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Uniform succession laws: intestacy

NSW LAW REFORM COMMISSION

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PREFACE

In 1991 the Standing Committee of Attorneys General (SCAG) approved the development of uniform succession laws for the whole of Australia. In 1995 a National Committee on Uniform Succession Laws was established to review the existing State laws relating to succession and to propose model national uniform laws. The Committee comprises representatives from the various jurisdictions in Australia and the Queensland Law Reform Commission is the co-ordinating agency. The New South Wales Attorney General asked the New South Wales Law Reform Commission to participate in the deliberations of the National Committee under terms of reference that were issued on 5 May 1995:

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

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

- the law of wills;[1]
- family provision (or Testator's family maintenance);[2]
- administration of estates of deceased persons;[3] and
- intestacy.

This Issues Paper, is the first stage of the review of the law relating to intestacy and raises, and invites comments on, a number of issues in relation to the law of intestacy in the different Australian jurisdictions. The law in New Zealand and England has also been included for the sake of

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1. See New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Issues Paper 10, 1996); See New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Report 85, 1998).
2. See New South Wales Law Reform Commission, *Uniform Succession Laws: Family Provision* (Issues Paper 11, 1996); National Committee on Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (Queensland Law Reform Commission, Miscellaneous Paper 28, 1997); National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004).
3. See New South Wales Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons* (Discussion Paper 42, 1999); Queensland Law Reform Commission, *Uniform Succession Laws: Recognition of Interstate and Foreign Grants of Probate and Letters of Administration* (Discussion Paper, WP 55, 2001); New South Wales Law Reform Commission, *Uniform Succession Laws: Recognition of Interstate and Foreign Grants of Probate and Letters of Administration* (IP 21, 2002).

comparison. The provisions relating to intestacy are principally contained in the following pieces of legislation:

- Succession Act 1981 (Qld) Part 3
- Administration and Probate Act 1929 (ACT) Part 3A
- Wills, Probate and Administration Act 1898 (NSW) Part 2 Div 2a
- Administration and Probate Act 1969 (NT) Part 3, Div 4-5
- Administration and Probate Act 1919 (SA) Part 3a
- Administration and Probate Act 1935 (Tas) Part 5
- Administration and Probate Act 1958 (Vic) Part 1 Div 6
- Administration Act 1903 (WA) Part 2
- Administration Act 1969 (NZ) Part 3
- Administration of Estates Act 1925 (Eng) Part 4

Unless otherwise stated, these Acts are the ones referred to in the summary tables at the commencement of each section of this Issues Paper.

The issues set out in this Issues Paper have been framed by the New South Wales Law Reform Commission and do not necessarily reflect the views of the National Committee which is yet to adopt a position in relation to the issues discussed. The National Committee invites members of the public and organisations with an interest or expertise in the issues under review to comment on the issues raised or any other issues that should be addressed.

TERMS OF REFERENCE

Pursuant to section 10 of the Law Reform Commission Act 1967 (NSW), the Attorney General, the Honourable Jeff Shaw QC MP, referred the following matter to the Law Reform Commission by letter dated 16 May 1995:

- **To inquire into and report on the existing law and procedure relating to succession and to recommend and draft a model State and Territories law on succession.**
- **In undertaking this inquiry the Commission is to consult with the Queensland Law Reform Commission which has accepted responsibility for the coordination of a uniform succession laws project.**

PARTICIPANTS

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

Master Joanne Harrison

The Hon Justice David Hodgson (Commissioner-in-charge)

The Hon Gordon Samuels AC CVO QC

Professor Michael Tilbury

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SUBMISSIONS

The Commission invites submissions on the issues relevant to this review, including but not limited to the issues raised in this Issues Paper.

All submissions and enquiries should be directed to:

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The closing date for submissions is Friday 10 June 2005.

Confidentiality and use of submissions

In preparing further papers on this reference, the Commission will refer to submissions made in response to this Issues Paper. If you would like all or part of your submission to be treated as confidential, please indicate this in your submission. The Commission will respect requests for confidentiality when using submissions in later publications.

Copies of submissions made to the Commission will also normally be made available on request to other persons or organisations. Any request for a copy of a submission marked "confidential" will be determined in accordance with the Freedom of Information Act 1989 (NSW).

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1. brothers and sisters of the intestate;
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(a) the remaining brothers and sisters in equal shares;
(b) the children of the deceased brother or sister; or
(c) the issue of the deceased brother or sister?

ISSUE 6.6 (page 98)

If the issue of a deceased brother or sister are to take the share of the intestate's estate to which the brother or sister would otherwise have been entitled:

(a) should the issue take per stirpes, per capita, or according to the modified form of per capita distribution that applies in South Australia; and
(b) what account ought to be taken of the provision that spouses are to be treated as separate persons?

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ISSUE 6.9 (page 100)

Where an intestate is predeceased by an aunt or uncle, should the share of the intestate's estate to which the aunt or uncle would otherwise have been entitled be taken by:

(a) the surviving siblings of the deceased aunt or uncle;
(b) the children of the deceased aunt or uncle; or
(c) the issue of the deceased aunt or uncle?

ISSUE 6.10 (page 100)

If the issue of a deceased aunt or uncle are to take the share of the intestate's estate to which the aunt or uncle would otherwise have been entitled:

(a) should the issue take per stirpes, per capita, or according to the modified form of per capita distribution that applies in South Australia; and

(b) what account ought to be taken of the provision that spouses are to be treated as separate persons?

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ISSUE 10.2 (page 135)

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ISSUE 10.3 (page 137)

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ISSUE 10.4 (page 138)

Is there a need to retain provisions for the construction of references to:

- any statutes of distribution;
- an heir or heir at law; or
- next of kin?

1. Introduction

- Intestacy in context
- Legislative definition of “Intestacy”
- Mechanisms for achieving distribution
- Title and powers of the personal representative
- What is available for distribution on intestacy?
- Is there a need to empower the personal representative to sell?

1.1 Succession may be testate or intestate. Justice Heenan recently explained:

> the transmission of the estate of a person on death, whether involving testate or intestate succession, is an inevitable consequence for any person who dies owning real or personal property of any kind. It is the death which effects the transmission of the property although the law provides mechanisms for the deceased, during his or her lifetime, to direct, if he or she should choose to do so, how the estate is to be distributed after death. Similar considerations arise in the case of intestate succession where, whether the omission by the deceased to give directions as to the distribution of his estate after death was intentional or otherwise, the distribution of the estate is determined by the statutory rules for intestate distribution. Again, it is the death of the deceased which effects the transmission of property once its future can no longer be enjoyed by the deceased. The case of intestate distribution perhaps shows this more plainly.[1]

1.2 Intestacy occurs when the whole or part of the estate of a deceased person is not disposed of by will. Total intestacy arises in circumstances where the whole of the estate of a deceased person is not disposed of by will, for example, where the deceased:

- fails to make a will;
- fails to make a valid will; or
- makes a valid will but all beneficiaries die before the deceased.

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

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

1. *Re Full Board of the Guardianship and Administration Board* (2003) 27 WAR 475 at para 48 (Heenan J).

1.4 There was once a distinction between total and partial intestacies for the purposes of administering an estate. Provision is now made so that partially intestate estates are administered, so far as possible, according to the same rules that apply to wholly intestate estates.[2]

INTESTACY IN CONTEXT

1.5 Intestacy would appear to occur quite frequently in Australia. In 1994, in South Australia, 6.44% of applications for grants were made in circumstances of intestacy. The rate was believed to be 14% in Queensland, just over 10% in Western Australia, and between 6% and 8% in other jurisdictions.[3] In 2003 in New South Wales, of the 23,140 matters dealt with in the Probate Division, 6% involved the grant of letters of administration. In 2002, 46,712 deaths were registered, 22,828 matters were dealt with in the Probate Division and 6% of these involved the grant of letters of administration. It is not known how many of the approximately 20,000 estates per year that do not come to the Probate Division are administered informally in intestacy.

1.6 Distribution of an estate, or part of an estate, on intestacy is governed by statutory provision. These rules can be seen as producing the same kind of result as a will would have done if the intestate had had the foresight, the opportunity, the inclination or the ability to produce such a document. The law identifies beneficiaries for the estate from the intestate's family in an order of preference beginning with those to whom the intestate is most closely related – starting with the intestate's spouse and issue (children, grandchildren and so on) then parents, siblings, nephews and nieces, grandparents, uncles and aunts, and finally cousins. Such a distribution scheme will generally suit many people who die intestate with substantial estates that need to be administered. These people will often be older, have a surviving spouse who will be in the same age group, and issue who are mature rather than infants and no longer dependent on their parents.[4] The intestate's parents will probably be dead. The private home, where not held in joint tenancy, will still constitute a significant proportion of an intestate's estate.

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2. See para 1.18-1.22 below.
3. W A Lee and A A Preece, *Lee's Manual of Queensland Succession Law* (5th edition, LBC Information Services, 2001) at 173.
4. While some groups in the community may die intestate at a younger age, for example, Indigenous people (who have lower life expectancies than the general population) and young people who are killed in car accidents, these groups are less likely to have substantial assets to be distributed upon death.

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

> should be certain, clear and simple both to understand and to operate. They do not lay down absolute entitlements, because the deceased is always free to make a will leaving his property as he chooses. They operate as a safety net for those who, for one reason or another, have not done this. If the rules can conform to what most people think should happen, so much the better. If they are simple and easy to understand, the more likely it is that people who want their property to go elsewhere will make a will. It is also important to enable estates to be administered quickly and cheaply. The rules should be such that an ordinary layman can easily interpret them and consequently administer them. Also the rules should make it unnecessary for an administrator to have to determine complex or debatable questions of fact.[5]

1.8 While the aim can be seen as producing the will that the intestate would have made, it is important to note that any system that has to cover all situations adequately will not cover individual cases perfectly. Families may not be close in the sense that the legislation assumes. Relatives who appear biologically closer to the intestate may be further away from the intestate's favour than those who seem to be biologically distant. Close family members may not get on. A spouse may become estranged.

1.9 People cannot be forced to make comprehensive wills and may fail to produce a valid will through no fault of their own. It is with this in mind that the rules of intestacy should be standardised and reformed to the extent that will enable them to produce a result that will be fair, albeit necessarily overly objective, in most cases. Any hardship produced by the uniform application of standard rules of intestacy may be alleviated by an application under family provision legislation.[6] The rules of intestacy should not be viewed as removing the need for wills, and they should not be seen to be lessening the importance of making a valid will.

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5. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 7.
6. See the proposals of the National Committee for Uniform Succession Laws relating to family provision: National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (Queensland Law Reform Commission, Miscellaneous Paper 28, 1997); and National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004).

Indigenous people

1.10 It is quite common for Indigenous people to die intestate.[7] It is questionable whether it is appropriate, or always appropriate, for the general law to apply without qualification in cases where an Indigenous person dies intestate. Indigenous concepts of family and time may well be incompatible with the assumptions underlying the general law. If so, the extent to which different distribution rules can, and should, apply arises. This issue is addressed separately in Chapter 9.

LEGISLATIVE DEFINITION OF "INTESTACY"

Jurisdiction	Provision
Qld	s 5
ACT	s 44(1)
NSW	
NT	s 61(1); *Trustee Act 1893* s 75
SA	s 72B(1)
Tas	s 3(1)
Vic	s 5(1)
WA	
NZ	s 2(1)
Eng	s 55(1)

1.11 Not all jurisdictions include a definition of intestacy in their relevant statutes. A number of Acts define "intestate" as:

> a person who dies and either does not leave a will, or leaves a will but does not dispose effectively by will of the whole or part of his or her property.[8]

Others provide that an "intestate" *includes*:

> a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate.[9]

1.12 In the Northern Territory, the *Trustee Act 1893* (NT) deems a persons to have died intestate in respect of a "beneficial interest in real estate or land" where that interest is "owing to the failure of the objects of the devise

7. R F Atherton and P Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, LexisNexis Butterworths, Australia, 2003) at 32.
8. *Succession Act 1981* (Qld) s 5; *Administration and Probate Act 1919* (SA) s 72B(1); *Administration and Probate Act 1969* (NT) s 61(1); *Administration and Probate Act 1929* (ACT) s 44(1).
9. *Administration and Probate Act 1935* (Tas) s 3(1); *Administration and Probate Act 1958* (Vic) s 5(1); *Administration Act 1969* (NZ) s 2(1); *Administration of Estates Act 1925* (Eng) s 55(1).

or other circumstances happening before or after the death of such person in whole or in part not effectually disposed of".[10]

1.13 Intestacy appears to have an accepted meaning. A legislative definition may, therefore, be unnecessary.

ISSUE 1.1

Should there be a legislative definition of "intestate" or "intestacy"?

ISSUE 1.2

If so, how should it be defined?

MECHANISMS FOR ACHIEVING DISTRIBUTION

1.14 Each jurisdiction has different mechanisms for achieving the distribution of an intestate's estate. Some of the mechanisms are broadly similar with only minor variations between some jurisdictions, but others are very different. For example, in South Australia and the Australian Capital Territory, the personal representative holds the estate on trust for the persons entitled under the intestacy provisions.[11] Some jurisdictions, such as Queensland, rely on the general provisions relating to administration of estates (whether testate or not),[12] while others, such as New South Wales and Tasmania, expressly provide for statutory trusts to take effect in intestacy.[13] Some jurisdictions include provisions that deal with old distinctions that may no longer be relevant to a modern system of administration of estates.

1.15 The remainder of this chapter needs to be considered in the context of any recommendations the National Committee makes in relation to the general administration of estates and in the light of considerations such as:

- whether there is any need for separate rules dealing with the administration of intestate estates;
- whether such rules should appear among the provisions dealing with intestacy or the administration of estates; and
- whether the mechanisms for the distribution of intestate and testate estates should be assimilated as far as possible.

10. *Trustee Act 1893* (NT) s 75.
11. *Administration and Probate Act 1919* (SA) s 72C(1); *Administration and Probate Act 1929* (ACT) s 45.
12. *Succession Act 1981* (Qld) Part 5.
13. *Administration and Probate Act 1935* (Tas) s 44.

TITLE AND POWERS OF THE PERSONAL REPRESENTATIVE

Qld	s 38, s 45(2), s 52(1)
ACT	s 45
NSW	s 61B(1), s 61F
NT	s 62
SA	s 72C
Tas	s 44, s 47
Vic	s 53
WA	s 13
NZ	s 78, s 79
Eng	s 47, s 49

1.16 In general the intestate estate is held on trust by the personal representative to be distributed to the persons entitled to it. The persons entitled are those who are eligible to receive an interest under the rules of distribution on intestacy.

1.17 Where the deceased has made a will (and the executor appointed does not refuse to act) the estate will be held in trust by the executor and any part of it that is subject to intestacy will be distributed by the executor according to the rules of intestacy.

Where the deceased has not made a will, or has made a will and the executor refuses to act, the estate will be held in trust by an administrator appointed by the court and the estate or any part of the estate that is subject to intestacy will be distributed by the administrator according to the rules of intestacy.

Distinction between wholly and partially intestate estates

Qld	s 38
ACT	s 45
NSW	s 61B(1), s 61F
NT	s 62
SA	s 72C(1)
Tas	s 44, s 47(a)
Vic	s 52, s 53(a)
WA	s 13(1)
NZ	s 78, s 79
Eng	s 49

1.18 All jurisdictions make some provision (express or implied) to the effect that the administrator or executor holds the intestate estate on trust to be distributed according to the rules of distribution. Some jurisdictions make a statement covering both wholly intestate and partially intestate estates. For example, the Australian Capital Territory's provision states:

> The personal representative of an intestate holds, subject to his or her rights, powers and duties for the purposes of administration, the intestate estate on trust for the persons entitled to it in accordance with this division. [14]

Most jurisdictions, however, make a distinction between wholly intestate estates and partially intestate estates. There seem to be two reasons for this distinction: a substantive reason and one relating to statutory construction or interpretation.

1.19 The substantive reason for the distinction is to require the issue to bring into account benefits received under the will. This is the situation, for example, in Tasmania and Victoria where general provision is made for dealing with intestate estates[15] subject to the bringing into account of any beneficial interests acquired by the issue of the deceased under the will.[16] The question of bringing into account beneficial interests acquired under a will is discussed in Chapter 8.[17]

1.20 New Zealand also follows this pattern,[18] but the special provisions relating to partially intestate estates include provisions relating to the nature of the beneficial interest acquired in some cases.[19]

1.21 Elsewhere the distinction has been made for reasons of statutory construction or interpretation. New South Wales, for example, provides, in respect of wholly intestate estates:

> Where a person dies wholly intestate, the real and personal estate of that person shall, subject to the payment of all such funeral and administration expenses, debts and other liabilities as are properly

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14. *Administration and Probate Act 1929* (ACT) s 45. See also *Administration and Probate Act 1969* (NT) s 62; *Administration and Probate Act 1919* (SA) s 72C(1); *Administration Act 1903* (WA) s 13(1).
15. *Administration and Probate Act 1935* (Tas) s 44. See also *Administration and Probate Act 1958* (Vic) s 52.
16. *Administration and Probate Act 1935* (Tas) s 47(a). See also *Administration and Probate Act 1958* (Vic) s 53(a).
17. See para 8.19-8.25.
18. *Administration Act 1969* (NZ) s 78 and s 79.
19. *Administration Act 1969* (NZ) s 79(2)-(4).

> payable out of the estate, be distributed or held in trust in the manner specified in this section…[20]

And, in respect of partially intestate estates:

> Where a person dies having made a will which effectively disposes of only part of the person's estate, [the division], so far as applicable and subject to the modifications specified in subsection (2), shall apply to and in relation to the part of the person's estate that is not disposed of by the will as if the last-mentioned part had comprised the whole of the person's estate. [21]

1.22 In Queensland general provision is made for distribution according to the rules of distribution[22] but separate provision is still made in relation to partial intestacies:

> The executor of the will of an intestate shall hold, subject to the executor's rights and powers for the purposes of administration, the residuary estate of an intestate on trust for the persons entitled to it. [23]

ISSUE 1.3

Should special provision be made for dealing with partially intestate estates:
(a) for the purposes of bringing into account; and/or
(b) for other purposes?

Beneficially Interested Personal Representative

Qld	
ACT	
NSW	s 61F(3)
NT	
SA	
Tas	s 47(b)
Vic	s 53(b)
WA	s 13(2)
NZ	
Eng	s 49(1)(b)

20. *Wills, Probate and Administration Act 1898* (NSW) s 61B(1).
21. *Wills, Probate and Administration Act 1898* (NSW) s 61F(1). See also *Administration of Estates Act 1925* (Eng) s 49(1).
22. The Queensland Act states that "the personal representative of a deceased person shall be under a duty to … distribute the estate of the deceased, subject to the administration thereof, as soon as may be": *Succession Act 1981* (Qld) s 52(1)(d).
23. *Succession Act 1981* (Qld) s 38.

1.23 Some jurisdictions also make special provision in relation to beneficially interested personal representatives.[24] In Tasmania, for example, the relevant provision states that:

> The personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this Part in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is intended to take such part beneficially.[25]

1.24 Queensland had a similar provision[26] which was not carried over when the *Succession Act 1981* (Qld) was enacted. The Queensland Law Reform Commission recommended the removal of the provision in 1978 on the grounds that it "might be construed as meaning that where the spouse or issue of an intestate happen to be his executor they cannot take benefit under a partial intestacy".[27] The provision was originally intended to deal with the historical position that an executor was entitled at law to such personalty of the testator that was undisposed of by will. Equity, however, took the view that an executor would be entitled to the testator's personalty that was not expressly disposed of, unless a contrary intention could be found on the part of the testator to exclude the executor from the benefit. In such cases the personalty went to those entitled upon intestacy.[28] The English *Executors Act of 1830*,[29] upon which the former Queensland provision was based, shifted the burden of proof in such circumstances in favour of those entitled to take on intestacy so that the executor was deemed to hold undisposed of personalty for the persons entitled to take on intestacy unless an express statement could be found in the will that the

24. *Wills, Probate and Administration Act 1898* (NSW) s 61F(3); *Administration and Probate Act 1935* (Tas) s 47(b); *Administration and Probate Act 1958* (Vic) s 53(b); *Administration Act 1903* (WA) s 13(2); *Administration of Estates Act 1925* (Eng) s 49(1)(b).
25. *Administration and Probate Act 1935* (Tas) s 47(b).
26. *Succession Act 1867* (Qld) s 34(2).
27. Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 23.
28. W A Lee, "Queensland Intestacy Rules 1968" (1970) 7 *University of Queensland Law Journal* 74 at 83.
29. 11 George IV and 1 William IV c 40.

executor was intended to take the residue beneficially. The Queensland Law Reform Commission concluded that:

> It is quite clear that the only persons who may take on intestacy in Queensland are those persons designated by [the intestacy provisions] and, therefore, there is no need to retain what is, in effect, an archaic amendment to an even more archaic rule.[30]

ISSUE 1.4

Is there a need for a special provision negating the statutory trusts where the personal representative takes the intestate estate beneficially?

WHAT IS AVAILABLE FOR DISTRIBUTION ON INTESTACY?

Jurisdiction	Provision
Qld	s 5, s 34(1)
ACT	s 5(1), s 45
NSW	s 61B(1)
NT	s 6(1), s 62
SA	s 72F
Tas	s 33, s 44(1)
Vic	s 38(4), s 52(1)
WA	s 10(1), s 13(1)
NZ	
Eng	s 33(4)

1.25 Most jurisdictions make provision to identify the estate that is available for distribution. In general the estate available for distribution is so much of the estate that has not been disposed of by will (either in whole or in part) less such expenses, debts and liabilities as may be payable by the estate in the course of the administration. The provisions in each jurisdiction vary in some respects but the general outcome would appear to be the same.

1.26 In Queensland separate provision is made for wholly and partially intestate estates. The property available for distribution in a wholly intestate estate is that which remains after payment of all such debts as are properly payable.[31] "Debts" is defined as including "funeral, testamentary and administration expenses, debts and other liabilities payable out of the estate of a deceased person".[32] The property available for

30. Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 23-24.
31. *Succession Act 1981* (Qld) s 34(1) definition of "residuary estate".
32. *Succession Act 1981* (Qld) s 5 definition of "debts".

distribution in a partially intestate estate is that which "is not effectively disposed of by the will".[33]

1.27 Similarly in New South Wales a wholly intestate estate that is available for distribution or to be held in trust is "subject to the payment of all such funeral and administration expenses, debts and other liabilities as are properly payable out of the estate".[34] Likewise in Western Australia the intestate estate is to be held in trust, subject to "the payment of all duties and fees and of the debts of the deceased in the ordinary course of administration".[35]

1.28 In the Australian Capital Territory and Northern Territory the personal representative holds the intestate estate, "subject to his or her rights, powers and duties for the purposes of administration".[36] The "purposes of administration" are defined as including "the payment in due course of administration of the debts, funeral and testamentary expenses duties and commission, and the costs, charges and expenses of the executor or administrator, and any costs that may be ordered to be paid out of the estate".[37]

1.29 South Australia adopts a similar approach, with the value of the intestate estate being the gross value of the estate less the intestate's debts and liabilities, funeral expenses, testamentary expenses, the costs of administering the estate and, where the intestate is survived by a spouse, the value of the intestate's personal chattels.[38]

1.30 As noted below, Tasmania and Victoria establish trusts for sale of the estate of an intestate and make rather more complex provision as to identify the "residuary estate" on intestacy.[39]

1.31 New Zealand would appear to make no provision to identify the estate that is available for distribution in its intestacy rules.

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33. *Succession Act 1981* (Qld) s 34(1) definition of "residuary estate".
34. *Wills, Probate and Administration Act 1898* (NSW) s 61B(1).
35. *Administration Act 1903* (WA) s 10(1).
36. *Administration and Probate Act 1929* (ACT) s 45; *Administration and Probate Act 1969* (NT) s 62.
37. *Administration and Probate Act 1929* (ACT) s 5(1) definition of "purposes of administration"; *Administration and Probate Act 1969* (NT) s 6(1) definition of "purposes of administration".
38. *Administration and Probate Act 1919* (SA) s 72F.
39. *Administration and Probate Act 1958* (Vic) s 38; *Administration and Probate Act 1935* (Tas) s 33(4). See para 1.38 below. See also *Administration of Estates Act 1925* (Eng) s 33(4).

1.32 The question of what is available for distribution to those entitled to a share in an intestate's estate is closely linked to questions of the order of the application of assets for the payment of debts of the deceased. For example, in the administration of solvent estates, most jurisdictions make the property of the deceased that is undisposed of by will available first for the payment of debts.[40] It should be noted that, in its Discussion Paper on the Administration of Deceased Estates, the National Committee has proposed the merging of property not disposed of by will into the category of "residuary estate" for the purpose of the payment of debts in the administration of a solvent estate.[41]

ISSUE 1.5

How should the estate that is available for distribution be identified?

IS THERE A NEED TO EMPOWER THE PERSONAL REPRESENTATIVE TO SELL?

Qld	Part 5
ACT	s 41, 50
NSW	*Conveyancing Act 1919* s 153(1)(b)
NT	s 80
SA	s 72C(2)
Tas	s 33
Vic	s 38
WA	s 10
NZ	s 27
Eng	s 41

1.33 Some jurisdictions make specific provision for the powers of personal representatives in dealing with intestate estates. The majority effectively give the executor an unfettered power of sale – no matter how it is expressed.

1.34 In New South Wales, the personal representative of the intestate estate has the power to "sell the real estate of the deceased person as to

40. See New South Wales Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons* (DP 42, 1999) para 15.34-15.55; Queensland Law Reform Commission, *Administration of Estates of Deceased Persons* (Discussion Paper, MP 37, 1999) at 198-208.
41. New South Wales Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons* (DP 42, 1999) para 15.54; Queensland Law Reform Commission, *Administration of Estates of Deceased Persons* (Discussion Paper, MP 37, 1999) at 207.

which the deceased person died intestate for the purposes of distribution or division amongst the persons entitled".[42]

1.35 The South Australian and New Zealand provisions simply permit the personal representative to "sell, or convert into money, the whole, or any part, of an intestate estate".[43]

1.36 Other jurisdictions operate to similar effect, giving personal representatives, in relation to intestate estates, the same powers as personal representatives in relation to testate estates. Examples of such jurisdictions are Queensland,[44] Western Australia,[45] the Northern Territory[46] and England.[47]

1.37 In contrast to the above jurisdictions, some seek to limit the power of sale to cases where there is a "special reason", for example, when the proceeds are needed to meet the costs of administration.[48] In the Australian Capital Territory and Victoria, this power of sale covers the intestate's personalty and realty.[49]

1.38 Tasmania and Victoria seek to regulate the proceeds of the sale further.[50] Victoria, for example, first establishes a trust for the sale or conversion of the property of the intestate into money.[51] Out of any money arising from such sales or conversions and any ready money of the deceased (not otherwise disposed of by will), the personal representative must meet "all such funeral testamentary and administration expenses debts and other liabilities as are properly payable thereout having regard to the rules of administration" and then "set aside a fund sufficient to

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42. *Conveyancing Act 1919* (NSW) s 153(1)(b).
43. *Administration and Probate Act 1919* (SA) s 72C(2); *Administration Act 1969* (NZ) s 27(1).
44. See *Succession Act 1981* (Qld) Part 5.
45. See *Administration Act 1903* (WA) s 10.
46. See *Administration and Probate Act 1969* (NT) s 80.
47. See *Administration of Estates Act 1925* (Eng) s 41.
48. *Administration and Probate Act 1929* (ACT) s 41, s 50; *Administration and Probate Act 1935* (Tas) s 33; *Administration and Probate Act 1958* (Vic) s 38.
49. *Administration and Probate Act 1929* (ACT) s 41; *Administration and Probate Act 1958* (Vic) s 38.
50. *Administration and Probate Act 1958* (Vic) s 38; *Administration and Probate Act 1935* (Tas) s 33.
51. *Administration and Probate Act 1958* (Vic) s 38(1).

provide for any pecuniary legacies bequeathed by the will (if any) of the deceased".[52] The "residuary estate" of the intestate is then identified as:

> The residue of the said money and any investments for the time being representing the same, including (but without prejudice to the trust for sale) any part of the estate of the deceased which may be retained unsold and is not required for the administration purposes aforesaid.[53]

Tasmania makes provision in similar terms.[54]

ISSUE 1.6

Is there a need for separate provision to be made for trusts for sale in relation to intestate estates?

52. *Administration and Probate Act 1958* (Vic) s 38(2).
53. *Administration and Probate Act 1958* (Vic) s 38(4).
54. *Administration and Probate Act 1935* (Tas) s 33.

2. General principles of distribution

- Distribution according to fixed lists
- Disclaimed interests

DISTRIBUTION ACCORDING TO FIXED LISTS

The Statute of Distributions

2.1 The rules governing the distribution of an intestate estate have their origins in the English *Statute of Distributions of 1670*.[1]

2.2 Distribution under this statute was complex, at least so far as it involved distributing to the next of kin. Once the "surplusage" of the personal estate was determined, a surviving husband would take the whole of his deceased wife's remaining estate. A widow, however, would take one third of her husband's estate if he left issue, the remainder passing to the children, with the share of any child who predeceased their father going to their descendants; but a widow would take one half if her husband left no issue, the other half passing, in such cases to the next of kin of the deceased who were in "equal degree".

2.3 Degrees of relationship were determined in accordance with the civil law progression, that is, essentially the order established late in the development of Roman Law,[2] by counting up the number of generations from the intestate to the nearest ancestor held in common with the claimant and then counting down the number of generations from the nearest common ancestor until the claimant was reached. Relatives who were separated from the intestate by a smaller number of steps, those who were of a higher degree, took to the exclusion of those of a lower degree, that is who were separated from the intestate by a greater number of steps. Those who were the same distance, or number of steps, from the intestate took equally.[3]

2.4 Subject to the spouse and descendents exercising their rights, the father of the intestate was next in line, then the mother, brothers and sisters – on an equal footing (although the children of brothers and sisters could take their deceased parent's share, grandchildren could not),

1. 22 & 23 Charles II c 10 s 5-7 as amended in 1685 by 1 James II c 17 s 7.
2. See J A C Thomas, *Textbook of Roman Law* (North Holland Publishing Co, Amsterdam, 1976) at 524-525; R W Lee, *The Elements of Roman Law* (4th ed, Sweet and Maxwell, London, 1956) at 263-264. See also *Mentney v Petty* (1722) Prec Ch 593 at 594; 24 ER 266 at 266; and W Blackstone, *Commentaries on the Laws of England* (9th ed, 1783) at 504.
3. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 352.

grandparents (in the absence of brothers and sisters), nieces and nephews, and so on.[4]

2.5 Although the Crown was ultimately entitled to take the personal estate if no other relatives were entitled,[5] the extent of the civil law list of distribution and the fact that executors could take as against the Crown, suggests that this was not common.

Modern provisions

Qld	Schedule 2
ACT	Schedule 6
NSW	s 61B
NT	Schedule 6
SA	s 72G, s 72H, s 72I, s 72J
Tas	s 44-45
Vic	s 51-52, s 55
WA	s 14
NZ	s 77
Eng	s 46

2.6 The provisions outlined above have been subject to reforms over the years, resulting in the regimes that apply today. The level of complexity has been reduced to an extent, at least in so far as identifying next of kin goes. All Australian jurisdictions now provide fixed lists which must be followed in determining the distribution of an intestate's estate. Although these lists vary, the general progression can be summarised as below. Each category will be discussed in more detail later in this Issues Paper:

1. The intestate's estate will go wholly to the surviving spouse or de facto partner if the intestate has left no issue.[6]
2. If one or more issue and spouse or de facto partner survive, the spouse or de facto partner is entitled to a prescribed amount (plus interest), the personal chattels and a proportion of the remaining estate. The issue are entitled to the rest.[7]

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4. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 353.
5. See *Halsbury's Laws of England* (Butterworth & Co, London, 1910) vol 11 at para 55-64. See para 7.1 below.
6. See para 3.21-3.27.
7. See para 3.28-3.59.

3. If a spouse and a de facto survive the intestate, the spouse's entitlement must be divided between them or rest wholly with one at the expense of the other.[8]

4. If one or more issue, but no spouse or de facto partner, survives the intestate those issue are entitled to the whole of the intestate estate.[9]

5. If a parent, or parents, of the intestate survives, but no spouse, de facto partner or issue, they are entitled to the whole of the intestate estate (if both parents survive the estate is divided equally between them).[10]

6. If the intestate is not survived by any of the above but is survived by next of kin, then the intestate estate will go to them according to the relevant list.[11]

7. If the intestate is not survived by any of the above the intestate estate shall be deemed to be *bona vacantia* and the Crown will be entitled to it (or to deal with it as it sees fit).[12]

Provisions relating to persons who, at the death of the intestate, are minors

Jurisdiction	Section
Qld	
ACT	s 46
NSW	
NT	s 63
SA	
Tas	s 46
Vic	s 54
WA	s 17
NZ	s 78
Eng	s 47

2.7 Some jurisdictions make separate provision for those who have not yet attained the age of 18 and are entitled to receive a share of an intestate estate upon distribution. In these cases we are dealing with children or minors whether they are issue of the deceased or not (for example, they could also be collateral relatives or the issue of collateral relatives).

8. See para 3.60-3.73.
9. See para 5.33-5.34.
10. See para 5.35.
11. See para 6.1-6.25.
12. See para 7.1-7.11.

2.8 First, these jurisdictions provide that a person who is entitled to the whole, or a share, of the intestate estate, is under 18 and not married, is entitled to take beneficially upon reaching 18 or marrying.[13]

2.9 Secondly, these jurisdictions make provision for circumstances where a minor dies who would otherwise be entitled to a share on distribution. The Northern Territory and Australian Capital Territory provide that if the person otherwise entitled dies unmarried before they turn 18, then the intestacy provisions take effect as if the person had died before the intestate.[14] In Tasmania and England the same effect is achieved by stating that the estate is held in trust for any children "who attain the age of 18 years or marry".[15]

2.10 Thirdly, the relevant provisions state that they do not affect any law that authorises expenditure for the maintenance, advancement or benefit of a minor out of property held on trust for him or her.[16] The Australian Capital Territory and Northern Territory both add that any amount expended from the estate for the maintenance, advancement or benefit of a minor shall be deemed, upon the death of that minor, before they marry or turn 18, to have reduced the amount of the intestate estate available for distribution by the amount expended.[17] Tasmania, New Zealand and England all add that minors who have married before they turn 18 shall "be entitled to give valid receipts for the income" of their share or interest.[18]

2.11 An advantage of such a provision is that, should an entitled person die unmarried and intestate in their infancy, the entitlement will pass to a blood relative of the intestate, rather than to the surviving parent of the infant who has no such connection to the original intestate. However, to

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13. *Administration and Probate Act 1929* (ACT) s 46(1); *Administration and Probate Act 1969* (NT) s 63(1). Tasmania, New Zealand and England make provision to the same effect, but make a distinction between issue of the intestate and other minor relatives: *Administration and Probate Act 1935* (Tas) s 46(3); *Administration Act 1969* (NZ) s 78(1); *Administration of Estates Act 1925* (Eng) s 47.
14. *Administration and Probate Act 1929* (ACT) s 46(2); *Administration and Probate Act 1969* (NT) s 63(2). See also *Administration Act 1969* (NZ) s 78(2).
15. *Administration and Probate Act 1935* (Tas) s 46(1)(a); *Administration of Estates Act 1925* (Eng) s 47. New Zealand uses "attain full age or marry under that age": *Administration Act 1969* (NZ) s 78(1)(a).
16. *Administration and Probate Act 1935* (Tas) s 46(1)(b); *Administration of Estates Act 1925* (Eng) s 47(1)(ii); *Administration and Probate Act 1929* (ACT) s 46(3); *Administration and Probate Act 1969* (NT) s 63(3).
17. *Administration and Probate Act 1929* (ACT) s 46(3); and *Administration and Probate Act 1969* (NT) s 63(3).
18. *Administration and Probate Act 1935* (Tas) s 46(1)(b); *Administration Act 1969* (NZ) s 78(1)(b); and *Administration of Estates Act 1925* (Eng) s 47(1)(ii).

omit such a provision, means vesting occurs as soon as the intestate dies, allowing vested interests to be quickly identified.[19]

2.12 Western Australia has a provision so that, when an infant is entitled on distribution to a share worth less than $10,000, that infant, or a person on their behalf, may apply to the Court to authorise the executor or administrator to expend all or part of the share for the infant's "maintenance, advancement or education". This provision is stated to be in addition to any power the executor or administrator may otherwise have to undertake expenditure on behalf of an infant.[20] Likewise, in Victoria, if the estate that remains to be distributed is less than $1,000 and no partner but only a child or children have survived the intestate, the administrator may pay the entitlement of any of the children to "to any person having the care and control of such child or children without seeing to the application thereof and without incurring any liability in respect of such payment".[21]

2.13 All other jurisdictions make no specific provision relating to persons who are minors at the death of the intestate, apparently relying on the law relating to trusts.

2.14 While allowance is sometimes made for children to take their share if they marry before they turn 18, consideration should also be given to allowing children to take their share before they turn 18 where they have not married but have, nevertheless, parented children of their own.

ISSUE 2.1

What provision (if any) should be made for minors who are entitled to part or all of an intestate estate?

ISSUE 2.2

Should minors take their share of an intestate estate unconditionally (that is without having to turn 18 or marry - but subject to the property being held for them until they turn 18 or marry)?

ISSUE 2.3

If not, and the minor dies before turning 18 or marrying, should the property available for distribution be reduced by the amount spent on them before their death?

19. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 363.
20. *Administration Act 1903* (WA) s 17.
21. *Administration and Probate Act 1958* (Vic) s 54.

ISSUE 2.4

If a minor's share in the intestate estate does not pass to him/her because the minor dies before reaching majority should the share pass to surviving issue of the minor?

ISSUE 2.5

What special provision, if any, should be made to accommodate minor issue of the intestate when the estate available for distribution is small?

Use and enjoyment of chattels

Qld	
ACT	
NSW	
NT	
SA	
Tas	s 46(1)(d)
Vic	
WA	
NZ	s 78(1)(c)
Eng	s 47(1)(iv)

2.15 In some jurisdictions a specific provision is included that states that a minor who has a vested or contingent interest in any personal chattels may be permitted, by the administrator, to have the use and enjoyment of the chattels in such a manner and subject to such conditions, if any, as the administrator may consider reasonable, and without being liable to account for any consequential loss.[22]

ISSUE 2.6

What provision, if any, ought to be made with respect to the use and enjoyment by minors of chattels of the estate?

Business Estates

2.16 The *Trustee Companies Act 1968* (Qld) provides that where administration is granted to a trustee company and the estate or part of it is employed in a business or undertaking, and one or more of those entitled on intestacy is a minor, the trustee company may (subject to the court's approval) postpone the sale and conversion of the property into money and

22. *Administration and Probate Act 1935* (Tas) s 46(1)(d); *Administration Act 1969* (NZ) s 78(1)(c); and *Administration of Estates Act 1925* (Eng) s 47(1)(iv).

the trustee company may carry on the business during the minority of the person so entitled.[23]

ISSUE 2.7

Should any provision be made for carrying on the business where one or more of those entitled is a minor?

DISCLAIMED INTERESTS

2.17 A question also arises about what may happen if a person entitled to take in intestacy disclaims that interest. There exists no statutory provision for such a situation. The common law position was explained by Justice Walton:

> Disclaimer is a refusal to accept an interest. As the old Years Books had it, nobody can put an estate into another in spite of his teeth … Now what effect does that [disclaimer] have? It seems to me that it leaves the executor of the will still holding the interest attempted to be disposed of under the statute, and still holding it as part of the estate of the deceased.[24]

2.18 If those entitled to an interest in the intestate estate disclaim that interest, the estate will be distributed as though the person disclaiming had predeceased the intestate. Their interest will not pass to the Crown by *bona vacantia* unless no other entitled people can be ascertained. This is because the intestate estate does not automatically vest in those who are entitled to a share in it. Rather the estate vests in the administrator and an entitled party may disclaim their interest before any distribution has been made.

2.19 This has been followed in New South Wales[25] and in South Australia[26], where Justice Legoe said, "…the interest does not go to the Crown bona vacantia, but devolves upon other members of that beneficiary class as if the … disclaiming person were non-existent".[27]

2.20 In New Zealand successors on intestacy have a statutory right to disclaim their entitlement. The successor must have reached majority and be of sound mind to exercise the right. The disclaimer must relate to the whole of the successor's entitlement and must be made within one year of the date on which administration of the intestate estate is first granted.

23. *Trustee Companies Act 1968* (Qld) s 29(1).
24. *Re Scott (deceased); Widdows v Friends of the Clergy Corporation* (1975) 1 WLR 1260 at 1271 (Walton J).
25. *Rex v Skinner* [1972] 1 NSWLR 307.
26. *In the Estate of Simmons (deceased)* (1990) 56 SASR 1.
27. *In the Estate of Simmons (deceased)* (1990) 56 SASR 1 at 14 (Legoe J).

The successor cannot have enjoyed or disposed of any part of his or her interest, accepted valuable consideration for the disclaimer, provide who is to be entitled to the disclaimed interest, nor be bankrupt when the disclaimer is made. The effect of a valid disclaimer is as if the successor had died immediately before the intestate, survived by as many issue as were alive at the time of the intestate's death.[28] The advantage of this provision over the common law is that the position of the issue of the person disclaiming is clarified.

2.21 It should be noted that disclaimed interests in an intestate estate may amount to "deprived assets" and may be counted as assets of the person disclaiming for the purpose of determining his or her eligibility for Commonwealth social security benefits.[29]

ISSUE 2.8

Should any legislative provision be made to deal with situations where a person otherwise entitled to an interest in the intestate estate disclaims that interest?

28. *Administration Act 1969* (NZ) s 81.
29. See *Social Security Act 1991* (Cth) s 9(4) and Part 3.12 Div 2.

3. Distribution to spouses and partners

- Who is a spouse or partner?
- Spouses to be treated as separate persons
- Distribution to spouses and partners

WHO IS A SPOUSE OR PARTNER?

3.1 As spouses and partners are the first parties considered when distributing the estate of an intestate it is important to know who can be considered a spouse or partner and how broadly the term is to be construed.

Spouses

Qld	s 5AA
ACT	s 44(1)
NSW	s 32G
NT	*Interpretation Act 1978* s 19A
SA	s 4
Tas	s 44(9)
Vic	s 3(1)
WA	s 14
NZ	s 77
Eng	s 46

3.2 A person will be a spouse of another when the two marry in Australia in accordance with the *Marriage Act 1961* (Cth) or, when a person is married overseas, that marriage is recognised in Australia under Part 5A of the *Marriage Act*.

3.3 In some jurisdictions the term "spouse" is now taken to include not only husband or wife but also de facto partner or other equivalent terms such as putative spouse or domestic partner.[1] The Australian Capital Territory includes "spouse" together with "domestic partner" within the term "partner".[2] Other jurisdictions specifically make reference to the intestate's husband or wife rather than spouse.[3] Issues relating to the identification of de facto partners are dealt with below.[4]

3.4 The Northern Territory is the only jurisdiction which specifically includes in its definition of spouse Aboriginal or Torres Strait Islander people who marry each other in accordance with the customs and traditions

1. *Succession Act 1981* (Qld) s 5AA; *Administration and Probate Act 1919* (SA) s 4; *Administration and Probate Act 1958* (Vic) s 3(1); and *Wills, Probate and Administration Act 1898* (NSW) s 32G.
2. *Administration and Probate Act 1929* (ACT) s 44(1) (definition of "eligible partner" and "partner").
3. *Administration Act 1903* (WA) s 14; *Administration and Probate Act 1935* (Tas) s 44(9); *Administration Act 1969* (NZ) s 77; and *Administration of Estates Act 1925* (Eng) s 46.
4. See para 3.8-3.18.

of the particular community of Aboriginal or Torres Strait Islander people with which either person identifies.[5]

Bigamous unions

3.5 A question may arise as to the status of a surviving spouse who finds that the deceased entered into a bigamous union with that "spouse". Where a deceased man, for example, underwent a marriage ceremony in Australia at the time he had a valid subsisting marriage to another woman, what is the position of the more recent wife? Can she claim to be the deceased's spouse for the purposes of intestate distribution?[6]

3.6 In *Re Milanovic*,[7] the deceased had been married in Serbia. During the Second World War he was separated from his wife and did not return to her. Some years later he "went through a form of marriage" with a second woman, who had no knowledge of his previous marriage. Despite the unwitting nature of this bigamous union (at least on the second wife's part), the Court held that the second wife was not entitled to make an application for testator's family maintenance. Douglas J held that the nature of this second marriage meant that, "[s]he is thus not the widow of the testator, and not in the class of persons who may make application for provision out of the testator's estate…"[8]

3.7 However, this situation may be addressed by the provisions that have been enacted by most jurisdictions to deal with situations where the deceased is married and also has a de facto partner.[9] So, although not married, a bigamist's second or subsequent partners may be entitled to a share of an intestate estate if they are found to be in a de facto relationship with the deceased.

ISSUE 3.1

What provision, if any, ought to be made for bigamous unions?

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5. See *Interpretation Act 1978* (NT) s 19A(1) and para 9.7 and 9.10 below.
6. R F Atherton and P Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, LexisNexis Butterworths, Australia, 2003) at 59.
7. *Re Milanovic* [1973] Qd R 205.
8. *Re Milanovic* [1973] Qd R 205 at 206 (Douglas J).
9. Para 3.8-3.18.

De facto relationships

Qld	s 5AA; *Acts Interpretation Act 1954* s 32DA
ACT	s 44(1); *Legislation Act 2001* s 169
NSW	s 32G, s 61B(3B); *Property (Relationships) Act 1984* s 4
NT	Schedule 6, Pt 2; *De Facto Relationships Act 1991* s 3A
SA	s 4; *Family Relationships Act 1975* s 11
Tas	s 44(3A), (3B) and (9); *Relationships Act 2003* s 4
Vic	s 3(1), s 3(3); *Property Law Act 1958* s 275
WA	s 15; *Interpretation Act 1984* s 13A
NZ	s 2(1); *Property (Relationships) Act 1976* s 2, s 2C, s 2D

3.8 For the purposes of this paper the term "de facto partner" has been adopted with the intention of encompassing the variety of terms used to describe such a person – de facto spouse, putative spouse, partner or domestic partner.

3.9 The de facto partner of the intestate will usually be entitled to take the spouse's share of the deceased's estate. A de facto partner is often given a high priority in the distribution of the intestate's property. The possible extent of such entitlement means it is important that such partners be identified and distinguished from mere cohabitants, close friends or carers, for example.

3.10 De facto partners are included in intestacy provisions in all Australian jurisdictions. This inclusion was necessary to remove the legal difficulties faced by de facto partners. Before de facto partners were included in intestacy provisions the surviving partner was eligible to apply to the court under family provision legislation for provision out of the estate. However, it was acknowledged that "such application for family provision may prove costly and time consuming and may not be worthwhile where the estate is small".[10]

3.11 Each jurisdiction provides requirements that must be met before a de facto relationship will be recognised in law. The presence of further requirements to be met by de facto partners seeking to become entitled in intestacy must also be determined. A decision must be made as to whether such further requirements are to be brought into the uniform legislation or left to the individual jurisdictions.

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10. NSW, *Parliamentary Debates (Hansard)*, Legislative Assembly, 17 October 1984, Wills, Probate and Administration (De Facto Relationships) Amendment Bill, Second Reading at 2003.

Requirements for recognition as a de facto partner

3.12 Generally a de facto partner is either one of two persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family. In most jurisdictions a de facto partner may be of the same gender as the intestate.[11]

3.13 The indicia of a de facto relationship, which are identified in separate statutes that deal with such relationships, include the nature and extent of their common residence; the length of their relationship; whether or not a sexual relationship exists or existed; the degree of financial dependence or interdependence, and any arrangement for financial support; their ownership, use and acquisition of property; the degree of mutual commitment to a shared life, including the care and support of each other, the care and support of children; the performance of household tasks; the reputation and public aspects of their relationship.[12]

3.14 For the purposes of determining entitlement on intestacy, most jurisdictions recognise a de facto partner only if the relationship has existed continuously for a certain period before the death of the intestate or if a child has been born to the de facto relationship.[13] The jurisdictions differ in what they consider to be an acceptable time period for the relationship to have existed prior to the death of the intestate. South Australia requires either five continuous years or a five year aggregate over a six year period.[14] A number prefer a much briefer two years.[15]

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11. *Succession Act 1981* (Qld) s 5AA(1)(b), *Acts Interpretation Act 1954* (Qld) s 32DA(5)(a); *Administration and Probate Act 1929* (ACT) s 44(1); *Legislation Act 2001* (ACT) s 169(2); *Wills, Probate and Administration Act 1898* (NSW) s 32G; *Property (Relationships) Act 1984* (NSW) s 4(1); *Administration and Probate Act 1969* (NT) Sch 6 Pt 2-3; *De Facto Relationships Act 1991* (NT) s 3A(3)(a); *Relationships Act 2003* (Tas) s 4(1); *Administration and Probate Act 1958* (Vic) s 3(1); *Administration Act 1903* (WA) s 15; *Interpretation Act 1984* (WA) s 13A(3)(a); *Administration Act 1969* (NZ) s 2(1); *Property (Relationships) Act 1976* (NZ) s 2D(1).
12. *Acts Interpretation Act 1954* (Qld) s 32DA(2); *Administration and Probate Act 1958* (Vic) s 3(3); *Property Law Act 1958* (Vic) s 275(2); *Legislation Act 2001* (ACT) s 169(2); *De Facto Relationships Act 1991* (NT) s 3A; *Relationships Act 2003* (Tas) s 4; *Interpretation Act 1984* (WA) s 13A(2); *Property (Relationships) Act 1976* (NZ) s 2D(2); and *Property (Relationships) Act 1984* (NSW) s 4(2).
13. *Family Relationships Act 1975* (SA) s 11(1); *Administration and Probate Act 1929* (ACT) s 44(1) (definition of "eligible partner"); *Administration and Probate Act 1969* (NT) Sch 6 Pt 2; *Administration and Probate Act 1935* (Tas) s 44(3A) and s 44(3B); *Administration and Probate Act 1958* (Vic) s 3(1) definition of "domestic partner"; and *Administration Act 1903* (WA) s 15(1).
14. *Family Relationships Act 1975* (SA) s 11(1)(a).

3.15 In New South Wales and Tasmania, where the intestate is survived by a de facto partner and issue (not being issue of the de facto partner), the de facto will not be entitled to anything if the relationship has existed for less than two years.[16]

3.16 In some jurisdictions, the requirement that a child be born to the relationship is subject to an additional requirement that the child must be under eighteen years at the intestate's death if the surviving partner is to be eligible to take on intestacy without having to prove the relationship existed for a continuous period immediately before the intestate's death.[17]

3.17 In South Australia a person must apply to the court for a declaration of their status as a de facto partner.[18] Such a claim will not be entertained unless it is supported by credible corroborative evidence.

3.18 In its Supplementary Report on Family Provision, the National Committee for Uniform Succession Laws, in considering how to identify a de facto relationship for the purposes of family provision, noted that, while the various jurisdictions enjoyed a degree of consistency in their definitions, each jurisdiction had slightly different provisions for determining whether two people had been in a de facto relationship and that there were also differences in relation to the qualifying period to establish a de facto relationship for the purposes of family provision. The Committee noted that the differences in each jurisdiction were necessary "to achieve consistency across the range of legislation within [each] individual jurisdiction concerning the rights or obligations of de facto partners".[19] The Committee, therefore, decided that the uniform legislation should not attempt a uniform definition of de facto partner but rather that a de facto partner should be identified "according to the relevant legislation

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15. *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (b)(i) to the definition of "eligible partner"; *Administration and Probate Act 1969* (NT) Sch 6 Pt 2; *Administration and Probate Act 1935* (Tas) s 44(3A) and (3B); *Administration and Probate Act 1958* (Vic) s 3(1) paragraph (b)(i) of the definition of "domestic partner"; and *Administration Act 1903* (WA) s 15(1).
16. *Wills, Probate and Administration Act 1898* (NSW) s 61B(3B); *Administration and Probate Act 1935* (Tas) s 44(3B).
17. *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (b)(ii) to the definition of "eligible partner"; *Administration and Probate Act 1958* (Vic) s 3(1) para (b)(ii) to the definition of "domestic partner".
18. *Family Relationships Act 1975* (SA) s 11(2).
19. National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) at para 2.21.

in the enacting jurisdiction".[20] A similar approach could be taken to identifying de facto partners for the purposes of distribution on intestacy.

ISSUE 3.2

Should the meaning of de facto partner be standardised for the purposes of intestacy or should the National Committee's draft Family Provision Bill be followed (that is, allow the definition of each jurisdiction to be applied)?

ISSUE 3.3

If there is to be a standardised meaning of "de facto partner", how should that term be defined?

ISSUE 3.4

In any event should a special period, or periods, apply to the recognition of de facto relationships for purposes of intestacy? If so, what periods?

ISSUE 3.5

Should any restrictions be placed on the ability of a de facto partner to succeed to an intestate's estate?

SPOUSES TO BE TREATED AS SEPARATE PERSONS

Qld	*Property Law Act 1974* s 15
ACT	s 44(2)(a)
NSW	s 61B(9)
NT	s 61(2)(a)
SA	
Tas	s 44(8)
Vic	s 52(1)(f)(viii)
WA	
NZ	
Eng	s 46(2); *Law of Property Act 1925* s 37

3.19 In Australia, a woman's property does not become that of her husband upon marriage. Married women have the same powers to deal with their interests in property that single women (and men, married or not) enjoy.[21] Nevertheless, most of the intestacy provisions state that

20. National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) at para 2.22 and cl 3(1) of the *Family Provision Bill* in Appendix 2.
21. *Property Law Act 1974* (Qld) s 15; *Married Persons' Property Act 1986* (ACT) s 3(1); *Married Persons (Equality of Status) Act 1996* (NSW) s 4(1); *Married Persons (Equality of Status) Act 1989* (NT) s 3(1); *Law of Property Act 1936* (SA) s 92, s 93;

spouses are to be treated as separate persons for the purposes of distribution under intestacy.[22] The issue of spouses being treated as separate persons arises, for example, where parents, grandparents or married cousins are entitled to distribution on intestacy. It goes without saying that each partner ought to be able to take the share to which they are entitled. It is surprising to find this expressly stated in modern statutes since the proposition is so obviously part of the general law today. However, cousins who are married and have issue give rise to a particular problem. This is discussed below.[23]

ISSUE 3.6

Is it necessary for the intestacy provisions to continue to contain an express statement that spouses are to be considered separate people?

DISTRIBUTION TO SPOUSES AND PARTNERS

3.20 The following paragraphs outline the current provisions for the distribution of intestate estates where there is a surviving spouse or partner. Some of the more complex provisions outlined below have been enacted to deal with situations where it is necessary to apportion a share for the surviving spouse or partner in order to accommodate other relatives who are also entitled to take, usually the surviving issue of the intestate. A simpler plan may be for the intestate estate to devolve in its entirety to the surviving spouse or partner, regardless of the presence of other relatives. These issues are dealt with in more detail below.[24]

Married Women's Property Act 1935 (Tas) s 3(1); *Marriage Act 1958* (Vic) s 156(1)(a), s 157; *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 2, s 3.

22. *Wills, Probate and Administration Act 1898* (NSW) s 61B(9); *Administration and Probate Act 1969* (NT) s 61(2)(a); *Administration and Probate Act 1929* (ACT) s 44(2)(a); *Administration and Probate Act 1958* (Vic) s 52(1)(f)(viii); *Administration and Probate Act 1935* (Tas) s 44(8); and *Administration of Estates Act 1925* (Eng) s 46(2); and *Law of Property Act 1925* (Eng) s 37. In Queensland *Property Law Act 1974* (Qld) s 15 applies generally to the "acquisition of any interest in property".
23. See para 6.12 and para 6.17.
24. Para 3.28-3.35.

Intestate leaves spouse or partner but no issue

Qld	s 35; Sch 2 Pt 1 It 1(1)
ACT	s 49(1),(2); Sch 6 Pt 6.1 It 1
NSW	s 61B(1), s 61B(2)
NT	s 66(1),(2); s 67(1),(2); Sch 6 Pt 1 It 1, It 3
SA	s 72G(a)
Tas	s 44(2)(b)
Vic	s 51(1)
WA	s 14(1) Table It 1 3-4; s 14(2)
NZ	s 77 It 1 and It 3
Eng	s 46(1)(i) Table It 1 and It 3

3.21 Where the intestate is survived by a spouse or partner, but no issue, the spouse or partner will either receive his or her entitlement in preference to other relatives, or will be entitled to the whole of the estate in the absence of specific relatives.

3.22 In most jurisdictions the surviving spouse or partner is entitled to the whole of the intestate's estate in the absence of surviving issue.[25]

3.23 Some jurisdictions, however, only allow such automatic entitlement when the intestate has not been survived by any issue, parents nor siblings (nor the issue of siblings).[26] In New Zealand, in the absence of surviving issue, only the presence of a parent will affect the surviving spouse's right to the whole of the estate.[27]

3.24 In the case of these latter jurisdictions (apart from New Zealand) if the intestate is survived by a parent or brother or sister (or the issue of a sibling), the spouse or partner is only entitled to the whole of the intestate's estate if its value is below a prescribed amount - $75,000 in Western Australia. If the value is greater than this prescribed amount, the spouse or partner is entitled to the threshold amount (plus interest calculated from the date of the death of the intestate until the date of payment[28]) and half

25. *Succession Act 1981* (Qld) Sch 2 Pt 1 It 1(1); *Wills, Probate and Administration Act 1898* (NSW) s 61B(2); *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.1 It 1; *Administration and Probate Act 1919* (SA) s 72G(a); *Administration and Probate Act 1935* (Tas) s 44(2)(b); and *Administration and Probate Act 1958* (Vic) s 51(1).
26. *Administration Act 1903* (WA) s 14(1) Table It 4; *Administration and Probate Act 1969* (NT) Sch 6 Pt 1 It 3; and *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 1.
27. *Administration Act 1969* (NZ) s 77 It 3.
28. See para 3.52 below.

of the intestate estate remaining.[29] The spouse or partner's absolute right to the personal (household) chattels[30] remains untouched.[31]

3.25 A similar situation applied in Queensland before recommendations of the Queensland Law Reform Commission were adopted in 1997. The Queensland Law Reform Commission recommended that a surviving spouse or partner should have to share only with the issue of the intestate.[32]

3.26 Such a provision might have been justified in the past by the belief that it would be unreasonable that a widow, who might remarry, could carry off the whole of the intestate's estate in preference to consanguine relatives of the intestate.[33] In 1993 the Queensland Law Reform Commission observed that the "relatively ungenerous provisions which intestacy rules make for surviving spouses" possibly reflected such concerns, "as may the fact that a significant majority of surviving spouses are women who have traditionally been discriminated against in succession law".[34]

3.27 If, as it has been said in Queensland, the surviving spouse "will most probably be a retired woman in the 75 to 80 year age group"[35] it seems inequitable today that he or she should have to share the estate with anyone other than the issue of the intestate. Where the estate is only small, the unfairness of any forced division will be even more apparent.

ISSUE 3.7

If the intestate is not survived by any issue, should the surviving spouse or partner be entitled to the whole of the estate?

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29. *Administration Act 1903* (WA) s 14(1) Table It 3; and *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 3.
30. See para 3.36-3.44.
31. *Administration Act 1903* (WA) s 14(1) Table It 1; *Administration and Probate Act 1969* (NT) s 66(2), s 67(1) and (2); and *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 3.
32. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at para 4.2.
33. See an analogous argument in *Blackborough v Davis* (1701) P Wms 41 at 49; 24 ER 285 at 288.
34. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at para 2.8.1.
35. Queensland, *Parliamentary Debates (Hansard)*, 20 August 1997, Succession Amendment Bill, Second Reading at 3017.

ISSUE 3.8

If not, who else should be entitled to a share and to how much should the surviving spouse or partner be entitled and in what proportions should the remainder of the estate be divided?

ISSUE 3.9

Should personal chattels be included in the spouse or partner's entitlement?

Intestate leaves spouse or partner and issue

Qld	s 35; Sch 2, Part 1, It 2
ACT	s 49(1),(2), s 49A, s 49AA; Sch 6, Pt 6.1, It 2
NSW	s 61B(1),(3),(3B),(14)
NT	s 66(1),(2); s 67(1),(2); Sch 6 Pt 1 It 2
SA	s 72G(b)
Tas	s 44(1),(2)(a),(3),(3B)
Vic	s 51(2), s 51(3), s 52(1)(a)
WA	s 14(1) Table It 1-2, s 14(3)
NZ	s 77, It 2
Eng	s 46(1)(i) Table It 2

3.28 When the intestate is survived by a spouse or partner and issue the intestate estate will be divided between them. While this is common to all jurisdictions, the methods adopted are not.

3.29 Questions have been raised from time to time concerning the desirability of preferring the surviving spouse or partner to the issue of the intestate.

3.30 In 1992 the Queensland Law Reform Commission proposed, on a preliminary basis, that where an intestate is survived by a spouse or partner and issue of the relationship, the surviving spouse or partner should take the entire estate to the exclusion of all others. This approach was justified on the grounds that the surviving spouse or partner would be expected, in the normal course of events, to look after the needs of children of the intestate who were still in their minority. This proposal envisaged that where the surviving spouse or partner was a step parent to the intestate's children, the surviving spouse or partner would be entitled to a generous statutory legacy of $500,000 and half the residue of the estate. The other half of the residue would then go to the surviving issue of the intestate who were also not the issue of the surviving spouse or partner.[36]

36. Queensland Law Reform Commission, *Intestacy Rules* (Working Paper 37, 1992) at para 3.4 and para 4.3.

3.31 Some submissions to the Queensland Law Reform Commission considered that these proposals might be too generous to the surviving spouse or partner in the case of large estates and paid insufficient attention to the "legitimate expectations" of issue.[37]

3.32 The Queensland Law Reform Commission therefore recommended a generous provision for the surviving spouse or partner, including, the personal property of the intestate, a statutory legacy of $100,000, the matrimonial home, a sum of up to $150,000 sufficient to discharge any mortgage on the matrimonial home, and one half of intestate estate remaining.[38] The Queensland Law Reform Commission considered that making provision for issue in this way was consistent "with the discernible policy of the courts in dealing with "usual" family provision applications and of the practice of many spouses who do make wills".[39]

3.33 In 1989 the Law Commission of England and Wales recommended that the surviving spouse should receive the whole estate no matter what other relatives remain. It was recognised that, "[i]f the statutory legacy is raised to a level which is sufficient to ensure adequate provision for the surviving spouse, the practical result in the vast majority of cases will be that the surviving spouse receives the whole estate".[40]

3.34 Some argument may be made for drawing a distinction between surviving issue who are dependent on their parents and those who are not. However, in both cases there are grounds to support the spouse receiving the greater proportion of the estate. In many cases the surviving (usually elderly) spouse will have greater need of the intestate's estate than the issue of the intestate, who are usually mature, rather than mere infants or young adults, and not financially dependent on the deceased.[41] In cases where surviving issue are in their minority or still dependent on their parents it can usually be assumed that they will be taken care of by the surviving spouse.[42] So far as surviving non-dependant children (and their "legitimate expectations") go, it has been suggested:

> **If it seems unfair that issue should inherit nothing on the death of their first parent to die, nevertheless under ordinary circumstances**

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37. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 15, 34.
38. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 37-38.
39. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 35.
40. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at para 30.
41. Queensland, *Parliamentary Debates (Hansard)*, 20 August 1997, Succession Amendment Bill, Second Reading at 3017.
42. NSW, *Parliamentary Debates (Hansard)*, Legislative Assembly, 28 November 1977, Wills, Probate and Administration (Amendment) Bill, Second Reading at 8995.

they should not have to wait long for the death of the surviving parent.[43]

3.35 However, there will be cases where "legitimate expectations" will not be met, especially where the issue are not also the issue of the surviving spouse, or where a surviving spouse remarries. The current rules in all jurisdictions make some provision for such circumstances by allowing provision for surviving issue in addition to the surviving spouse, at least in the case of larger estates. An argument can, however, be made, for keeping the intestacy provisions as simple as possible and allowing the "legitimate expectations" of issue to be dealt with by way of applications for family provision. In most family provision cases the interests of the surviving spouse or partner will be preferred over that of surviving adult children of the intestate.

ISSUE 3.10

In principle, should the estate be divided between the spouse and issue?

Surviving spouse's entitlement to personal chattels

Qld	s 34A; Sch 2 Part 1 It 2
ACT	s 44(1), s 49(2), s 49A
NSW	s 61A(2), s 61B(3)(a)
NT	s 61(1), s 66(2), s 67(1),(2)
SA	s 72B(1), s 72F(b), s 72H(1)
Tas	
Vic	s 5(1), s 51(2)(a)
WA	s 14(1) Table It 1; s 14(2)(a)
NZ	s 2(1), s 77 It 1, 2, 3
Eng	s 46(1)(i) Table It 2; s 55(1)(x)

3.36 In most jurisdictions the surviving spouse is entitled to the household (or personal) chattels.[44] It is generally stated that these chattels include articles of household or personal use or adornment (ornament).[45] The

43. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 35.
44. *Succession Act 1981* (Qld) Sch 2 Pt 1 It 2(1)(a), It 2(2)(a); *Administration and Probate Act 1969* (NT) s 67(1), (2); *Administration and Probate Act 1919* (SA) s 72H(1); *Administration and Probate Act 1929* (ACT) s 49A; *Administration Act 1903* (WA) s 14(1) Table It 1; *Administration and Probate Act 1958* (Vic) s 51(2)(a); *Wills, Probate and Administration Act 1898* (NSW) s 61B(3)(a); *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 2; *Administration Act 1969* (NZ) s 77 It 1, 3.
45. *Administration of Estates Act 1925* (Eng) s 55(1)(x); *Administration and Probate Act 1958* (Vic) s 5(1); *Administration Act 1969* (NZ) s 2(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (a) to the definition of "personal chattels"; *Administration and Probate Act 1969* (NT) s 61(1) paragraph (a) to the

spouse's right to the personal, or household, chattels has been recognised as minimising the disruption caused by the death of the intestate, and producing "some continuity of lifestyle for the spouse and any surviving children".[46] Another reason for giving the surviving spouse or partner a right to personal, or household, chattels is that it spares the surviving spouse or partner from a potentially unseemly struggle with other beneficiaries over the ownership of particular chattels, for example, kitchenware, lawnmowers, and so on, where it may be difficult or impossible for the surviving spouse or partner to prove ownership, and undesirable to require her or him to do so.

3.37 Of the seven jurisdictions which give detailed definitions of chattels,[47] there are a number of common inclusions. Linen, china, glassware, liquors, consumable stores and domestic animals are all considered chattels.[48] Most also include furniture,[49] wines,[50] motor cars[51] and motor car accessories[52]

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definition of "personal chattels"; *Administration Act 1903* (WA) s 14(2)(a); *Administration and Probate Act 1919* (SA) s 72B(1).

46. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 362.
47. *Succession Act 1981* (Qld) s 34A; *Administration and Probate Act 1929* (ACT) s 44(1); *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); *Administration and Probate Act 1969* (NT) s 61(1) paragraph (a) to the definition of "personal chattels"; *Administration and Probate Act 1958* (Vic) s 5(1) definition of "personal chattels"; *Administration Act 1969* (NZ) s 2(1); and *Administration of Estates Act 1925* (Eng) s 55(1)(x).
48. *Succession Act 1981* (Qld) s 34A(1); *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); *Administration of Estates Act 1925* (Eng) s 55(1)(x); *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (a) to the definition of "personal chattels"; *Administration and Probate Act 1969* (NT) s 61(1) paragraph (a) to the definition of "personal chattels"; and *Administration Act 1969* (NZ) s 2(1).
49. *Succession Act 1981* (Qld) s 34A(1); *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); *Administration of Estates Act 1925* (Eng) s 55(1)(x); *Administration and Probate Act 1958* (Vic) s 5(1); and *Administration Act 1969* (NZ) s 2(1).
50. *Succession Act 1981* (Qld) s 34A(1); *Administration of Estates Act 1925* (Eng) s 55(1)(x); *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (a) to the definition of "personal chattels"; *Administration and Probate Act 1969* (NT) s 61(1) paragraph (a) to the definition of "personal chattels"; and *Administration Act 1969* (NZ) s 2(1).
51. *Administration of Estates Act 1925* (Eng) s 55(1)(x); *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1919* (SA) s 72B(1) paragraph (b) to the definition of "personal chattels"; *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (b) to the definition of "personal chattels"; and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (b) to the definition of "personal chattels".

(not used for business at the time of the intestate's death), as well as plate (and/or plated articles), books, pictures, prints, jewellery, and musical and scientific instruments or apparatus.[53] Any chattels used for business at the intestate's death,[54] money and securities for money[55] are generally excluded.

3.38 Other items which are specifically identified as personal chattels in some jurisdictions include curtains, drapes, carpets, ornaments, domestic appliances and utensils, garden appliances and utensils, other chattels of ordinary household use or decoration,[56] garden effects or appliances,[57] carriages (not used for business),[58] horses (not used for business), stable

52. *Administration of Estates Act 1925* (Eng) s 55(1)(x); *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (b) to the definition of "personal chattels"; and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (b) to the definition of "personal chattels".
53. *Administration of Estates Act 1925* (Eng) s 55(1)(x); *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (a) to the definition of "personal chattels"; *Administration and Probate Act 1969* (NT) s 61(1) paragraph (a) to the definition of "personal chattels"; and *Administration Act 1969* (NZ) s 2(1).
54. *Administration of Estates Act 1925* (Eng) s 55(1)(x); *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1919* (SA) s 72B(1); *Administration Act 1969* (NZ) s 2(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (c) to the definition of "personal chattels" (where chattel used exclusively for business purposes); and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (c) to the definition of "personal chattels" (where chattel used exclusively for business purposes).
55. *Administration of Estates Act 1925* (Eng) s 55(1)(x); *Administration and Probate Act 1958* (Vic) s 5(1); *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (d) to the definition of "personal chattels"; *Administration and Probate Act 1969* (NT) s 61(1) paragraph (d) to the definition of "personal chattels"; and *Administration Act 1969* (NZ) s 2(1).
56. *Succession Act 1981* (Qld) s 34A(1); and *Wills, Probate and Administration Act 1898* (NSW) s 61A(2).
57. *Succession Act 1981* (Qld) s 34A(1); *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); *Administration of Estates Act 1925* (Eng) s 55(1)(x); *Administration and Probate Act 1958* (Vic) s 5(1); and *Administration Act 1969* (NZ) s 2(1).
58. *Administration of Estates Act 1925* (Eng) s 55(1)(x); and *Administration and Probate Act 1958* (Vic) s 5(1).

furniture and effects (not used for business),[59] clothing,[60] vehicles and accessories, boats and accessories and aircraft and accessories.[61]

3.39 Items which some jurisdictions do not consider chattels include motor vehicles, boats, aircraft, racing animals, original paintings, trophies, clothing, jewellery, chattels of a personal nature,[62] and original paintings and other original works of art.[63]

3.40 Contentious items are vehicles (cars, carriages, boats and aircraft), clothing and jewellery.

3.41 Rather than go into any detail, Western Australia, provides a general definition – articles of personal or household use or adornment.[64] The Queensland Law Reform Commission favoured this position, considering it more appropriate to exclude "…items which would not ordinarily be treated as personal property, rather than to devise a definition which attempts to list all possible items of property which should be treated as personal property".[65]

3.42 Tasmania, on the other hand, has not provided for the surviving spouse's entitlement to any of the intestate's personal possessions. This was not the position of the Law Reform Commission of Tasmania, which suggested that a definition of personal chattels could be provided similar to that provided in New Zealand.[66]

3.43 In three jurisdictions, where the intestate is survived by a partner, the personal chattels of the intestate are not included in the intestate estate for the purposes of distribution.[67]

3.44 In some jurisdictions, a "thing" (household chattel) will be taken as owned by the intestate even if it was held subject to a charge, encumbrance or lien securing the payment of money; or the intestate only held the

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59. *Administration of Estates Act 1925* (Eng) s 55(1)(x); *Administration and Probate Act 1958* (Vic) s 5(1); and *Administration Act 1969* (NZ) s 2(1).
60. *Administration and Probate Act 1929* (ACT) s 44(1) paragraph (a) to the definition of "personal chattels"; and *Administration and Probate Act 1969* (NT) s 61(1) paragraph (a) to the definition of "personal chattels".
61. *Administration Act 1969* (NZ) s 2(1).
62. *Succession Act 1981* (Qld) s 34A(2); and *Wills, Probate and Administration Act 1898* (NSW) s 61A(2).
63. *Succession Act 1981* (Qld) s 34A(2).
64. *Administration Act 1903* (WA) s 14(2)(a).
65. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 40.
66. Law Reform Commission of Tasmania, *Report on Succession Rights on Intestacy* (Report 43, 1985) at 12.
67. *Administration and Probate Act 1929* (ACT) s 49(2); *Administration and Probate Act 1969* (NT) s 66(2); and *Administration and Probate Act 1919* (SA) s 72F(b).

interest as grantor under a bill of sale or as hirer under a hire-purchase agreement.[68] In some of these jurisdictions the owner's rights with respect to the item are also expressly preserved.[69]

ISSUE 3.11

Should the surviving spouse be entitled to the intestate's personal possessions?

ISSUE 3.12

If so, should a detailed list of chattels be included or should reference simply be made to "articles of personal or household use or adornment"?

ISSUE 3.13

If a detailed list is to be provided, what should be included in it?

Spouse's entitlement to a statutory legacy

Qld	Sch 2 Pt 1 It 2
ACT	Sch 6 Pt 6.1 It 2(2)(a)
NSW	s 61A(2), s 61B(3)(b), s 61B(10)
NT	Sch 6 Pt 1 It 2(1), It 3(1)
SA	s 72G(b)(i)(B)
Tas	s 44(3)
Vic	s 51(2)
WA	s 14(1) Table It 2, 3
NZ	s 77 It 1, 2, 3
Eng	s 46(1)(i) Table It 2, 3

3.45 Throughout Australia, the spouse is entitled to a statutory legacy,[70] in most jurisdictions in addition to the household or personal chattels.[71] Although there is limited correspondence, there is no uniformity and the amount differs between jurisdictions. The prescribed amount may be left to

68. *Succession Act 1981* (Qld) s 34A(3)(b); *Administration Act 1969* (NZ) s 2(1); and *Wills, Probate and Administration Act 1898* (NSW) s 61A(2).
69. *Wills, Probate and Administration Act 1898* (NSW) s 61B(10); and *Administration Act 1969* (NZ) s 77 It 1, 2, 3.
70. *Succession Act 1981* (Qld) Sch 2 Pt 1 It 2(1)(a), It 2(2)(a); *Wills, Probate and Administration Act 1898* (NSW) s 61B(3)(b); *Administration and Probate Act 1958* (Vic) s 51(2); *Administration and Probate Act 1919* (SA) s 72G(b)(i)(B); *Administration Act 1903* (WA) s 14(1) Table It 2(b) and It 3(b); *Administration and Probate Act 1935* (Tas) s 44(3); *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.1 It 2(2)(a); *Administration and Probate Act 1969* (NT) Sch 6 Pt 1 It 2 and It 3. See also *Administration Act 1969* (NZ) s 77 It 2 and It 3; and *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 2 and It 3.
71. See para 3.36-3.44 above.

be fixed by Regulations[72] or a specific amount may have been included in the legislation. In New South Wales the amount prescribed by regulation is $200,000.[73] In Queensland and the Australian Capital Territory legislation states that the amount is $150,000,[74] $100,000 in Victoria,[75] $50,000 in Tasmania[76] and Western Australia[77] and $10,000 in South Australia.[78]

3.46 The Law Reform Commission of Tasmania were not satisfied with that State's law:

> It seems that the original purpose of the legacy was to enable the spouse to remain in the matrimonial home if he or she so desired and, to assist in his or her day to day maintenance. The sum of $50 000 is widely acknowledged as being insufficient for these purposes.[79]

The Law Reform Commission of Tasmania also suggested that the legacy should be altered by regulation, rather than statute, to allow for easier adjustments to take place in a climate of fluctuating property values.[80] It is important to bear in mind that property values differ according to location as well as over time. The Law Commission of England and Wales observed that, if the purpose of the statutory legacy is to allow the surviving spouse to purchase the intestate's share of their shared home, a legacy which allows for the purchase of a London house will provide a spouse who lives elsewhere with a substantial surplus.[81]

3.47 The surviving spouse's entitlement to a fixed statutory legacy was intended to remove financial hardship and ensure that the spouse can continue living in the manner to which he or she has become accustomed.[82] The spouse will be able substantially to reduce any mortgage to which the

72. *Administration and Probate Act 1969* (NT) Sch 6 Pt 1 It 2(1), It 3(1); *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); *Administration Act 1969* (NZ) s 77 It 1, 2, 3; and *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 2.
73. *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); *Wills, Probate and Administration Regulation 2003* (NSW) cl 5(2).
74. *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.1 It 2(2)(a); *Succession Act 1981* (Qld) Sch 2 Pt 1 It 2.
75. *Administration and Probate Act 1958* (Vic) s 51(2).
76. *Administration and Probate Act 1935* (Tas) s 44(3).
77. *Administration Act 1903* (WA) s 14(1) Table It 2.
78. *Administration and Probate Act 1919* (SA) s 72G(b)(i)(B).
79. Law Reform Commission of Tasmania, *Report on Succession Rights on Intestacy* (Report 43, 1985) at 13.
80. Law Reform Commission of Tasmania, *Report on Succession Rights on Intestacy* (Report 43, 1985) at 13.
81. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 5.
82. NSW, *Parliamentary Debates (Hansard)*, Legislative Council, 28 November 1977, Wills, Probate and Administration (Amendment) Bill, Second Reading at 10326.

matrimonial home may be subject. If the estate is only small, the entitlement to a legacy means the spouse may avoid severe financial hardship and the associated "expense and domestic unpleasantness" of a family provision application.[83]

3.48 The provision of a small legacy to the surviving spouse was supported by the Law Reform Committee of South Australia which identified a problem in that:

> [t]he amount is the same whether the wife is the first wife or second wife, whether she has been married for one year, five years or thirty years, whether any of the husband's assets came from the use of money provided by the wife or the wife's relatives or by her co-operation in a business, whether the relationship between the husband and wife was good or ill, whether she remarries speedily, and many other permutations and combinations of facts.[84]

3.49 It was intended that the presence of a fixed legacy should take pressure off the surviving spouse to sell essential assets so that their proceeds may be distributed to the intestate's children. In New South Wales an example was given of:

> a case where a woman died and left a widower with children [and] the estate had to be shared between a father and his children. The children became upset with their father and demanded their share of the estate. Naturally, he could not understand why his wife's estate did not pass to him and why he had to share it with his married children. The result was that members of the family were at loggerheads, other solicitors had to be brought in, barristers had to be engaged and much distress was caused by unnecessary litigation and court appearances.[85]

3.50 The Queensland Law Reform Commission in 1993 observed that:

> the main purpose of giving a statutory legacy of a reasonably substantial amount is that it makes easy the administration of all estates of less than the amount of the statutory legacy plus the personal property. There can be no doubt as to who will inherit. This is particularly important in the case of very small estates.[86]

3.51 Another reason for a comparatively large statutory legacy is that if the estate includes the intestate's interest in a family business, and the

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83. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 363.
84. Law Reform Committee of South Australia, *Relating to the Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 6.
85. NSW, *Parliamentary Debates (Hansard)*, Legislative Assembly, 25 October 1977, Wills, Probate and Administration (Amendment) Bill, Second Reading at 8998.
86. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 41.

business is the surviving spouse or partner's source of livelihood, the surviving spouse or partner may be unable to continue to operate the business if a substantial share of it has to be removed to meet the entitlements of other beneficiaries.

ISSUE 3.14

Should a statutory legacy be retained?

ISSUE 3.15

If so, should the prescribed amount be specified in uniform legislation or left to be fixed by Regulation in each jurisdiction?

ISSUE 3.16

How much should the legacy be?

Interest on statutory legacy

Qld	
ACT	s 49(1),(4); Sch 6, Pt 6.1, It 2(2)(b)
NSW	s 61B(12), s 84A
NT	
SA	
Tas	s 44(3)
Vic	s 51(2)(c)(ii), s 51(3); *Penalty Interest Rates Act 1983* s 2
WA	s 14(1) Table It 2-3, s 14(4)
NZ	s 39, s 77 It 1-3
Eng	s 46(1)(i) Table It 2 and 3

3.52 When the spouse is entitled to a prescribed amount to be drawn from the intestate's estate, they are often entitled to interest in addition to the legacy, which is also payable from the estate. Provisions of this sort are said to be statutory recognition of the common law principle that "pecuniary legacies carry interest unless the contrary is indicated in the will or instrument of their creation".[87] However, the position at common law was strictly that if a legacy was charged out of land, the legacy carried interest from the date of death of the deceased, but if a legacy was given out of personal estate, the legacy carried interest only from the year after the death of the deceased, unless other provision was made in the will.[88] Jurisdictions that make provision for interest on the statutory legacy

87. NSW, *Parliamentary Debates (Hansard*) Legislative Assembly, 25 October 1977, Second Reading at 8994. See, eg, *Succession Act 1981* (Qld) s 52(1)(e) and s 52(1A).
88. *Maxwell v Wettenhall* (1722) 2 P Wms 26; 24 ER 628. See also *Bird v Lockey* (1716) 2 Vern 743; 23 ER 1086; and F Jordan, *Administration of the Estates of Deceased Persons* (3rd ed, 1948) at 34-36.

calculate it from the date of death of the intestate until the prescribed amount is paid (or appropriated) to the spouse.[89] The interest rate is sometimes flexible – set by Regulation[90] or subordinate legislation.[91] In Victoria the rate is currently 9.5% per annum and in New South Wales 6% per annum.[92] Where the rate is fixed by legislation is it is 8% per annum in the Australian Capital Territory,[93] 5% per annum in Western Australia and 4% per annum in Tasmania.[94]

3.53 Charging interest on the statutory legacy can be said to reflect the general objective of the law "that estates should be distributed as soon as may be".[95]

3.54 Queensland, the Northern Territory and South Australia make no provision for interest on the statutory legacy.

ISSUE 3.17

Should interest be paid on the surviving spouse's statutory legacy?

ISSUE 3.18

Should the interest rate be set in uniform legislation or by regulation in each jurisdiction?

89. *Wills, Probate and Administration Act 1898* (NSW) s 61B(12); *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.1 It 2(2)(b); *Administration and Probate Act 1958* (Vic) s 51(2)(c)(ii); *Administration Act 1903* (WA) s 14(4); *Administration and Probate Act 1935* (Tas) s 44(3); *Administration Act 1969* (NZ) s 77 It 1, 2, 3; and *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 2 and It 3.
90. *Wills, Probate and Administration Act 1898* (NSW) s 61B(12) and s 84A.
91. The Attorney-General under *Penalty Interest Rates Act 1983* (Vic) s 2 (less 2.5%); the Governor-General by Order in Council in New Zealand under *Administration Act 1969* (NZ) s 39(2)(b); and the Lord Chancellor in England.
92. *Wills, Probate and Administration Act 1898* (NSW) s 61B(12); *Wills, Probate and Administration Regulation 2003* (NSW) cl 6(2).
93. *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.1 It 2(2)(b).
94. *Administration and Probate Act 1935* (Tas) s 44(3).
95. W A Lee and A A Preece, *Lee's Manual of Queensland Succession Law* (5th edition, LBC Information Services, 2001) at 131.

Apportionment between spouse and issue

Qld	Sch 2, Part 1, It 2
ACT	Sch 6, Pt 6.1, It 2(2)(c), It 2(3)
NSW	s 61B(3)(c)
NT	Sch 6 Pt 1 It 2, It 3
SA	s 72G(b)
Tas	s 44(3)
Vic	s 51(2)(c)(iii), s 52(1)(a)
WA	s 14(1) Table It 2(b); s 14(2b)
NZ	s 77 It 2
Eng	s 46(1)(i) Table It 2

3.55 If any of the intestate estate remains after the distribution of personal or household chattels and the statutory legacy to the surviving spouse, the estate is then divided proportionally between the surviving spouse and issue.

3.56 There are currently two approaches to apportioning the remaining intestate estate among the surviving spouse and issue.

3.57 One approach is to make different provisions for situations where there is only one child of the intestate and situations where there is more than one child of the intestate. So, if only one child survives the intestate, the spouse is entitled to the prescribed amount and one half of the remaining intestate estate. If more than one of the intestate's children has survived, the spouse is entitled to the prescribed legacy and one third of the remaining estate.[96] This approach dates back at least as far as the Statute of Distributions of 1670.

3.58 The other approach is to make no distinction in determining the proportions for distribution between situations where there is only one child and situations where there are a number of children of the intestate. That is to say, that the spouse is entitled to the same proportion of the remainder of the estate no matter how many children or their issue survive. This entitlement may be to half[97] or a third[98] of the remainder; the issue sharing the remaining half or two-thirds respectively.

96. *Succession Act 1981* (Qld) Sch 2 Pt 1 It 2(1)(b)(ii) and It 2(2)(b)(ii), *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.1 It 2(2)(c); and *Administration and Probate Act 1969* (NT) Sch 6 Pt 1 It 2(1)(b)(ii).

97. *Wills, Probate and Administration Act 1898* (NSW) s 61B(3)(c); *Administration and Probate Act 1919* (SA) s 72G(b); and *Administration of Estates Act 1925* (Eng) s 46(1)(i) Table It 2.

98. *Administration and Probate Act 1935* (Tas) s 44(3)(a); *Administration and Probate Act 1958* (Vic) s 51(2)(c)(iii), s 52(1)(a); *Administration Act 1903* (WA) s 14(1) Table It 2(b); and *Administration Act 1969* (NZ) s 77 It 2.

3.59 The Law Reform Commission of Tasmania suggested an approach similar to that which the Queensland Law Reform Commission proposed on a preliminary basis in 1992.[99] It was thought that, where a spouse and one child survive the intestate, the spouse would be in greater need of financial assistance than the child. If the child is a minor the spouse will generally be responsible for his or her support. If the child is an adult, he or she will generally be capable of supporting him or herself. Where more than one child have survived the intestate greater provision should be made for them.[100]

ISSUE 3.19

What is an appropriate proportion of the remaining estate to go to the surviving spouse?

ISSUE 3.20

Should the proportion alter according to the number of surviving issue? If so, how?

ISSUE 3.21

Would it be useful to distinguish dependent from non-dependent issue?

Intestate leaves a spouse and a de facto partner

Jurisdiction	Provision
Qld	s 35, s 36; Sch 2 Part 1 It 1(2), It 2(2)
ACT	s 45A
NSW	s 61B(1), s 61B(3A)
NT	s 66(1),(2); s 67(3); Sch 6 Pt 3
SA	s 72H(2),(3)
Tas	s 44(3A)
Vic	s 51A
WA	s 15(2),(3)
NZ	s 77C
Eng	

3.60 When an intestate is survived by a spouse, that spouse will be entitled to a share in the intestate's estate. When the intestate is survived by a spouse and a de facto partner, the spouse's entitlement will be divided between them. The situation envisaged is the presence of a surviving spouse and a sole surviving de facto partner. There are a number of ways by which the spouse's entitlement can be divided between them.

99. See para 3.30 above.
100. Law Reform Commission of Tasmania, *Report on Succession Rights on Intestacy* (Report 43, 1985) at 13.

Distribution in Queensland

3.61 Queensland is not concerned with the length of the relationship between the de facto and the intestate; only that it existed. There are three methods that may be employed in dividing the spouse's entitlement between a spouse and a de facto partner.[101]

3.62 The first method is for the spouse and de facto partner to produce a distribution agreement. They reach agreement amongst themselves as to how the spouse's entitlement is to be divided amongst them and put it in writing.[102]

3.63 The second method involves a partner or the personal representative applying to the court for a distribution order. The granting of such an order may be conditional. It may require that entitlement be distributed in a way the court considers just and equitable – in so requiring, no assumption will be made in favour of an equal distribution as a starting point or otherwise; it may find one partner to be solely entitled. The conditions for the granting of a court order are that there is no distribution agreement and that the personal representative has not commenced distribution of the estate.[103]

3.64 The third approach allows the personal representative to divide the estate into equal shares to distribute to the partners. This will be subject to the presence of surviving issue. Where issue exist, the statutory legacy must be equally split between the partners. Three conditions must be met for distribution to occur in this manner:

- the partners must have three months notice (given as soon as practicable) of the distribution;
- the personal representative must have no notice of a distribution agreement; and
- the personal representative must:
  - have no notice of an application for a distribution order, or
  - have a copy of a court order striking out or discontinuing an application for a distribution order, or
  - have been notified that the partners agree that the estate should be equally distributed by the personal representative (despite any prior application for a distribution order).[104]

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101. See *Succession Act 1981* (Qld) s 36.
102. *Succession Act 1981* (Qld) s 36(1)(a).
103. *Succession Act 1981* (Qld) s 36(1)(b).
104. *Succession Act 1981* (Qld) s 36(1)(c).

Distribution Elsewhere

3.65 ***When the whole entitlement goes to the de facto partner.*** In many jurisdictions the de facto partner of an intestate will take the spouse's entitlement exclusively if a number of conditions are met. The de facto relationship must have existed for a specified period before the intestate's death. In New South Wales, the Northern Territory and Tasmania the relevant period is at least two years;[105] at least five years in Western Australia[106] and the Australian Capital Territory;[107] and 6 years or more in Victoria.[108]

3.66 Some jurisdictions require that the relationship should have existed continuously for the period specified.[109] In some of these jurisdictions the period is also required to have been immediately before the intestate's death.[110] Another condition is added in some jurisdictions that the intestate must not have lived with their lawful spouse (or lived as the spouse of their lawful spouse[111]) at any time during that period.[112]

3.67 In the Northern Territory and Victoria the de facto will take the spouse's share regardless of the above conditions, where the intestate is survived by issue[113] of the intestate and the de facto partner.

3.68 ***When the whole entitlement goes to the spouse.*** In some jurisdictions, if the applicable conditions are not met by the surviving de facto partner, the spouse will be entitled to the spouse's share exclusively.[114] In Victoria, this will be the case if the de facto has not lived with the intestate continuously for at least two years immediately before

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105. *Administration and Probate Act 1969* (NT) Sch 6 Pt 3 It 1(a); *Wills, Probate and Administration Act 1898* (NSW) s 61B(3A); and *Administration and Probate Act 1935* (Tas) s 44(3A).
106. *Administration Act 1903* (WA) s 15(3).
107. *Administration and Probate Act 1929* (ACT) s 45(1)(b).
108. *Administration and Probate Act 1958* (Vic) s 51A(1).
109. *Administration and Probate Act 1969* (NT) Sch 6 Pt 3 It 1(a); *Administration and Probate Act 1958* (Vic) s 51A(1); *Administration and Probate Act 1929* (ACT) s 45A(1)(b); *Wills, Probate and Administration Act 1898* (NSW) s 61B(3A)(a); and *Administration and Probate Act 1935* (Tas) s 44(3A)(a).
110. *Administration and Probate Act 1969* (NT) Sch 6 Pt 3 It 1(a); *Administration Act 1903* (WA) s 15(3)(a); and *Administration and Probate Act 1935* (Tas) s 44(3A)(a).
111. *Administration Act 1903* (WA) s 15(3)(b).
112. *Administration and Probate Act 1969* (NT) Sch 6 Pt 3 It 1(a); *Wills, Probate and Administration Act 1898* (NSW) s 61B(3A)(a); and *Administration and Probate Act 1935* (Tas) s 44(3A)(a).
113. In Victoria the issue must have been under eighteen years at the intestate's death.
114. *Administration and Probate Act 1969* (NT) Sch 6 Pt 3 It 1; *Wills, Probate and Administration Act 1898* (NSW) s 61B(3A)(b); and *Administration and Probate Act 1935* (Tas) s 44(3A)(b).

the intestate's death and if the intestate was not survived by issue of the intestate and de facto partner, or such issue was not under eighteen years at the intestate's death.[115] A similar position applies in the Australian Capital Territory.[116]

3.69 ***When the entitlement is apportioned between the spouse and the de facto partner.*** In South Australia and New Zealand, the spouse and each de facto partner will be entitled to an equal share in the spouse's entitlement regardless of the length, or nature of, the relationships involved.[117]

3.70 In a number of jurisdictions the spouse and de facto will share the spouse's entitlement subject to a number of requirements and variations. The de facto relationship must have existed for a specified period before the intestate's death. This means at least two years but less than five years in the Australian Capital Territory and Western Australia.[118] Additionally, in Western Australia, the relevant period is that immediately before the death of the intestate, and the intestate must not have lived as the spouse of his or her lawful spouse during that period.[119] Victoria and the Australian Capital Territory require the period to have been continuous.[120] Where the appropriate conditions are met the spouse's share will be divided equally between the spouse and de facto partner.

3.71 It is also possible to apportion entitlements according to the duration of the relationships involved. In Victoria, if the de facto relationship has existed for at least two years but less than four years before the death of the intestate, the spouse will be entitled to two-thirds and the de facto partner one-third of the spouse's entitlement. Where the de facto relationship has existed for at least four years but less than five, the spouse's entitlement is one half and where the de facto relationship has existed for at least five years, but less than six, the spouse's entitlement is one-third while that of the de facto partner is two-thirds.[121]

3.72 South Australia provides that, where an intestate is survived by a lawful spouse and a putative spouse, they shall both be entitled to equal shares in the

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115. *Administration and Probate Act 1958* (Vic) s 3(1) definition of "domestic partner".
116. *Administration and Probate Act 1929* (ACT) s 44(1) definition of "eligible partner".
117. *Administration and Probate Act 1919* (SA) s 72H(2); *Administration Act 1969* (NZ) s 77C.
118. *Administration and Probate Act 1929* (ACT) s 45A(1)(a); and *Administration Act 1903* (WA) s 15(2)(a).
119. *Administration Act 1903* (WA) s 15(2).
120. *Administration and Probate Act 1929* (ACT) s 45(1)(a); *Administration and Probate Act 1958* (Vic) s 51A(1).
121. *Administration and Probate Act 1958* (Vic) s 51A(1).

property (including personal chattels).[122] Where any dispute arises between the two as to the division of personal chattels of an intestate between them, the administrator may sell the personal chattels and divide the proceeds of the sale equally between them.[123]

3.73 In the Northern Territory, where the intestate is survived by both a spouse and a de facto partner – (a) the de facto partner is entitled to the personal chattels absolutely if – (i) he or she was the de facto partner of the intestate for a continuous period of not less than 2 years immediately preceding the intestate's death, and the intestate did not at any time during that period live with the person to whom he or she was married; or (ii) the intestate is also survived by issue of the intestate and the de facto partner; and (b) except where paragraph (a) applies, the spouse is entitled to the personal chattels absolutely.[124]

ISSUE 3.22

What provision ought to be made for situations where the intestate is survived by a spouse and a de facto partner?

ISSUE 3.23

Should special provision be made for personal chattels?

Intestate leaves more than one de facto partner

Qld	s 36
ACT	
NSW	
NT	
SA	
Tas	
Vic	
WA	s 15(4)
NZ	s 77C
Eng	

3.74 The situation is less clear where the intestate is survived by more than one de facto partner. In New South Wales a de facto partner will only be entitled to the spouse's share of an intestate estate, if they were the sole partner in a de facto relationship with the deceased and were not a partner in any other de facto relationship.[125] In the Australian Capital Territory the definitions of "spouse" and "domestic partner" are such that there can only

122. *Administration and Probate Act 1919* (SA) s 72H(2).
123. *Administration and Probate Act 1919* (SA) s 72H(3).
124. *Administration and Probate Act 1969* (NT) Sch 6 Pt 3.
125. *Wills, Probate and Administration Act 1898* (NSW) s 32G(1).

be one eligible partner (in addition to a spouse).[126] Western Australia and New Zealand, however, provide that where an intestate has been survived by two or more de facto partners they are entitled to equal shares in the de facto partner's entitlement.[127]

3.75 In Queensland, however, provision is made for the distribution of the spouse's entitlement if more than one spouse (rather than a spouse and a de facto partner) survives the intestate.[128] Since "spouse" is defined to include de facto partners, it appears that the spouse's entitlement may, therefore, be apportioned when the intestate is survived by more than one de facto partner.

3.76 In South Australia, the question of multiple putative spouses arguably cannot arise since a putative spouse is required to be living with the deceased "as the husband or wife de facto".[129] It can be argued that the reference to "husband or wife" imports the idea of a relationship that is like marriage and, thus, is monogamous.

3.77 While the Northern Territory provides that a couple will be in a de facto relationship "if they are not married but have a marriage-like relationship",[130] in determining whether such a relationship exists it is expressly irrelevant that "either of the persons is in another defacto relationship".[131] Western Australia also requires the relationship to be "marriage-like"[132] but makes it irrelevant that either of the persons is in another de facto relationship.[133]

3.78 The other Australian jurisdictions also do not appear to import the idea of monogamy into the concept of de facto relationships.

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126. "Domestic partnership" is defined as "the relationship between 2 people, whether of a different or the same sex, living together as a couple on a genuine domestic basis": *Legislation Act 2001* (ACT) s 169(2).
127. *Administration Act 1903* (WA) s 15(4); *Administration Act 1969* (NZ) s 77C.
128. *Succession Act 1981* (Qld) s 36. See para 3.61-3.64.
129. *Family Relationships Act 1975* (SA) s 11.
130. *De Facto Relationships Act 1991* (NT) s 3A(1).
131. *De Facto Relationships Act 1991* (NT) s 3A(3)(c).
132. *Interpretation Act 1984* (WA) s 13A(1).
133. *Interpretation Act 1984* (WA) s 13A(3)(b).

3.79 Envisaging the impracticalities of addressing the intestacy of "the itinerant with a 'wife in every port'; or the open polygamist, perhaps with many children," the Queensland Law Reform Commission in its 1993 Report suggested that, where the intestate was survived by more than one de facto, none should be entitled to the spouse's share.[134]

ISSUE 3.24

What provision should be made where there is more than one de facto partner?

134. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at para 2.4.

4. Rights of spouse or partner to the shared home

- The shared home
- The spouse or partner's entitlement
- Valuing the intestate's interest in the shared home
- Election by the surviving spouse or partner
- Power of the personal representative to dispose of the shared home
- Restrictions on the spouse's right to acquire the shared home
- Determination of the curtilage of the shared home

Qld	s 34B, Part 3 Div 3
ACT	s 49F-49M
NSW	s 61A(2), s 61B(13), s 61D, s 61E Sch 4
NT	s 72-79
SA	s 72B(1), 72L
Tas	
Vic	s 37A
WA	s 14(6), Sch 4
NZ	
Eng	s 41; *Intestate's Estates Act 1952* s 5; Schedule 2

4.1 Most jurisdictions (except Tasmania and New Zealand) extend to the surviving spouse or partner a conditional right to the intestate's (undisposed) interest in the home they shared until the intestate's death. The nature of this right differs among the jurisdictions. In some the spouse may elect to acquire the intestate's interest in the shared home towards satisfaction of their entitlement in intestacy, making up for any shortfall out of their own assets. In other jurisdictions the spouse may raise any shortfall from the intestate estate or an election will amount to complete satisfaction of the spouse's entitlement regardless of any shortfall.

4.2 There is a limited range of circumstances in which the question of the shared home will arise. In many cases the surviving spouse or partner will have been a joint tenant with the intestate and, therefore, entitled to the shared home by survivorship. In other cases the surviving spouse or partner will be the one who owns the shared home. This chapter is concerned with situations where the intestate owned the shared home either in whole or in part (for example, as a tenant in common with the surviving spouse or partner).

4.3 The spouse's access to this right will only arise if the intestate has an interest in a shared home that is not effectively disposed of by will.[1] Although New South Wales states that the home must be within the State, it is not expressly limited to interests that are not effectively disposed of by will.

4.4 Provisions relating to the use of the shared home by a surviving spouse or partner may be rendered unnecessary if it is decided to give the

1. *Succession Act 1981* (Qld) s 39A(1)(a); *Administration and Probate Act 1929* (ACT) s 49G(1); *Administration and Probate Act 1969* (NT) s 73(1); *Administration and Probate Act 1919* (SA) s 72L(1); *Administration Act 1903* (WA) Sch 4 cl 1(1)(b); and *Intestates' Estates Act 1952* (Eng) Sch 2 para 1(1).

whole of the intestate estate to any surviving spouse or partner.[2] Such an approach could be highly desirable, especially in light of the complex provisions outlined below, for example, in relation to the election by the surviving spouse to acquire the shared home or the determination of the curtilage of the shared home.

THE SHARED HOME

4.5 The home is generally stated to be a building[3], or part of a building, designed to be used solely[4] as a separate[5] residence for one family or person.[6] In Western Australia, reference is made to a "dwelling house that… was ordinarily used by the surviving husband or wife as his or her ordinary place of residence".[7] In Queensland, it also includes caravans and manufactured homes.[8]

4.6 Most jurisdictions also include the curtilage of the home in the interest that the spouse has the right to appropriate or acquire.[9] In Victoria, no reference is made to the "curtilage" but provision is made for subdivision if a shared home is not "part of a farm"[10] but is "part of a larger property and the intestate's interest in the shared home cannot be severed from the intestate's interest in the larger property without subdividing".[11]

4.7 Queensland defines interest as a registered or registrable interest that is, or includes, a shared home. "Shared home" includes manufactured homes and caravans.[12]

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2. See para 3.28-3.35 and Issue 3.10.
3. A "unit or building lot:" in Northern Territory; and apartment or flat in New South Wales.
4. Or "principally" in Queensland and New South Wales.
5. "And permanent" in the Northern Territory.
6. *Succession Act 1981* (Qld) s 34B(1); *Administration and Probate Act 1919* (SA) s 72B(1) paragraph (a) of the definition of "dwellinghouse"; *Administration and Probate Act 1969* (NT) s 72(1); *Wills, Probate and Administration Act 1898* (NSW) s 61A(2).
7. *Administration Act 1903* (WA) Sch 4 cl 1(1)(b).
8. *Succession Act 1981* (Qld) s 34B(2).
9. *Administration and Probate Act 1929* (ACT) s 49F paragraph (a) to the definition of "dwelling house"; *Wills, Probate and Administration Act 1898* (NSW) s 61A(2); *Administration and Probate Act 1919* (SA) s 72B(1) paragraph (b) of the definition of "dwellinghouse"; *Administration Act 1903* (WA) Sch 4 cl 1(4); and *Intestates' Estates Act 1952* (Eng) Sch 2 para 7(1). See also para 4.44-4.47 below.
10. *Administration and Probate Act 1958* (Vic) s 37A(11).
11. *Administration and Probate Act 1958* (Vic) s 37A(10).
12. *Succession Act 1981* (Qld) s 34B(3).

ISSUE 4.1

How should the shared home be defined?

The residential requirement

4.8 Most jurisdictions require that the spouse or partner must have been residing in the shared home at the intestate's death.[13] In New South Wales the spouse or partner and/or the intestate must have occupied the home at the time, as their only or principal residence.[14] In Victoria, it must have been the principal residence of both parties.[15]

4.9 Principal residence has been held to mean "…that the residence has to be the first in rank or importance to the [surviving partner] and the deceased".[16]

4.10 One reason for requiring that the surviving spouse or partner must have lived in the shared home at the death of the intestate is to reduce the likelihood of a surviving spouse and partner having to divide the shared home between them if they have to share the spousal entitlement.[17]

ISSUE 4.2

Should the spouse and the intestate have been residing in the home at the intestate's death before the surviving spouse will be entitled?

THE SPOUSE OR PARTNER'S ENTITLEMENT

4.11 The Law Reform Commission of Tasmania has suggested that:

> **Wherever possible, if the surviving spouse so desires, he/she should be able to remain in the matrimonial home. To be forced to leave the home after the partner's death, and after possibly years of home life there, could be a most traumatic experience.[18]**

13. *Succession Act 1981* (Qld) s 39A(1)(b); *Administration and Probate Act 1969* (NT) s 73(1); *Administration and Probate Act 1929* (ACT) s 49G(1); *Administration and Probate Act 1919* (SA) s 72L(1); *Administration Act 1903* (WA) Sch 4 cl 1(1)(b); and *Intestates' Estates Act 1952* (Eng) Sch 2 para 1(1).
14. *Wills, Probate and Administration Act 1898* (NSW) s 61D(1).
15. *Administration and Probate Act 1958* (Vic) s 37A(1).
16. *Laspitis v Laspitis* [2001] NSWSC 749 (Master Macready).
17. See para 3.60-3.73 above.
18. Law Reform Commission of Tasmania, *Report on Succession Rights on Intestacy* (Report 43, 1985) at 13.

The jurisdictions that give the surviving spouse some right to the shared home generally achieve this by allowing the surviving spouse to elect to obtain the intestate's interest in the shared home.[19] However, there are many different ways in which the surviving spouse or partner can make satisfaction for the value of the intestate's interest in the shared home. Most jurisdictions allow the value of the interest to be met in part from the surviving spouse or partner's share of the estate.

4.12 In some jurisdictions the surviving spouse or partner can provide satisfaction for the interest in the shared home, first by relying on any share of the intestate estate to which they are entitled on distribution and, then, if their share in the estate is insufficient to cover the value of the intestate's interest in the shared home, by paying the difference from their own pocket.[20]

4.13 In New South Wales the surviving spouse or partner can provide satisfaction for the shared home, first by relying on any share of the intestate estate to which they are entitled on distribution, but, if the value of the intestate's interest in the shared home exceeds the surviving spouse or partner's entitlement, any difference is then met from the share of the estate to which any issue of the intestate are entitled.[21]

4.14 Finally, a number of jurisdictions provide that the surviving spouse or partner may elect to use the shared home in satisfaction of any entitlement the surviving spouse or partner may have in a share of the intestate estate.[22] However, these jurisdictions appear to make no provision to cover any difference that may arise if the value of the intestate's interest in the shared home exceeds the value of the survivor's share in the intestate estate.

4.15 It has been argued that the intestate's interest in the shared home cannot be seen as going towards, or as satisfying, the partner's share if its

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19. *Succession Act 1981* (Qld) s 39A(2); *Administration and Probate Act 1929* (ACT) s 49G; *Wills, Probate and Administration Act 1898* (NSW) s 61D(1); *Administration and Probate Act 1969* (NT) s 73(1); *Administration and Probate Act 1919* (SA) s 72L; *Administration and Probate Act 1958* (Vic) s 37A(2); *Administration Act 1903* (WA) Sch 4 cl 1(1); and *Intestates' Estates Act 1952* (Eng) Sch 2 para 1(1).
20. *Administration and Probate Act 1919* (SA) s 72L(1) and s 72L(4); *Administration and Probate Act 1958* (Vic) s 37A(2) and s 37A(7); *Administration Act 1903* (WA) Sch 4 cl 1(1) and cl 7(2); *Intestates' Estates Act 1952* (Eng) Sch 2 para 1 and para 5(2); *Succession Act 1981* (Qld) s 39A(2), s 39C(4).
21. *Wills, Probate and Administration Act 1898* (NSW) s 61B(13). This has particular implications for the administration of the intestate estate. See para 4.43 below.
22. *Administration and Probate Act 1929* (ACT) s 49G(1); *Administration and Probate Act 1969* (NT) s 73(1).

value exceeds the value of that share. It has been suggested that, "[o]ne does not … properly speak of the 'satisfaction' of a surviving spouse's entitlement to receive, say, $250,000 by the transfer to him or her of property worth $600,000, especially when that would mean that other close family members … would be deprived of an entitlement to $350,000". A better alternative may be to have the surviving partner pay any excess into the intestate estate to be distributed.[23] Whatever approach is adopted, however, the manner in which any shortfall is made up should, in the interests of clarity, be expressly stated in the legislation.

4.16 Each of the above scenarios could potentially leave a surviving spouse with only the shared home and no other assets from the estate, assuming the value of the shared home is equal to, or greater than, any share in the estate to which the surviving spouse or partner may be entitled on distribution. In some jurisdictions the surviving spouse or partner may also end up substantially out of pocket if they wish to continue living in the shared home. While it may be considered that a home's "value is not purely monetary, but extends to the emotional investment and the sense of wellbeing and security that comes with long-term home ownership"[24] the continued right to the shared home may be meaningless if there are no other assets available to the surviving spouse or partner.

4.17 Hardingham, Neave and Ford support the spouse's ability to acquire the intestate's interest in the matrimonial home for the same reasons they are in favour of the spouse's entitlement to the household, or personal, chattels. That is, such provision will help minimise the disruption caused by the intestate's death and will "produce some continuity of lifestyle for the spouse and any surviving children".[25]

ISSUE 4.3

Should the surviving spouse or partner be entitled to obtain the intestate's interest in the shared home?

ISSUE 4.4

To what extent, if any, ought the intestate's interest in the shared home be used in satisfaction of the share of the estate to which the surviving spouse or partner is entitled on distribution?

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23. N Crago, "The Rights of An Intestate's Surviving Spouse to the Matrimonial Home" (2000) 29 *Western Australian Law Review* 197 at 199.
24. Queensland, *Parliamentary Debates (Hansard)* 7 October 1997, Succession Amendment Bill, Second Reading at 3632.
25. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 362.

ISSUE 4.5

How should any outstanding balance be met if the value of the intestate's interest in the shared home exceeds the value of the spouse or partner's entitlement if there were no shared home available?

VALUING THE INTESTATE'S INTEREST IN THE SHARED HOME

Qld	s 34B(4), 39A(5)
ACT	s 49G(6), s 49H
NSW	s 61A(2), s 61E, Sch 4 cl 2(3)
NT	s 73(6), s 74
SA	s 72L(1)
Tas	
Vic	s 37A(2), s 37A(6)
WA	Sch 4 cl 4(3) and cl 5
NZ	
Eng	s 41(3); *Intestates' Estates Act 1952* Schedule 2, para 3(2)

Spouse may require valuation

4.18 Prior to making an election, the spouse may require[26] the personal representative[27] to obtain[28] the value of the intestate's interest from a qualified valuer and inform[29] the spouse.[30] In Queensland the personal representative must promptly comply with such a request.

4.19 In Victoria, no provision is made for the surviving spouse to request a valuation. However, where the intestate is survived by a child or other issue, the personal representative "must" obtain a valuation of the home.[31]

ISSUE 4.6

Should provision be made so that the spouse may require a valuation of the shared home before making an election?

26. "Ask" in Queensland.
27. "Administrator" in New South Wales.
28. "Ascertain and fix" in New South Wales and England.
29. "Give a copy of it to" in Queensland.
30. *Succession Act 1981* (Qld) s 39A(5); *Administration and Probate Act 1929* (ACT) s 49G(6) and s 49H; *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 2(3); *Administration and Probate Act 1969* (NT) s 73(6) and s 74; *Administration Act 1903* (WA) Sch 4 cl 4(3); and *Intestates' Estates Act 1952* (Eng) Sch 2 para 3(2) and *Administration of Estates Act 1925* (Eng) s 41(3).
31. *Administration and Probate Act 1958* (Vic) s 37A(6).

Fixing the value

4.20 The value of the intestate's interest in the shared home is usually the market value of the intestate's interest,[32] although it is sometimes given no more elaboration than "value".[33]

4.21 While the professional engaged to value the interest may be generally be said to be a valuer[34], most jurisdictions provide, more specifically, that this person shall be a registered valuer[35], qualified valuer[36], duly qualified agent[37], duly qualified valuer[38], or a Fellow or an associate member of the Australian Institute of Valuers Incorporated, and includes a person who, in the opinion of the Minister, possesses equivalent qualifications.[39]

4.22 The value will usually be calculated as at the death of the intestate.[40] The alternative is to determine the value as at the date when the spouse exercises their right.[41] Where the spouse is entitled to acquire the intestate's interest, Queensland provides that it shall be acquired for its transfer value, rather than value, at the intestate's death. As in New South Wales, this is held to mean the market value of the interest, less any amount needed to discharge any mortgage, charge, encumbrance or lien to which the interest may be subject at the time of transfer.[42]

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32. *Succession Act 1981* (Qld) s 34B(4); *Administration and Probate Act 1929* (ACT) s 49G(6); *Wills, Probate and Administration Act 1898* (NSW) s 61E(3)(a); *Administration and Probate Act 1969* (NT) s 74; and *Administration Act 1903* (WA) Sch 4 cl 5.
33. *Administration and Probate Act 1919* (SA) s 72L(1); *Administration and Probate Act 1958* (Vic) s 37A(2); and *Administration of Estates Act 1925* (Eng) s 41(3).
34. *Administration and Probate Act 1958* (Vic) s 37A(6).
35. Registered under the *Valuers Registration Act 1992* (Qld) as defined in *Valuation of Land Act 1944* (Qld) s 2.
36. *Administration and Probate Act 1929* (ACT) s 49H; and *Administration Act 1903* (WA) Sch 4 cl 5.
37. *Wills, Probate and Administration Act 1898* (NSW) s 61E(1). A duly qualified agent is one qualified under the *Valuers Act 2003* (NSW).
38. *Administration of Estates Act 1925* (Eng) s 41(3).
39. *Valuation of Land Act 1963* (NT) s 4.
40. *Succession Act 1981* (Qld) s 34B(4); *Administration and Probate Act 1919* (SA) s 72B(1); and *Administration and Probate Act 1958* (Vic) s 37A(2). In New South Wales this is the case where the spouse exercises their right within twelve months of the intestate's death: *Wills, Probate and Administration Act 1898* (NSW) s 61A(2) paragraph (b)(i) to the definition of "value".
41. In England, see *Robinson v Collins* [1975] 1 All ER 321, and in New South Wales where the spouse has not exercised their right within twelve months of the intestate's death: *Wills, Probate and Administration Act 1898* (NSW) s 61A(2) paragraph (b)(ii) to the definition of "value".
42. *Succession Act 1981* (Qld) s 34B(4); *Wills, Probate and Administration Act 1898* (NSW) s 61E(3).

4.23 Given the rapid increases that can occur in the price of real estate, the time of its valuation can make a great difference to the value of the property. This was seen in *Robinson v Collins,*[43] "…where the matrimonial home was appropriated at £8,000, its value at the date of appropriation, and not £4,200, its value at the date of death of the deceased".[44] This case was cited by the Law Commission of England to support its argument that:

> **[i]n the interval between the intestate's death and the time of appropriation, house prices will often have risen quite sharply so that the statutory legacy will no longer be sufficient to enable the surviving spouse to remain in the matrimonial home.[45]**

ISSUE 4.7

How and when should the value of the intestate's interest in the shared home be determined?

ISSUE 4.8

Should the value be the market value less any amount needed to discharge any mortgage, charge or other encumbrance to which the interest is subject at the date valued?

ELECTION BY THE SURVIVING SPOUSE OR PARTNER

Procedural requirements

Qld	s 39A
ACT	s 49G
NSW	Sch 4 cl 2, cl 3
NT	s 73
SA	s 72L
Tas	
Vic	s 37A
WA	Sch 4 cl 3, cl 4
NZ	
Eng	*Intestates' Estates Act 1952* (Eng) Sch 2 para 3

4.24 There are a number of procedural requirements that must be met by the surviving spouse or partner in order for the election to be effective.

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43. *Robinson v Collins* [1975] 1 All ER 321.
44. G L Certoma, *The Law of Succession in New South Wales* (3rd ed, LBC Information Services, Sydney, 1997) at 35.
45. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 9.

Election must be in writing

4.25 In some jurisdictions it is expressly stated that the election must be in writing.[46]

> **ISSUE 4.9**
>
> Should the election be required to be in writing?

Time for making the election

4.26 The spouse is generally required to make an election within a certain time. In South Australia and Queensland, if the spouse is the personal representative (administrator in South Australia), election must be made within three months of the representative's appointment (or from the granting of administration).[47]

4.27 If the spouse is not the representative, election must be made within three months of being given written notice by the representative, which states that the spouse has three months to exercise their right.[48] Queensland also requires the notice to state that the spouse must obtain a court order before they can make an election if any restrictions apply to the home.[49] Victoria provides that the personal representative must, within thirty days of the granting of administration, provide written notice to the partner advising of the partner's right to make an election.[50]

4.28 In a number of other jurisdictions the time limit is one year from the granting of representation or administration subject to the court's power to extend it.[51] In the Australian Capital Territory, and Northern Territory such an extension may be granted where probate of the intestate's will has been revoked because the will was invalid; a question of the existence, or

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46. *Succession Act 1981* (Qld) s 39A(2); *Administration and Probate Act 1929* (ACT) s 49G(4); *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 2(1); *Administration and Probate Act 1969* (NT) s 73(4); *Administration and Probate Act 1919* (SA) s 72L(3); *Administration Act 1903* (WA) Sch 4 cl 4(1); *Administration and Probate Act 1958* (Vic) s 37A(5); and *Intestates' Estates Act 1952* (Eng) Sch 2 para 3(1)(c).
47. *Succession Act 1981* (Qld) s 39A(3); *Administration and Probate Act 1919* (SA) s 72L(2); and *Administration and Probate Act 1958* (Vic) s 37A(3). The period may be extended at the discretion of the Court in South Australia.
48. *Succession Act 1981* (Qld) s 39A(3)(b)(i); and *Administration and Probate Act 1919* (SA) s 72L(2)(b).
49. *Succession Act 1981* (Qld) s 39A(3)(b)(ii).
50. *Administration and Probate Act 1958* (Vic) s 37A(4).
51. *Administration and Probate Act 1929* (ACT) s 49G(2); *Administration and Probate Act 1969* (NT) s 73(2); *Administration Act 1903* (WA) Sch 4 cl 3; *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 3(1)(b); and *Intestates' Estates Act 1952* (Eng) Sch 2 para 3(1)(a).

nature, of a person's interest in the intestate estate, had not been determined when administration of the estate was first granted; or for any other reason, affecting the administration or distribution of the estate, where the Court considers it proper to do so.[52]

ISSUE 4.10

Should the surviving spouse or partner be required to make an election within a certain time? If so, how long?

ISSUE 4.11

Should it be possible for the Court to grant an extension of time for a surviving spouse or partner to make an election? If so, when should the value of the intestate's interest in the shared home be fixed?

ISSUE 4.12

Should personal representatives be required to give the surviving spouse or partner notice of their rights to make an election? If so, when should that notice be given?

To whom the election must be made

4.29 The spouse's election must be communicated to different people in different circumstances. If the spouse is not the personal representative, election must be given to the personal representative.[53] If the spouse is one of two or more representatives, then election must be given to each other representative.[54] In Victoria[55] if the partner is not a personal representative, the election must be given to the personal representative who sent the notice advising of the spouse's right to make an election.[56] If the spouse is the sole representative, election must be given to the Registrar.[57] In Victoria, if the partner is a representative election must be

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52. *Administration and Probate Act 1929* (ACT) s 49G(3).
53. *Succession Act 1981* (Qld) s 39A(4)(a); *Administration and Probate Act 1929* (ACT) s 49G(4)(a); *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 2(1)(a); *Administration and Probate Act 1969* (NT) s 73(4)(a); *Administration and Probate Act 1919* (SA) s 72L(3)(a); *Administration Act 1903* (WA) Sch 4 cl 4(1)(a); and *Intestates' Estates Act 1952* (Eng) Sch 2 para 3(1)(c).
54. *Succession Act 1981* (Qld) s 39A(4)(b); *Administration and Probate Act 1929* (ACT) s 49G(4)(b); *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 2(1)(b); *Administration and Probate Act 1969* (NT) s 73(4)(b); *Administration Act 1903* (WA) Sch 4 cl 4(1)(b); and *Intestates' Estates Act 1952* (Eng) Sch 2 para 3(1)(c).
55. *Administration and Probate Act 1958* (Vic) s 37A(5)(b).
56. See para 4.27 above.
57. *Succession Act 1981* (Qld) s 39A(4)(c); *Administration and Probate Act 1929* (ACT) s 49G(4)(c); *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 2(1)(c);

given to the Registrar,[58] while election must be given to the Public Trustee if the spouse is an administrator in South Australia.[59]

ISSUE 4.13

To whom should the spouse's election be given?

Power of a surviving spouse or partner who is a minor to make an election

Qld	
ACT	s 49N(2)
NSW	Sch 4 cl 6
NT	s 79(2)
SA	
Tas	
Vic	s 37A(9)(b)
WA	Sch 4 cl 8(2)
NZ	
Eng	*Intestate's Estates Act 1952* Sch 2 para 6(2)

4.30 Some jurisdictions include a specific provision concerning the power of a surviving spouse who is also a minor to make a valid requirement, election or consent where required.

4.31 In most of these jurisdictions a requirement or consent made or given concerning the acquisition of a shared home by a surviving spouse who is a minor is as valid and effective as it would be if the spouse had attained majority.[60]

ISSUE 4.14

Should surviving spouses who are minors be able to make an election to acquire a shared home?

Administration and Probate Act 1969 (NT) s 73(4)(c); and *Administration Act 1903* (WA) Sch 4 cl 4(1)(c).

58. *Administration and Probate Act 1958* (Vic) s 37A(5)(a).
59. *Administration and Probate Act 1919* (SA) s 72L(3)(b).
60. *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 6; *Administration and Probate Act 1969* (NT) s 79(2); *Administration and Probate Act 1929* (ACT) s 49N(2); *Administration and Probate Act 1958* (Vic) s 37A(9)(b); *Administration Act 1903* (WA) Sch 4 cl 8(2); and *Intestates' Estates Act 1952* (Eng) Sch 2 para 6(2).

Power of a surviving partner with mental disability to make a valid election

Qld	
ACT	S 49N(1)
NSW	
NT	S 79(1)
SA	
Tas	
Vic	
WA	Sch 4, cl 8(1)
NZ	
Eng	*Intestate's Estates Act 1952* Sch 2 para 6(1)

4.32 In some jurisdictions, where the surviving spouse has a mental disability, a requirement or consent concerning the spouse's right to the shared home may be validly made or given on their behalf. In the different jurisdictions, this may be done by their committee,[61] receiver,[62] their guardian,[63] a person who has the care and management of their estate[64], or, should there be no such carers, the Court.

ISSUE 4.15

What provision should be made for spousal election when the spouse has a mental disability?

Revocation of the election

Qld	s 39A(7)
ACT	s 49G(5)
NSW	Sch 4 cl 2(2)
NT	s 73(5)
SA	
Tas	
Vic	
WA	Sch 4 cl 4(2)
NZ	
Eng	*Intestates' Estates Act 1952* Sch 2 para 3(2)

4.33 Once made, an election in some jurisdictions may only be revoked with consent. In most of these jurisdictions the consent is that of the

61. *Administration and Probate Act 1929* (ACT) s 49N(1); and *Intestates' Estates Act 1952* (Eng) Sch 2 para 6(1).
62. *Intestates' Estates Act 1952* (Eng) Sch 2 para 6(1).
63. *Administration and Probate Act 1969* (NT) s 79(1).
64. *Administration Act 1903* (WA) Sch 4 cl 8(1).

personal representatives.[65] In Queensland the consent must be in writing[66] and in New South Wales the consent of the Court is required.[67]

ISSUE 4.16

Should there be provision for the revocation of an election?

ISSUE 4.17

If there is to be a provision for the revocation of an election, whose consent should be required and should that consent be in writing?

POWER OF THE PERSONAL REPRESENTATIVE TO DISPOSE OF THE SHARED HOME

Qld	s 39D
ACT	s 49L
NSW	s 61D, Sch 4 cl 3(3) and (4)
NT	s 77
SA	s 72M
Tas	
Vic	
WA	Sch 4 cl 6(2)
NZ	
Eng	*Intestate's Estates Act 1952* Sch 2, para 4

4.34 Most jurisdictions limit a personal representative's powers concerning the disposal of an intestate's interest in a shared home in two situations:

- **when the surviving spouse's election is pending; and**
- **when the election has been made to acquire the interest.**

4.35 The intestate's interest in a shared home is not to be sold, or otherwise disposed of, if the time within which an election may be made has not expired, or if to do so would be contrary to an election. This restriction does not, however, stop a personal representative from disposing of such an interest as a last resort should the proceeds be needed to satisfy any of the intestate's liabilities.[68]

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65. *Administration and Probate Act 1929* (ACT) s 49G(5); *Administration Act 1903* (WA) Sch 4 cl 4(2); *Administration and Probate Act 1969* (NT) s 73(5); *Intestates' Estates Act 1952* (Eng) Sch 2 para 3(2).
66. *Succession Act 1981* (Qld) s 39A(7).
67. *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 2(2).
68. *Succession Act 1981* (Qld) s 39D(3); *Administration Act 1903* (WA) Sch 4 cl 6(2); *Administration and Probate Act 1929* (ACT) s 49L(1); *Administration and Probate*

4.36 In some jurisdictions this restriction will not apply if the surviving spouse is the personal representative (or one of them),[69] and in some it is also expressly stated that the restriction will not affect the validity of the sale of any of the intestate's estate.[70]

4.37 In New South Wales and the Northern Territory the intestate's interest in the shared home may be disposed of, before the expiration of the period within which election may be made, if the Court rejects the application of a surviving spouse to acquire the shared home.[71]

4.38 In South Australia, the surviving spouse or partner is entitled to continue to live in the shared house until the expiration of the period in which they can elect to acquire the house. However the administrator (personal representative) may sell the intestate's interest in a shared house, before the expiration of the period within which an election may be made has expired, if the spouse or partner has ceased to live there.[72]

ISSUE 4.18

What restrictions, if any, should be placed on the personal representative's powers to dispose of the shared home?

ISSUE 4.19

Should the restriction apply if the surviving spouse is a personal representative of the intestate's estate?

ISSUE 4.20

Should the validity of the sale of any of the intestate's estate, by the personal representative/s, be affected by the restriction?

ISSUE 4.21

On what conditions, if any, should it be possible to dispose of the intestate's interest in the shared home before the expiration of the period within which election may be made?

Act 1969 (NT) s 77(1); *Intestates' Estates Act 1952* (Eng) Sch 2 para 4(1); and *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 3(3).

69. *Administration and Probate Act 1929* (ACT) s 49L(3); *Administration and Probate Act 1969* (NT) s 77(3); and *Intestates' Estates Act 1952* (Eng) Sch 2 para 4(4).

70. *Administration and Probate Act 1929* (ACT) s 49L(4); *Administration and Probate Act 1969* (NT) s 77(4); *Succession Act 1981* (Qld) s 39D(4); and *Intestates' Estates Act 1952* (Eng) Sch 2 para 4(5).

71. *Administration and Probate Act 1969* (NT) s 77(2); *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 3(4).

72. *Administration and Probate Act 1919* (SA) s 72M.

Where the spouse is a trustee

Qld	s 39C(5)
ACT	s 49M
NSW	Sch 4 cl 7(2)
NT	s 78
SA	s 72L(5)
Tas	
Vic	s 37A(9)(a)
WA	Sch 4 cl 7(1)
NZ	
Eng	*Intestates' Estates Act 1952* Sch 2 para 5(1)

4.39 When the deceased has died intestate the surviving spouse or partner may be the intestate's personal representative and, as such, the trustee of the intestate estate for those entitled. In a number of jurisdictions, where the spouse is a trustee, express provision is made that they may acquire the intestate's interest in the shared home notwithstanding their role as trustee.[73] If the spouse, as trustee, is not entitled to acquire the intestate's interest in the shared home, that interest will remain part of the intestate estate to be divided and distributed in accordance with the rules, potentially leaving the spouse without a residence.

ISSUE 4.22

Should express provision be made that a surviving spouse or partner may acquire the intestate's interest in the shared home notwithstanding any role as trustee?

RESTRICTIONS ON THE SPOUSE'S RIGHT TO ACQUIRE THE SHARED HOME

Qld	s 39B
ACT	s 49J-49K
NSW	Sch 4 cl 3
NT	s 73, s 75, s 76
SA	
Tas	
Vic	
WA	Sch 4 cl 2
NZ	

73. *Succession Act 1981* (Qld) s 39C(5); *Administration and Probate Act 1929* (ACT) s 49M; *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 7(2); *Administration and Probate Act 1969* (NT) s 78; *Administration and Probate Act 1919* (SA) s 72L(5); *Administration and Probate Act 1958* (Vic) s 37A(9)(a); *Administration Act 1903* (WA) Sch 4 cl 7(1); and *Intestates' Estates Act 1952* (Eng) Sch 2 para 5(1).

Eng	*Intestate's Estates Act 1952* Sch 2 para 1(2) and para 2

4.40 There are a number of situations in which the surviving spouse's right to elect to acquire the shared home will be restricted. They are generally concerned with maintaining the administrator's ability to sell or dispose of the rest of the intestate's estate.

4.41 These situations generally concern shared homes forming part:

- of a building in which an intestate has an interest in the whole building;
- of a registered or registrable interest in land (in which the intestate has an interest in the whole of that interest) used (either solely or partly) for agricultural purposes;
- of a building used as a hotel, motel, boarding house or hostel at the date of the intestate's death; or
- where part of the shared home was used for purposes other than domestic purposes at the date of the intestate's death.[74]

Should any of these situations be present, the surviving spouse will only be entitled to elect to acquire the shared home if the Court makes an order to that effect. Such an order will only be made if the Court is satisfied that the acquisition would not be likely to diminish the assets of the intestate or make the disposal of the assets substantially more difficult. [75]

4.42 Some of these jurisdictions also restrict the spouse's right if the interest in a shared house is a tenancy that will determine within two years after the intestate's death, or if the landlord would be entitled to determine the lease within that period.[76]

4.43 In New South Wales, twelve months after the date on which letters of administration are first taken out in respect of the intestate's estate the spouse will lose their right to acquire the shared home in a number of circumstances (as well as those above). These circumstances will arise:

74. *Succession Act 1981* (Qld) s 39B(1); *Administration and Probate Act 1929* (ACT) s 49K(a)-(d); *Administration Act 1903* (WA) Sch 4 cl 2; *Administration and Probate Act 1969* (NT) s 76(a)-(d); *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 3(2); and *Intestates' Estates Act 1952* (Eng) Sch 2 para 2.
75. *Succession Act 1981* (Qld) s 39B(5); *Administration and Probate Act 1929* (ACT) s 49K(e), (f); *Administration Act 1903* (WA) Sch 4 cl 2; *Administration and Probate Act 1969* (NT) s 76(e), (f); *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 3(2); and *Intestates' Estates Act 1952* (Eng) Sch 2 para 2.
76. *Administration and Probate Act 1929* (ACT) s 49J; *Administration Act 1903* (WA) Sch 4 cl 1(2); *Administration and Probate Act 1969* (NT) s 75; and *Intestates' Estates Act 1952* (Eng) Sch 2 para 1(2).

- when the administrator requires the intestate's interest in the shared home to meet funeral and administration expenses, debts and other liabilities payable out of the estate of the intestate, or
- in any case in which the transfer or conveyance by the administrator to the spouse of the interest of the intestate in the shared home would require compliance with the provisions of the *Environmental Planning and Assessment Act 1979* (NSW), *Conveyancing Act 1919* (NSW), *Strata Schemes (Freehold Development) Act 1973* (NSW) and *Strata Schemes (Leasehold Development) Act 1986* (NSW) – all of which concern the division of land.[77]

The former provision is necessary in light of the fact that the value of the intestate's interest in the shared home can also be met from the share of the estate to which the issue are otherwise entitled.[78]

ISSUE 4.23

Should the spouse's right be restricted where the interest in the shared home is a tenancy that will determine within 2 years after the intestate's death, or if the landlord would be entitled to determine the lease within that period?

ISSUE 4.24

Should there be any other restrictions on the spouse's right to obtain the intestate's interest in the shared home?

DETERMINATION OF THE CURTILAGE OF THE SHARED HOME

Qld	
ACT	s 49F(a)
NSW	Sch 4, cl 4
NT	
SA	s 72B(1)
Tas	
Vic	s 37A(10)-(11)
WA	Sch 4 cl 1(4)
NZ	
Eng	*Intestate's Estates Act 1952* Sch 2, para 7(1)

4.44 Curtilage in this context refers to the land, or real property, associated with and belonging to a dwelling house. The curtilage of a free-standing building is, in some cases, important to its use and enjoyment. When a shared home stands on part of an allotment of land and other parts of the allotment are devoted to other purposes, be they residential, commercial or agricultural, it is sometimes necessary, in the interests of

77. *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 3(1).
78. See para 4.13 above.

those issue of the intestate entitled to a share in the estate, to separate the shared home from the rest of the allotment. In such cases, the curtilage of the home must be retained and cannot be disposed of separately from the dwelling house. It is important to be able to ascertain the curtilage. All land beyond it is economically available to be used to the benefit of the rest of the estate.

4.45 New South Wales provides parameters in determining what may be considered curtilage. Aside from the land on which the building itself stands, curtilage is presumed to be that which "is attached to and occupied with the building for the amenity or convenience of the building, does not exceed 2,500 square metres and no estate or interest in any land contiguous with the land comprised in that area is comprised in the intestate's estate…" If any question arises as to the curtilage of the shared house, the Court may make an order on the issue which it considers to be just, on the application of the administrator (or any person beneficially interested in the estate).[79]

4.46 In South Australia the house generally includes the building's curtilage.[80] Reference to "house" in a number of other jurisdictions will include any garden or portion of ground attached to and usually occupied with the house or otherwise required for the amenity or convenience of the house.[81]

4.47 In Victoria, a reference to a home that is part of a farm is a reference to the entire farm and, if a home is part of a larger property and cannot be severed from the property without subdividing the property, a reference to that home will be a reference to that property.[82]

ISSUE 4.25

Should the shared home include curtilage?

ISSUE 4.26

If so, how should curtilage be defined?

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79. *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 4.
80. *Administration and Probate Act 1919* (SA) s 72B(1) paragraph (b) of the definition of "dwellinghouse".
81. *Administration and Probate Act 1929* (ACT) s 49F paragraph (a) to the definition of "dwelling house"; *Administration Act 1903* (WA) Sch 4 cl 1(4); and *Intestates' Estates Act 1952* (Eng) Sch 2 para 7(1).
82. *Administration and Probate Act 1958* (Vic) s 37A(10) and s 37A(11).

Power of administrator to create easements or restrictions

Qld	
ACT	
NSW	Sch 4 cl 5
NT	
SA	
Tas	
Vic	
WA	
NZ	
Eng	

4.48 In separating the shared home from the rest of an allotment or building, in New South Wales, the administrator has the power to create easements, or restrictions, which they consider necessary for the purpose of using any part of the land or building. These easements are created when the interest of an intestate in the shared home or land (or part thereof) is transferred or conveyed by the administrator.[83]

4.49 In rendering all interests in the building and/or land usable, the easements, or restrictions, may benefit or burden any part of the shared building or land. In the case of some subdivisions, for example, the power to create easements may be necessary, but most jurisdictions do not include such a power in their intestacy provisions.

ISSUE 4.27

Is it necessary to include the power to create easements or restrictions in intestacy rules?

83. *Wills, Probate and Administration Act 1898* (NSW) Sch 4 cl 5.

5. Issue and parents of the intestate

- Who are issue?
- Distribution per stirpes
- Distribution to issue and parents of the intestate
- Statutory trust in favour of issue of the intestate

5.1 The primary purpose of this chapter is to deal with situations where the intestate's estate must be distributed to the issue of the intestate or to the parents of the intestate. In each case determinations must be made about parentage. The basic principles relating to the issue of an intestate also applies equally to the issue of remoter next-of-kin. Distribution to remoter next-of-kin is dealt with in the next chapter.

WHO ARE ISSUE?

5.2 The issue of a person are that person's lineal descendants. That is, they are the person's children, grandchildren, great grandchildren, and so on. In most cases, there will be no difficulty establishing the relevant relationship. Children who are adopted will be treated as children of their adopting parents and, at the same time, cease to be children of their natural parents.[1] Further, the fact that a person's parents were not married to each other will not affect whether a person will be identified as issue in the distribution of an intestate estate.[2] In a few cases, however, parentage will be established by presumption.

Presumptions of parentage

Qld	*Status of Children Act 1978* s 18A-18E
ACT	s 49E; *Parentage Act 2004* s 7-11
NSW	*Status of Children Act 1996* s 9-14
NT	*Status of Children Act 1979* s 4, s 4A, s 5, Part 3A, s 9-9B
SA	*Family Relationships Act 1975* s 7, s 8, s 10c, s 10d
Tas	*Status of Children Act 1974* s 5, s 8-s 8C, Part 3
Vic	*Status of Children Act 1974* s 3, s 5, s 7, s 8, Part 2
WA	s 12A
NZ	*Status of Children Act 1969* s 5, s 7, s 8
Eng	

1. *Adoption of Children Act 1964* (Qld) s 28(1); *Adoption Act 1993* (ACT) s 43; *Adoption Act 2000* (NSW) s 95; *Adoption of Children Act 1994* (NT) s 45; *Adoption Act 1988* (SA) s 9; *Adoption Act 1988* (Tas) s 50; *Adoption Act 1984* (Vic) s 53(1); *Adoption Act 1994* (WA) s 75; *Adoption Act 1955* (NZ) s 16(2); *Adoption Act 1976* (Eng) s 39.
2. *Status of Children Act 1978* (Qld) s 3(1); *Parentage Act 2004* (ACT) s 38(2); *Status of Children Act 1979* (NT) s 4; *Status of Children Act 1996* (NSW) s 5(1); *Family Relationships Act 1975* (SA) s 6(1); *Status of Children Act 1974* (Tas) s 3(1); *Status of Children Act 1974* (Vic) s 3; *Administration Act 1903* (WA) s 12A; *Family Law Reform Act 1987* (Eng) s 1(1); *Status of Children Act 1969* (NZ) s 3(1).

5.3 Presumptions of parentage may arise from a number of circumstances depending on the relevant provisions in each jurisdiction. Parentage may be presumed from:

- **marriage;[3]**
- **cohabitation when the parents are not married;[4]**
- **use of artificial fertilisation procedures;[5]**
- **birth registration;[6]**
- **court findings;[7] and**
- **acknowledgement of paternity.[8]**

Apart from the use of artificial fertilisation procedures, all of the above categories of presumption are contained in the *Family Law Act 1975* (Cth).[9]

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3. *Status of Children Act 1996* (NSW) s 9; *Parentage Act 2004* (ACT) s 7; *Status of Children Act 1978* (Qld) s 18A; *Status of Children Act 1974* (Tas) s 5; *Family Relationships Act 1975* (SA) s 8; *Status of Children Act 1974* (Vic) s 5; *Status of Children Act 1979* (NT) s 4A; *Status of Children Act 1969* (NZ) s 5(1); s 7(1)(a). See also *Family Law Act 1975* (Cth) s 69P; *Family Court Act 1997* (WA) s 188.
4. *Parentage Act 2004* (ACT) s 8; *Status of Children Act 1996* (NSW) s 10; *Status of Children Act 1978* (Qld) s 18E; *Status of Children Act 1974* (Tas) s 8; *Status of Children Act 1979* (NT) s 5. See also *Family Law Act 1975* (Cth) s 69Q; *Family Court Act 1997* (WA) s 189.
5. *Parentage Act 2004* (ACT) s 11; *Status of Children Act 1996* (NSW) s 14; *Status of Children Act 1974* (Tas) Part 3; *Status of Children Act 1974* (Vic) Part 2; *Family Relationships Act 1975* (SA) s 10c, s 10d; *Status of Children Act 1979* (NT) Part 3A. See para 5.13-5.16 below.
6. *Status of Children Act 1978* (Qld) s 18B; *Status of Children Act 1974* (Tas) s 8A; *Status of Children Act 1979* (NT) s 9; *Status of Children Act 1996* (NSW) s 11; *Parentage Act 2004* (ACT) s 9; *Status of Children Act 1974* (Vic) s 8(1); *Status of Children Act 1969* (NZ) s 8(1). See also *Family Law Act 1975* (Cth) s 69R; *Family Court Act 1997* (WA) s 190.
7. *Status of Children Act 1978* (Qld) s 18C; *Status of Children Act 1974* (Tas) s 8B; *Status of Children Act 1979* (NT) s 9B; *Status of Children Act 1996* (NSW) s 12; *Parentage Act 2004* (ACT) s 10; *Status of Children Act 1969* (NZ) s 8(3); *Family Relationships Act 1975* (SA) s 7(c). See also *Family Law Act 1975* (Cth) s 69S; *Family Court Act 1997* (WA) s 191. Court findings are rules of law rather than presumptions.
8. *Status of Children Act 1996* (NSW) s 13; *Status of Children Act 1978* (Qld) s 18D; *Status of Children Act 1979* (NT) s 9A; *Family Relationships Act 1975* (SA) s 7(b); *Status of Children Act 1974* (Tas) s 8C; *Status of Children Act 1974* (Vic) s 8(2); and *Status of Children Act 1969* (NZ) s 7(1)(b). See also *Family Law Act 1975* (Cth) s 69T; *Family Court Act 1997* (WA) s 192.
9. *Family Law Act 1975* (Cth) s 69P-s 69T. See also *Family Court Act 1997* (WA) s 188-192.

5.4 In the Australian Capital Territory, any presumption arising from registration will only operate in intestacy if the registration takes place before the death of the intestate.

5.5 In Western Australia and Victoria, in circumstances where parents are entitled to a benefit on the intestacy of a child,[10] the presumption must be admitted by, or established against, the parent in the lifetime of their child (the intestate).[11]

ISSUE 5.1

Should the definition of issue be included in the uniform legislation or should it be left to other enactments in the individual jurisdictions?

ISSUE 5.2

Should any special provisions be made in uniform legislation in relation to presumptions of parentage?

Step children

5.6 With the exception of the spouse of an intestate, a person related only by marriage is not entitled to share in the estate of the intestate.[12] Stepchildren of the intestate, therefore, are not entitled to a share in the intestate's estate.[13] It was therefore the case, before the introduction of adequate family provision legislation, that:

> **if a man accepted full responsibility for his wife's children by a previous marriage without a formal adoption, those children had no rights against his estate.[14]**

5.7 It can be argued that the number of stepchildren in the general community will have increased with the higher incidence of parents divorcing and subsequently remarrying and that "the traditional family structure of two parents and associated progeny all living together in the one home can no longer be taken as the norm, and the modern family structure quite often includes children from other relationships, who may become stepchildren upon subsequent marriage of one or other of their

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10. Para 5.35 below.
11. *Administration Act 1903* (WA) s 12A(2); and *Status of Children Act 1974* (Vic) s 7(1)(b). See also *Status of Children Act 1969* (NZ) s 7(1)(b).
12. S Toller, *The Law of Executors and Administrators* (3rd ed, J Butterworth and Son, London, 1814) at 385.
13. *Re Leach (deceased)* [1985] 2 All ER 754 at 759.
14. *Re Leach (deceased)* [1985] 2 All ER 754 at 759. See also K Mackie, "Stepchildren and Succession" (1997) 16 *University of Tasmania Law Review* 22 at 23. A child adopted by a husband and wife is, in the event of divorce and the wife remarrying, a stepchild of the wife's second husband: *Re O'Malley (dec'd)* [1981] Qd R 202.

biological parents".[15] It may, therefore, be considered unfair that stepchildren are excluded from intestacy provisions when natural children are included.

5.8 However, there are other considerations to be taken into account. First, if step children were to be entitled in intestacy to take upon the death of a spouse of one natural parent, those step children could not only potentially be beneficiaries under each natural parent's will, or entitled to take upon their intestacy, but also potentially entitled to a share of any new spouse of the other natural parent upon intestacy. This could be perceived, in some cases, as a form of "double dipping". Secondly, it is possible that a step parent may be estranged from or never even have met their step child, especially if the marriage has taken place once the step child has become an adult.

5.9 Any approach to limit the category of step children to those who are dependent upon the step parent, or who are under 18 years of age, would be undesirable as arbitrary and perhaps requiring investigations as to whether the step children were in fact dependent upon the step parent. If there is a dependency, it is appropriately addressed in an application for family provision rather than allowing it to confuse unnecessarily distributions upon intestacy.

5.10 This is recognised in some jurisdictions in so far as stepchildren may now bring proceedings for family provision.[16] The National Committee's proposed *Family Provision Bill 2004* expressly states that a non-adult child of the deceased, for the purposes of automatic eligibility for family provision, "does not include a step-child of the deceased person",[17] but leaves a step-child, whether under the age of 18, or not, to apply as a person to whom the deceased person "owed a responsibility to provide maintenance, education or advancement in life".[18]

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15. K Mackie, "Stepchildren and Succession" (1997) 16 *University of Tasmania Law Review* 22 at 23.
16. *Status of Children Act 1978* (Qld) s 40, s 40A; *Family Provision Act 1969* (ACT) s 7; *Family Provision Act 1970* (NT) s 7; *Testator's Family Maintenance Act 1912* (Tas) s 2(1) paragraph (b) to the definition of "child", s 3A; and *Family Protection Act 1955* (NZ) s 3. See R F Atherton and P Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, LexisNexis Butterworths, Australia, 2003) at 74.
17. *Family Provision Bill 2004* cl 6(2) in National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) Appendix 2.
18. *Family Provision Bill 2004* cl 7(1) in National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of*

5.11 If the more general approach of allowing the whole estate of an intestate to go to the surviving spouse even when there are issue surviving, were to be adopted,[19] the step children of the deceased would continue to be cared for by the surviving spouse (that is, their natural parent) and, if their natural parent were to die first, they could always make a family provision application if the surviving spouse (their step parent) refused to support them adequately. On the other hand it could be argued that such a provision could operate unfairly even for adult children when the natural parent dies first and the estate passes to the step parent and then ultimately to the step parent's family by either will or intestacy to the exclusion of the step children who might otherwise have had an interest in their natural parent's estate.

5.12 The Law Reform Commission of Tasmania mentioned the situation where the intestate is survived by children of a previous relationship and where the existing children cannot rely on the surviving spouse for support.[20]

ISSUE 5.3

Are there any circumstances when stepchildren should be entitled to an issue's share in intestacy?

Artificially conceived children

Qld	*Status of Children Act 1978* s 14A, s 15
ACT	*Parentage Act 2004* s 11
NSW	*Status of Children Act* 1996 s 14
NT	*Status of Children Act 1979* Part 3A
SA	*Family Relationships Act 1975* s 10a, s 10c, s 10d
Tas	*Status of Children Act 1974* Part 3
Vic	*Status of Children Act 1974* s 10A, s 10D, s 10E
WA	s 12A(2a); *Artificial Conception Act 1985* s 3, s 5, s 6, s 6A
NZ	*Status of Children Act 1969* Part 2
Eng	*Human Fertilisation and Embryology Act 1990* s 27-29

5.13 When a child is artificially conceived the child's mother and her husband are presumed to be the parents of the child.[21] Paternity will not be

Attorneys General (Queensland Law Reform Commission, Report 58, 2004) Appendix 2.

19. See para 3.28-3.35 and Issue 3.10.
20. Law Reform Commission of Tasmania, *Report on Succession Rights on Intestacy* (Report 43, 1985) at 13.
21. *Family Provision Act 1969* (ACT) s 11; *Status of Children Act 1996* (NSW) s 14; *Status of Children Act 1974* (Tas) Part 3; *Status of Children Act 1974* (Vic) Part 2; *Family Relationships Act 1975* (SA) s 10c, s 10d; and *Status of Children Act 1969* (NZ) s 18. See also *Family Law Act 1975* (Cth) s 60H.

imposed unless the procedure was conducted with the husband's consent.[22] The couple need not be married; it is sufficient that they be living together on a *bona fide* domestic basis.

5.14 In three jurisdictions the law expressly applies to heterosexual and same-sex couples alike.[23] In the latter case, the law can only apply to lesbian relationships.

5.15 Situations of surrogacy may also need to be taken into account, where a woman carries a child to term, on behalf of another woman, under an arrangement made before the child's birth which sees the assignment of her parental rights to that woman and the father.[24]

5.16 The law can experience difficulty in responding to such recent practices.[25] As with artificial conception, it would seem preferable for the intestacy provision to adopt a general approach, leaving the specifics to each jurisdiction.

ISSUE 5.4

What provision, if any, ought to be made for artificially conceived children in the context of intestacy?

ISSUE 5.5

Should provision be made for surrogacy in the context of intestacy?

22. *Status of Children Act 1978* (Qld) s 15(2); *Status of Children Act 1979* (NT) s 5D; *Status of Children Act 1974* (Vic) s 10C(2); *Status of Children Act 1996* (NSW) s 14(1)(a); *Family Provision Act 1969* (ACT) s 11(4); *Status of Children Act 1974* (Tas) s 10C(1); *Artificial Conception Act 1985* (WA) s 6; *Status of Children Act 1969* (NZ) s 18(1)(c); and *Human Fertilisation and Embryology Act 1990* (Eng) s 28(2)(b). The requirement of consent may lead to confusion since it would seem that a man will not be the child's father if he does not consent to his wife undergoing the procedure.
23. *Parentage Act 2004* (ACT) s 11(4); *Status of Children Act 1979* (NT) s 5DA; and *Artificial Conception Act 1985* (WA) s 6A.
24. R F Atherton and P Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, LexisNexis Butterworths, Australia, 2003) at 56.
25. See the comments by Bryson J concerning the making of an adoption order in relation to a child who had been born as the result of a surrogacy arrangement: *Re A and B* (2000) 26 Fam LR 317 at 321.

Children not yet born (en ventre sa mere)

Qld	*Status of Children Act 1978* s 18A(2)
ACT	*Parentage Act 2004* s 7(2)
NSW	*Status of Children Act 1996* s 9(2)
NT	*Status of Children Act 1979* s 4A(2)
SA	*Family Relationships Act 1975* s 8
Tas	*Status of Children Act 1974* s 5(2)
Vic	*Status of Children Act 1974* s 5
WA	
NZ	*Status of Children Act 1969* s 5(1)
Eng	s 55(2)

5.17 A child *en ventre sa mere* is a child that, although conceived or implanted in its mother's womb, has not yet been born at the death of its father. References to a child or issue living at the death of any person include children or issue *en ventre sa mere* at the death. Children will be presumed to be the issue of the intestate husband if the wife gives birth within a period ranging from ten months[26] to forty-four weeks[27] after the husband's death (in the absence of evidence to the contrary). No time limit is specified in Western Australia or England.[28] The importance of providing a time limit is, traditionally, to ensure that the issue is indeed that of the intestate. As administration of the estate traditionally ceased a year after the death, this presumption should not produce undue administrative difficulty, as children *en ventre sa mere* will have been born within that year.[29]

ISSUE 5.6

Should children en ventre sa mere continue to be treated as issue for the purposes of intestacy?

ISSUE 5.7

If so, should model legislation impose a time period within which the child must be born following the death of the intestate?

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26. *Family Relationships Act 1975* (SA) s 8; *Status of Children Act 1974* (Vic) s 5; *Status of Children Act 1969* (NZ) s 5(1).
27. *Status of Children Act 1978* (Qld) s 18A(2); *Status of Children Act 1996* (NSW) s 9(2); *Status of Children Act 1974* (Tas) s 5(2)(b); *Status of Children Act 1979* (NT) s 4A(2); and *Family Provision Act 1969* (ACT) s 7.
28. See *Administration of Estates Act 1925* (Eng) s 55(2).
29. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 419.

Delayed conception and suspended gestation

5.18 Advances in human artificial reproductive technology have rendered current provisions for children *en ventre sa mere* inadequate to deal with all the possible situations where a child of the deceased is born after the deceased's death. We are here considering situations where, for example, the sperm of the deceased has been frozen and inseminated after his death (posthumous or post mortem conception) or where insemination has already taken place before death but the resulting zygote or embryo is frozen and only placed in the womb after death.

5.19 An example of such a situation may be found in a 1996 Tasmanian case in which a husband died intestate leaving two frozen embryos which had been produced by him and his wife as part of an in vitro fertilisation program. The deceased was survived by his wife and four children. The embryos were fertilised ova that had been frozen before they began to divide into cells (zygotes). The questions before the Court were whether the zygotes were living issue at the date of the intestate's death, and whether they became issue on being born alive. The judge held that zygotes were not actually living at the date of the deceased's death. The rights that attach to the unborn zygotes are contingent on being born alive. The Court held that a zygote would become a child of the deceased on being born alive. No reason could be seen for differentiating between zygotes and children *en ventre sa mere*.[30]

5.20 In 1986 the New South Wales Law Reform Commission considered the question of posthumous conception in so far as it affected the rules of distribution on intestacy.[31] The Commission noted the practical difficulty that could arise where the deceased parent's estate was either wholly or partly distributed after the date of conception or birth of the artificially conceived child. It therefore recommended that any child so conceived should not be entitled to participate in the distribution of the deceased parent's estate. It was considered that this would remove the need for the personal representative to enquire into the "possibility of the subsequent birth of persons who... will be regarded as children of the deceased".[32] The Commission, however, also recommended that any children born as a result of such procedures should be entitled to make an application for family

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30. *Re the Estate of the Late K* (1996) 5 Tas R 365 (Slicer J). See also D Clark, "En ventre sa frigidaire: Zygotes as children" (1996) *Alternative Law Journal* 165.
31. New South Wales Law Reform Commission, *Artificial Conception: Human Artificial Insemination* (Report 49, 1986) at para 12.6-12.12
32. New South Wales Law Reform Commission, *Artificial Conception: Human Artificial Insemination* (Report 49, 1986) at para 12.9.

provision on the basis that the complexity of such an application (involving tracing to beneficiaries) was outweighed by the rarity of such cases.

5.21 A United Kingdom Committee of Inquiry into Human Fertilisation and Embryology which reported in 1984 recommended that any child born by artificial conception who was not *in utero* at the date of death of its father should be "disregarded for the purposes of succession to and inheritance from the latter".[33] The Committee also considered that posthumous conception was a practice that ought to be "actively discouraged".

5.22 The Ontario Law Reform Commission, on the other hand, preferred to give the posthumously conceived child, so far as possible, the same rights of inheritance as though the child were conceived in the deceased's lifetime. The Commission did not consider it practical to allow for the postponement of distribution or the upsetting of distributions already made but instead recommended that:

> a posthumously conceived child of a husband should be entitled to inheritance rights in respect of any undistributed estate once the child is born or is *en ventre sa mere*, as if the child were conceived while the husband was alive.[34]

5.23 Legislation and codes of practice in various jurisdictions may have an impact on whether children can be conceived after the death of a parent. For example, in Victoria the use by a surviving spouse or partner of gametes from the deceased or the transfer of embryos formed from the gametes of the deceased may not be possible on account of consent requirements and the requirement that the couple be living together at the time the procedure is carried out.[35] Various codes of practice also prevent the use of artificial reproductive technologies in certain circumstances where one partner has died:

> Directions under the Western Australian Act state that no consent given by a gamete provider may include a consent for the posthumous use of the gametes. A person must not knowingly use gametes in an artificial fertilisation procedure after the death of the gamete provider. The South Australian Code of Practice states that a licensee must dispose of an embryo that is kept in storage for future use of a couple if either member of the couple dies, unless the storage consent specifies how an embryo is to be dealt with or disposed of in the event of death,

33. United Kingdom, Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314, 1984) at para 10.9.
34. Ontario Law Reform Commission, *Human Artificial Reproduction and Related Matters* (Report, 1985) vol 2 at 182.
35. *Infertility Treatment Act 1995* (Vic) s 8, s 12.

in which case the licensee must deal with the embryo or dispose of it in accordance with those conditions.[36]

5.24 On the other hand, in the United Kingdom, a recent enactment has allowed that a man may be treated as the father of a child conceived or implanted as an embryo after his death provided he has consented in writing to such procedures being carried out after his death.[37]

5.25 It may, however, be preferable to adopt the simple approach of disregarding for the purposes of intestate succession any child born by means of artificial reproductive technologies where the child was not *en ventre sa mere* at the death of the intestate. Alternatively, the giving of the whole of the intestate estate to the surviving spouse or partner will, in the normal course of events, ensure that the interests of a child so born are adequately provided for.

ISSUE 5.8

Should special provision be made, in the context of intestacy, to deal with children who have been born following delayed conception or gestation?

ISSUE 5.9

If so, on what conditions should the interests of children so born be recognised?

DISTRIBUTION PER STIRPES

Jurisdiction	Section
Qld	s 36A
ACT	s 49B
NSW	s 61C
NT	s 68
SA	s 72I
Tas	s 46(1)(a), s 46(3)
Vic	s 52(1)
WA	s 14(2b)
NZ	s 78
Eng	s 47

5.26 If a person or persons within a group of those who are entitled to take in an intestate distribution dies, their descendants (subject to certain limitations discussed below) are entitled to take the share that they would have taken. There are two ways in which the distribution to descendants can be managed. The distribution can be either *per stirpes* (by stock) or *per capita* (by head). Intestate distribution is generally *per stirpes*.

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36. New South Wales Department of Health, *Review of the Human Tissue Act 1983 - Discussion Paper: Assisted Reproductive Technologies* (1998) at para 6.5.
37. *Human Fertilisation and Embryology (Deceased Fathers) Act 2003* (UK) s 1.

5.27 *Per stirpes* distribution means that the entitlement of descendants will be determined by the entitlement of those who have predeceased them and would otherwise have been entitled to take. For example, the grandchildren of an intestate will only take proportionately among themselves the share that their deceased parent would have taken if he or she were alive.

5.28 On the other hand *per capita* distribution gives each person entitled to take an equal share regardless of the degree of their descent. For example, the grandchildren of an intestate whose parent has predeceased the intestate will take in equal shares together with the other surviving children of the intestate.

5.29 All jurisdictions in Australia, except for South Australia, provide for distribution *per stirpes*. South Australia has adopted a modified form of stirpital distribution. If distribution is to be made to the next of kin, and the intestate is not survived by a sibling, aunt nor uncle,[38] but is survived by issue of such a relative, the intestate estate devolves upon that issue, as if the issue were issue of the intestate. Distribution is then *per capita*.[39]

5.30 In Victoria, while distribution is generally *per stirpes*, an exception is made where the intestate's nieces and nephews are entitled, and all of the intestate's siblings are dead. The nieces and nephews will take equal shares, rather than the share to which their parent would have been entitled.[40]

5.31 An argument in support of *per capita* distribution could be made on the grounds that if all of one generation have predeceased the intestate, there would appear to be no valid reason why some of their children should receive less if they are from a family with more siblings than some of the others. Such an approach is fair in the context of distribution lists which limit entitlement to the children of deceased siblings, aunts and uncles and do not allow for further descent. A similar argument could be made in support of *per capita* distribution in cases where an intestate is predeceased by all of his or her children and is survived by grandchildren (who are either all living or have died without issue).

5.32 Although the Queensland Law Reform Commission originally supported the South Australian practice, it reconsidered its view after the Public Trustee of Queensland raised concerns about the practicalities, rather than the justice, of the proposition. The example was given of a man who died intestate at a very great age leaving four grandchildren who were

38. *Administration and Probate Act 1919* (SA) s 72J(d)(iv).
39. *Estate of Hughes* (1985) 38 SASR 5 at 11 (Bollen J).
40. *Administration and Probate Act 1958* (Vic) s 52(1)(f)(vi).

the issue of himself and his current wife. He had, however, had a child to a wife he had married, and subsequently divorced, early in his life. He did not keep in touch with his first wife and child and, on the intestate's death, it was not known whether this child was alive or had produced grandchildren. Unless this is ascertained distribution *per capita* cannot be made.[41] The mixed *per stirpes*/*per capita* distribution which operated in Queensland from 1982 was accordingly abandoned in 1998.[42]

ISSUE 5.10

Should per stirpes distribution apply in all cases?

ISSUE 5.11

If not, in what circumstances should per capita distribution be applied?

DISTRIBUTION TO ISSUE AND PARENTS OF THE INTESTATE

Intestate leaves issue but no partner

Qld	s 35, s 36A, Sch 2 Pt 2 It 1
ACT	s 49(1), s 49B, Sch 6, Pt 6.2, It 1
NSW	s 61B(1),(4), s 61C
NT	s 66(1), s 68; Sch 6 Pt 4 It 1
SA	s 72G(c), s 72I
Tas	s 44(5), s 46(1)
Vic	s 52(1)(f)
WA	s 14(1) Table It 5; s 14(2a), (2b)
NZ	s 77 It 4, s 78(1), (2)
Eng	s 46(1)(ii)

5.33 Where an intestate has been survived by issue but not by a partner, all the jurisdictions provide means for, at least part of, the intestate's estate to flow to the intestate's issue or to be divided amongst the issue where more than one survive.

5.34 The method of dividing the estate between the issue of the intestate is determined on a *per stirpes* basis so that if an intestate's child has predeceased the intestate, but is survived by issue of his or her own, then such issue will be entitled to the share of the intestate's estate that the

41. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 56-57.
42. *Succession Amendment Act 1997* (Qld). See also W A Lee and A A Preece, *Lee's Manual of Queensland Succession Law* (5th edition, LBC Information Services, 2001) at para 1205.

intestate's issue (their father or mother) would have been entitled to, and so on.

Intestate leaves no partner and no issue but leaves a parent or parents

Qld	s 35(1); Sch 2 Pt 2 It 2
ACT	s 49(1); Sch 6, Pt 6.2, It 2
NSW	s 61B(1),(5)
NT	s 66(1); Sch 6 Pt 4 It 2
SA	s 72B(1), s 72G(d), s 72J(a)
Tas	s 44(6)
Vic	s 52(1)(b)-(ea)
WA	s 14(1) Table It 6 and It 7
NZ	s 77 It 5
Eng	s 46(1)(iii),(iv), s 47(3)

5.35 If the intestate is not survived by a spouse or de facto partner, nor by any issue, all jurisdictions provide that the intestate's surviving parent, or parents, will be entitled to the intestate's estate. It is commonly the case that the surviving parent is entitled to the whole of the intestate's estate unless both parents survive, in which case the estate is to be divided equally between them.[43] However, in Western Australia, if the intestate dies without spouse or partner and without issue, but leaves a parent or parents and brothers and/or sisters and/or children of a deceased brother or sister, the surviving parents are entitled to the first $6,000 of the estate and, in relation to any amount in excess of the first $6,000, the parents will be entitled to half of the remaining estate (in equal shares if both parents survive) and the surviving brothers and sisters or the children of deceased brothers and sisters will be entitled to the other half.[44]

43. *Succession Act 1981* (Qld) Sch 2 Pt 2 It 2; *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.2 It 2; *Wills, Probate and Administration Act 1898* (NSW) s 61B(5); *Administration and Probate Act 1969* (NT) Sch 6 Pt 4 It 2; *Administration and Probate Act 1919* (SA) s 72J(a); *Administration and Probate Act 1935* (Tas) s 44(6); *Administration and Probate Act 1958* (Vic) s 52(1)(b)-(ea); *Administration Act 1903* (WA) s 14(1) Table It 7; *Administration Act 1969* (NZ) s 77 It 5; and *Administration of Estates Act 1925* (Eng) s 46(1)(iii) and (iv).

44. *Administration Act 1903* (WA) s 14(1) Table It 6.

ISSUE 5.12

If the intestate dies without spouse or partner and without issue, should the parents of the intestate be entitled to the estate?

ISSUE 5.13

If so, should surviving parents be solely entitled to distribution? And if not, what other next of kin should be entitled to share with them in the estate and in what proportions?

STATUTORY TRUST IN FAVOUR OF ISSUE OF THE INTESTATE

Qld	
ACT	
NSW	s 61C(1)-(2)
NT	
SA	
Tas	s 46(1)-(2)
Vic	
WA	
NZ	s 78(1)-(2)
Eng	s 47(1)-(2)

5.36 Most jurisdictions do not specifically address statutory trusts for issue of the intestate. The establishment of such trusts is included in their general provisions. That is, they provide, generally, for the estate to be held on trust for those entitled.[45] The separate provisions outlined here may, therefore, be unnecessary.

5.37 In some jurisdictions, trusts in favour of issue of the intestate are specified to be held for any child, or if there are more than one, for any child in equal shares, living at the intestate's death.[46]

5.38 These trusts are also held for all issue living at the intestate's death, of any child of the intestate who has predeceased the intestate. No issue can take whose parent is living at the intestate's death and is capable of so taking.[47]

45. See para 1.16.
46. *Wills, Probate and Administration Act 1898* (NSW) s 61C(1); *Administration and Probate Act 1935* (Tas) s 46(1); *Administration Act 1969* (NZ) s 78(1)(a); and *Administration of Estates Act 1925* (Eng) s 47(1)(i).
47. *Wills, Probate and Administration Act 1898* (NSW) s 61C(1)(b); *Administration and Probate Act 1935* (Tas) s 46(1)(a); *Administration Act 1969* (NZ) s 78(1)(a) and *Administration of Estates Act 1925* (Eng) s 47(1)(i).

5.39 Such issue take according to their stocks, in equal shares if more than one, the share their parent would have taken if he or she had been alive at the intestate's death.[48] This distribution is *per stirpes*.[49]

5.40 Except for New South Wales, where a trust in favour of issue fails "by reason of no child or other issue attaining an absolutely vested interest" the intestate estate is held as though "the intestate had died without leaving issue living" at his or her death.

ISSUE 5.14

Does special provision need to be made for statutory trusts in favour of issue of the intestate?

48. *Wills, Probate and Administration Act 1898* (NSW) s 61C(2); *Administration and Probate Act 1935* (Tas) s 46(1)(a); *Administration Act 1969* (NZ) s 78(1)(a); and *Administration of Estates Act 1925* (Eng) s 47(1)(i).

49. See para 5.26-5.32 above.

6. Distribution to next of kin of the intestate

- The general order of distribution
- Brothers and sisters of the intestate
- Grandparents of the intestate
- Aunts and uncles of the intestate
- More remote next of kin
- Meaning of statutory trust for any class of relatives other than issue of the intestate

THE GENERAL ORDER OF DISTRIBUTION

Qld	s 35(1A), s 37
ACT	s 49(5), s 49C(1)
NSW	s 61B(6), s 61C(3)
NT	s 66(5), s 69
SA	s 72B(1), s 72G(d); s 72J
Tas	s 44(7), s 46(3)
Vic	s 52(1)(f)
WA	s 14(1)
NZ	s 77 It 6-7, s 78(3)
Eng	s 46(1)

6.1 When the intestate is not survived by a spouse or partner, issue or parents, each jurisdiction makes provision for the distribution of the intestate estate to the next of kin of the intestate and, in some degree, their issue. The broad order adopted by each jurisdiction is that:

- **brothers and sisters of the intestate take first;**
- **grandparents of the intestate take next; and**
- **aunts and uncles of the intestate take if no one else is entitled.**

This order is broadly reflective of the old *Statute of Distributions* which established an order whereby those next of kin in closest relationship to the intestate were entitled to take in preference to relatives of remoter degree.

ISSUE 6.1

Is the general scheme appropriate whereby the next of kin are entitled to a share of an intestate estate in the following order:

1. brothers and sisters of the intestate;
2. grandparents of the intestate; and then
3. aunts and uncles of the intestate?

ISSUE 6.2

If not, what order of distribution should be adopted?

6.2 While the above applies as a general scheme, each jurisdiction makes different provision with respect to some of the categories.

Relationships of the whole and half blood

Qld	s 34(2)
ACT	s 44(2)(b)
NSW	s 61B(6)
NT	s 61(2)(b)
SA	s 72B(2)
Tas	s 44(7)
Vic	s 52(1)(f)(vii)
WA	s 12B
NZ	s 77 It 6-7
Eng	s 46(1)(v)

6.3 Two of the categories outlined above, namely brothers and sisters of the intestate and aunts and uncles of the intestate, require a consideration of the question of relationships of the whole and half blood. Siblings who share both parents are relatives of the whole blood and siblings who have only one parent in common are relatives of half blood.

6.4 Most jurisdictions now state that the distinction between whole and half blood is immaterial for the purposes of determining entitlement,[1] so that siblings of the half blood are entitled to take together with siblings of the whole blood. (Siblings of the half blood may, therefore, now benefit by the possibility of inheriting from two family groupings instead of one.)

6.5 The distinction, however, remains in New South Wales and England. In these jurisdictions, a distinction is still drawn between brothers and sisters of the whole blood and brothers and sisters of the half blood, so that brothers and sisters of the whole blood and their issue are entitled to take before brothers and sisters of the half blood and their issue,[2] and aunts and uncles of the whole blood and their issue are entitled to take before uncles and aunts of the half blood and their issue.[3]

6.6 The Law Reform Committee of South Australia recommended against the incorporation of such a distinction in the law of that State as:

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1. *Succession Act 1981* (Qld) s 34(2); *Administration Act 1903* (WA) s 12B; *Administration and Probate Act 1929* (ACT) s 44(2)(b); *Administration and Probate Act 1969* (NT) s 61(2)(b); *Administration and Probate Act 1919* (SA) s 72B(2); *Administration and Probate Act 1958* (Vic) s 52(1)(f)(vii); *Administration and Probate Act 1935* (Tas) s 44(7)(a) and (c); and *Administration Act 1969* (NZ) s 77 It 6 and It 7.
2. *Wills, Probate and Administration Act 1898* (NSW) s 61B(6)(a) and (b); and *Administration of Estates Act 1925* (Eng) s 46(1)(v).
3. *Wills, Probate and Administration Act 1898* (NSW) s 61B(6)(d) and (e); *Administration of Estates Act 1925* (Eng) s 46(1)(v).

> [t]here are many families in which the half blood and the whole blood live together perfectly happily and it has been the experience of at least one member of this Committee that when distinctions between whole and the half blood have been made by will, they have been productive of great unhappiness.[4]

6.7 Distinctions between relatives of the whole and half blood appear to have been relevant for the purposes of identifying an heir under the English law relating to the inheritance of land under *primo genitur*, so that, for example, brothers of the half blood could only inherit after sisters of the whole blood, and so on.[5] This and other such distinctions in the law of heirship were described in 1881 as "precious absurdities in the English law of real property".[6] There would appear to be no justification for such a distinction in the law of intestate succession today.

ISSUE 6.3

Should any distinction be made between relatives of the whole and half blood?

BROTHERS AND SISTERS OF THE INTESTATE

Qld	s 37(1)(a), s 37(2)(a), Sch 2 Part 2 It 3
ACT	s 49C(1)(a), s 49C(2)
NSW	s 61B(6)(a) and (b)
NT	s 69(1)(a), s 69(2)
SA	s 72J(b)
Tas	s 44(7)(a), s 46(3)
Vic	s 52(1)(f)(v)-(vi)
WA	s 14(1) Table It 8; s 14(3a)
NZ	s 77 It 6; s 78(3)
Eng	s 46(1)(v), s 47(3)

6.8 Each jurisdiction provides that if the intestate is not survived by a spouse or partner, issue or parents, the brothers and sisters of the intestate who survive are entitled to take.

6.9 Some jurisdictions provide that if any brother or sister has predeceased the intestate, any surviving children of the deceased brother or sister (that is, the intestate's nephews and nieces) can take their parent's entitlement in equal shares.[7] Remoter issue, for example, grand nephews

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4. Law Reform Committee of South Australia, *Relating to the Reform of the Law on Intestacy and Wills* (Report 28, 1974) at 7.
5. Inheritance Act of 1833 (3&4 William IV c 106) s 9.
6. *In re Goodman's Trusts* (1881) 17 ChD 266 at 299 (James LJ).
7. *Succession Act 1981* (Qld) s 37(1)(a); *Administration Act 1903* (WA) s 14(1) Table It 8, s 14(3a); *Administration and Probate Act 1958* (Vic) s 52(1)(f). See also

and nieces, are, therefore, excluded. Both Queensland and Western Australia state that the intestate's nieces and nephews take according to a *per stirpes* distribution.[8]

6.10 Victoria, however, provides that, if all the brothers and sisters have predeceased the intestate, their surviving children are entitled to take on a *per capita* basis.[9] In Victoria, if all of these surviving nephews and nieces predecease the intestate, their children (the grand nieces and nephews of the intestate), in absence of any surviving grand parents or uncles and aunts, may be entitled to take as relatives of the fourth degree (together with cousins of the intestate) under the modified civil law distribution scheme that Victoria has retained.[10]

6.11 The remaining jurisdictions provide that if a sister or brother has predeceased the intestate, the surviving issue of that brother or sister are entitled to take a share.[11] This means that, in some cases, grand nieces and nephews of the intestate may be entitled to take if their parents have predeceased them. In the majority of these jurisdictions the issue take according to a *per stirpes* distribution. South Australia, however, offers a modified form of *per capita* distribution whereby, if all the brothers and sisters predecease the intestate, their surviving issue are treated as if they were issue of the intestate.[12]

6.12 Further, the provision that spouses are to be treated as separate persons for the purposes of intestacy[13] may cause problems if a person dies intestate and has nieces and nephews from different siblings and some of these nephews and nieces have married (being cousins). If those nephews and nieces predecease the intestate but are survived by children, their children will represent each of their parents and be entitled to take twice as much as they would be entitled to if only one parent were entitled.

I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 369-370).

8. *Administration Act 1903* (WA) s 14(3a); *Succession Act 1981* (Qld) s 37(2)(a).
9. *Administration and Probate Act 1958* (Vic) s 52(1)(f)(vi).
10. *Administration and Probate Act 1958* (Vic) s 52(1)(f). See para 6.19-6.20 below. See also I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 369-370.
11. *Administration and Probate Act 1969* (NT) s 69(1)(a) and s 69(2); *Administration and Probate Act 1935* (Tas) s 44(7)(a), s 46(3); *Administration and Probate Act 1919* (SA) s 72J(b); *Wills, Probate and Administration Act 1898* (NSW) s 61B(6)(a) and (b), s 61C(3); *Administration and Probate Act 1929* (ACT) s 49C(1)(a); *Administration of Estates Act 1925* (Eng) s 46(1)(v) and s 47(3); *Administration Act 1969* (NZ) s 77 It 6, s 78(3).
12. *Administration and Probate Act 1919* (SA) s 72J(b)(iv).
13. See para 3.19 above.

ISSUE 6.4

What provision should be made for distribution to brothers and sisters of the intestate and their issue?

ISSUE 6.5

Where the intestate is predeceased by a brother or sister, should the share of the intestate's estate to which the brother or sister would otherwise have been entitled be taken by:

(a) the remaining brothers and sisters in equal shares;
(b) the children of the deceased brother or sister; or
(c) the issue of the deceased brother or sister?

ISSUE 6.6

If the issue of a deceased brother or sister are to take the share of the intestate's estate to which the brother or sister would otherwise have been entitled:

(a) should the issue take per stirpes, per capita, or according to the modified form of per capita distribution that applies in South Australia; and
(b) what account ought to be taken of the provision that spouses are to be treated as separate persons?

GRANDPARENTS OF THE INTESTATE

Qld	s 37(1)(b)
ACT	s 49C(1)(b)
NSW	s 61B(6)(c)
NT	s 69(1)(b)
SA	s 72J(c)
Tas	s 44(7)(b)
Vic	s 52(1)(f)(v)
WA	s 14(1) Table It 9
NZ	s 77 It 7
Eng	s 46(1)(v)

6.13 Each jurisdiction provides that surviving grandparents are the next category entitled to take on intestacy. There is generally no variance in these provisions except that New Zealand has established a regime whereby the maternal and paternal families are treated separately.[14] Half of the intestate estate is made available to the surviving maternal grandparents and if neither of them has survived, their half devolves to their children, that is, the maternal aunts and uncles of the intestate. Likewise, the other half of the estate is made available to the surviving

14. *Administration Act 1969* (NZ) s 77 It 7.

paternal grandparents and if neither of them has survived, their half devolves to their children, that is, the paternal aunts and uncles of the intestate. It is only if no one from the paternal side of the family has survived that their half then goes to the maternal side, and *vice versa*.

ISSUE 6.7

What provision should be made for distribution to the grandparents of the intestate?

AUNTS AND UNCLES OF THE INTESTATE

Qld	s 37(1)(c), s 37(2)(b)
ACT	s 49C(1)(c), s 49C(2)
NSW	s 61B(6)(d), (e)
NT	s 69(1)(c), s 69(2)
SA	s 72J(d)
Tas	s 44(7)(c), s 46(3)
Vic	s 52(1)(f)
WA	s 14(1) Table It 10; s 14(3a)
NZ	s 77 It 7
Eng	s 46(1)(v), s 47(3)

6.14 Each jurisdiction provides that surviving aunts and uncles of the intestate are the next category of next of kin entitled to take on intestacy.

6.15 Queensland and Western Australia provide that if any aunt or uncle has predeceased the intestate, any surviving children of the deceased brother or sister (that is, the intestate's cousins) can take their parent's entitlement in equal shares.[15] Remoter issue, for example, first cousins once removed, are, therefore, excluded from this category. In both these jurisdictions the intestate's cousins take according to a *per stirpes* distribution.[16]

6.16 Other jurisdictions provide that if an uncle or aunt has predeceased the intestate, the surviving issue of that uncle or aunt are entitled to take a share.[17] This means that, in some cases, first cousins once removed of the

15. *Succession Act 1981* (Qld) s 37(1)(c); *Administration Act 1903* (WA) s 14(1) Table It 10, s 14(3a).
16. *Succession Act 1981* (Qld) s 37(2)(b); *Administration Act 1903* (WA) s 14(3a).
17. *Administration and Probate Act 1969* (NT) s 69(1)(c) and s 69(2); *Administration and Probate Act 1935* (Tas) s 44(7)(c), s 46(3); *Administration and Probate Act 1919* (SA) s 72J(d); *Wills, Probate and Administration Act 1898* (NSW) s 61B(6)(d) and (e), s 61C(3); *Administration and Probate Act 1929* (ACT) s 49C(1)(c); *Administration of Estates Act 1925* (Eng) s 46(1)(v), s 47(3); *Administration Act 1969* (NZ) s 77 It 7, s 78(3).

intestate may be entitled to take if their parents have predeceased them. In the majority of these jurisdictions the issue take according to a *per stirpes* distribution. South Australia, however, offers a modified form of *per capita* distribution whereby, if all the aunts and uncles predecease the intestate, their surviving issue are treated as if they were issue of the intestate.[18]

6.17 Further, the provision that spouses are to be treated as separate persons for the purposes of intestacy[19] may cause problems if a person dies intestate and has cousins from different siblings and some of these cousins have married. If those cousins predecease the intestate but are survived by children, their children will represent each of their parents and be entitled to take twice as much as they would be entitled to if only one parent were entitled.

6.18 Finally, in Victoria no issue of a deceased aunt or uncle of the intestate may take in this category. However, cousins of the intestate may take as part of the next category that is entitled to distribution (relatives of the fourth degree) under the modified civil law distribution scheme that Victoria has retained.[20]

ISSUE 6.8

What provision should be made for distribution to aunts and uncles of the intestate and their issue?

ISSUE 6.9

Where an intestate is predeceased by an aunt or uncle, should the share of the intestate's estate to which the aunt or uncle would otherwise have been entitled be taken by:

(a) the surviving siblings of the deceased aunt or uncle;
(b) the children of the deceased aunt or uncle; or
(c) the issue of the deceased aunt or uncle?

ISSUE 6.10

If the issue of a deceased aunt or uncle are to take the share of the intestate's estate to which the aunt or uncle would otherwise have been entitled:

(a) should the issue take per stirpes, per capita, or according to the modified form of per capita distribution that applies in South Australia; and
(b) what account ought to be taken of the provision that spouses are to be treated as separate persons?

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18. *Administration and Probate Act 1919* (SA) s 72J(b)(iv).
19. See para 3.19 above.
20. *Administration and Probate Act 1958* (Vic) s 52(1)(f). See para 6.19-6.20 below. See also I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 369-370.

MORE REMOTE NEXT OF KIN

Qld	
ACT	
NSW	
NT	
SA	
Tas	s 44(7)
Vic	s 52(1)(f)
WA	
NZ	
Eng	

6.19 Most jurisdictions make no further provision for distribution to next of kin of the intestate beyond surviving aunts and uncles of the intestate and their children or issue. However, both Tasmania and Victoria allow for further distribution, at least in part, according to the old civil law rules of distribution.

6.20 Victoria achieves this by stating that distribution shall be "among the next of kin of the intestate who are in equal degree and their representatives".[21] Because Victoria also restricts the passing of entitlements to issue after children of brothers and sisters of the intestate,[22] the next category of relatives to take under the Victorian scheme after aunts and uncles of the intestate includes grand nephews and nieces of the intestate and cousins of the intestate, who are both relatives of the fourth degree.[23]

6.21 Tasmania, achieves this by providing that the estate "shall be held in trust for the next-of-kin of the intestate according to the civil law; but there shall be no representation in relation to persons entitled under this last provision".[24] It has been observed that this limits the remaining next of kin to a range that is "narrow and remote":

> **Great grandparents, a rare phenomenon even in this day and age, may claim as kin of the third degree. Brothers and sisters of grandparents (kin of the fourth degree) and their issue may also claim. It is to be**

21. *Administration and Probate Act 1958* (Vic) s 52(1)(f).
22. *Administration and Probate Act 1958* (Vic) s 52(1)(f)(iii).
23. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 370.
24. *Administration and Probate Act 1935* (Tas) s 44(7).

> questioned whether it would not be more appropriate for the Crown to benefit rather than such kin.[25]

6.22 There may be benefits in putting a limit on the classes of relatives entitled. When going back through ancestors and next of kin it has been argued that it would be prudent to put a limit on the extent to which relatives must be traced. It is when cousins and remoter relatives must be found "that real difficulty and expense often arise".[26] This is particularly the case in a country "a large proportion of whose population are immigrants, or children or grandchildren of immigrants".[27] This problem will be compounded in some cases where members of some families have migrated to different countries. Although shares in the intestate's estate may be distributed to known beneficiaries while some remain unknown, the presence of undiscovered beneficiaries would require a perpetual trust.

6.23 These difficulties were recognised by the Law Reform Commission of Tasmania, which identified the problem of having to locate all an intestate's relatives under the current law:

> Searching for, or tracing next of kin is potentially a laborious and time consuming job as there is no limitation on how many generations must be searched to find the intestate's nearest surviving next of kin.[28]

6.24 If the list of distribution is too thorough and expansive it runs the risk of confusing those who must interpret the Act's operation. Before New South Wales limited next of kin to the aunts and uncles of the intestate, it was thought that "the provisions concerning next of kin [were] almost as forbidding as is the list of persons shown at the beginning of the Prayer Book – persons whom one is not supposed to marry".[29]

6.25 In 1993 the Queensland Law Reform Commission considered:

> There seems to be no reason to make this list shorter, for example, by excluding cousins, or to make it longer, by including great-grandparents, great uncles and aunts or their issue.[30]

ISSUE 6.11

What provision, if any, should be made for distribution to remoter next of kin?

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25. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 396.
26. NSW, *Parliamentary Debates (Hansard)*, Legislative Council, 23 November 1954, Administration of Estates Bill, Second Reading at 1811.
27. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 63.
28. Law Reform Commission of Tasmania, *Report on Succession Rights on Intestacy* (Report 43, 1985) at 14.
29. NSW, *Parliamentary Debates (Hansard)*, Legislative Council, 23 November 1954, Administration of Estates Bill, Second Reading at 1815.
30. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 63.

MEANING OF STATUTORY TRUST FOR ANY CLASS OF RELATIVES OTHER THAN ISSUE OF THE INTESTATE

Qld	
ACT	
NSW	s 61C(3)
NT	
SA	
Tas	s 46(3)
Vic	
WA	
NZ	s 78(3)
UK	s 47(3)

6.26 It is uncommon for jurisdictions to address specifically statutory trusts for classes of relatives other than the issue of the intestate. Such trusts will usually be covered by the provisions that deal generally with the title of the intestate estate.[31]

6.27 In some jurisdictions, for example, New South Wales, separate provision is, however, made so that where the estate or any part of the estate is directed to be held on statutory trust for any class of relatives other than issue of the intestate, "that estate or part shall be held in trust corresponding to the statutory trust for the issue of the intestate as if that trust were repeated with the substitution of references to the members or member of that class for references to the children or child of the intestate".[32] New Zealand makes similar provision in almost exactly the same terms,[33] as do Tasmania and England, except that Tasmania and England also provide that the "provision for bringing any money or property into account" does not apply in the case of trusts for relatives other than the issue of the deceased.[34]

31. As is the case in Queensland, Australian Capital Territory, Northern Territory, South Australia, Victoria and Western Australia.
32. *Wills, Probate and Administration Act 1898* (NSW) s 61C(3).
33. *Administration Act 1969* (NZ) s 78(3).
34. *Administration and Probate Act 1935* (Tas) s 46(3); *Administration of Estates Act 1925* (Eng) s 47(3).

6.28 Separate provision in relation to any estate held on trust for relatives who are not issue of the intestate would appear to be unnecessary since the question of distribution to relatives other than issue is dealt with in the distribution lists.

ISSUE 6.12

If the estate of an intestate is to be held on trust for relatives who are not issue in the same manner as for issue of the intestate, is it necessary to include a separate provision to that effect?

7. Distribution when no relatives are entitled

- Bona vacantia
- Provision for dependants

BONA VACANTIA

Qld	s 35(1); Sch 2 Pt 2 It 4; *Property Law Act 1974* s 20(3)(a)
ACT	s 49(1); s 49CA; Sch 6 Pt 6.2 It 4
NSW	s 61B(7)
NT	s 66(1); Sch 6 Pt 4 It 4; *Law of Property Act 2000* s 20
SA	s 72G(e)
Tas	s 45
Vic	s 55
WA	s 14(1) Table It 11; *Escheat (Procedure) Act 1940* s 2, s 9
NZ	s 76, s 77 It 8
Eng	s 45(1)(d), s 46(1)(vi)

7.1 *Bona vacantia* is the Crown's statutory right to the property of an intestate estate, to which no relatives are entitled. In most jurisdictions when the intestate is not survived by a spouse or partner, issue, parents or remoter eligible relatives, the Crown (or "Territory") is entitled to the intestate's estate by *bona vacantia.*[1]

7.2 The possibility of an intestate's estate passing to the Crown may not be so unlikely as it once was, given the reduction in the size of the average family in Australia and the higher incidence of single child families. The following hypothetical example illustrates the point:

> Alan died intestate leaving no spouse and no issue. Alan was an only child of parents each of whom was an only child. His parents and all of his grandparents had predeceased him.[2]

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1. *Succession Act 1981* (Qld) Sch 2 Pt 2 It 4; *Administration and Probate Act 1919* (SA) s 72G(e); *Administration and Probate Act 1958* (Vic) s 55; *Administration and Probate Act 1929* (ACT) Sch 6 Pt 6.2 It 4; *Administration and Probate Act 1969* (NT) s 66(1) and Sch 6 Pt 4 It 4; *Wills, Probate and Administration Act 1898* (NSW) s 61B(7); *Administration and Probate Act 1935* (Tas) s 45; *Administration Act 1969* (NZ) s 77 It 8; and *Administration of Estates Act 1925* (Eng) s 46(1)(vi). Western Australia does not employ *bona vacantia*. It is the only Australian jurisdiction which maintains escheat to the Crown. Escheat is the feudal rule whereby real property would revert to the Crown, or lord of the fee, should the owner of such property die intestate and without heirs. Land may also have reverted if the holder grossly breached his or her feudal bond. In Western Australia escheated property includes real and personal property: *Administration Act 1903* (WA) s 14(1) Table It 11; *Escheat (Procedure) Act 1940* (WA) s 2, s 9. In cases of intestacy, at least, escheat has been expressly abolished in *Property Law Act 1974* (Qld) s 20(3)(a); *Wills, Probate and Administration Act 1898* (NSW) s 61B(7); *Law of Property Act 2000* (NT) s 20; *Administration and Probate Act 1935* (Tas) s 45; *Administration and Probate Act 1958* (Vic) s 55; *Administration Act 1969* (NZ) s 76; and *Administration of Estates Act 1925* (Eng) s 45(1)(d).
2. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 65.

A further example may be found in a 1991 case where one third of the large estate of an elderly woman (who left no relatives entitled on intestacy) went on partial intestacy to the Crown, contrary to her intention, because her will was badly drawn.[3]

7.3 In the Australian Capital Territory, conditions are imposed upon the public trustee where the Territory is entitled to an intestate estate. The estate must be held in trust until six years have passed since the date of death of the intestate. At that point the estate must be sold and the proceeds paid to the Territory (less all costs and charges lawfully due to the public trustee or any other person).[4]

7.4 An alternative proposal could be to enact a provision whereby the intestate's estate goes to a charity or charities rather than to the Crown.[5] In 1985 the Law Reform Commission of Tasmania noted:

> The Commission believes that most people would prefer their estate to go to charity than to the Crown, given that no close family exist at the time of their death. Although many people might object to the property going to the State rather than to relatives of the deceased, they are less likely to object to it going to charity.[6]

However, the Tasmanian proposal would involve the establishment of a "Charities Board" to distribute the funds received. Uniform national legislation would then require the creation of a charities board in each jurisdiction. The Law Commission of England and Wales was opposed to such a proposal as the chosen charity would, then, also have the job of administering the intestate estate and would be required to account to any beneficiaries that are subsequently discovered.[7]

7.5 A provision to similar effect has been enacted in Queensland with respect to Indigenous people who die intestate. In cases where the chief executive of the Aboriginal and Islander Affairs Corporation is unable to determine that any person is entitled to succeed to the estate or a part of the estate, that property shall "vest in the chief executive who shall apply the moneys or the proceeds of the sale of any property (less the expenses (if any) of such sale) for the benefit of [Aborigines/Islanders] generally" under

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3. *Mortensen v State of New South Wales* (NSW Court of Appeal, No 40544/1990, 12 December 1991, unreported).
4. *Administration and Probate Act 1929* (ACT) s 49CA.
5. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 13.
6. Law Reform Commission of Tasmania, *Report on Succession Rights on Intestacy* (Report 43, 1985) at 15.
7. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 14.

the schemes whereby the chief executive may grant aid to Indigenous persons who apply for it on such terms as the chief executive may think fit.[8]

ISSUE 7.1

Are the present provisions for the disposal of intestate estates where no relatives of the intestate are entitled to distribution under the rules of intestacy satisfactory?

PROVISION FOR DEPENDANTS

Qld	
ACT	
NSW	s 61B(8)
NT	
SA	
Tas	s 45(2)
Vic	*Financial Management Act 1994* s 58(3)
WA	
NZ	s 77 It 8
Eng	s 46(1)(vi)

7.6 A number of jurisdictions allow the Crown to provide for dependants for whom the intestate might have been reasonably expected to have made provision,[9] or who might be said to have a "moral claim" against the estate.[10] In New South Wales the Crown Solicitor has published guidelines on the procedure for applications.[11]

7.7 Such a provision was designed to include foster children and "will cover also the situation of an old friend, say, who looked after the intestate in the last days of his life".[12] Such a provision could also be used, albeit in limited circumstances, to provide for step children of the intestate who are otherwise not entitled to distribution on intestacy.[13]

7.8 The provision can be seen to be statutory recognition of the common law right "of certain dependants of the intestate who, although not entitled

8. *Community Services (Aborigines) Act 1984* (Qld) s 169, s 173(4); *Community Services (Torres Strait) Act 1984* (Qld) s 179, s 183(4). See para 9.15-9.16 below.
9. *Wills, Probate and Administration Act 1898* (NSW) s 61B(8); *Administration and Probate Act 1935* (Tas) s 45(2); *Administration and Probate Act 1958* (Vic) s 58(3); *Administration Act 1969* (NZ) s 77 It 8; and *Administration of Estates Act 1925* (Eng) s 46(1)(vi).
10. *Escheat (Procedure) Act 1940* (WA) s 9.
11. K Mason and L G Handler, *Wills Probate and Administration Service* (Butterworths, Service 69) at para 5206.
12. NSW, *Parliamentary Debates (Hansard)*, Legislative Assembly, 16 November 1954, Administration of Estates Bill, Second Reading at 1715.
13. See para 5.6-5.12.

at law, may nevertheless petition the Crown for a waiver of its rights of *bona vacantia* in any estate in respect of which there are no legal next of kin".[14] It has been noted, at least in New South Wales, that the provision allowing dependants to make application was of particular importance to de facto couples, both heterosexual and same-sex, before the reforms of 1984 and 1999 respectively, since they could not apply under family provision legislation.[15]

7.9 Certoma has criticised the discretionary nature of this provision and argues that, at least in New South Wales, "…it implies that the intestate would not reasonably have been expected to make provision for a relative as close as a first cousin. It would, one would suspect, be difficult to imagine that any testator would prefer the Crown as *bona vacantia* rather than to benefit his closest relatives."[16]

7.10 It can be argued that such a provision is no longer necessary given the broader scope of family provision legislation to cover dependants. In any case, the recommendations of the National Committee in relation to family provision would appear to cover the situation, whereby a person, whether or not they are a member of the family of a deceased person, may apply for a family provision order if they are "a person to whom [the] deceased person owed a responsibility to provide maintenance, education or advancement in life."[17] In making a family provision order in relation to such an application, the court may have regard to whether the applicant "was being maintained, either wholly or partly, by the deceased person before the deceased person's death".[18]

7.11 It is important to distinguish between the nature of an application under family provision and the nature of an application for provision out of *bona vacantia*. In the case of a claim for family provision a person, who is not entitled to a share of the deceased's estate, may only make a claim if they were being maintained by the deceased or over whom the deceased

14. NSW, *Parliamentary Debates (Hansard)*, Legislative Assembly, 25 October 1977, Wills, Probate and Administration (Amendment) Bill, Second Reading at 8993.
15. K Mason and L G Handler, *Wills Probate and Administration Service* (Butterworths, Service 70) at para 1305.6.
16. G L Certoma, "Intestacy in New South Wales: The 1977 Statutory Amendments" (1979) 53 *Australian Law Journal* 77 at 83.
17. *Family Provision Bill 2004* cl 7 in National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) Appendix 2.
18. *Family Provision Bill 2004* cl 11(2)(j) in National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) Appendix 2.

had responsibility. In the case of an application for provision out of *bona vacantia* application may be made by a person who has a purely moral claim to a share of the estate, for example, foster children.

ISSUE 7.2

Should uniform legislation allow persons to petition the Crown to make provision for them out of bona vacantia?

ISSUE 7.3

If so, what criteria should be used to identify the people who are entitled to apply?

8. Accounting for benefits received upon or before death

- Gifts given before death
- Testamentary gifts

8.1 To ensure that intestate estates are divided equitably some jurisdictions provide that, when the intestate benefits someone either before and/or upon death and that person is entitled to a share of the intestate estate, that benefit is taken into account in determining their entitlement. That is, the value of any benefit received is subtracted from the share that the recipient is entitled to under the rules of distribution on intestacy.

8.2 There are essentially two categories of provisions. First, those that deal with gifts made by the intestate during his or her lifetime. Secondly, in the case of partial intestacies, those where the intestate has made provision for someone in his or her will.

8.3 It should be noted that three Australian jurisdictions make no provision to account for benefits received on or before the death of an intestate.[1] The absence of any such provisions in these jurisdictions has apparently not resulted in any substantial injustice. There is, therefore, a good case for simplifying the administration of intestate estates by not including such provisions in any uniform national legislation.

GIFTS GIVEN BEFORE DEATH

Statute of Distributions

8.4 The rules relating to the taking into account of benefits conferred on a person entitled on intestacy have their origins in the Statute of Distributions which provided that settlements and advancements conferred by the intestate upon his children in his lifetime were to be taken into account in determining their (or their issue's) portion upon intestacy.[2] The rule, which is sometimes referred to as "the doctrine of hotchpot", was narrow in scope, applying only to children of the male intestate and applied only in cases of total intestacy.[3]

8.5 Essentially two types of benefits were envisaged:

- marriage settlements whereby property was settled upon children upon marriage; and
- advancements which were usually intended to set up children in their chosen profession or business.

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1. Queensland, New South Wales and Western Australia.
2. 22 & 23 Charles II c 10 s 5.
3. See Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 59; I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand.* (2nd ed, Law Book Company, Sydney, 1989) at 432-440.

The rule did not apply to casual payments or gifts made to children.[4]

8.6 The rule as established by the Statute of Distributions has been modified in some jurisdictions and abolished in New South Wales,[5] Queensland,[6] Western Australia,[7] New Zealand and England.[8] It has been observed that the parliaments of these jurisdictions "clearly considered the doctrine of hotchpot to be more productive of difficulty than justice".[9] There was certainly difficulty in defining "advancement" and uncertainty concerning the date of valuation of the benefits conferred.[10]

8.7 It has been argued that the abolition showed a "determination to remove anomalies, anachronisms, relics, remnants and vestiges of outmoded and outdated statutory and common law. No longer will there be problems of gifts *inter vivos* vying with devices and bequests".[11]

Modern provisions

Qld	
ACT	s 49BA
NSW	
NT	s 68(3)-(4)
SA	s 72K
Tas	s 46(1)(c)
Vic	s 52(1)(f)(i)
WA	
NZ	
Eng	

8.8 Five jurisdictions have provisions relating to gifts that an intestate has made to certain people in his or her lifetime.

4. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 59.
5. *Wills, Probate and Administration (Amendment) Act 1977* (NSW).
6. *Succession Acts Amendment Act 1968* (Qld).
7. *Administration Act Amendment Act 1976* (WA) s 3, repealing *Administration Act 1903* (WA) s 13(1) which imported hotchpot into the law of Western Australia: *In re Cornwall* (1910) 13 WAR 40. The abolition of hotchpot was recommended by the Law Reform Commission of Western Australian: Law Reform Commission of Western Australia, *Report on Distribution on Intestacy* (Project No 34, Part 1, 1973) at para 36-39.
8. *Law Reform (Succession) Act 1995* (Eng).
9. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand.* (2nd ed, Law Book Company, Sydney, 1989) at 440.
10. See I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand.* (2nd ed, Law Book Company, Sydney, 1989) at 440.
11. NSW, *Parliamentary Debates (Hansard)*, Legislative Assembly, 25 October 1977, Wills, Probate and Administration (Amendment) Bill, Second Reading at 8998.

8.9 Tasmania and Victoria both have provisions that are closest to the regime established by the Statute of Distributions. In Victoria the relevant provision applies where a child has any real or personal property, or any estate or interest therein, by settlement of the intestate, or was advanced by the intestate in his or her lifetime.[12] In Tasmania the relevant provision applies only to advancements or marriage settlements to children of the intestate unless a contrary intention is expressed. The value of any such advancement or settlement is taken as at the date of the intestate's death, rather than value at the date on which the advancement or settlement was made.[13]

8.10 The Australian Capital Territory, Northern Territory and South Australia have extended the application of their provisions by covering the giving of any money or property for the "benefit of" the recipient,[14] unless a contrary intention can be found.[15] However, each jurisdiction has placed a monetary limit on the value of such gifts, so that, in order to be taken into account, the gifts must be valued at more than $10,000 in the Australian Capital Territory and $1,000 in South Australia and the Northern Territory.[16]

8.11 The Australian Capital Territory, Northern Territory and South Australia have also limited the application of their provisions to gifts given no more than 5 years before the death of the intestate.[17] The Law Reform Commission of Tasmania has explained the benefits of a time limit, before which gifts need not be brought to account:

> **Details of gifts may become sketchy over long periods of time; and the law should not place too much constructive interpretation on the treatment of relatives by an intestate during his lifetime. The law should not retrospectively determine how he should have treated his family during his lifetime, but rather how he most probably would**

12. *Administration and Probate Act 1958* (Vic) s 52(1)(f)(i).
13. *Administration and Probate Act 1935* (Tas) s 46(1)(c).
14. The Northern Territory adds the old provisions - "to or for the benefit of his or her child, or settled any money or property for the benefit of his or her child, by way of advancement or on marriage of the child": *Administration and Probate Act 1969* (NT) s 68(3)(b).
15. *Administration and Probate Act 1919* (SA) s 72K(1)(a); *Administration and Probate Act 1929* (ACT) s 49BA(1); *Administration and Probate Act 1969* (NT) s 68(3).
16. *Administration and Probate Act 1919* (SA) s 72K(1)(d); *Administration and Probate Act 1969* (NT) s 68(3)(d).
17. *Administration and Probate Act 1919* (SA) s 72K(1)(a); *Administration and Probate Act 1929* (ACT) s 49BA(1)(a); *Administration and Probate Act 1969* (NT) s 68(3)(a).

> have treated them had he made a will or had he made a will which effectively dealt with his entire estate.[18]

8.12 Each jurisdiction, however, varies considerably as to the people whose benefits must be taken into account. The Northern Territory limits the application of its provision to children of the intestate. South Australia extends it to any person entitled under the rules of intestacy, other than the surviving spouse or partner of the intestate.[19] The Australian Capital Territory also extends it to any person entitled under the rules of intestacy, other than the surviving spouse or partner of the intestate but also extends the coverage of the provision to any gifts to an otherwise "unentitled" spouse or partner of a person who is entitled. An "unentitled partner" is a person who is not entitled to a share of the intestate estate and who was the partner of the entitled person in question at the time of the gift to the entitled person, and was either the spouse of the entitled person at the time of the gift; or had been their domestic partner continuously for two or more years at the time; or was a parent of a child of the entitled person, if the child was under eighteen at the time.[20]

8.13 The Law Reform Commission of Tasmania suggested that spouses should not have to account for gifts given to them by the intestate as there would be:

> an untold number of substantial gifts given by one spouse to the other during their time together, and in many cases it might be difficult to determine what is a gift and what is the result of a combined contribution by both spouses.[21]

8.14 The Australian Capital Territory and Northern Territory provide that the valuation of the gifts must be made as at the date of death of the intestate.[22] South Australia fixes the valuation at the date of gift.[23]

8.15 The requirement that any advancement be accounted for presumes that the intestate "…would have wished to bring about equality on the distribution of the intestate estate."[24] Given the equitable origins of the doctrine of hotchpot, Certoma has argued that, "[t]hese doctrines are based

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18. Law Reform Commission of Tasmania, *Report on Succession Rights on Intestacy* (Report 43, 1985) at 18.
19. *Administration and Probate Act 1919* (SA) s 72K(1)(a).
20. *Administration and Probate Act 1929* (ACT) s 49BA(4).
21. Law Reform Commission of Tasmania, *Report on Succession Rights on Intestacy* (Report 43, 1985) at 17.
22. *Administration and Probate Act 1969* (NT) s 68(4); *Administration and Probate Act 1929* (ACT) s 49BA(2).
23. *Administration and Probate Act 1919* (SA) s 72K(2).
24. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 440.

upon the principle that equity leans against double portions according to which a parent is presumed to intend to produce equality of benefit amongst his or her children." Rather than being abolished, he suggests the doctrine should be extended to include testamentary gifts.[25]

8.16 General arguments against taking account of gifts made during the lifetime of the intestate include the difficulty of making investigations about such gifts and obtaining valuations.[26] The rule could also be seen as defeating the intentions of the deceased.[27]

8.17 The benefits of abolishing the requirement that *inter vivos* gifts be accounted for may be understood by recognising that advancements to children, such as those given by way of marriage settlement, are not common in contemporary society. Merit, however, may still be identified in a requirement which, "does not interfere with planned inequality, but, in the case of issue at least, …rejects accidental inequality in favour of that degree of equality produced by hotchpot."[28]

8.18 The Queensland Law Reform Commission's arguments against the doctrine of hotchpot, as originally established, were based on the low frequency with which its provisions would be called into operation. The contemporary intestate, who will have given a gift upon the marriage or setting up for life of a child, will most likely die at a considerable age. Any gift made upon the marriage or setting up for life of a child will have been made many years before any of the time periods provided by the relevant statutes. If issue feel that an inequitable distribution has resulted, they may make a family provision claim.[29] As noted above, however, some jurisdictions have overcome some of these concerns by extending the application of the provisions to cover benefits other than settlements for advancement or upon marriage. This may, however, have the effect of unnecessarily complicating the administration of estates where gifts to be taken into account will have to be ascertained and valued.

ISSUE 8.1

What provisions, if any, should be made to take into account gifts given by the intestate before death to persons who are entitled to take according to the rules of intestacy?

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25. G L Certoma, *The Law of Succession in New South Wales* (3rd ed, LBC Information Services, Sydney, 1997) at 40.
26. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 60.
27. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 12.
28. I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, Sydney, 1989) at 441.
29. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 60.

TESTAMENTARY GIFTS

Qld	
ACT	s 49D
NSW	
NT	s 70
SA	s 72K
Tas	s 44(4), s 47(a)
Vic	s 53(a)
WA	
NZ	s 79
Eng	

8.19 Some jurisdictions specify classes of people who are generally required to account for any testamentary gifts they have received in the case of a partial intestacy. The result is that their entitlement under the intestacy will be reduced by the value of the testamentary gift.[30]

8.20 Four jurisdictions make provision for the situation where a spouse or partner of the intestate receives a benefit under the will.[31] In three cases, if the value of the beneficial interest given to the intestate's spouse or partner is less than the statutory legacy to which they are entitled in intestacy – the spouse or partner will be entitled to the statutory legacy less the amount of the beneficial interest. If the value of the beneficial interest given to the spouse or partner is greater than the statutory legacy to which they are entitled in intestacy – the spouse or partner will not be entitled to the statutory legacy.[32] However, the spouse or partner will only have to account where the intestate is survived by particular relatives - issue in the Australian Capital Territory,[33] or issue, parents, siblings or the issue of siblings in the Northern Territory.[34] In Tasmania, however, it is simply stated that a testamentary gift to a spouse or partner shall be taken to have been given in or towards satisfaction of their share of the intestate estate. This will be the case unless a contrary intention was expressed in the will or appears from the circumstances of the case. Tasmania makes

30. *Administration and Probate Act 1929* (ACT) s 49D(3); *Administration and Probate Act 1919* (SA) s 72K(1)(b); *Administration and Probate Act 1935* (Tas) s 44(4), s 47(a); *Administration and Probate Act 1958* (Vic) s 53(a); *Administration and Probate Act 1969* (NT) s 70(3) and (4); and *Administration Act 1969* (NZ) s 79(2).
31. *Administration and Probate Act 1935* (Tas) s 44(4) and s 47(a); *Administration and Probate Act 1929* (ACT) s 49D(1) and (3); *Administration and Probate Act 1969* (NT) s 70(3) and (4); and *Administration Act 1969* (NZ) s 79.
32. *Administration and Probate Act 1929* (ACT) s 49D(3)(b); *Administration and Probate Act 1969* (NT) s 70(3) and (4); and *Administration Act 1969* (NZ) s 79(2)(b).
33. *Administration and Probate Act 1929* (ACT) s 49D(3).
34. *Administration and Probate Act 1969* (NT) s 70(3) and (4).

the point of stating that the statutory legacy will only take effect – if the husband or wife brings the gift into account at a valuation – as at the intestate's death.

8.21 In the Northern Territory, if the intestate's child acquires an interest under the intestate's will and is also entitled to a share of the intestate's estate, the testamentary benefit must be brought into account at a valuation as at the intestate's death.[35]

8.22 South Australia provides that when a testamentary gift is given to a person who is also entitled to a share of the intestate estate, the gift must be taken to have been given in or towards satisfaction of the entitled person's share of the intestate estate. This will be the case unless a contrary intention was expressed or appears from the circumstances of the case, or the value of the gift does not exceed $1,000.[36]

8.23 In Victoria, any real or personal property, or any estate or interest therein acquired by any issue of the intestate under his or her will, must be brought into account by the issue.[37]

8.24 The Queensland Law Reform Commission saw provisions requiring testamentary benefits to be brought into account as being "contrary to the intestacy theory":

> Proposals that a spouse or indeed any other beneficiary under an intestacy should bring other benefits into account run counter to the basic assumption of what intestacy rules are about. An administrator should not be saddled with having to take a general account of all the benefits which the deceased intentionally conferred, whether directly or indirectly, on the surviving spouse, so as to reduce the benefit to the spouse of intestacy rules. Moreover, it would be unprecedented to confer upon an administrator the investigatory powers which would be necessary to establish the facts and strike an account. Accordingly, the Commission recommends that a statutory beneficiary should not be required to account for any benefits received under any will made by the intestate or under any gift or entitlement received from the intestate during the intestate's life-time, or payable on the intestate's death.[38]

35. *Administration and Probate Act 1969* (NT) s 70(6).
36. *Administration and Probate Act 1919* (SA) s 72K(1).
37. *Administration and Probate Act 1958* (Vic) s 53(a).
38. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 53.

8.25 The Law Commission of England and Wales raised similar concerns about the requirement that testamentary gifts be accounted for, "[i]n particular, it can defeat the very object of the deceased in making the partial dispositions in the will. The rule is complicated and difficult for administrators to apply and its abolition would greatly simplify the administration of estates".[39]

ISSUE 8.2

What provision, if any, should be made for the taking into account of testamentary benefits received by persons who are also entitled under the rules of intestacy?

39. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 14.

9. Indigenous people

- Indigenous kinship
- Current provisions
- A way forward?

9.1 There are many different types of Indigenous communities in Australia: rural, urban, traditional and historical communities, including groups that have gathered together from different regions. Indigenous people may continue to live traditional lifestyles, or they may be involved in various ways and to various extents in non-Indigenous lifestyles. This makes it difficult to formulate a general scheme that would be inclusive of all the diversity in Indigenous communities throughout Australia.

INDIGENOUS KINSHIP

9.2 In general in Australia, the distribution of property on intestacy is based on a relatively narrow range of family relationships that are reflective of English, or at least Western, law and society. It may, therefore, be inappropriate to apply the current general intestacy rules to members of Indigenous communities, who may have a broader concept of family relationships.[1] For example, the Australian Law Reform Commission has stated that, unless the particular nature of Aboriginal family relationships was recognised in the intestacy provisions, the application of the general principles, with their fixed lists of next of kin, would remain inappropriate. The Commission noted that, "[t]he Aboriginal kinship system may include persons who are not blood relations at all (as distinct from classificatory relations), and yet there may be important obligations and rights existing between the deceased and such a person".[2] Other commentators have observed:

> It is very important to note that Aboriginal kinship structures are very different from Western kinship structures and that customary law obligations flow from those kinship relationships. This applies whether or not the Aboriginal people seem to have traditional lifestyles.[3]

9.3 It has also been noted that "the extreme emphasis on lineal, bloodline relationships in the common law contrast with the acceptance of collateral, adopted and maritally linked relatives in Aboriginal customary law".[4] Examples of such differences include:

- willingness to recognise kinship without blood relationship, including adoption and by marriage;

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1. See R F Atherton and P Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, LexisNexis Butterworths, Australia, 2003) at 32.
2. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 227.
3. R F Atherton and P Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, LexisNexis Butterworths, Australia, 2003) at 33; P Vines, "Wills as shields and spears" (2001) 5(13) *Indigenous Law Bulletin* 16 at 16.
4. P Vines, "Wills as shields and spears" (2001) 5(13) *Indigenous Law Bulletin* 16 at 16.

- equivalence of some relatives (eg all sisters' sons may be regarded as brothers, while opposite-sex siblings may be regarded as cousins);
- non-lineal view of time - kin names like 'father' may be repeated at what non-Aborigines would regard as different generational levels. This reflects a more circular view of time with regards to kinship.[5]

9.4 The possibility has been raised that the relationships specified in the legislation could, for the purposes of that legislation, be interpreted more broadly than they would be at common law. As Justice McPherson said:

> I am conscious of the fact that the designation of Aboriginal relationships such as mother, brother, sister and so on, may not necessarily be the same as those relationships in western society, which is evidently the criterion used as the basis for distribution on intestacy under the Succession Act. It is possible (I say no more) that for succession purposes relationships are capable in some circumstances of being understood in ways that are broader than would ordinarily be the case at common law…[6]

CURRENT PROVISIONS

9.5 Only a few jurisdictions make provision for Indigenous persons in relation to intestacy. Broadly, these provisions fall into two categories. First, those that recognise Indigenous customary marriages for the purpose of distribution according to the general intestacy rules. Secondly, those that provide for a separate or additional distribution regime for Indigenous people in certain circumstances.

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5. P Vines, "Wills as shields and spears" (2001) 5(13) *Indigenous Law Bulletin* 16 at 16.
6. *Jones v Public Trustee of Queensland* (2004) 209 ALR 106 at para 20 (McPherson JA).

Recognition of customary marriage

Qld	*Community Services (Aborigines) Act 1984* s 173; *Community Services (Torres Strait) Act 1984* s 183
ACT	
NSW	
NT	s 6(1), s 6(4), s 67A
SA	
Tas	
Vic	
WA	*Aboriginal Affairs Planning Authority Act 1972* s 35; *Aboriginal Affairs Planning Authority Act Regulations 1972* r 9
NZ	
Eng	

9.6 At its most basic level, the recognition of Indigenous customary marriages for the purposes of intestacy is simply a means of bringing Indigenous persons into the general scheme for distribution on intestacy by including customary marriage in the definition of spouse.

9.7 In the Northern Territory and Western Australia, Aboriginal customary marriages are recognised in intestacy. Such recognition will only have effect in intestacy if the couple have not entered into a valid marriage under the *Marriage Act 1961* (Cth). This may not be a great obstacle, as the Australian Law Reform Commission recorded that it had been estimated that at least ninety per cent of marriages between "traditional Aborigines" were not made according to the requirements of the Commonwealth Act.[7] Older Aboriginal Persons may, however, be caught by this restriction as "a *Marriage Act* marriage is one of the few things that Aborigines living on reserves run by missions did have performed in a non-Aboriginal manner".[8] Western Australia recognises some Aboriginal marriages for the purposes of intestacy, holding that a spouse may be ascertained and entitled, when the intestate is survived by a person of the opposite sex who, "according to the social structure of the tribe to which[s]he belonged" is the spouse of the deceased. The intestate's children and parents may also be determined in the same manner.[9]

7. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 173.
8. P Vines, "Wills as Shields and Spears" (2002) 5(13) *Indigenous Law Bulletin* 16 at 17.
9. *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) reg 9(1).

9.8 A provision recognising Indigenous customary marriages was included in proposed intestacy provisions published by the Queensland Law Reform Commission in 1992:

> Where a relationship between two persons is recognised by Aboriginal or Torres Strait Island customary law that relationship is recognised for the purposes of this Part unless recognition of the relationship would confer rights which would not be conferred by customary law.[10]

However, this provision was not included in the Commission's final report.[11]

Polygamy

9.9 While Aboriginal intestates may be survived by a spouse and a de facto partner, the situation has also been raised of the deceased having been in a polygamous customary marriage with more than one spouse. Despite the decline of polygamy, especially in urban Aboriginal communities, Dr Sutton observed that, "…it is not uncommon for second and third marriages to be concealed from authorities where those authorities disapprove of polygyny…At present one must assume that polygyny will be around for an indefinite future, even if it continues to decline in gross terms."[12] The, albeit declining, presence of polygamous customary marriage between Aboriginal people was identified by the Australian Law Reform Commission in its report into the recognition of Aboriginal customary laws.[13]

9.10 The Northern Territory specifically provides for Aboriginal people leaving more than one spouse. The spouse's entitlement, including the value of personal chattels, will be divided equally amongst the spouses.[14] This position is similar to the general provisions in South Australia and New Zealand, which divide the spouse's entitlement equally between the spouse and the de facto regardless of the length of their relationships or their living arrangements.[15] The right of a spouse or de facto to appropriate the matrimonial home, however, does not exist in the Northern Territory.

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10. Draft s 34(3) in Queensland Law Reform Commission, *Intestacy Rules* (Working Paper 37, 1992) at 31.
11. See para 9.27 below.
12. P Sutton, "Aboriginal Customary Marriage – Determination and Definition" (1985) 12 *Aboriginal Law Bulletin* 13 at 14.
13. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31,1986) Vol 1 at 169.
14. *Administration and Probate Act 1969* (NT) s 67A.
15. See para 3.69 above.

The relevance of de facto relationships provisions

9.11 Even where a marriage between two Aboriginal people is not recognised under Commonwealth law, the requirements of a de facto relationship may have been satisfied. In such a case the cohabitation, rather than the marriage, is recognised.[16] Distribution can then be made according to the general provisions.

> ISSUE 9.1
>
> What provision, if any, should be made to recognise Indigenous customary marriages for purposes of intestacy?

Additional/separate distribution regimes

Qld	*Community Services (Aborigines) Act 1984* s 173; *Community Services (Torres Strait) Act 1984* s 183
ACT	
NSW	
NT	s 6(1), s 6(4), s 71-71F
SA	
Tas	
Vic	
WA	*Aboriginal Affairs Planning Authority Act 1972* s 35, *Aboriginal Affairs Planning Authority Act Regulations 1972* reg 9
NZ	*Te Ture Whenua Maori Act 1993* s 109-110
Eng	

9.12 Only three Australian jurisdictions make additional or separate provisions for the distribution of estates of intestate Indigenous persons. The provisions in two of these jurisdictions appear to draw on attitudes and approaches that are more appropriate to the old Aboriginal protection systems. One commentator has noted that the effect of the Western Australian and Queensland regimes has been to remove control over intestate estates from Indigenous next of kin (as administrators) and give control to government officials.[17] Such a removal of control from Indigenous people in the management of their families' affairs is inappropriate.

Western Australia

9.13 In Western Australia, the property of all people of Aboriginal descent who die intestate vests in the Public Trustee to be distributed according to the State's intestacy rules. If those entitled under the general regime

16. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 175.
17. P Vines, "Wills as shields and spears" (2001) 5(13) *Indigenous Law Bulletin* 16 at 17.

cannot be found, distribution is to be made by reference to the Regulations, which, according to the Act, should, to the extent that it is practicable, "provide for the distribution of the estate in accordance with the Aboriginal customary law as it applied to the deceased at the time of his death".[18] However, the current provisions recognising customary law really only acknowledge "tribal marriage" and then provide for a more limited range of relatives who are entitled than even the regime that applies to the general community allows.[19] There is no consideration of a category of customary next of kin any wider than the spouse, children and parents of the intestate.[20]

9.14 If no valid claim is made within two years of the intestate's death provision is made for beneficial distribution to a person with a moral claim, or for the estate to be held in trust by the Aboriginal Affairs Planning Authority to be "used for the benefit of persons of Aboriginal descent".[21] The Act defines an Aboriginal person as "a person of Aboriginal descent only if he is also of the full blood descended from the original inhabitants of Australia or more than one fourth of the full blood".[22] This definition does not accord with the generally accepted definitions of Aboriginality contained in other legislation and given the small size of the estates of many Aboriginal intestates, such a requirement may prove relatively costly as the blood descent of each claimant must be determined.[23] The Aboriginal person must also not have been married under the *Marriage Act 1961* (Cth)[24] which must further limit the application of the provisions.

Queensland

9.15 Queensland has established separate regimes upon intestacy for both Aboriginal people and Torres Strait Islanders. If an Aboriginal or Torres Strait Islander dies intestate and it proves "impracticable to ascertain the person or persons entitled in law to succeed to the estate … or any part of it" the chief executive of the Aboriginal and Islander Affairs Corporation may determine "which person or persons shall be entitled to so succeed or whether any person is so entitled".[25] This distribution is entirely at the

18. *Aboriginal Affairs Planning Authority Act 1972* (WA) s 35(2).
19. *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) reg 9.
20. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 228; P Vines, "Wills as shields and spears" (2001) 5(13) *Indigenous Law Bulletin* 16 at 17.
21. *Aboriginal Affairs Planning Authority Act 1972* (WA) s 35(3).
22. *Aboriginal Affairs Planning Authority Act 1972* (WA) s 33.
23. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 229.
24. *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) reg 9.
25. *Community Services (Aborigines) Act 1984* (Qld) s 173(1); *Community Services (Torres Strait) Act 1984* (Qld) s 183(1).

chief executive's discretion and, although he or she may have reference to Indigenous customary law, the distribution is not required to accord with any customary practices.

9.16 If the chief executive is unable to determine that any person is entitled to succeed to the estate or a part of the estate, that property shall "vest in the chief executive who shall apply the moneys or the proceeds of the sale of any property (less the expenses (if any) of such sale) for the benefit of [Aborigines/Islanders] generally" under the schemes whereby the chief executive may grant aid to Indigenous persons who apply for it on such terms as the chief executive may think fit.[26]

Northern Territory

9.17 The Northern Territory provides for a separate regime for distribution of the intestate estate of an Indigenous person, but only in relation to an intestate Indigenous person who "has not entered into a marriage that is a valid marriage under the *Marriage Act 1961* of the Commonwealth".[27] This requirement may prove to be too limiting in many cases, especially where marriage under the *Marriage Act 1961* (Cth) may be entirely incidental to other relationships of kinship of which some individuals may be a part.

9.18 A person who claims to be entitled to take an interest in an intestate Aboriginal Person's estate under the customs and traditions of the community or group to which the Aboriginal intestate belonged or a professional personal representative (like the Public Trustee) may apply to the Court for an order for distribution of the estate. Such an application must be accompanied by a plan of distribution of the intestate estate prepared in accordance with the traditions of the community or group to which the Aboriginal intestate belonged.[28]

9.19 An example of the application of such a plan can be found in a recent judgment of the Northern Territory Supreme Court:

> [3] The estate comprises cash only in the hands of the Public Trustee amounting to approximately $28,700.
>
> [4] The affidavit evidence of each of three deponents, senior members of clan groups making out the Jawoyn people, asserts that she or he is qualified and authorised by Jawoyn tradition to say who is entitled to take an interest in the estate under the customs and traditions of the Jawoyn. That evidence is consistent in showing that the intestate was

26. *Community Services (Aborigines) Act 1984* (Qld) s 169, s 173(4); *Community Services (Torres Strait) Act 1984* (Qld) s 179, s 183(4).
27. *Administration and Probate Act 1969* (NT) s 71(1)(a).
28. *Administration and Probate Act 1969* (NT) s 71B.

> the last member of another clan, that he was "grown up" by the late Gerry Mumbin who has three living children, Kevin, Kathleen and Lisa. Those children, in classificatory terms, were the "wives" and "brother-in-law" of the intestate. As the deceased had no children, the Mumbin siblings were his close family. The evidence also shows that Kevin, Kathleen and Lisa Mumbin succeeded to the non Aboriginal estate of the intestate in accordance with the customs and traditions of the Jawoyn and are entitled in equal shares. A letter to the Public Trustee from the Executive Director of the Jawoyn Association confirms that evidence. ...
>
> [6] The plan of distribution proposes that the estate be divided into three parts (I assume equal parts) and that one of each part be distributed to Kevin, Kathleen and Lisa Mumbin.
>
> [7] I am satisfied that in all the circumstances it would be just to order that the estate be distributed in accordance with the plan and order accordingly.[29]

9.20 An application must be made within six months after administration of the intestate estate has been granted. This time may, however, be extended by the Court whether or not the six months has expired and subject to whatever, if any, conditions the Court thinks fit. No application will be allowed after the intestate estate has been lawfully and fully distributed.[30]

9.21 The Court may order that the intestate estate (or in part thereof) be distributed in a specified manner. In making the order for distribution the Court must take into account the traditions of the community or group to which the intestate belonged and the plan that accompanied the application. In any event, the Court will not make any order for distribution "unless it is satisfied that to make the order would, in all the circumstances, be just".[31]

9.22 The Court may distribute any or all of the intestate Aboriginal person's estate, including that which has been distributed by the administrator before the administrator has had notice of an above application. Where the administrator has made a distribution, before or after receiving notice of an application, the Court will not disturb such a distribution as long as it was "made for the purposes of providing for the maintenance, education or advancement in life of a person who was totally or partially dependent on the intestate Aboriginal [person] immediately before his or her death".[32]

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29. *Application by the Public Trustee for the Northern Territory* [2000] NTSC 52.
30. *Administration and Probate Act 1969* (NT) s 71C.
31. *Administration and Probate Act 1969* (NT) s 71E.
32. *Administration and Probate Act 1969* (NT) s 71F.

9.23 As with the general provisions, the debts and liabilities of the estate, the funeral and testamentary expenses, the costs and expenses of administering the estate and the estate duties, succession duties and other duties and fees payable in relation to the estate are not included in the intestate estate of an intestate Aboriginal person.[33]

New Zealand

9.24 New Zealand has established a scheme of entitlement in relation to Maori freehold land on intestacy. The scheme will apply when the owner of any beneficial interest in Maori freehold land dies intestate. Distribution is made per stirpes and will go firstly to any of the intestate's issue who survive him or her. If there are none, then the land will go to the intestate's siblings or the issue of these siblings, if a sibling has not survived the intestate, but has left issue. Should no such relatives be found the chain of title shall be followed and priority granted to "the issue, living at the deceased's death, of the person nearest in the chain of title to the deceased who has issue living at the deceased's death."[34]

9.25 Should a surviving spouse be left by the intestate, that spouse is entitled to a life interest, or until remarriage, in the intestate's interest in the land unless a separation order or separation agreement is in force in respect of the marriage between the surviving spouse and the intestate. The spouse is entitled to surrender his or her entitlement.[35]

9.26 Aside from the scheme of entitlement to Maori freehold land all other property devolves according to the general scheme of distribution on intestacy.[36]

A WAY FORWARD?

9.27 Despite the distinctive and important role that kinship and marriage plays in Aboriginal society, the Queensland Law Reform Commission, in 1993, recommended against the recognition of customary rules:

> Until extensive work has been done to bring knowledge of customary law clearly into focus and widespread consultation has been initiated and brought to fruition, the Commission is of the view that it could be counter-productive, even misleading, to introduce legislation at the present time purporting to affect customary law, or to recognise it, in the narrow context of intestacy rules.[37]

33. *Administration and Probate Act 1969* (NT) s 71A.
34. *Te Ture Whenua Maori Act 1993* (NZ) s 109(1).
35. *Te Ture Whenua Maori Act 1993* (NZ) s 109(2)-(4).
36. *Te Ture Whenua Maori Act 1993* (NZ) s 110(1).
37. Queensland Law Reform Commission, *Intestacy Rules* (Report 42, 1993) at 13.

9.28 The model in operation in the Northern Territory may be an appropriate model. Prue Vines has usefully suggested that:

> The first step in legislation should be to extend the kinship group entitled on intestacy to one matching customary law patterns. If the requirement not to have been in a *Marriage Act* marriage is removed, the Northern Territory model is the best one on offer because it allows for the recognition of different patterns of customary law amongst different groups.[38]

9.29 The Northern Territory regime, in requiring that somebody must claim to be entitled to a distribution under Indigenous customs and traditions, also allows the possibility that the intestate estates of some Indigenous people can be distributed according to the general rules, which may be the most appropriate response in some circumstances.

ISSUE 9.2

Should the Northern Territory scheme for distribution on intestacy according to Indigenous customs and traditions be adopted?

ISSUE 9.3

If yes, does it require modification?

ISSUE 9.4

If no, should any separate scheme for distribution on intestacy be adopted for Indigenous people?

38. P Vines, "Wills as shields and spears" (2001) 5(13) *Indigenous Law Bulletin* 16 at 18.

10. Miscellaneous provisions

- Survivorship and intestacy
- Abolition of courtesy and right of dower
- References to statutes of distribution, heirs and next of kin

SURVIVORSHIP AND INTESTACY

10.1 The question of survivorship, as it affects intestacy provisions, arises in two situations:

- where the intestate and someone who may be entitled to take on intestacy have both died (either in the same event or separately) but, because of the circumstances of the deaths, the order in which they died is uncertain; and
- where a person who is otherwise entitled survives the intestate but dies within a certain number of days (usually less than a month) of the intestate.

The first situation will be dealt with in the National Committee's final report on the administration of estates of deceased persons, and will not be considered further in this Issues Paper.

Surviving the intestate by less than a month

Qld	s 35(2)
ACT	
NSW	
NT	
SA	s 72E
Tas	
Vic	
WA	
NZ	
Eng	s 46(2A)-(3)

10.2 Both South Australia and England provide that when a spouse or partner does not survive the intestate by more than 28 days, the estate will be distributed as if the spouse or partner had not survived the intestate at all.[1]

10.3 Queensland, on the other hand, extends its provisions to cover all people entitled on intestacy, not just spouses or partners and states that, if the person does not survive the intestate for a period of 30 days, the estate will be dealt with as if the person had not survived the intestate.[2]

1. *Administration and Probate Act 1919* (SA) s 72E; *Administration of Estates Act 1925* (Eng) s 46(2A) and s 46(3).
2. *Succession Act 1981* (Qld) s 35(2).

10.4 The Law Commission of England and Wales used an example to justify such a provision:

> a case involving a married couple with no children, who had both died intestate in a car crash. The husband's parents were prepared to proceed on the basis that it was not known which had survived, on the findings of the inquest without having evidence of a pathologist filed in the probate proceedings. However the wife's parents were not prepared to do so and therefore the Registrar had to call for expert evidence which increased the cost of probate without altering the result. If there had been a survivorship clause in the intestacy rules this would not have been necessary.[3]

10.5 Provisions requiring that beneficiaries survive testators by 30 days are common in wills and were originally included in wills to avoid an accumulation of death duties in the case of simultaneous or near simultaneous deaths.[4] The National Committee has previously recommended that the law of wills include a provision to the effect that beneficiaries under a will must survive the testator by 30 days unless a contrary intention appears in the will.[5] There would appear to be no reason why such a provision ought not be included in the law relating to intestacy.

ISSUE 10.1

What provision, if any, should be made to deal with situations where a person otherwise entitled on intestacy dies within a month of the intestate?

ISSUE 10.2

Should any provision be limited in application to surviving spouses or partners?

3. England and Wales, Law Commission, *Family Law: Distribution on Intestacy* (Report 187, 1989) at 14.
4. New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Report 85, 1998) at para 6.45.
5. New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Report 85, 1998) at para 6.47.

ABOLITION OF COURTESY AND RIGHT OF DOWER

Qld	*Intestacy Act 1877* s 28
ACT	s 48
NSW	s 52
NT	s 65
SA	s 46(3)
Tas	*Conveyancing and Law of Property Act 1884* s 89
Vic	*Dower Abolition Act 1880*; *Married Women's Property Act 1884* s 25
WA	s 16
NZ	*Married Women's Property Act 1952* s 4
Eng	s 45(1)(b),(c)

10.6 Estate by courtesy (or curtesy) and the right of dower both concern real property.

10.7 Estate by courtesy was a husband's right to a life estate in all of his wife's land on her death. The right was only exercisable if the wife's title in the land was capable of being disposed of by her through her will, if the wife had possession of the land before her death, if she had not already disposed of the land and if no child capable of inheriting the land had been born to the marriage.

10.8 The right of dower was a wife's right to a life estate in a third of all her husband's land (including that which he had alienated) on his death. This right was, again only exercisable if the husband's title in the land was capable of being disposed of by him through his will and if the husband had possession of the land before his death. Although the right could still have been exercised if a child had been born to the marriage, it could not if the dower had been "barred".

10.9 All jurisdictions have abolished courtesy and the right of dower. The majority have included the abolition in their current provisions relating to intestacy,[6] or at least administration of estates.[7] Others have, however, abolished dower and courtesy in other statutes.[8] There would appear to be

6. *Administration and Probate Act 1929* (ACT) s 48; *Administration and Probate Act 1969* (NT) s 65; *Administration Act 1903* (WA) s 16; *Administration of Estates Act 1925* (Eng) s 45(1)(c) and (d).
7. *Administration and Probate Act 1919* (SA) s 46(3); *Wills, Probate and Administration Act 1898* (NSW) s 52.
8. *Intestacy Act 1877* (Qld) s 28; *Conveyancing and Law of Property Act 1884* (Tas) s 89; *Dower Abolition Act 1880* (Vic); *Married Women's Property Act 1884* (Vic) s 25; *Married Women's Property Act 1952* (NZ) s 4. On the effect of a repeal of a provision repealing the right of dower, see *Marshall v Smith* (1907) 4 CLR 1617;

no reason why a provision abolishing courtesy and the right of dower should be included in any future legislative provisions.

ISSUE 10.3

Should the abolition of courtesy and right of dower be retained in any future legislative provisions relating to intestacy?

REFERENCES TO STATUTES OF DISTRIBUTION, HEIRS AND NEXT OF KIN

Qld	s 39
ACT	
NSW	
NT	
SA	
Tas	
Vic	s 56
WA	
NZ	s 80(1)
Eng	s 50(1)

10.10 Since the Statutes of Distribution have been replaced by the current provisions relating to intestacy, some jurisdictions provide that references made to any statutes of distribution in instruments made *inter vivos* or in a will shall be construed as references to the current intestacy rules; and references in such an instrument or will to an heir or heir at law or next of kin of a person shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on the intestacy of that person under the current provisions.[9]

and in Queensland, see *Acts Interpretation Act 1954* (Qld) s 20 whereby a repeal of the Act will not revive the interests.

9. *Succession Act 1981* (Qld) s 39; *Administration and Probate Act 1958* (Vic) s 56; *Administration Act 1969* (NZ) s 80(1) (but not including "heir" or "heir at law"); and *Administration of Estates Act 1925* (Eng) s 50(1) (but not including "heir" or "heir at law"). See the discussion on such provisions in Queensland Law Reform Commission, *The Law Relating to Succession* (Report 22, 1978) at 24.

10.11 Lee suggests that this is one of a number of construction provisions in the *Succession Act 1981* (Qld) "designed to remedy comparatively common problems arising from inappropriate use of terminology in wills".[10]

ISSUE 10.4

Is there a need to retain provisions for the construction of references to:

- any statutes of distribution;
- an heir or heir at law; or
- next of kin?

10. **W A Lee and A A Preece, *Lee's Manual of Queensland Succession Law* (5th edition, LBC Information Services, 2001) at 173; see also 225 and 230.**

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