THE UNIVERSITY of ADELAIDE

South Australian Law Reform Institute

Looking After One Another: Review of the *Inheritance (Family Provision) Act 1972* (SA)

Adelaide Legal Experts Roundtable Report

The Roundtable

On 31 March 2017 the South Australian Law Reform Institute ('the Institute') hosted a Roundtable of legal experts, including succession lawyers and representatives of the Supreme Court of South Australia, to discuss the Discussion Questions identified in the Institute's Background Paper *Looking After One Another: Review of the Inheritance (Family Provision) Act 1972* (SA). This forms part of the Institute's broader reference on Succession Law and Family Inheritance Law, received from the Attorney General in 2011 and supported by the Law Foundation of South Australia

The Roundtable was conducted at the University of Adelaide under Chatham House rules. The Institute is grateful for the time and valuable contributions of all participants.

The following report contains the views of the Roundtable. These views are not the confirmed views of the Institute, however they provide an important framework for further consultation and research. They will be considered alongside the Reports of similar Roundtables conducted in Mt Gambier and Berri with legal experts and community members, as well as the views received from the broader South Australian community through the traditional submission process and the SA Government's YourSAy website.

We want to hear from you

The Institute welcomes written submissions in response to the issues raised in this Report **by 15 May 2017** and intends to finalise its Report to Government during the second half of 2017.

Further information about the Institute, this Reference, terminology and the Background Paper containing the Discussion Questions considered during the Roundtable can be found at https://law.adelaide.edu.au/research/law-reform-institute/ or https://www.yoursay.sa.gov.au/decisions/looking-after-one-another/about

Views of the Roundtable

The Policy Behind the *Inheritance (Family Provision) Act 1972* (SA)

Roundtable participants discussed the policy behind the *Inheritance (Family Provision) Act 1972* (SA), and whether certain policy interests should be better reflected in any future reforms of the Act.

A range of views on the policy interests behind the current law were expressed, however there was a general view that the notion of testamentary freedom has been diluted in recent years. There was also a general acceptance that testamentary freedom cannot be absolute, and must be balanced with other public interests such as ensuring adequate provision is made for genuine dependents and other particularly vulnerable people.

Participants acknowledged the range of views in the community: the beneficiary would see family provision laws as meddling or interfering in the will, whereas potential claimants would see these laws as necessary to alleviate hardship or unfairness. Participants noted the view within the

community that under the current law, ‘every player wins a prize’ due to the success of a small handful of what has been described as ‘opportunistic claims’.

Court representatives noted that the law has not accepted ‘pure’ testamentary freedom for over 100 years. This is because complete testamentary freedom leads to injustice. The law looks to situations to correct mistakes or to prevent arbitrariness and capricious conduct.

Participants noted interstate efforts in NSW and Victoria aimed to ‘redress the balance’ between testamentary freedom and other policy goals.

Recent case law in the United Kingdom, including the Court of Appeal decision in *Ilott v Mitson* [2017] UKSC 17 was discussed, as was the general trend towards non-dependent adult children making family provision claims.

Participants cited a number of recent cases where claimants were generally vulnerable, as well as cases where claimants were not actually in need.

Legal practitioners also 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.

Participants noted the reality that currently well-resourced clients can structure their estates so as to avoid potential family provision claims, however this is not necessarily available to ‘regular’ South Australians with small estates such as a modest family home.

Legal practitioners also noted the disconnect between public expectations and reality when it comes to family provision laws. There was a sense of frustration around the idea of ‘go away’ money to settle uncertain outcomes.

Participants agreed that any future reforms need to send the message that there is ‘real risk’ in bringing greedy claims and deter those who bring such claims and those who advise them.

It was also noted that previous studies have confirmed that 60% of Australian adults make a will and want to make their wishes known. They do want to exercise their testamentary freedom and if you go back to parliamentary debates, there has always been recognition of testator’s duty or obligation to provide for their dependents.

Who should be able to make a claim?

Roundtable participants discussed the Discussion Questions directed at the question of which categories of family members or other dependents should be eligible to make a claim under the South Australian laws.

The many modern complications arising from different family structures were discussed.

A range of views were expressed as to appropriate law reform options. One popular view was to leave the current list of eligible claimants (in s6 of the Act) in place and tighten the other legal criteria that apply to determining a claim. For example, continue to allow adult children to be eligible to claim, but apply criteria to exclude those that cannot show either special vulnerability or contribution to the estate asset.

For example, some participants acknowledged that sometimes adult children will have a valid claim, but that there was a need to include some exceptions. It was noted, for example, that there are cases when adult children who do not have a disability or special needs should be able to claim but that there should be a tightening of adult children’s claims where the adult child is financially secure.

A number of participants also 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.

There was general agreement that many complex or questionable claims arise from those made by adult children, but there was also recognition that in some cases these claims are genuine and should be permitted under the law. As some legal practitioners explained there are circumstances where a testator is being capricious. In these cases, it should be a matter for the court determine whether the claimant is able to receive from the estate.

Consideration was given to alternative regimes in Victoria and NSW. Some participants 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.

Some support was expressed for the current South Australian provision that is sufficiently flexible to take into consideration the different circumstances of particular claimants.

Representatives of the court emphasised that currently s6 of the Act 'only lets you put your hand up'. Claimants must then satisfy the criteria in s7. Court representatives explained that there are 100–200 family provision claims in the Supreme Court of South Australia out of 6,000 probate claims. This suggests that the current laws are not resulting in high numbers of problematic claims.

What further criteria should apply?

Participants discussed the current legal criteria that applies to determining family provision claims in s7 of the Act.

Consideration was given to alternative models, such as the more prescribed 'checklist' approach in the recently amended Victorian legislation.

There was general support for retaining the two staged approach (ie: list of eligible claimants in s6 and legal criteria to be applied in s7) however mixed views were expressed as to the merits of reforming the current test in s7.

For example, some saw the Victorian checklist 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. 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.

Participants 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 s7.

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, for example the case where deceased did not leave any money to his daughter because he mistakenly thought she was well-off, when in fact she was not.

Some also expressed the view that a checklist would unnecessarily curtail the discretion of the court, risk of limiting the breadth of inquiry and could give rise to a mechanical approach.

Others noted that in the case of *Illot v Mitson* the Court 'regretted' that the Law Reform Commission and the Parliament had not provided the court with more detail in terms of the criteria that should be applied when determining family provision claims.

Alternative options such as the provision of guidelines were also discussed.

Timing of Claims and Costs

Participants discussed issues relating to the time frames for making family provision claims under the current South Australian Act, as well as the issue around costs associated with making family provision claims.

Timing

While there was not strong support for an extension of the time period from six to twelve months, 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.

Participants also discussed the need for special rules to apply to small estates. For example some legal practitioners explained that there may never be grant of probate in estates of up to $350 000.

There was also strong support for reform to s14(2) of the Act.

For example, some participants noted that, with respect to s14(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.

Further discussion on this issue was truncated due to time constraints, but participants were encouraged to share further thoughts with the Institute.

Costs

A shared view was expressed that there should be a stronger approach to costs to avoid the perception that making a family provision claim carries no risk of costs, even if the claim proves to be unmeritorious.

There was strong support for a shift from the current 'costs come out of the estate' approach towards a 'loser pays' approach to costs.

There was also strong support for continuing to provide courts with a wide discretion on the question of costs, but with an acceptance that the default position is that the loser pays, and executor is paid on indemnity basis.

However, some participants noted that in many cases, 'loser pays' could mean that the State pays the costs. For this reason, there was also strong support for mandatory minimum mediation of family provision related disputes to try and avoid escalating costs and/or agree to costs orders early in the proceedings.

Other participants also 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 be made, as they did not make the will.

Many participants agreed that strict costs rules can be a blunt instrument in family provision claims. An approach that focuses on early resolution of disputes was strongly favoured.

There was also support 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 more appropriately meets their needs. For these participants, if the rules relating to filing offers can be more appropriately framed for 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 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.

Further discussion on this issue was truncated due to time constraints, but participants were encouraged to share further thoughts with the Institute.

Mediation

Participants discussed the benefits of mediation and other forms of dispute resolution in family provision claims.

It was noted that in practice, nearly all family provision claims settle before reaching court.

Representatives from the court explained that, in their experience, around 50% 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.

Participants discussed the importance of early exchange of information between parties at the earliest possible date so that practitioners can give more informed advice ahead of mediation. This would also assist in addressing problems with delays in mediation arising from one party not providing important information to the other.

One practitioner raised high costs before settlement conferences as a concern. It was also noted that some parties come very late to mediation.

Other participants described problems associated with working with inexperienced local lawyers dabbling in succession that can result in costs blowing out before settlement conferences.

Representatives from the courts noted that, in general, legal practitioners were very concerned to minimise costs, and that some of the bad experiences relating to costs blowouts did not appear to apply in South Australia.

However, other participants noted that while this may be the case from the court's perspective, there is still a feeling within the community that unfair settlements are happening before going anywhere near a court.

Brief consideration was given to how to address specific problems arising in the context of small estates. Representatives from the court considered that small estates should be defined as estates under $500 000. Representatives from the court noted that there are existing processes, such as simplified summary trial processes, that can be utilised to deal with small estates.

Other participants supported efforts to adjust court procedures to deal with small estates, and to allow those involved in claims of larger estates to be able to 'opt in' to these streamlined processes.

All participants agreed that streamlined processes, such as those outlined by the representatives from the court, should be adopted with respect to family provision claims arising in the context of small estates.

Further discussion on this issue was truncated due to time constraints, but participants were encouraged to share further thoughts with the Institute.

Notional Estates

Participants discussed the concept of notional estate – a legal mechanism employed in NSW family provision laws to discourage testators from dealing with their assets during their life in order to minimise the property that is in their estate and frustrate the operation of family provision laws.

A range of views were expressed, but most participants were opposed to the introduction of NSW style notional estate or clawback regimes in South Australia.

For example, some participants expressed the view that introducing notional estates would further undermine testamentary freedom: 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 could encourage more litigation.

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. Others noting that in some cases, millions of dollars can be 'hidden in a trust' away from a deserving family provision claimant.

It was also noted that there 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. However, others pointed to the very different context between Family Court and family provision claims.

Some participants 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 *Inheritance (Family Provision) Act*.

Further discussion on this issue was truncated due to time constraints, but participants were encouraged to share further thoughts with the Institute.

Roundtable Participants

Judge Graham Dart	Supreme Court of South Australia
Vickie Chapman MP	Deputy State Liberal Leader
The Hon Tom Gray QC	Former Justice of the South Australian Supreme Court
Professor John Williams	Director, South Australian Law Reform Institute
Brian Withers	Former Master, Supreme Court of South Australia
Ian Robertson SC	Barrister, Brian Martin Chambers
Richard Ross-Smith	Barrister, STEP
Christopher Brohier	Barrister , Elizabeth Mews
Richard Bradshaw	Partner, Johnston Withers
Alf Macolino	Partner, O'Loughlins Lawyers
John Daenke	Principal , Daenke Lawyers
Michael Rizzuto	Principal Lawyer, MGR Estate Law
Lesia Iwaniw	Partner, Moran & Partners
Rosemary Caruso	Senior Lawyer, Tindall Gask Bentley
Mark Jordan	Lawyer, Carpenter & Associates
Adam Osborn	Lawyer, Tindall Gask Bentley
Jenny Tummel	Lawyer, Mellor Olsson
Gaetano Aiello	Lawyer, Treloar & Treloar
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Dr Sylvia Villios	Lecturer, University Adelaide Law School
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