Vines, ‘Consequences of Intestacy for Indigenous People in Australia: The Passing of Property and Burial Rights’ (2004) 8(4) *Australian Indigenous Law Reporter* 1, 8–9 (now *Australian Indigenous Law Review*). Vines notes that this approach would require additional funding for Aboriginal legal services, legal aid and possibly a dedicated initiative from the Public Trustee in each jurisdiction to deal with the problem: at 8–9. The ALRM has previously noted to SALRI that such a valuable initiative in South Australia to promote will making amongst Aboriginal communities was frustrated by funding cuts. It is unfortunate that such a worthwhile effort was frustrated. SALRI endorses efforts at encouraging greater will making amongst Aboriginal persons and, at the suggestion of figures in the Aboriginal community, has had some very preliminary discussion with the Law Society about combining any future SALRI law reform project to examine Indigenous succession law issues with a pro bono will making and education effort. See also LRCWA, above n 18, 239–241.

⁵¹⁵ SALRI was told that in the latter case the estate is usually informally distributed by elders.

monetary value, particularly if they have been employed or in business and accumulated superannuation and death benefit entitlements or have been successful artists.⁵¹⁶

9.1.2 There is tension between various aspects of Australian succession law and Aboriginal kinship and customary law and practice.⁵¹⁷ There is a particular tension between the English based concepts of eligible family members who are entitled to claim under family provision legislation and Aboriginal kinship structures.⁵¹⁸ Aboriginal customary laws about who are kin⁵¹⁹ and about the persons to whom obligations are owed are different to traditional English based concepts and may well differ from the present English based laws of succession, including those relating to family provision. As Prue Vines observes,

[t]he extreme emphasis on lineal, bloodline relationships in the common law contrasts with the acceptance of collateral, adopted and maritally linked relatives in Aboriginal customary law. Added to this is a level of complexity in the naming of Aboriginal relationships which is connected to specified obligations which continue to exist whether one is living traditional or non-traditional lifestyle. Ideas of family do not change just because one moves to Sydney or Brisbane or Perth [or Adelaide].⁵²⁰

9.1.3 The implications of Aboriginal kinship expectations in Aboriginal society are profound. 'Aboriginal kinship relationships govern all aspects of a person's social behaviour and prescribe the obligations or duties a person has toward others as well as the activities or individuals that a person must avoid.'⁵²¹ It has been observed that Aboriginal kinship structures and the customary law obligations that flow applies whether or not an Aboriginal person has a traditional lifestyle.⁵²²

9.1.4 The Northern Territory Law Reform Committee has noted that in traditional Aboriginal societies such as in the Northern Territory customary laws are likely to govern who should keep sacred

⁵¹⁶ It has been previously suggested to SALRI, but not confirmed, that some elders may have control of large sums of money from mining or other activity on Aboriginal Lands and it has been suggested that the manner in which it is dealt with on the elder's death is not consistent.

⁵¹⁷ There is, for example, tension between Australian law and Aboriginal customary practice as to the entitlement to decide on the disposal of the body of a deceased. See LRCWA, above n 18, 257; Queensland Law Reform Commission, *A Review of the Law in relation to the Final Disposal of a Dead Body*, above n 512, 156 [6.70]–[6.71], 161 [6.93]. See also below [9.4.3].

⁵¹⁸ LRCWA, above n 18, 240.

⁵¹⁹ Ibid 257. The Aboriginal kinship system has been explained as follows: 'Social relationships in which people refer to each other using terms of biological relatedness such as 'mother', 'son', 'cousin' are called kinship systems. In Aboriginal society everybody with whom a person comes into contact is called by a kinship term, and social interaction is guided by patterns of behaviour considered appropriate to particular kin relationships. Although a person's sex and age are important in determining social status, the system of relatedness largely dictates the way people behave towards one another, prescribing dominance, deference, obligation or equality as the basis of the relationship. Aborigines employ what is known as a 'classificatory' kinship system; that is the terms used among blood relatives are also used to classify or group more distantly related and unrelated people. Classificatory systems are based on two principles. First, siblings of the same sex (a group of brothers or a group of sisters) are classed as equivalent in the reckoning of kin relationships. Thus my father's brothers are classed as one with my father and are called 'father' by me; likewise, all women my mother calls 'sister' are my 'mothers'. Following this logic, the children of all people I call 'father' or 'mother' will be classed as my 'brothers' and 'sisters'. Secondly, in theory this social web can be extended to embrace all other people with whom one comes into contact in a lifetime.' See R Tonkinson, 'MarduJarra Kinship', as cited in Heather McRae, Gareth Nettheim and Laura Beacroft (eds), *Indigenous Legal Issues* (LBC Information Service, 2nd ed, 1997) 83.

⁵²⁰ Prue Vines, 'Wills as Shields and Spears: The Failure of Intestacy Law and the Need for Wills for Customary Law Purposes in Australia' (2001) 5(13) *Indigenous Law Bulletin* 16.

⁵²¹ Queensland Law Reform Commission, *A Review of the Law in relation to the Final Disposal of a Dead Body*, above n 512, 145, n 28.

⁵²² Vines, 'Wills as Shields and Spears', above n 520.

objects previously in the custody of a deceased person. Customary rules will also govern the giving of gifts and obligations under kinship. These customary rules of distribution will affect non-Aboriginal ideas on priority of claims and narrow concepts of kin.⁵²³ The Law Reform Commission of Western Australia noted that relevant customary laws are still also practised in Western Australia for the distribution of property upon death.⁵²⁴

9.1.5 As all the Australian statutory succession regimes (including South Australia) are based on a non-Aboriginal view of family and kinship, it has been suggested that this creates a serious mismatch between the various legislative schemes and Aboriginal cultural expectations.⁵²⁵ Applying the conventional English based kinship rules of current law and practice can produce different results than applying the kinship rules or customs of a particular Aboriginal group.⁵²⁶ The situation is further complicated, as the National Committee notes, as ‘there are many different types of Aboriginal communities in Australia: rural, urban, traditional and historical communities, including groups that have gathered together from different regions. Aboriginal people live in a diversity of lifestyles.’⁵²⁷ There are various different Aboriginal groups in South Australia whose customs, kinship rules and cultural obligations are not identical.

9.2 Intestacy and Aboriginal issues

9.2.1 The National Committee noted the tension between existing English based succession law and Aboriginal customary law and practice and recommended a special provision for Aboriginal people in relation to intestate estates (though only partly in a family provision context) whereby a person claiming to be entitled to a share in the intestate estate under the laws, customs, traditions and practices of the Aboriginal community or group to which the Aboriginal deceased belonged, may apply to the Supreme Court for an order for distribution of the estate according to a scheme submitted to the court.⁵²⁸ Such laws have been adopted in the Northern Territory and New South Wales.

9.2.2 Such laws have not gained universal support. The VLRC, for example, did not recommend adoption of these special provisions and also criticised the drafting.⁵²⁹ The VLRC concluded: ‘Implementation of the National Committee’s recommended model would promote national consistency. However, the Commission is not satisfied ... that the recommended model would greatly assist Aboriginal and Torres Strait Islander families in Victoria.’⁵³⁰

⁵²³ Northern Territory Law Reform Committee, above n 112, 17. See also ALRC, *The Recognition of Aboriginal Customary Laws*, above n 18, vol 1, 224–232.

⁵²⁴ LRCWA, above n 18, 233.

⁵²⁵ Vines, ‘Wills as Shields and Spears’, above n 520. See also ALRC, *Recognition of Aboriginal Customary Laws*, above n 18, [337]; LRCWA, above n 18, 239–241.

⁵²⁶ See also Vines, above n 514.

⁵²⁷ NSWLRC, *Intestacy*, above n 301, 228 [14.2].

⁵²⁸ Ibid 246 Rec 45. Part 4 of the Model Bill is based on, but is not identical with legislation that has been in force now in the Northern Territory for more than 35 years in the *Administration and Probate Act 1979* (NT). NSW and Tasmania have enacted the model provisions. Lindsay J has since described in detail some of the difficulties in interpreting and applying these provisions in *Re Estate of Wilson, deceased* [2017] NSWSC 1 (18 January 2017).

⁵²⁹ See SALRI, above n 2, 159–160 [313]–[314] for a summary of the VLRC’s views.

⁵³⁰ VLRC, *Succession Laws*, above n 6, 95 [5.172].

9.2.3 The VLRC recommended further research, community consultation and consideration *including* ‘to designing a more accessible scheme for distribution of Aboriginal estates that does not necessarily require a Supreme Court application’.⁵³¹

9.3 Family provision and Aboriginal issues

9.3.1 The National Committee specifically considered the relevance of Aboriginal customary law in family provision proceedings.⁵³² The Committee cited the following comments from a submission from the West Australian Aboriginal Legal Aid Service:

[We would] support family legislation which includes a general class of eligible adults and a general class of eligible children who could apply for provision as long as the matters which courts should take into account in considering such applications allowed for consideration of Aboriginal cultural issues. This would help alleviate some of the problems that currently exist for Aboriginal and Torres Strait island people because of the relatively narrow categories of people who may apply for family provision.⁵³³

9.3.2 The Committee noted that only the Northern Territory had partly recognised Aboriginal custom in relation to family provision in extending the entitlement to apply to traditional Aboriginal spouses.⁵³⁴ The National Committee noted that cultural and customary laws and practices in relation to succession would vary within and between communities and not every member of a particular community would feel bound by the laws, customs and practices of that community⁵³⁵ (which raises the question why the National Committee suggested that formula for intestate Aboriginal estates). The National Committee concluded it was inappropriate to specify ‘what customary practices and customary laws should be taken into account by the Court when determining a person’s eligibility to apply for family provision from the estate of a deceased member of a particular community’.⁵³⁶

9.3.3 However, the National Committee added to the list of relevant factors to take into account in any family provision claim, ‘any relevant Aboriginal or Torres Strait Islander customary law or other customary law’. The Committee ‘considered it important to enable the Court to take into account the deceased person’s and the applicant’s membership of a particular community and the customary practices and customary laws which help define that community in determining whether the deceased person owed the applicant a [relevant] responsibility’.⁵³⁷

9.3.4 The Law Reform Commission of Western Australia reached a different view. It conducted wide consultation with Aboriginal communities and concluded that the eligibility to seek family provision under the *Inheritance (Family and Dependents Provision) Act 1972* (WA) did not adequately recognise kin relationships in Aboriginal society:

It is the Commission’s opinion that the provisions of the Act do not provide adequately for the extended kin relationships recognised in Aboriginal society. Aboriginal people take their kinship obligations at customary law very seriously and these obligations may include the provision of

⁵³¹ Ibid 93–96, [5.160]–[5.178] and Recommendation 36.

⁵³² National Committee (MP 28), above n 3, 21–23.

⁵³³ Ibid 22.

⁵³⁴ *Family Provision Act 1970* (NT) s 7(1a). This does not appear in the current version, presumably on the basis that it is now incorporated by the term ‘de facto spouse’.

⁵³⁵ National Committee (MP 28), above n 3, 22.

⁵³⁶ Ibid.

⁵³⁷ Ibid 22–23. See also *Eatts v Gunday* [2014] QCA 309 (28 November 2014).

housing, financial assistance, education or general support of persons in a classificatory kin relationship. In particular, child-rearing in Aboriginal society is often shared and the responsibility for provision for a child may fall with different kin throughout that child's life. In these circumstances, there is scope for a person in a customary law kin relationship with a deceased at the time of his or her death, who is wholly or partly dependent upon the deceased, to be inadequately provided for in the distribution of an Aboriginal deceased estate.⁵³⁸

9.3.5 The Law Reform Commission of Western Australia recommended:

1. That the list of persons entitled to claim against a testate or intestate estate of an Aboriginal person under s 7 of the *Inheritance (Family and Dependents Provision) Act 1972* (WA) be extended to include a person who is in a kinship relationship with the deceased which is recognised under the customary law of the deceased and who at the time of death of the deceased was being wholly or partly maintained by the deceased.
2. That traditional Aboriginal marriage be recognised as a marriage and that children of a traditional Aboriginal marriage be recognised as issue of a marriage for the purposes of the *Inheritance (Family and Dependents Provision) Act 1972* (WA).⁵³⁹

9.3.6 The Northern Territory Law Reform Committee also preferred a wider approach to the relationships which should be included in family provision laws and the wider definition should include reference to Aboriginal relationships.⁵⁴⁰ The Committee referred to the *Motor Accidents Compensation Act* (NT) and suggested that this Act could assist in establishing a definition of 'Aboriginal relations'.⁵⁴¹ The NT Committee also noted that s 11(2)(m) of the Model Family Provision Legislation states that the court may take into consideration any relevant Aboriginal or Torres Strait Island customary law or other customary law and this provision could be sufficient to take into account customary Aboriginal or Torres Strait Island marriages.⁵⁴²

9.3.7 The VLRC did not consider amending the eligibility criteria for family succession claims in an Aboriginal context but it did consider the National Committee's proposal to allow a person, who claims to be entitled to a share of an Aboriginal person's intestate estate, to apply for a variation of the general intestacy law where the applicant claims to be entitled 'under the customs and traditions of the community or group' to which the deceased Aboriginal person belonged.

9.3.8 The VLRC was not convinced of the National Committee's proposal:

the Commission is not satisfied, following research and consultation, that the recommended model would greatly assist Aboriginal and Torres Strait Islander families in Victoria. For these reasons, the Commission does not recommend adoption of the provisions recommended by the National Committee, as implemented in New South Wales and Tasmania... The Commission considers that further research and community consultation is necessary to design a scheme for distribution of the estates of Aboriginal people who die intestate in Victoria. It is the

⁵³⁸ LRCWA, above n 18, 241. The Commission noted that the Public Trustee had supported this proposal and no submissions have been received that opposed it: at 242.

⁵³⁹ Ibid 242.

⁵⁴⁰ Northern Territory Law Reform Committee, above n 112, 46.

⁵⁴¹ Ibid citing *Motor Accidents Compensation Act* (NT) – s 4, definition of 'spouse' and s 37.

⁵⁴² Ibid 46–47. See also s 3(2) of the *De Facto Relationships Act* (NT) which states: 'In this Act – (a) a reference to a de facto partner of an Aboriginal or Torres Strait Islander includes a reference to an Aboriginal or Torres Strait Islander to whom the person is married according to the customs and traditions of the particular community of Aboriginals or Torres Strait Islanders with which either person identifies; and (b) a reference to a de facto relationship includes a reference to a de facto relationship between 2 persons who are de facto partners by virtue of paragraph (a).'

Commission's view that the general intestacy law is not appropriate for many Aboriginal people and that it should be tailored to the specific needs of Aboriginal communities in Victoria.⁵⁴³

9.3.9 Staff at the Aboriginal Legal Rights Movement have previously explained to SALRI the inappropriateness of succession laws based on British heritage for at least some Aboriginal communities. In a previous written submission, the SA Legal Services Commission described the inappropriateness of the existing law in South Australia for many Aboriginal people in the context of both the distribution of intestate estates and family provision matters. It commented:

Based on the Commission's experience, the current laws of intestacy provide a number of challenges for Aboriginal people. As noted in your [Intestacy] Issues Paper, one of these is the definition of "family" which for many Aboriginal people is much broader than immediate blood relatives and founded on kinship rather than familial relationships.

9.3.10 The Legal Services Commission submitted:

The Commission supports the view that consideration should be given to developing specific legislative provisions for Aboriginal deceased estates in the South Australian *Administration and Probate Act 1919*. Provisions should allow for the taking of oral evidence on the appropriate distribution of an estate as an alternative option to the submission of a written distribution plan.

9.3.11 SALRI's consultation to date (which is far from extensive in this context) has not found any consensus in relation to adopting the Model Bill to Aboriginal estates in a family provision context (as was also the case with the Model Bill and Aboriginal intestate estates) or indeed any other succession law reform proposal to Aboriginal communities.

9.3.12 The Law Society said in its submission that it was of 'the view that an approach should be taken under both Intestacy Laws and the *IFPA* that take into account the cultural complexities unique to Aboriginal estates'.⁵⁴⁴ The Law Society said there 'is some basis' for the Model provisions to apply and that 'the evidential onus should fall upon the applicant to prove that the relevant laws, customs, traditions and practices apply in relation to that death and the assets of the deceased'.⁵⁴⁵

9.3.13 SALRI's consultation with the Aboriginal Legal Rights Movement; other lawyers with experience in acting for Aboriginal people; Mr Frank Lampard OAM, the Commissioner for Aboriginal Engagement; several Aboriginal and non-Aboriginal people who have lived on the APY Lands and academics with interest in Aboriginal affairs has revealed differing views about the Model Bill and whether a specific model to reflect Aboriginal kinship is appropriate and, if so, what model to adopt. A concern expressed to SALRI was the disputation and difficulty that may arise in determining what 'the laws, customs, traditions and practices' are and whether the deceased belonged to the community or group asserted. It was also said that 'community' is ambiguous and its meaning difficult to work out in some cases.⁵⁴⁶

⁵⁴³ VLRC, *Succession Laws*, above n 6, 95 [5.172]–[5.175].

⁵⁴⁴ Law Society, *Submission to Cutting the Cake – South Australian Rules of Intestacy*, above n 296, 4 [28].

⁵⁴⁵ Ibid 4.

⁵⁴⁶ See also *Re Estate of Wilson, deceased* [2017] NSWSC 1 (18 January 2017) [7]–[16].

9.4 The Institute's views

9.4.1 SALRI previously agreed that enacting the model provisions in relation to Aboriginal intestate estates was not the best way to cater for Aboriginal kinship relationships and customary obligations.⁵⁴⁷ SALRI raised that a preferable way could be to include in the classes of people who may make an application under the *IFPA* people to whom the deceased owed kinship obligations.⁵⁴⁸ SALRI, on further reflection, considers that it is premature to make any recommendation on this or other succession law items with an Aboriginal focus. SALRI notes that, without expressing a final view on the suitability of the National Committee's suggestions for recognising Aboriginal kinship in a family succession context, the VLRC's observations quoted above of the need for further research and consultation are of equal application for South Australia in relation to Aboriginal specific laws in family provision. SALRI considers that further research and consultation is necessary in South Australia. There is no consensus in either law reform reports or the limited consultation that SALRI has undertaken to date with Aboriginal communities. Difficult questions may arise about who has standing and what are the relevant laws, customs, traditions and practices and sometimes about what group or community the deceased belonged to.⁵⁴⁹ Lindsay J has described in detail the difficulties in interpreting and applying such provisions in *Re Estate of Wilson, deceased*.⁵⁵⁰

9.4.2 Though SALRI has conducted some consultation with the ALRM and others in Aboriginal communities as to Aboriginal succession law issues (including the *IFPA*), further consultation is needed to enable any meaningful recommendations to be put. SALRI is of the view that, as confirmed by Associate Professor Alex Reilly and Dr Manuel Solis at the University of Adelaide and Ken Mackie at the University of Tasmania and Kris Wilson at Flinders University and a number of Aboriginal law students and graduates, any examination of law reform proposals relating to Aboriginal communities and succession law (including under the *IFPA*) should only be undertaken as a wider project with wide, inclusive and culturally appropriate consultation. It is also piecemeal to make proposals with respect to the one Aboriginal specific succession issue of family provision when that issue reflects of a wider tension between current English based Australian succession law and Aboriginal kinship and customary law and practice.

9.4.3 There is, for example, particular tension between Australian law and Aborigine customary practice as to the entitlement to decide on the disposal of the body of a deceased person.⁵⁵¹ Often, complex legal and cultural issues arise in this area.⁵⁵² The disposal of a deceased's remains has been flagged to SALRI⁵⁵³ as an area of considerable difficulty and bitterness, and of particular importance to Aboriginal people.⁵⁵⁴ Such disputes may also arise in families of other cultural backgrounds or where

⁵⁴⁷ SALRI, above n 2, Rec 53, 61.

⁵⁴⁸ Ibid 56 [7.6.5], 60 [7.8.11]. The ALRC also recommended this in *Recognition of Aboriginal Customary Laws*, above n 18, [337]. See also Xynas, above n 18, 207–212; Vines, 'Wills as Shields and Spears', above n 520, n 16; LRCWA, above n 18, 239–241.

⁵⁴⁹ SALRI, above n 2, 60 [7.8.8].

⁵⁵⁰ *Re Estate of Wilson, deceased* [2017] NSWSC 1 (18 January 2017) [7]–[16].

⁵⁵¹ See LRCWA, above n 18, 257; Queensland Law Reform Commission, *A Review of the Law in relation to the Final Disposal of a Dead Body*, above n 512, 156, [6.70]–[6.71], 191 [6.93].

⁵⁵² Queensland Law Reform Commission, *A Review of the Law in relation to the Final Disposal of a Dead Body*, above n 512, 135–205; Queensland Law Reform Commission, *A Review of the Law in relation to the Final Disposal of a Dead Body*, Information Paper WP No 58, 26–49.

⁵⁵³ SALRI, above n 2, 61 [7.9.1].

⁵⁵⁴ The VLRC observed: 'The Commission was told that funerals and burials are particularly significant for Aboriginal people and form an integral part of Aboriginal culture. For many it is important to be buried on country': VLRC,

there has been a break down in family relationships and sometimes because of circumstances such as the fostering, informal adoption or stepparent adoption of the deceased.⁵⁵⁵ It has been suggested to SALRI that legislative reform in this area would be beneficial.

9.4.4 SALRI has decided against including the topic of funeral instructions and the disposal of human remains in either its Intestacy Report⁵⁵⁶ or this Report. Further research and wide and inclusive consultation with Aboriginal people and other communities into this sensitive topic is required as is approval from the University of Adelaide's Human Research Ethics Committee. For those reasons, SALRI does not make any recommendations at this stage for any reform of the law relating to funeral instructions, the entitlement to decide on the disposal of the body of a deceased or disputes about the disposal of human remains in this Report. It is proposed that these items will be the subject of a future wider reference by SALRI to look at the tension between Australian succession law and Aboriginal customary law and practice and this reference should also include the role of instructions about funeral arrangements in a will, the disposal of human remains and the resolution of any disputes that may arise.⁵⁵⁷ This is a sensitive area, especially for Aboriginal communities.

9.4.5 Recommendation:

Recommendation 28

SALRI recommends that, subject to funding, research ethics approval, the necessary consultation (especially with Aboriginal communities) and the input of Aboriginal communities, it undertake a future law reform project to examine the various areas where there is tension between current succession laws in South Australia and Aboriginal kinship and customary law and practice (this project to include funeral instructions in a will, the disposal of a deceased's remains and the resolution of disputes that may arise) and to make appropriate recommendations.

Funeral and Burial Instructions, Report (2016) 19 [3.22]. See further at 19–21 [3.21]–[3.32]; LRCWA, above n 18, 257–264. Almost half of the court cases concerning disputes about the funeral arrangements of a deceased person involve Aboriginal people. See VLRC, *Funeral and Burial Instructions*, above n 554, 19, [3.21]. See also Prue Vines, 'The New South Wales Project on the Inheritance Needs of Aboriginal People: Solving the Problem by making Culturally Appropriate Wills' (2012) 6 *Australian Indigenous Law Review* 18, 23.

⁵⁵⁵ See generally VLRC, above n 554, 16–26, Ch 3; Heather Conway and John Stannard, 'The Honours of Hades: Death, Emotion and the Law of Burial Disputes' (2011) 34 *University of New South Wales Law Journal* 860.

⁵⁵⁶ SALRI, above n 2, 61 [7.9.1].

⁵⁵⁷ Ibid Rec 54, 61.

Part 10 – Other Issues

The following issues were not specifically covered in the survey questions or discussion questions:

10.1 Farming estates

10.1.1 SALRI notes the problems confronting farming families and estates in a succession and family provision context. Issues arising from farming estates were of a major concern in the Mt Gambier and Berri Roundtables due to the particular character of family provision disputes in regional and rural areas. In the Mt Gambier Legal Expert Roundtable, it was noted that rural and regional estates typically are less in value than in Adelaide but it is not unusual to find farming estates of up to \$2 million. Participants at the Berri Legal Experts Roundtable noted that whilst typical house in Adelaide may be worth \$750 000, in Berri it is \$120 000. It was noted that a house near Mt Gambier may sell for as little as \$90 000.⁵⁵⁸ One participant noted that in the family farming contexts, maintaining the viability of the farm can be difficult: 'If the farm is left to one child, and you want to maintain the business viability of the farm, which is harder and harder, you need to try and find assets to provide for the rest of the family and avoid any potential family provision claim. This can prove difficult if not impossible.'

10.1.2 One attendee at the Mt Gambier Community Roundtable explained that she had eight children, including two sons who are helping to maintain the family farm. At the time of her husband's death, an arrangement was made with all children to allow the sons to keep working the farm, and the other children received cash. The attendee now faces the daunting prospect of making a will that preserves the farm and lets the sons keep working it, but that is also fair to the other children and avoids any family inheritance claim. The attendee hoped that the sons on the farm can afford to pay out the other children, but she is not sure. SALRI notes that this illustrates some of the difficult moral and legal issues testators face when seeking to draft a will that both accords with their wishes and can withstand a claim under the *IFPA*. Another attendee explained that farming estates are especially vulnerable to family provision claims and issues. He noted that a large number of farms in this area are held in family trusts. These are designed to protect the farm against external attack, but they do not count on the internal attack, which can be much worse. This attendee also had experienced unconscionable conduct claims being made against father's will, and was really struggling to keep the farm going in the face of that unsubstantiated claim.

10.1.3 This issue was also raised in the YourSAy survey.

10.1.4 Case example

One of the respondents expressed her concerns with the law as follows: 'I am trying to arrange a waterproof will to arrange the passing of the family farm to the next two generations of family members who have an active interest and financial interest and reliance on the family farm. Whilst at the same time aware that two generations of immediate family who have nothing to do with the farm or a financial reliance on it have indicated they will contest any will to receive a greater share than they are currently allocated.'

⁵⁵⁸ See also SALRI, above n 1, 30 [3.3.6].

10.1.5 Case example

A farmer's daughter discussed the distribution of the farming property in her family: 'I am a daughter of a farmer's daughter, where all passed on to the sons, leaving the four daughters with nothing and the sons with property, incomes and a life of privilege.'

10.1.6 The recommendations in this Report are partly designed to address some of these issues and concerns but SALRI accepts the view of Ms Iwaniw in consultation that particular issues arise in relation to farming estates and any reform to the *IFPA* must take account of the wider context.

10.2 Powers of attorney and advance care directives

10.2.1 Many people expressed their concerns during the consultation with Powers of Attorney and Advance Care Directives and the financial exploitation of older Australians resulting from the use of these instruments. Some concerns were expressed about the operation of the *Powers of Attorney and Agent Act 1984*. There appears to be an opportunity for unscrupulous family members to exploit other family members, especially an elderly relative, through the exercise of their powers. This exploitation can continue over many years and there is little recourse that can be taken against the appointed attorney as a result of the abuse of power as the person exploited is generally mentally incapacitated, frail and vulnerable and has a relationship of trust with the attorney.

10.2.2 There has been an increase of reported cases of financial abuse of this nature and these cases are likely to become more prevalent as a result of greater wealth and increasing levels of dementia and increasing life expectancy.⁵⁵⁹ This supports the views expressed in the consultation. The issue of elder abuse has gained recent prominence and concern.⁵⁶⁰

10.2.3 The Hon Tom Gray QC and others consider this issue to be a serious problem and raised with SALRI whether there are appropriate safeguards in the present law which address abuses of power under these instruments. Mr Gray QC and others suggested to SALRI that that the *Powers of Attorney and Agent Act 1984* and linked legislation in this context need thorough review. SALRI agrees with this suggestion. Whilst this issue is beyond the scope of this Report, SALRI considers it to be an important issue that would benefit from further research and consultation in a future reference.

10.3 Charities

10.3.1 The role of charities in society is important. It is clear that charities are disadvantaged under current family provision law and practice, usually in favour of independent adult children.⁵⁶¹

10.3.2 SALRI notes the following comments by Chesterman J in an extra-judicial speech:

⁵⁵⁹ See, for example, Overington, above n 78; ALRC, *Elder Abuse — A National Legal Response*, above n 227, 37–47, 159–202; Mike Clare, Barbara Blundell and Joseph Clare, 'Examination of the Extent of Elder Abuse in Western Australia (Research Report, University of Western Australia, April 2011) 1, 31.

⁵⁶⁰ See ALRC, *Elder Abuse — A National Legal Response*, above n 227; Parliament of South Australia, *Elder Abuse*, above n 227.

⁵⁶¹ White et al, above n 8, 901; McGregor-Lowndes and Hannah, *Every Player Wins a Prize? Family Provision Applications and Bequests to Charity*, above n 36; McGregor-Lowndes and Hannah, 'Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs', above n 51, 1–24. See further Hannah and McGregor-Lowndes, *From Testamentary Freedom to Testamentary Duty: Finding the Balance*, above n 132, Appendix A.

It has seemed to me on occasions that the authority of *In Re Sinnot* has not been given proper recognition in cases where the competing claims are those of an adult child and a charity. It appears that there is an implicit assumption that the charity had no moral claim on the testator who correspondingly had no moral duty to benefit it. The contest is regarded as one between a claimant who *prima facie* had a moral claim on the testator, and a beneficiary who did not... generally speaking an adult child financially independent or even in affluent circumstances should have no claim on an estate left to charity particularly where there had not been a close relationship between parent and child for many years, though even that factor is of subsidiary importance... suggest that if cases were determined in accordance with established, orthodox, legal principle testamentary gifts to charities would not be disturbed on an application by an adult child who cannot demonstrate some special need or special moral claim.

I wish to suggest that attitudes have changed, or are changing, and that the courts ought to consider that there are or may well be moral duties on testators to benefit charities. My reason for saying this is the importance of charities to the social fabric of our community. ...

These figures indicate two things: the first is that charitable organisations have a value measurable in economic contribution as well as social and humanitarian terms. The second is that very large numbers of the public are actively involved in their activities, or support them financially.

The mark of a civilized society is how it cares for its citizens who cannot care for themselves. Charities, as we all know, provide physical help and emotional encouragement to the destitute, the dispossessed and the afflicted.

One only has to think of the work of the Salvation Army, St Vincent de Paul or the Smith Family. Other charities, of which the Cancer Council is one, undertake research to find ways of overcoming insidious diseases, thereby improving the health and quality of life of individuals and populations. The benefits are individual and universal.

Some conclusions follow. Testators who are responsible citizens could not be ignorant of the importance of charities and their value to society. As we all benefit from living in a society so we all have an obligation to maintain and improve it. There is, I suggest, a moral aspect to the support of charities which alleviate suffering and promote the common good. It cannot be said that there is no moral duty to provide them with financial support. There is and always will be a natural (or moral) tendency to advance children by testamentary gift but there is also a natural or moral inclination to assist those who work unselfishly for others and for the good of society. A testator's desire to discharge this moral duty should not, I think, be ignored or denigrated by an unquestioning assumption that "family comes first". It may, or may not, depending upon the testator's assessment of where his or her duty lies.

I expect that these considerations will assume increasing importance in applications under the *Succession Act* in the times ahead.⁵⁶²

10.3.3 The status of charities as beneficiaries under wills also featured in the recent Supreme Court judgment in *Ilott*. The Supreme Court was critical of the Court of Appeal for arguing that the beneficiary charities had no expectation of benefit under Mrs Jackson's will and that they therefore would not be prejudiced by an increased award to Mrs Ilott. Lord Hughes pointed out that the claims of Mrs Ilott and the charities were not on a par. He noted that, although not based on personal need, charities 'depend heavily on testamentary bequests for their work, which is by definition of public benefit' and 'more fundamentally, these charities were the chosen beneficiaries of the deceased' and as a result they

⁵⁶² See Chesterman, above n 271, 15–19.

did not need to justify their claim under the English Act the same way Mrs Iltott did.⁵⁶³ It has been suggested that the Supreme Court decision in *Iltott* challenges the notion under family provision law that ‘charity begins at home’.⁵⁶⁴

10.3.4 A contrary view is that the real issue in this area of family provision law is commensurability; that is what is to be made of a testator's wish that a certain charity be left a gift by him or her in contest with his or her moral obligations to his or her family? These family obligations are completely different from a charitable duty to people in general. The *IFPA* is concerned with family obligations. This view emphasises the notion that ‘charity begins at home’. As a New Zealand judge explained: ‘the courts have consistently applied the maxim “charity begins at home” in respect of deceased persons who have preferred to provide for charitable causes than to their relatives.’⁵⁶⁵

10.3.5 Very few responses relating specifically to charities were received in consultation. Mr Rymill and Mr Evans agreed with the approach of Chesterman J. The Legal Services Commission was of the view that charities and other organisations may find it easier to defend bequests if they can show a strong connection between themselves and the testator.

10.3.6 SALRI notes the force of the views of Chesterman J and Lord Hughes and accepts that charities should not be disadvantaged under the *IFPA*. There is a sound policy rationale to protect the income that charities receive given the obvious public benefit of their role in society. SALRI accepts that charities have a legitimate interest in the outcome of wills where the testator has left property to a charity. It logically follows, in accordance with the importance of testamentary freedom and the stronger focus that this Report recommends should be attached to it, that testators should be ordinarily free to leave their estate to whom they wish, whether a charity or not, unless the limited circumstances arise in which it is appropriate for a court to alter a will.⁵⁶⁶

10.3.7 However, SALRI concludes that it is unnecessary to include in the *IFPA* any specific legislative provision relating to charities. The question of any dispute under the *IFPA* between the charities nominated in a will and eligible relatives can be left to the usual law to resolve, notably with the recommendations in this Report.

10.4 Accessibility of the law

10.4.1 A central premise of law reform is to promote the clarity, comprehension and accessibility of the law. SALRI adopts the view of Kirby J in this context: ‘The right of citizens ... to have the most modern, well-informed, efficient system of law that the state can reasonably provide.’⁵⁶⁷

10.4.2 The accessibility of the law was highlighted by one of the respondents in the YourSAy surveys. This person noted: ‘We are led to believe that lawyers are the only ones who can sort out legal issues, I

⁵⁶³ *Iltott v Mitson* [2017] 2 WLR 979, [46].

⁵⁶⁴ See, for example, Chris Millward, ‘The end of the *Iltott* saga: a Victory for Testamentary Freedom’ (2017) 161(16) *Solicitors Journal* 10–11; Mark Jones, ‘*Iltott*: Upholding Testamentary Freedom’, *Family Law Weekly*, 9 March 2017; Olivia Rudgard, ‘Charities win Supreme Court challenge to six-figure award made to daughter who was left out of mother’s will’, *The Telegraph* (online), 15 March 2017, <<http://www.telegraph.co.uk/news/2017/03/15/supreme-court-rule-case-daughter-left-mothers-160k-will-favour/>>.

⁵⁶⁵ *Meller v Tetley-Jones* (High Court, Auckland, A 1247/84, 3 February 1987, Barker J) 9.

⁵⁶⁶ See Recommendations 2, 3 above. See also McGregor-Lowndes and Hannah, *Every Player Wins a Prize? Family Provision Applications and Bequests to Charity*, above n 36, 90.

⁵⁶⁷ Kirby, ‘Changing Fashions and Enduring Values’, above n 23.

believe that it's all about interpretation. Humans have that ability to see things differently yet we need lawyers to sort this out, who I might add also are subject to interpretation. Why can't we write laws that judges can adjudicate on without involving lawyers. Lawyers have become experts in converting simple issues into complicated ones at a substantial cost.'

10.4.3 The Law Society suggested that, after any amendments in due course to the *IFPA* (also noting SALRI's previous Report into Intestacy),⁵⁶⁸ consolidation of South Australian succession law legislation into one new *Succession Act* be considered.⁵⁶⁹ This has been done in Queensland, New South Wales and Victoria. This is a sensible suggestion (along with updating or discarding any outdated or antiquated provisions). It would assist both the community and practitioners and support the goal of the law being as understandable and accessible as possible.⁵⁷⁰ SALRI considers that an area of law as important as succession and especially family provision should be clear, comprehensible and accessible.

10.4.4 Recommendations

Recommendation 29

SALRI recommends that, subject to appropriate funding, it undertake a future law reform project to examine the role and operation of the current law in South Australia with respect to powers of attorney under the *Powers of Attorney and Agent Act 1984* (to include advance care directives and the *Guardianship and Administration Act 1993* and other linked legislation if appropriate) and with a particular view to addressing any concerns of abuse and exploitation.

Recommendation 30

SALRI accepts that charities have a legitimate interest where a testator has left property to a charity (especially in accordance with the importance in this context of testamentary freedom), but it is unnecessary to include any specific provision relating to charities and SALRI recommends no change to the *Inheritance (Family Provision) Act 1972* in this context.

Recommendation 31

SALRI recommends that after, or at the same time as, any amendments to the *Inheritance (Family Provision) Act 1972* (noting SALRI's earlier Report into Intestacy),⁵⁷¹ there be consolidation of South Australian succession law legislation into one new *Succession Act* to promote accessibility and ease of reference.

⁵⁶⁸ SALRI, above n 2, 65 [7.14].

⁵⁶⁹ See also Law Society, Submission to Cutting the Cake – South Australian Rules of Intestacy, above n 296.

⁵⁷⁰ See above [5.5.2].

⁵⁷¹ SALRI, above n 2, 65 [7.14].

Appendix A – Family Provision Bill 2004 (Model Bill)

Family Provision Bill 2004

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Family Provision Bill 2004

Act No , 2004

A Bill for

An Act to ensure that adequate provision is made for members of the family of a deceased person, and certain other persons, from the estate of the deceased person; and for other purposes.

Clause 1 Family Provision Bill 2004

Part 1 Preliminary

[enacting formula]

Part 1 Preliminary

1 Name of Act

This Act is the *Family Provision Act 2004*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

(1) In this Act:

costs, in relation to proceedings under this Act relating to the estate or notional estate of a deceased person, means the costs, charges and expenses of or incidental to the proceedings.

Court means [insert name of appropriate court for jurisdiction].

deceased transferee means a deceased transferee referred to in section 32 or 33.

de facto partner means [insert appropriate definition for jurisdiction or define other appropriate term for jurisdiction]

[This draft uses the NSW term “de facto partner”. Each jurisdiction may insert the appropriate term for the jurisdiction where references to de facto partner occur in the draft Bill.]

family provision order means an order made by the Court under Part 2 in relation to the estate or notional estate of a deceased person to provide from that estate for the maintenance, education or advancement in life of another person.

notional estate of a deceased person means property designated by a notional estate order as notional estate of the deceased person.

notional estate order means an order made by the Court under Part 3 designating property specified in the order as notional estate of a deceased person.

person entitled to exercise a power means a person entitled to exercise a power, whether or not the power:

- (a) is absolute or conditional, or

Family Provision Bill 2004

Clause 4

Preliminary

Part 1

- (b) arises under a trust or in some other manner, or
- (c) is to be exercised solely by the person or by the person together with one or more other persons (whether jointly or severally).

property includes the following:

- (a) real and personal property,
- (b) any estate or interest (whether a present, future or contingent estate or interest) in real or personal property,
- (c) money,
- (d) any cause of action for damages (including damages for personal injury),
- (e) any other chose in action,
- (f) any right with respect to property,
- (g) any valuable benefit.

property held by a person includes property in relation to which the person is entitled to exercise a power of appointment or disposition in favour of himself or herself.

will includes a codicil and any other testamentary disposition.

- (2) Notes in the text of this Act do not form part of this Act.

4 Application of Act to deceased persons

- (1) This Act applies in relation to the estate of a deceased person whether or not administration of the estate has been granted.

Note. Administration may be granted for the purposes of being able to apply for a family provision order (see section 42).

- (2) For the purposes of this Act, **administration** is granted in respect of the estate of a deceased person if:
 - (a) probate of the will of the deceased person is granted in *[insert name of jurisdiction]* or granted outside *[insert name of jurisdiction]* but sealed in accordance with *[insert name of appropriate provision of jurisdiction]*, or
 - (b) letters of administration of the estate of the deceased person are granted in *[insert name of jurisdiction]* or granted outside *[insert name of jurisdiction]* but sealed in accordance with *[insert name of appropriate provision of jurisdiction]*, whether the letters were granted with or without a will

Clause 5 Family Provision Bill 2004

Part 1 Preliminary

annexed and whether for general, special or limited purposes,
or

(c) an order is made under *[insert references to appropriate provisions of jurisdiction relating to transfer of administration to the public trustee, election by the Public Trustee to administer small estates, administration by Public Trustee of intestate estates]*.

(3) For the purposes of this Act, the **administrator** of the estate of a deceased person is a person to whom administration of the estate has been granted or any of the following persons:

- (a) a person who holds the estate or any part of that estate on a trust that arises out of the will or on the intestacy of the deceased person,
- (b) a person who is otherwise entitled or required to administer that estate or any part of that estate.

5 Act binds Crown

This Act binds the Crown, not only in right of *[insert name of jurisdiction]* but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

Family Provision Bill 2004

Clause 6

Family provision orders

Part 2

Part 2 Family provision orders

Division 1 Applications for family provision orders

6 Family members who are entitled to make applications

- (1) The following members of the family of a deceased person may apply to the Court for a family provision order in respect of the estate of the deceased person:
- (a) the wife or husband of the deceased person at the time of the deceased person's death,
 - (b) a person who was, at the time of the deceased person's death, the de facto partner of the deceased person,
 - (c) a non-adult child of the deceased person.

- (2) In this section:

non-adult child of a deceased person means a child of the deceased person who was a minor when the deceased person died or who was born after the deceased person died, but does not include a step-child of the deceased person.

Note. Section 11 sets out the matters that the Court may consider when determining whether to make a family provision order, and the nature of any such order.

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

- (1) A person to whom a deceased person owed a responsibility to provide maintenance, education or advancement in life may apply to the Court for a family provision order in respect of the estate of the deceased person.
- (2) An application may be made under this section by a person whether or not the person is a child or other member of the family of the deceased person.

Note. Section 11 sets out the matters that the Court may consider when determining whether a person is entitled to make an application under this section.

8 Applications for persons lacking capacity

- (1) This section applies to the following persons:
- (a) the administrator of the estate of the deceased person,

Clause 9 Family Provision Bill 2004

Part 2 Family provision orders

- (b) *[insert appropriate reference to litigation guardian/guardian ad litem/guardian] of a person,*
- (c) *[insert reference to appropriate equivalent to the public trustee in jurisdiction],*
- (d) *[insert reference to appropriate officer of jurisdiction in relation to children in care],*
- (e) *[insert reference to appropriate officer under mental health legislation of jurisdiction].*
- (2) A person to whom this section applies may apply to the Court:
 - (a) for a family provision order on behalf of a person who is or may be entitled to apply for such an order but who lacks capacity to do so, or
 - (b) for advice or directions as to whether an application for a family provision order ought to be made by or on behalf of any such person.

9 Time limit for applications

- (1) An application for a family provision order must be made not later than 12 months after the death of the deceased person, unless the Court otherwise directs.
- (2) If an application for a family provision order has been made by any person, it is, for the purposes of determining whether any subsequent application is made within the required time, taken to have been made by all persons who are entitled to make an application for a family provision order in respect of the estate concerned.
- (3) An application is taken to be made on the day it is filed in the Court's registry.
- (4) For the purposes of this section, an application for advice or directions made under section 8 is taken to be an application for a family provision order.

Division 2 Determination of applications

10 When family provision order may be made

- (1) The Court may, on application under Division 1, make a family provision order in respect of the estate of a deceased person, if the Court is satisfied that:

Family Provision Bill 2004

Clause 10

Family provision orders

Part 2

- (a) the person in whose favour the order is to be made is a person who may make an application, or is a person on whose behalf such an application may be made, and
 - (b) at the time that the Court is determining whether or not to make the order, adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made is not made by the provision made in the will of the deceased person, or the operation of the intestacy rules in relation to the estate of the deceased person, or both.
- (2) The Court may make such order for provision out of the estate of the deceased person as the Court thinks ought to be made for the maintenance, education or advancement in life of the person in whose favour the order is made, having regard to the facts known to the Court at the time the order is made.

Note. Property that may be the subject of a family provision order is set out in Division 3. This Part applies to property, including property that is designated as notional estate (see section 24). Part 3 sets out property that may be designated as part of the notional estate of a deceased person for the purpose of making a family provision order.
- (3) The Court may make a family provision order in favour of a person in whose favour a family provision order has previously been made in relation to the same estate only if:
 - (a) the Court is satisfied that there has been a substantial detrimental change in the person's circumstances since a family provision order was last made in favour of the person, or
 - (b) at the time that a family provision order was last made in favour of the person:
 - (i) the evidence about the nature and extent of the deceased person's estate (including any property that was, or could have been, designated as notional estate of the deceased person) did not reveal the existence of certain property (the *undisclosed property*), and
 - (ii) the Court would have considered the deceased person's estate (including any property that was, or could have been, designated as notional estate of the deceased person) to be substantially greater in value if the evidence had revealed the existence of the undisclosed property.

Clause 11 Family Provision Bill 2004

Part 2 Family provision orders

11 Matters to be considered by Court

- (1) The Court may have regard to the matters set out in subsection (2) for the purpose of determining:
 - (a) whether a person is entitled to make an application under section 7, and
 - (b) whether, in the case of any application under Division 1, to make a family provision order and the nature of any such order.
- (2) The following matters may be considered by the Court:
 - (a) any family or other relationship between the person in whose favour the order is sought to be made (the *proposed beneficiary*) and the deceased person, including the nature and duration of the relationship,
 - (b) the nature and extent of any obligations or responsibilities owed by the deceased person to the proposed beneficiary, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the deceased person's estate,
 - (c) the nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered,
 - (d) the financial resources (including earning capacity) and financial needs, both present and future, of the proposed beneficiary, of any other person in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person's estate,
 - (e) any physical, intellectual or mental disability of the proposed beneficiary, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that is in existence when the application is being considered or that may reasonably be anticipated,
 - (f) the age of the proposed beneficiary when the application is being considered,
 - (g) any contribution, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by

Family Provision Bill 2004

Clause 12

Family provision orders

Part 2

the proposed beneficiary to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family,

- (h) any provision made for the proposed beneficiary by the deceased person, either during the deceased person's lifetime or any provision made from the deceased person's estate,
- (i) the date of the will (if any) of the deceased person and the circumstances in which the will was made,
- (j) whether the proposed beneficiary was being maintained, either wholly or partly, by the deceased person before the deceased person's death and, if the Court considers it relevant, the extent to which and the basis on which the deceased person did so,
- (k) whether any other person is liable to support the proposed beneficiary,
- (l) the character and conduct of the proposed beneficiary or any other person before and after the death of the deceased person,
- (m) any relevant Aboriginal or Torres Strait Islander customary law or other customary law,
- (n) any other matter the Court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered.

12 Other possible applicants

- (1) In determining an application for a family provision order, the Court may disregard the interests of any other person by or in respect of whom an application for a family provision order may be made (other than a beneficiary of the deceased person's estate) but who has not made an application.
- (2) However, the Court may disregard any such interests only if:
 - (a) notice of the application, and of the Court's power to disregard the interests, is served on the person concerned, in the manner and form prescribed by the regulations *[insert reference to prescribing by rules of court, if appropriate for the jurisdiction]*, or
 - (b) the Court determines that service of any such notice is unnecessary, unreasonable or impracticable in the circumstances of the case.

Clause 13 Family Provision Bill 2004

Part 2 Family provision orders

13 Interim family provision orders

- (1) The Court may make an interim family provision order before it has fully considered an application for a family provision order if it is of the opinion that no less provision than that proposed in the interim order would be made in favour of the person concerned in the final order.
- (2) After making an interim family provision order, the Court must proceed to finally determine the application for a family provision order by confirming, revoking or varying the interim order.

Division 3 Property that may be used for family provision orders

14 Property that may be used for family provision orders

- (1) A family provision order may be made in respect of the estate of a deceased person.
- (2) If the deceased person died leaving a will, the estate of the deceased person includes property that would, on a grant of probate of the will, vest in the executor of the will, or would on a grant of administration with the will annexed, vest in the administrator appointed under that grant.
- (3) A family provision order may not be made in relation to property of the estate that has been distributed, except as provided by subsection (5).
- (4) Where property in the estate of a deceased person is held by the administrator of that estate as trustee for a person or for a charitable or other purpose, the property is to be treated, for the purposes of this Act, as not having been distributed unless it is vested in interest in that person or for that purpose.
- (5) A family provision order may be made in relation to property that is not part of the estate of a deceased person, or that has been distributed, if it is designated as notional estate of the deceased person by an order under Part 3.

15 Orders may affect property in or outside jurisdiction

A family provision order may be made in respect of property situated in or outside *[insert name of jurisdiction]* when, or at any time after, the order is made, whether or not the deceased person was, at the time of death, domiciled in *[insert name of jurisdiction]*.

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Division 4 General provisions relating to family provision orders

16 Nature of orders

- (1) A family provision order must specify:
 - (a) the person or persons for whom provision is to be made, and
 - (b) the amount and nature of the provision, and
 - (c) the manner in which the provision is to be provided and the part or parts of the estate out of which it is to be provided, and
 - (d) any conditions, restrictions or limitations imposed by the Court.
- (2) A family provision order may require the provision to be made in one or more of the following ways:
 - (a) by payment of a lump sum of money,
 - (b) by periodic payments of money,
 - (c) by application of specified existing or future property,
 - (d) by way of an absolute interest, or a limited interest only, in property,
 - (e) by way of property set aside as a class fund for the benefit of 2 or more persons,
 - (f) in any other manner the Court thinks fit.
- (3) If provision is to be made by payment of an amount of money, the family provision order must specify whether interest is payable on the whole or any part of the amount payable for the period, and, if so, the period during which interest is payable and the rate of the interest.

17 Consequential and ancillary orders

The Court may, in addition to, or as part of, a family provision order, make orders for or with respect to all or any of the following matters for the purpose of giving effect to the family provision order:

- (a) the transfer of property of the estate directly to the person in whose favour the order is made, or to any other person as trustee for that person,
- (b) the constitution of any person by whom property of the estate is held as a trustee of that property,
- (c) the appointment of a trustee of property of the estate,

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- (d) the powers and duties of a trustee of property of the estate, including any trustee constituted or appointed under this section,
- (e) the vesting in any person of property of the estate,
- (f) the exercise of a right or power to obtain property for the estate,
- (g) the sale of or dealing with property of the estate,
- (h) the disposal of the proceeds of any sale or other realising of property of the estate,
- (i) the securing, either wholly or partially, of the due performance of an order under this Part,
- (j) the management of the property of the estate,
- (k) the execution of any necessary conveyance, document or instrument, the production of documents of title or the doing of such other things as the Court thinks necessary in relation to the performance of the order,
- (l) any other matter the Court thinks necessary.

18 Undertakings to restore property

- (1) The Court may make a family provision order subject to a condition that the person in whose favour the order is made is to enter into an undertaking, or give security, that, if the order is revoked because the deceased person was not deceased when the order was made, the person will restore any property received under the order, or otherwise make restitution, in accordance with any order of the Court made on the revocation.
- (2) In this section:
deceased person means the person (whether or not deceased) from whose estate a family provision order is made.

19 Payment for exoneration from liability for orders

- (1) The Court may, as part of a family provision order, or at any time, on the application of a beneficiary of the estate of a deceased person, by order:
 - (a) fix a periodic payment or lump sum payable by a beneficiary of an estate affected by a family provision order to represent the proportion of the property in the estate affected by the

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family provision order that is borne by the beneficiary's portion of the estate, and

- (b) exonerate the beneficiary's portion of the estate from any further liability under the family provision order, on condition that payment is made as directed by the Court.
- (2) Without limiting subsection (1), in making any order under this section, the Court may do any of the following:
- (a) specify the person to whom the payment or lump sum is to be paid,
 - (b) specify how any periodic payment is to be secured,
 - (c) specify how any lump sum is to be invested for the benefit of any proposed beneficiary.

Note. Section 43 enables the Court to replace property in the estate or notional estate of a deceased person that has been, or is proposed to be, affected by a family provision order with property offered in substitution for the affected property.

20 Effect of order vesting property in estate

[Each jurisdiction may determine whether to include a provision applying particular provisions of its trust law to an order under section 17.]

21 Variation and revocation of family provision orders

- (1) A family provision order may be varied or revoked by the Court only in accordance with this Act.
- (2) The Court may, by order, vary or revoke a family provision order so as to allow provision to be made in favour of another person wholly or partly from all or any property affected by the order.
- (3) The Court must not vary or revoke a family provision order so as to allow provision to be made in favour of another person unless that person shows sufficient cause for not having applied for a family provision order before the order sought to be varied or revoked was made.
- (4) A family provision order is revoked if the grant of administration in respect of the estate of the deceased person is revoked or rescinded, unless the Court otherwise provides when revoking or rescinding the grant.

Note. The Court may also vary a family provision order under sections 13 and 43.

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22 Variation and revocation of other orders

If a family provision order is varied or revoked, the Court may:

- (a) vary or revoke any other orders made by it as a consequence of, or in relation to, the order to such extent as may be necessary as a result of the variation or revocation, and
- (b) make such additional orders as may be so necessary.

23 Effect of family provision order

A family provision order takes effect, unless the Court otherwise directs, as if the provision was made:

- (a) in a codicil to the will of the deceased person, if the deceased person made a will, or
- (b) in a will of the deceased person, if the deceased person died intestate.

24 Application

- (1) This Part applies to interim family provision orders in the same way as it applies to family provision orders.
- (2) This Part (other than section 14) applies to property designated as part of the notional estate of a deceased person in the same way as it applies to property that is part of the estate of a deceased person.

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Note.

This Part applies where, as a result of certain property transactions, property is not included in the estate of a deceased person or where property has been distributed from the estate of a deceased person. This Part enables the Court in limited circumstances to make an order designating property that is not included in the estate, or has been distributed from the estate, as "notional estate" of the deceased person for the purpose of making a family provision order under Part 2 in respect of the estate of the deceased person (or for the purpose of ordering that costs in the proceedings be paid from the notional estate).

Property may be designated as notional estate if it is property held by, or on trust for, a person by whom property became held (whether or not as trustee), or the object of a trust for which property became held on trust:

- (a) as a result of a distribution from the estate of a deceased person (see section 30), whether or not the property was the subject of the distribution, or
- (b) as a result of a relevant property transaction, whether or not the property was the subject of the transaction (see section 31), or
- (c) as a result of a relevant property transaction entered into by a person by whom property became held, or for whom property became held on trust, as a result of a relevant property transaction or a distribution from the estate of a deceased person (see section 32), whether or not the property was the subject of the relevant property transaction.

Property may also be designated as notional estate if it is property:

- (a) held by the administrator of the estate of a person by whom property became held as a result of a relevant property transaction or distribution referred to in paragraph (a)–(c) above and who has since died (known as the **deceased transferee**), or
- (b) held by, or on trust for, a person by whom property became held, or for the object of a trust for which property became held on trust, as a result of a distribution from the estate of a deceased transferee,

whether or not the property was the subject of the relevant property transaction or the distribution from the estate of the deceased person or the deceased transferee (see section 33).

Section 43 enables the Court to replace property in the estate or notional estate of a deceased person that has been, or is proposed to be, affected by a family provision order with property offered in substitution for the affected property.

Division 1 Relevant property transactions

25 Definition

In this Part:

relevant property transaction means a transaction or circumstance affecting property and described in section 26 or 27.

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26 Transactions that are relevant property transactions

- (1) A person enters into a relevant property transaction if the person does, directly or indirectly, or does not do, any act that (immediately or at some later time) results in property being:
 - (a) held by another person (whether or not as trustee), or
 - (b) subject to a trust,and full valuable consideration is not given to the person for doing or not doing the act.
- (2) The fact that a person has entered into a relevant property transaction affecting property does not prevent the person from being taken to have entered into another relevant property transaction if the person subsequently does, or does not do, an act affecting the same property the subject of the first transaction.
- (3) The making of a will by a person, or the omission of a person to make a will, does not constitute an act or omission for the purposes of subsection (1), except in so far as it constitutes a failure to exercise a power of appointment or disposition in relation to property that is not in the person's estate.

27 Examples of relevant property transactions

- (1) The circumstances set out in subsection (2), subject to full valuable consideration not being given, constitute the basis of a relevant property transaction for the purposes of section 26.
- (2) The circumstances are as follows:
 - (a) if a person is entitled to exercise a power to appoint, or dispose of, property that is not in the person's estate and does not exercise that power before ceasing (because of death or the occurrence of any other event) to be entitled to do so, with the result that the property becomes held by another person (whether or not as trustee) or subject to a trust or another person (immediately or at some later time) becomes, or continues to be, entitled to exercise the power,
 - (b) if a person holds an interest in property as a joint tenant and the person does not sever that interest before ceasing (because of death or the occurrence of any other event) to be entitled to do so, with the result that, on the person's death, the property becomes, by operation of the right of survivorship, held by another person (whether or not as trustee) or subject to a trust,

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- (c) if a person holds an interest in property in which another interest is held by another person (whether or not as trustee) or is subject to a trust, and the person is entitled to exercise a power to extinguish the other interest in the property and the power is not exercised before the person ceases (because of death or the occurrence of any other event) to be so entitled with the result that the other interest in the property continues to be so held or subject to the trust,
 - (d) if a person is entitled, in relation to a life assurance policy on the person's life under which money is payable on the person's death, or if some other event occurs, to a person other than the administrator of the person's estate, to exercise a power:
 - (i) to substitute a person or a trust for the person to whom or trust subject to which money is payable under the policy, or
 - (ii) to surrender or otherwise deal with the policy,and the person does not exercise that power before ceasing (because of death or the occurrence of any other event) to be entitled to do so,
 - (e) if a person who is a member of, or a participant in, a body (corporate or unincorporate), association, scheme, fund or plan, dies and property (immediately or at some later time) becomes held by another person (whether or not as trustee) or subject to a trust because of the person's membership or participation and the person's death or the occurrence of any other event,
 - (f) if a person enters into a contract disposing of property out of the person's estate, whether or not the disposition is to take effect before, on or after the person's death or under the person's will or otherwise.
- (3) Nothing in this section prevents any other act or omission from constituting the basis of a relevant property transaction for the purposes of section 26.
- (4) For the purposes of this Act, in the circumstances described in subsection (2) (b), a person is not given full or any valuable consideration for not severing an interest in property held as a joint tenant merely because, by not severing that interest, the person retains, until his or her death, the benefit of the right of survivorship in respect of that property.

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28 When relevant property transactions take effect

- (1) For the purposes of this Act, a relevant property transaction is taken to have effect when the property concerned becomes held by another person or subject to a trust or as otherwise provided by this section.
- (2) A relevant property transaction consisting of circumstances described in section 27 (2) (a), (c) or (d) is taken to have been entered into immediately before, and to take effect on, the person's death or the occurrence of the other event resulting in the person no longer being entitled to exercise the relevant power.
- (3) A relevant property transaction consisting of circumstances described in section 27 (2) (b) or (e) is taken to have been entered into immediately before, and to take effect on, the person's death or the occurrence of the other event referred to in those paragraphs.
- (4) A relevant property transaction that involves any kind of contract for which valuable consideration, though not full valuable consideration, is given for the person to enter into the transaction is taken to be entered into and take effect when the contract is entered into.

Division 2 When notional estate orders may be made

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

- (1) The Court may make an order designating property as notional estate only:
 - (a) for the purposes of a family provision order to be made under Part 2, or
 - (b) for the purposes of an order that the whole or part of the costs of proceedings in relation to the estate or notional estate of a deceased person be paid from the notional estate of the deceased person.

Note. Section 14 (5) enables a family provision order to be made in relation to property designated as notional estate of a deceased person.
Section 49 enables the Court to order that costs be paid out of the notional estate of a deceased person.

- (2) The Court must not make an order under subsection (1) (b) for the purposes of an order that the whole or part of an applicant's costs be paid from the notional estate of the deceased person unless the Court

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makes or has made a family provision order in favour of the applicant.

30 Notional estate order may be made where property of estate distributed

- (1) The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that, as a result of a distribution of the deceased person's estate, property became held by a person (whether or not as trustee) or subject to a trust.
- (2) Property may be designated as notional estate by a notional estate order under this section if it is property that is held by, or on trust for:
 - (a) a person by whom property became held (whether or not as trustee) as a result of a distribution referred to in subsection (1), or
 - (b) the object of a trust for which property became held on trust as the result of a distribution referred to in subsection (1),whether or not the property was the subject of the distribution.

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

- (1) The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that the deceased person entered into a relevant property transaction before his or her death and that the transaction is a transaction to which this section applies.

Note. The kinds of transactions that constitute relevant property transactions are set out in sections 26 and 27.
- (2) This section applies to the following relevant property transactions:
 - (a) a transaction that took effect within 3 years before the death of the deceased person and was entered into with the intention, wholly or partly, of denying or limiting provision being made out of the estate of the deceased person for the maintenance, education or advancement in life of any person who is entitled to apply for a family provision order,
 - (b) a transaction that took effect within one year before the death of the deceased person and was entered into when the

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deceased person had a responsibility to make adequate provision, by will or otherwise, for the proper maintenance, education or advancement in life of any person who is entitled to apply for a family provision order,

- (c) a transaction that took effect or is to take effect on or after the deceased person's death.

- (3) Property may be designated as notional estate by a notional estate order under this section if it is property that is held by, or on trust for:

- (a) a person by whom property became held (whether or not as trustee) as the result of a relevant property transaction, or
(b) the object of a trust for which property became held on trust as the result of a relevant property transaction,

whether or not the property was the subject of the relevant property transaction.

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

- (1) The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that:

- (a) it:
(i) has power, under this or any other section of this Act, to make a notional estate order designating property held by, or on trust for, a person (the *transferee*) as notional estate of the deceased person, or
(ii) immediately before the death of a person (the *deceased transferee*), had power, under this or any other section of this Act, to make a notional estate order designating property held by, or on trust for, the deceased transferee as notional estate of the deceased person, and
(b) since the relevant property transaction or distribution that gave rise to the power to make the order was entered into or made, the transferee, or the deceased transferee, entered into a relevant property transaction, and
(c) there are special circumstances that warrant the making of the order.

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- (2) Property may be designated as notional estate by a notional estate order under this section if it is property that is held by, or on trust for:
- (a) a person by whom property became held (whether or not as trustee) as the result of the relevant property transaction entered into by the transferee or the deceased transferee, or
 - (b) the object of a trust for which property became held on trust as the result of the relevant property transaction entered into by the transferee or the deceased transferee,

whether or not the property was the subject of the relevant property transaction.

- (3) A notional estate order may be made under this section instead of or in addition to an order under section 30, 31 or 33.

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

- (1) The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that:
- (a) immediately before the death of a person (*the deceased transferee*), it had power under this or any other section of this Act, to make a notional estate order designating property held by, or on trust for, the deceased transferee as notional estate of the deceased person, and
 - (b) the power did not arise because property became held by the deceased transferee as trustee only, and
 - (c) in the case of property referred to in subsection (2) (b), there are special circumstances that warrant the making of the order.
- (2) The following property may be designated as notional estate by a notional estate order under this section, whether or not it was the property the subject of the relevant property transaction or distribution from which the Court's power to make such an order arose:
- (a) if administration has been granted in respect of the estate of the deceased transferee—property that is held by the administrator of the estate of the deceased transferee in his or

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her capacity as administrator of the estate of the deceased transferee, or

- (b) if all or part of the estate of the deceased transferee has been distributed—property that is held by, or on trust for:
 - (i) a person by whom property became held (whether or not as trustee) as the result of the distribution of the deceased transferee's estate, or
 - (ii) the object of a trust for which property became held on trust as the result of the distribution of the deceased transferee's estate.
- (3) A notional estate order may be made under this section instead of or in addition to an order under section 30, 31 or 32.

Note. Administration of the estate of a deceased transferee may be granted for the purposes of being able to designate property as notional estate under this section (see section 42).

34 Disadvantage and other matters required before order can be made

- (1) The Court must not, merely because a relevant property transaction has been entered into, make an order under section 31, 32 or 33 unless the Court is satisfied that the relevant property transaction or the holding of property resulting from the relevant property transaction:
 - (a) directly or indirectly disadvantaged the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death), or
 - (b) involved the exercise by the principal party to the transaction or any other person (whether alone or jointly or severally with any other person) of a right, a discretion or a power of appointment, disposition, nomination or direction that, if not exercised, could have resulted in a benefit to the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death), or
 - (c) involved the exercise by the principal party to the transaction or any other person (whether alone or jointly or severally with any other person) of a right, a discretion or a power of appointment, disposition, nomination or direction that could, when the relevant property transaction was entered into or at

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a later time, have been exercised so as to result in a benefit to the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death), or

- (d) involved an omission to exercise a right, a discretion or a power of appointment, disposition, nomination or direction that could, when the relevant property transaction was entered into or at a later time, have been exercised by the principal party to the transaction or any other person (whether alone or jointly or severally with any other person) so as to result in a benefit to the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death).

- (2) In this section:

principal party to the transaction, in relation to a relevant property transaction, means the person who, under section 26 or 27, enters into the relevant property transaction.

35 Effect of notional estate order

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

36 More than one notional estate order may be made

The Court may make one or more notional estate orders in connection with the same proceedings for a family provision order, or any subsequent proceedings relating to the estate.

37 Power subject to Division 3

The Court's power to make a notional estate order under this Division is subject to Division 3.

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Part 3 Notional estate orders

Division 3 Restrictions and protections relating to notional estate orders

38 General matters that must be considered by Court

The Court must not make a notional estate order unless it has considered the following:

- (a) the importance of not interfering with reasonable expectations in relation to property,
- (b) the substantial justice and merits involved in making or refusing to make the order,
- (c) any other matter it considers relevant in the circumstances.

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

The Court must not make a notional estate order unless it is satisfied that:

- (a) the deceased person left no estate, or
- (b) the deceased person's estate is insufficient for the making of the family provision order, or any order as to costs, that the Court is of the opinion should be made, or
- (c) provision should not be made wholly out of the deceased person's estate because there are other persons entitled to apply for family provision orders or because there are special circumstances.

40 Determination of property to be subject to notional estate order

- (1) In determining what property should be designated as notional estate of a deceased person, the Court must have regard to the following:
 - (a) the value and nature of any property:
 - (i) the subject of a relevant property transaction, or
 - (ii) the subject of a distribution from the estate of the deceased person or from the estate of a deceased transferee, or
 - (iii) held by the administrator of the estate of any deceased transferee in his or her capacity as administrator of the estate of the deceased transferee,
 - (b) the value and nature of any consideration given in a relevant property transaction,

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- (c) any changes in the value of property of the same nature as the property referred to in paragraph (a), or the consideration referred to in paragraph (b), in the time since the relevant property transaction was entered into, the distribution was made, the property became held by the administrator of the estate of the deceased transferee or the consideration was given,
 - (d) whether property of the same nature as the property referred to in paragraph (a), or the consideration referred to in paragraph (b), could have been used to obtain income in the time since the relevant property transaction was entered into, the distribution was made, the property became held by the administrator of the estate of the deceased transferee or the consideration was given,
 - (e) any other matter it considers relevant in the circumstances.
- (2) The Court must not designate as notional estate property that exceeds that necessary, in the Court's opinion, to allow the provision that should be made, or, if the Court makes an order that costs be paid from the notional estate under section 49, to allow to costs to be paid as ordered, or both.
- (3) If, as a result of a relevant property transaction or of a distribution from the estate of a deceased person or from the estate of a deceased transferee, property becomes held by a person as a trustee only, the Court must not designate as notional estate any property held by the person other than the property held by the person as a trustee as a consequence of any such relevant property transaction or distribution.

41 Restrictions on out of time or additional applications

- (1) This section applies to proceedings where:
 - (a) an application for a family provision order is made later than 12 months after the death of the deceased person, or
 - (b) an application for a family provision order is made in relation to an estate that has been previously the subject of a family provision order.
- (2) The Court must not make a notional estate order in the proceedings unless:
 - (a) it is satisfied that:

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- (i) the property to be designated as notional estate is property that was the subject of a relevant property transaction or of a distribution from the estate of a deceased person or from the estate of a deceased transferee, and
 - (ii) the person who holds the property holds it as a result of the relevant property transaction or distribution as trustee only, and
 - (iii) the property is not vested in interest in any beneficiary under the trust, or
- (b) it is satisfied that there are other special circumstances that justify the making of the notional estate order.

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Clause 42

Miscellaneous

Part 4

Part 4 Miscellaneous

42 Grant of probate or administration

- (1) The Court may grant administration in respect of the estate of a deceased person, in order to permit an application to be made for a family provision order, to a person who may make an application, or to a person who may make an application on behalf of another person, if it is satisfied that it is proper to make the grant, whether or not the deceased person left property in *[insert name of jurisdiction]*.
- (2) The Court may grant administration in respect of the estate of a deceased transferee, in order to permit property to be designated as notional estate under section 33, to a person who may make an application, or to a person who may make an application on behalf of another person, if it is satisfied that it is proper to make the grant, whether or not the deceased transferee left property in *[insert name of jurisdiction]*.
- (3) Any such grant is to be for the purposes only of applying for a family provision order or a notional estate order.
- (4) The granting of administration under this section or under the *[insert name of appropriate Act of jurisdiction]* does not:
 - (a) prevent the Court from granting administration under this section, or
 - (b) unless the Court otherwise orders, affect any previous grant of administration under this section.
- (5) The provisions of the *[insert name of appropriate Act of jurisdiction]* apply to a grant of administration under this section, and to the administrator of the estate, in the same way as they apply to a grant of administration under that Act and the administrator of any estate for which such a grant has been made.

43 Substitution of property affected by orders or proposed orders

- (1) If the Court has made, or proposes to make, a family provision order affecting certain property in the estate of a deceased person, the Court may, on application by a person who offers other property in substitution (the *replacement property*):
 - (a) vary the family provision order by substituting the replacement property for the property affected by the order, or

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- (b) make a family provision order in respect of the replacement property instead of the property proposed to be affected by such an order,
as appropriate.
- (2) If the Court has made, or proposes to make, a notional estate order designating certain property as notional estate, the Court may, on application by a person who offers other property in substitution (the *replacement property*):
 - (a) vary the notional estate order by substituting the replacement property for the property designated as notional estate by the order, or
 - (b) make a notional estate order designating the replacement property as notional estate instead of the property proposed to be designated as notional estate by such an order,
as appropriate.
- (3) The Court may vary or make an order under this section only if it is satisfied that the replacement property can properly be substituted for the property affected or proposed to be affected by the family provision order, or the property designated or proposed to be designated as notional estate, as appropriate.
- (4) An order varied or made under this section is taken to be an order in respect of property of the estate or notional estate of the deceased person for the purposes of this Act (except section 23 (Effect of family provision order)).

44 Protection of administrator who distributes after giving notice

- (1) The administrator of the estate of a deceased person may distribute the property in the estate if:
 - (a) the property is distributed not earlier than 6 months after the deceased person's death, and
 - (b) the administrator has given notice in the form prescribed in Schedule 1 that the administrator intends to distribute the property in the estate after the expiration of a specified time, and
 - (c) the time specified in the notice is not less than 30 days after the notice is given, and
 - (d) the time specified in the notice has expired, and

Family Provision Bill 2004

Clause 45

Miscellaneous

Part 4

- (e) at the time of distribution, the administrator does not have notice of any application or intended application for a family provision order affecting the estate of the deceased person.
- (2) An administrator who distributes property in the estate of a deceased person is not liable in respect of that distribution to any person of whose application for a family provision order affecting the estate of the deceased person the administrator did not have notice at the time of the distribution if:
 - (a) the distribution was made in accordance with this section, and
 - (b) the distribution was properly made by the administrator.
- (3) The notice given by the administrator must be given in accordance with the regulations.
- (4) For the purposes of this section, notice to the administrator of an application or intention to make any application under this Act must be in writing signed by the applicant or the applicant's *[insert appropriate reference for jurisdiction to a legal practitioner]*.

45 Protection of administrator in other circumstances

- (1) An administrator of the estate of a deceased person who distributes property in the estate for the purpose of providing those things immediately necessary for the maintenance, education or advancement in life of a person who was wholly or substantially dependent on the deceased person immediately before his or her death is not liable for any such distribution that is properly made.
- (2) Subsection (1) applies whether or not the administrator had notice at the time of the distribution of any application or intended application for a family provision order affecting property in the estate.
- (3) No person who may have made or may be entitled to make an application under this Act is entitled to bring an action against the administrator of the estate of a deceased person because the administrator has distributed any part of the estate if the distribution was properly made by the administrator after the person (being of full legal capacity) has notified the administrator in writing that the person either:
 - (a) consents to the distribution, or
 - (b) does not intend to make any application under this Act that would affect the proposed distribution.

Clause 46 Family Provision Bill 2004

Part 4 Miscellaneous

- (4) An administrator of the estate of a deceased person who receives notice of an intended application under this Act is not liable in respect of a distribution of any part of the estate if the distribution was properly made by the administrator not earlier than 12 months after the deceased person's death.
- (5) Subsection (4) does not apply if the administrator receives written notice that the application has been commenced in the Court or is served with a copy of the application before making the distribution.
- (6) For the purposes of this section, notice to the administrator of an application or intention to make any application under this Act must be in writing signed by the applicant or the applicant's *[insert appropriate reference for jurisdiction to a legal practitioner]*.

46 Release of rights under Act

- (1) A release by a person of the person's rights to apply for a family provision order has effect only if it has been approved by the Court and to the extent that the approval has not been revoked by the Court.
- (2) Proceedings for the approval by the Court of a release of a person's rights to apply for a family provision order may be commenced before or after the death of the person whose estate may be the subject of the order.
- (3) The Court may approve of a release in relation to the whole or any part of the estate or notional estate of a person.
- (4) In determining an application for approval of a release, the Court is to take into account all the circumstances of the case, including whether:
 - (a) it is or was, at the time any agreement to make the release was made, to the advantage, financially or otherwise, of the releasing party to make the release, and
 - (b) it is or was, at that time, prudent for the releasing party to make the release, and
 - (c) the provisions of any agreement to make the release are or were, at that time, fair and reasonable, and
 - (d) the releasing party has taken independent advice in relation to the release and, if so, has given due consideration to that advice.
- (5) In this section:

Family Provision Bill 2004

Clause 47

Miscellaneous

Part 4

release of rights to apply for a family provision order means a release of such rights, if any, as a person has to apply for a family provision order, and includes a reference to:

- (a) an instrument executed by the person that would be effective as a release of those rights if approved by the Court under this section, and
- (b) an agreement to execute such an instrument.

47 Revocation of approval of release

- (1) The Court may not revoke an approval of a release given by it under section 46, except as provided by this section.
- (2) The Court may revoke an approval if it is satisfied:
 - (a) that its approval was obtained by fraud, or
 - (b) that the release was obtained by fraud or undue influence.
- (3) The Court may revoke an approval, either wholly or partially in respect of specified property, if it is satisfied that all persons who would be, in the Court's opinion, sufficiently affected by the revocation consent to the revocation.

48 Court may determine date of death

The Court may, if the date or time of death of a person is uncertain, determine, for the purpose of giving effect to any provision of this Act, a date or time of death that the Court thinks is reasonable for the purposes of the provision.

49 Costs

The Court may order that the costs of proceedings under this Act in relation to the estate or notional estate of a deceased person be paid out of the estate or notional estate, or both, in such manner as the Court thinks fit.

Note. Section 29 sets out the circumstances in which the Court may make a notional estate order for the purpose of ordering that costs be paid from the notional estate of a deceased person.

50 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Clause 51 Family Provision Bill 2004

Part 4 Miscellaneous

51 Rules of Court

- (1) For the purpose of regulating any proceedings under this Act in or before the Court, rules of court, not inconsistent with this Act, may be made under the *[insert name of appropriate Act of jurisdiction]* for or with respect to any matter that by this Act is required or permitted to be prescribed by rules of court or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) This section does not limit the rule-making powers conferred by the *[insert name of appropriate Act of jurisdiction]*.
- (3) Without limiting subsection (1), a rule may be made conferring jurisdiction on Registrars of the Court to hear and determine specified proceedings under this Act.

[This provision may be inserted by jurisdictions in which rules of court relating to proceedings are intended to be made.]

[When the Bill is enacted additional provisions will need to be inserted relating to amendments, repeals and savings and transitional provisions.]

Family Provision Bill 2004

Notice of distribution

Schedule 1

Schedule 1 Notice of distribution

(Section 44)

Notice of intended distribution of estate

Any person having any claim on the estate of *(name in capitals)* late of *(place)* *(occupation)* who died on *(date)* must send particulars of his or her claim to the executor *(or as the case may be)* *(name)* at *(address of executor or administrator)* (or care of *name of solicitor*, solicitor, *address, and, if applicable,* or their agents, *name, address*) within 30 days *(or such longer period as may be necessary so that the time specified expires not earlier than 6 months after the deceased person's death)* from publication of this notice. After that time, if the executor *(or as the case may be)* has received no notice of any claims, he or she may distribute the assets of the estate. Probate was *(or* Letters of Administration were) granted in *(name of jurisdiction)* on *(date)*.

Appendix B – Family Provision Laws in Australia (Eligible Applicants and Discretionary Factors)

JURISDICTION	LIST OF ELIGIBLE APPLICANTS	GROUND OF CRITERIA
South Australia <i>Inheritance (Family Provision) Act 1972</i>	s 6 (a) Spouse (b) Former spouse (ba) Domestic partner (including former domestic partners under s 4) (c) Children (g) Stepchildren (including of former domestic partners) if they were maintained wholly or partly or legally entitled to be maintained wholly or partly by the deceased immediately before his death (h) Grandchildren (i) Parents, if they cared for, or contributed to the maintenance of the deceased during his lifetime (j) Siblings, if they cared for, or contributed to the maintenance of the deceased during his lifetime	s 7(1)(b): If the applicant is left without adequate provision for his proper maintenance, education or advancement in life, the Court may order such provision as the Court thinks fit out of the deceased's estate for the applicant's maintenance, education or advancement in life.
Victoria <i>Administration and Probate Act 1958</i>	s 90 (a) Spouse or domestic partner (b) Children (including adopted) if under 18 OR full-time student between 18–25 OR disabled child (c) Stepchildren, if under 18 OR full-time student between 18–25 OR disabled child (d) Person who, for a substantial period of deceased's life, believed deceased was parent and was treated as such — if under 18 OR full-time student between 18–25 OR disabled child (e) Former spouse/domestic partner, if at the time of the deceased's death, they could have taken proceedings under the <i>Family Law Act 1975</i> (Cth) (f) Child/stepchild not referred to in (b) and (c) (g) Person who, for a substantial period of deceased's life, believed deceased was parent and was treated as such (h) Registered caring partner of deceased (i) Grandchild (j) Spouse or domestic partner of deceased's child, where child dies within one year of deceased's death (k) Person who was a member of the deceased's household	s 91(1): On an application under section 90A, the Court may order that provision be made out of the estate of a deceased person for the proper maintenance and support of an eligible person. s 91A(1): in making a family provisions order, the Court must have regard to: (a) The deceased's will (b) Deceased's reasons for making dispositions (c) Deceased's intentions to providing for applicant s 91A(2): the court may have regard to the following criteria: (a) Relationship between deceased and applicant (b) Obligations or responsibilities of deceased to applicant, other applicants and beneficiaries (c) Size and nature of estate (d) Financial resources, including earning capacity and financial needs of applicant and beneficiary of estate (e) Any physical, mental or intellectual disability of applicant or beneficiary of estate (f) Age of applicant (g) Contribution of applicant to estate or welfare of deceased or deceased's family (h) Benefits previously given by deceased to applicant or beneficiary (i) Whether applicant maintained by deceased before deceased's death (j) Liability of any other person to maintain applicant (k) Applicant's character and conduct

		<p>(l) Effect of family provision order on amounts received from deceased's estate by other beneficiaries</p> <p>(m) Any other relevant matter</p> <p>s 91(2)(b): applicants from (h)–(k) must additionally prove that they have been wholly or partly dependent on the deceased for their maintenance and support</p> <p>s 91(2)(c)–(d): All applicants must prove that at the time of death, the deceased had a moral duty to provide for the applicant's proper maintenance and support, AND his distribution of his estate failed to make adequate provision for the proper maintenance and support of the applicant</p> <p>s 91(4): when determining the amount of provision to be made, the Court may take into account the degree:</p> <ul style="list-style-type: none"> (a) of moral duty the deceased had at the time of death (b) to which the distribution of the deceased's estate failed to make adequate provision for the proper maintenance and support of the applicant (c) to which the applicant is not capable, by reasonable means, of providing adequately for his own proper maintenance and support — for applicants from (f)–(g) (d) to which the applicant was wholly or partly dependent on the deceased at the time of the deceased's death for their proper maintenance and support — for applicants (h)–(k) <p>s 91(5)(b): for applicants (h)–(k), the definition of 'eligible person' must be proportionate to the applicant's degree of dependency on the deceased</p>
<p>Western Australia</p> <p><i>Family Provision Act 1972</i></p>	<p>s 7(1)</p> <ul style="list-style-type: none"> (a) spouse or domestic partner (b) former spouse or domestic partner who at the time of the deceased's death was receiving or entitled to receive maintenance from the deceased (c) child (including children born within 10 months after the deceased's death) (d) grandchild if maintained wholly or partly by the deceased OR one of the parents was the deceased's child and had predeceased the deceased OR if born within 10 months after the deceased's death and one of the parents was the deceased's child and had predeceased the deceased (e) stepchild if maintained wholly or partly or was entitled to be maintained wholly or partly by the deceased OR where deceased received or was entitled to receive property from estate of the stepchild's parent above the prescribed value. (f) Parents, if relationship was admitted by deceased or established in lifetime of deceased 	<p>s 6(1): if the disposition of the deceased's estate does not make adequate provision for the proper maintenance, support, education or advancement in life of any of the person mentioned in s 7, the Court may order such provision as the Court thinks fit out of the deceased's estate</p>

Appendix B

Table of Family Provision Laws in Australia
(Eligible Applicants and Discretionary Factors)

<p>New South Wales</p> <p><i>Succession Act 2006</i></p>	<p>s 57(1)</p> <p>(a) Spouse</p> <p>(b) Domestic partners</p> <p>(c) Children (s 57(2): including adopted children, children born in a de facto relationship by virtue of <i>Status of Children Act 1996</i> and a child for whose long-term welfare both parties have parental responsibility by virtue of <i>Children and Young Persons (Care and Protection) Act 1998</i>)</p> <p>(d) Former spouse</p> <p>(e) Person who was wholly or partly dependent on the deceased AND was a grandchild OR a member of the deceased's household</p> <p>(f) Person in a close personal relationship with the deceased at the time of the deceased's death (where one or each of whom provides domestic support and personal care: s 3(3))</p>	<p>s 59(1)–(2): if adequate provision for the proper maintenance, education or advancement has not been made for the applicant, the court may make such order for provision out of the estate</p> <p>s 60(1)–(2): in determining whether to make a family provision order, the Court may have regard to:</p> <p>(a) Relationship between applicant and deceased</p> <p>(b) Obligations or responsibilities owed by deceased to applicant</p> <p>(c) Nature and extent of deceased's estate</p> <p>(d) Financial resources and financial needs of applicant</p> <p>(e) Financial circumstances of person applicant is cohabitating with</p> <p>(f) Physical, intellectual or mental disability of applicant</p> <p>(g) Age of applicant</p> <p>(h) Any contribution by applicant to the deceased's estate or welfare</p> <p>(i) Any provisions for the applicant by the deceased</p> <p>(j) Evidence of deceased's testamentary intentions</p> <p>(k) Whether applicant was maintained, wholly or partly, by the deceased</p> <p>(l) Whether any other person is liable to support applicant</p> <p>(m) Character and conduct of applicant</p> <p>(n) Character and conduct of any other person</p> <p>(o) Relevant Aboriginal or Torres Strait Islander customary law</p> <p>(p) Any other relevant matter</p>
<p>Northern Territory</p> <p><i>Family Provision Act</i></p>	<p>s 7(1)</p> <p>(a) Spouse or de facto partner</p> <p>(b) Former spouse or de facto partner – must be maintained by deceased before deceased's death (2(b))</p> <p>(c) Child</p> <p>(d) Stepchild – must be maintained by deceased before deceased's death</p> <p>(e) Grandchild – if parent was a child of the deceased and had predeceased the deceased OR grandchild was not maintained by parent or parents at time of deceased's death</p> <p>(f) Parent – if maintained by deceased immediately before deceased's death OR deceased was not survived by spouse, de facto partner or any children</p>	<p>s 8(1): if adequate provision is not available from the estate of the deceased for the proper maintenance, education and advancement in life of the applicant, the court may order such provision as fit out of the estate of the deceased.</p> <p>s22: the court shall have regard to the testator's reasons for making the dispositions.</p>
<p>Australian Capital Territory</p> <p><i>Family Provision Act 1969</i></p>	<p>s 7(1)</p> <p>(a) Partner (7(9)): defined to include someone who was the domestic partner of the deceased at any time AND either:</p> <p>deceased's spouse, civil union partner or civil partner at any time OR</p> <p>deceased's domestic partner continuously for 2 or more years at any time OR</p> <p>parent of a child of the deceased</p> <p>(b) Person in domestic relationship with deceased for 2 or more years continuously</p> <p>(c) Child</p>	<p>s 8(2): the court shall make an order if adequate provision for the proper maintenance, education or advancement in life of the applicant is not available.</p> <p>s 8(3) – criteria for decision under subsection (2):</p> <p>(a) Applicant's character and conduct</p> <p>(b) Relationship between applicant and deceased</p> <p>(c) Financial and non-financial contributions by either or both applicant and deceased to the property or financial resources or either or both persons</p> <p>(d) Any contributions by applicant or deceased to welfare of another or of child of either person</p>

	<p>(d) Stepchild – must be maintained by the deceased immediately before the deceased's death</p> <p>(e) Grandchild – if parent of grandchild was child of deceased and had predeceased the deceased OR grandchild was not maintained by parent or parents at time of deceased's death</p> <p>(f) Parent – if maintained by deceased immediately before deceased's death OR deceased was not survived by partner or any children</p>	<p>(e) Income, property and financial resources of applicant and deceased</p> <p>(f) Applicant and deceased's physical and mental capacity for gainful employment</p> <p>(g) Financial needs and obligations of applicant and deceased</p> <p>(h) Responsibility of either applicant and deceased to support any other person</p> <p>(i) Terms of any order under the <i>Domestic Relationships Act 1994</i></p> <p>(j) Any payments to either the applicant or deceased by the other in respect of the maintenance of the other person or child of other person</p> <p>(k) Any other relevant matter</p> <p>s 22: the court shall have regard to the testator's reasons for making the dispositions</p>
<p>Tasmania</p> <p><i>Testator's Family Maintenance Act 1912</i></p>	<p>s 3A</p> <p>(a) Spouse: including domestic partners (s2(1))</p> <p>(b) Children: including adopted, stepchildren and surrogate children (s2(1))</p> <p>(c) Parents, if deceased dies without leaving spouse or children</p> <p>(d) Former spouse, if receiving or entitled to receive maintenance from the deceased</p> <p>(e) Person whose significant relationship with deceased, within meaning of <i>Relationships Act 2003</i>, had ceased before date of deceased's death and who was receiving or entitled to receive maintenance from the deceased</p>	<p>s 3(1): if applicant is left without adequate provision for his proper maintenance and support, the court may order such provision as the court, having regard to all the circumstances of the case, thinks proper out of the deceased's estate.</p> <p>s 7: in fixing the amount of provision, the court shall have regard to the net value of the estate and whether any such person is entitled to independent means</p> <p>s 8A: the court may have regard to the deceased's reasons for making the dispositions and the court may accept such evidence of those reasons as it considers sufficient</p>
<p>Queensland</p> <p><i>Succession Act 1981</i></p>	<p>s 41(1): spouse, child or dependant</p> <p>s 5AA: spouse = husband or wife; de facto partner (as defined in <i>ALA</i>); civil partner; former husband or wife; former civil partner (if had not remarried or entered into civil partnership with another person before deceased's death AND was entitled to receive maintenance at time of deceased's death)</p> <p>s 40: child = any child, stepchild or adopt child</p> <p>s 40: dependant = any person who was being wholly or substantially maintained or supported by the deceased being:</p> <p>(a) Parent of deceased</p> <p>(b) Parent of surviving child under 18 of deceased</p> <p>(c) Person under 18</p> <p>s 40A: stepchild = person is the child of deceased's spouse AND the deceased person and the stepchild's parent has not divorced</p> <p>Exception: if stepchild's parent had predeceased the deceased and the marriage between the deceased and stepchild's parent subsisted when the parent died</p>	<p>s 41(1): if adequate provision is not made for the proper maintenance and support of the deceased's spouse, child or dependent, the court may order such provision as it thinks fit out of the deceased's estate.</p> <p>s 41(1A): the court shall not make an order for dependant unless satisfied it is proper that some provision is made for the dependant, having regard to the extent to which the dependant was maintained or supported by deceased before the deceased person's death and the dependant's need for continue maintenance and support</p>

Appendix C – Cases decided under the *Inheritance (Family Provision) Act 1972* from 2000 to 2016

	Case	Relationship of Plaintiff/s to Deceased	Value of Estate	Outcome	
				Application granted	Application dismissed
2016	<i>Butler v Tiburzi</i> [2016] SASC 108	Adult daughter (aged 67)	\$1 567 950.55	The plaintiff was granted \$725 000.	
2016	<i>Parker v Australian Executor Trustees Ltd</i> [2016] SASC 64	Five adult children (aged between 57 and 63) Most of the estate had been left to the defendant for charitable purposes.	\$1 173 250.17	The plaintiffs were granted \$75 000, \$175 000, \$150 000, \$150, 000 and \$185 000 respectively.	
2015	<i>Carter v Brine</i> [2015] SASC 204	Domestic partner	\$3 924 000.00		The plaintiff had been left with life interests in the deceased's principal residence, a French townhouse and an English apartment. The Court ruled that she had not been left without adequate provision for her proper maintenance, education or advancement in life.
2015	<i>Broadhead v Prescott</i> [2015] SASC 34	Adult children (aged between 61 and 63)	\$333 423.81	Each plaintiff to obtain a provision out of the estate in the amount of \$47 500	
2015	<i>Daniel v Van Zwol</i> [2015] SASCFC 38	Adult son (aged 66) The will provided that he would not receive any part of the deceased's estate because he had never repaid the value of another property of the deceased's that he had received earlier.	\$326 761.12	The deceased's reason for excluding the plaintiff from any provision from her estate was held to be incorrect and the plaintiff was awarded equal shares with the other beneficiaries.	
2014	<i>Hynard v Gavros</i> [2014] SASC 42	Adult daughter (aged 49)	\$372 000	The plaintiff would receive an amount equal to 55% of the residue of the deceased's estate.	

2013	<i>Kozłowski v Kozłowski</i> [2013] SASFC 112	Adult son (aged 42)	\$275 000	The adult son is entitled to half of three quarters from the proceeds of the sale of the property.	
2013	<i>Brennan v Mansfield</i> [2013] SASC 83	Domestic partner	\$2.5 million	The plaintiff is to receive the sum of \$1 000 000, with an additional \$900 000 from the residue of the deceased's estate.	
2013	<i>R (Plaintiff) v Bong</i> [2013] SASC 39	Domestic partner Whether the plaintiff and the deceased were domestic partners so as to enable the plaintiff to seek an order for provision out of the deceased's estate.		The plaintiff was found to be a domestic partner from January 1989 – March 1990 and was so entitled to make an application for provision out of the deceased's estate.	
2011	<i>Cavallaro v Cavallaro</i> [2011] SASC 123	Adult son (aged 76)	\$310 000	The plaintiff's right of residence of the home property to be converted to a life interest, and the plaintiff's one-quarter interest in the home property to be converted immediately into cash (\$75 000)	
2010	<i>Pizimolas v Pizimolas & Zannis</i> [2010] SASFC 34	Adult son (aged 47)	\$650 000	Adult son would receive a legacy of \$100 000 and one-third of the residue of the estate.	
2009	<i>Hellwig v Carr</i> [2009] SASC 117	Adult children (aged 43 to 61)	\$130 000	The four plaintiffs received \$30 000, \$30 000, \$20 000, and \$7 500 respectively.	
2009	<i>Whittington v Whittington</i> [2009] SASC 142	Wife	\$202 547	The plaintiff would be entitled to 60.8% of the net proceeds from the sale of the estate	
2009	<i>Wall v Crane</i> [2009] SASC 382	Two separate claims by deceased's adult daughter (aged 52) and deceased's grandson. The will provided that the deceased's daughter would not receive any provision because financial assistance and adequate provision had been given to them during the deceased's lifetime	\$ 1 138 978.24	The deceased's daughter would receive \$160 000 from the residual estate The deceased's grandson would receive \$50 000	
2007	<i>Bowyer v Wood</i> [2007] SASC 327	Adult daughter (aged 48) Appeal against the trial judge's order to dismiss the application because the Plaintiff had already	\$1.2 million	The plaintiff would receive \$200 000 borne out of the legacy to the charities and siblings of the testatrix.	

		received gift of \$77 464 along with substantial financial assistance from the deceased during his lifetime. Furthermore, the plaintiff and her husband were self-supporting.			
2006	<i>Armalis v Kasselouris</i> [2006] SASC 198	Adult daughter with severe disabilities (aged 50)	\$390 000	Plaintiff's legacy of \$40 000 increased to a one-half-share of the net estate	
2005	<i>Fennell v Aherne</i> [2005] SASC 280	Three adult sons and one adult daughter – all estranged from the deceased (aged 41 to 53)	\$162 659.60	Plaintiffs would receive \$10 000, \$10 000, \$25 000, and \$25 000 respectively.	
2005	<i>Drioli v Rover</i> [2005] SASC 395	Two estranged adult daughters (aged 45 to 48)	\$443 337.16	One daughter would receive \$125 000 and the other \$75 000	
2004	<i>Lock v Tower Trust Limited</i> [2004] SASC 96	Adult son (aged 60) Appeal from a Master's order to award \$40 000 on the basis that it was inadequate.	Under \$200 000		Appeal dismissed.
2003	<i>Barns v Barns</i> [2003] 214 CLR 169	Adult daughter (aged 46) Whether a deed excluding the plaintiff from the estate is valid		Order that the deed should be set aside	
2003	<i>McGuffie v Korcynski</i> [2003] SASC 178	Whether grandchildren could apply for provision when there is a dispute to the paternity of the plaintiffs' mother.			Plaintiffs excluded as eligible applicants
2002	<i>Delisio v Santoro</i> [2002] SASC 65	Application by adult daughters (aged 52 and 46) and counterclaim by one adult son (aged 51)	\$206 730.65	\$15 000 each for the plaintiffs and counterclaimant	
2000	<i>Carraill v Carraill</i> [2000] SASC 55	Application by adult son (aged 51) and counterclaim by adopted grandchildren	1.7 million	Adult son would receive the deceased's estate and interest in a particular plot of land absolutely. The adopted grandchildren would receive \$10 000 each.	

Appendix D – Administration and Probate Act 1958 (Vic) Part IV

Administration and Probate Act 1958 (Vic), Part IV

91A Factors to be considered in making family provision order

- (1) In making a family provision order, the Court must have regard to—
 - (a) the deceased's will, if any; and
 - (b) any evidence of the deceased's reasons for making the dispositions in the deceased's will (if any); and
 - (c) any other evidence of the deceased's intentions in relation to providing for the eligible person.
- (2) In making a family provision order, the Court may have regard to the following criteria—
 - (a) any family or other relationship between the deceased and the eligible person, including—
 - (i) the nature of the relationship; and
 - (ii) if relevant, the length of the relationship;
 - (b) any obligations or responsibilities of the deceased to—
 - (i) the eligible person; and
 - (ii) any other eligible person; and
 - (iii) the beneficiaries of the estate;
 - (c) the size and nature of the estate of the deceased and any charges and liabilities to which the estate is subject;
 - (d) the financial resources, including earning capacity, and the financial needs at the time of the hearing and for the foreseeable future of—
 - (i) the eligible person; and
 - (ii) any other eligible person; and
 - (iii) any beneficiary of the estate;
 - (e) any physical, mental or intellectual disability of any eligible person or any beneficiary of the estate;
 - (f) the age of the eligible person;
 - (g) any contribution (not for adequate consideration) of the eligible person to—
 - (i) building up the estate; or
 - (ii) the welfare of the deceased or the deceased's family;
 - (h) any benefits previously given by the deceased to any eligible person or to any beneficiary;
 - (i) whether the eligible person was being maintained by the deceased before that deceased's death either wholly or partly and, if the Court considers it relevant, the extent to which and the basis on which the deceased had done so;
 - (j) the liability of any other person to maintain the eligible person;
 - (k) the character and conduct of the eligible person or any other person;
 - (l) the effects a family provision order would have on the amounts received from the deceased's estate by other beneficiaries;
 - (m) any other matter the Court considers relevant.

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