# SUCCESSION AMENDMENT BILL 1997

# EXPLANATORY NOTES

## GENERAL OUTLINE

### Objectives of the Legislation

To reform the Queensland succession laws by amending Part III of the *Succession Act 1981*—Distribution on Intestacy—and replacing it with new intestacy provisions that:

- give an increased legacy to the spouse
- recognise opposite sex de facto relationships of 5 years duration
- reinstate the traditional *per stirpes* rule to govern entitlements of issue of the intestate
- make a number of other reforms

### Reasons for the objectives and how they will be achieved

The Queensland Law Reform Commission received a reference to make recommendations to bring the Queensland intestacy laws up to date. Working Paper No. 37 was issued in July 1992 and Report No. 42 in June 1993. None of the Commission recommendations have yet been enacted in law. This Bill is based on a number of the Commission recommendations.

An intestacy occurs when people die either not having made a will at all, or having made a will which does not cover all of their property.

The Rules currently provide for $^1/_2$ or $^1/_3$ of the estate to be distributed to the spouse. The balance goes first to the children and then to more remote issue of the intestate. If there is no spouse or issue, then to the intestate's

parents, brothers and sisters, nephews and nieces, then grandparents, then uncles and aunts, then cousins.

It is important to note that if adequate provision for maintenance and support is not made for a dependent parent, child, spouse (including de facto spouse of 5 years), a family provision application can be made under Part 4 of the *Succession Act.* The court has a discretion to order that such provision be made. A family provision claim will supersede any intestacy rights or legacy.

It is difficult to estimate with any accuracy the number of intestacies and there are no precise statistics available as far as Queensland is concerned. In 1988 the Law Commission of England and Wales in Working Paper No. 108 entitled "*The Distribution on Intestacy*" estimated that about 1/2 the population die intestate. That figure is significantly lower in Queensland, possibly as low as 20% of the population, due in part to the free will-making service offered by the Public Trustee.

The average age for death among males in Australia, in 1997, was 75 and for women, 80.8 years. The Intestacy Rules operate, primarily in relation to this older age group.

- A surviving spouse will most probably be a retired woman in the 75 to 80 year age group.
- Any children of the intestate and the spouse will most probably be mature rather than young adults or infants.
- The parents of the intestate will most probably already be dead.
- It will be unusual for the intestate to die leaving more than one spouse (married or de facto).

The Public Trust Office has one of, if not the largest intestacy practices in Queensland—13.5% of the estates they administer are intestacies. These have an average value of about $92,000 (including real property).

The most notable reform is the increased legacy to the spouse and the recognition of opposite sex de facto relationships of 5 years duration. When there is a surviving spouse or de facto spouse and issue, the spouse or de facto spouse takes the household chattels, $100,000 and 1/2 the residue if one child, (1/3 residue if more than 1 child) and the issue take the balance. When there are no issue, the surviving spouse or de facto spouse will take the entire estate. The residue no longer has to be shared with the parents, brothers and sisters, and nieces and nephews of the intestate.

The Bill also reinstates the traditional *per stirpes* rule to govern entitlements of issue of the intestate. The effect of the change is that where all the children of the intestate predecease the intestate leaving issue, the issue will now take *per stirpes* (or by representation) instead of *per capita* (in equal shares). The new distribution is set out in section 36A.

A number of other reforms are also made, for example, statutory beneficiaries will no longer be required to account for any beneficial interest received under a will, on a partial intestacy.

## Administrative cost to Government of implementation

Nil.

## Fundamental legislative principles

The Bill is consistent with fundamental legislative principles.

## Consultation

The Commission consulted using Working Paper No. 37. Over 660 copies were distributed to:

- Queensland Judiciary and courts
- Federal Judiciary
- Church organisations and committees
- Aboriginal and Torres Strait Islander Councils
- Community Legal Centres and others providing legal services
- several Queensland law firms
- Association of Labor Lawyers
- Queensland Council of Civil Liberties
- several legal bodies including law and bar associations
- Universities and law schools
- education institutions and law reform commissions

- Ethnic Community Councils and Services
- Trustee Companies Assn of Australia (Qld Council)

There were 14 respondents to the Working Paper. Their comments were taken into account when preparing the final report (No. 42) which contains the Commission recommendations.

The Department of Justice circulated almost 100 copies of a draft Bill and explanatory document to a number of persons, including:

- Queensland Judiciary and courts
- Community Legal Centres and others providing legal services
- several Queensland law firms
- the Queensland Law Society and Bar Association of Queensland
- University law schools
- all previous respondents to the Commission Working Paper No. 37

Sixteen responses were received. Their comments were taken into account in preparing this Bill. *Clause 12,* Division 3 was added to the Bill as a result of the consultation. It gives a spouse or de facto spouse an election to acquire the matrimonial home, effectively at market value, if they ordinarily resided in it at the time of the intestate's death. This scenario would arise if the title to the matrimonial home was held by the intestate solely in the intestate's name or as a tenant-in-common with the spouse or de facto spouse. This election exists in most other Australian jurisdictions.

The Legal Branch, Department of the Premier and Cabinet confirmed that there are no native title implications on this election and transfer as the burden of native title will go with any transfer of the property.

# NOTES ON PROVISIONS

*Clause 1* Short Title for this Bill.

*Clause 2* Provides for the Act to commence on a day to be fixed by proclamation. This will permit people to be informed of the new

provisions. Consideration is also being given to having a revenue ruling confirming this advice in place on proclamation of this Bill in relation to *Clause 9, section 36*.

*Clause 3* Provides for the amendment of the *Succession Act 1981* by this Bill.

*Clause 4* Amends section 5 by adding the definition of “de facto spouse.” The definition of de facto spouse is the same as that already existing in s. 40 of the *Succession Act* for family provision applications. The qualifying period will be 5 years of the 6 years immediately preceding the death. The qualifying period will not be reduced if there is a child of the relationship. The relationship must exist at the time of death.

Clause 5 Inserts a new division heading before section 34.

*Clause 6* Inserts a number of definitions.

*Clause 7* Inserts a definition of “household chattels” and “matrimonial home.” Any chattel that are used exclusively for business purposes will not fall within the definition of household chattels. Similarly, money and security for money or other investments do not come with the definition of household chattels and therefore, there is no need to exclude them here. The same would apply to a coin or stamp collection that was used for investment purposes.

*Clause 8* Makes the distribution of the residuary estate subject to Division 3—Provisions about matrimonial home.

*Clause 9* Replaces section 36 with a new section 36 and 36A.

*Section 36* sets out how the entitlement is to be distributed if both a spouse and de facto spouse are entitled to a whole or a part of the intestate's residual estate. There are three possible methods for distributing the entitlement when there is *both* a spouse and a de facto spouse potentially entitled to the spouse's share:

s. 36(1)(a) a distribution agreement, which is a written agreement between the spouse and the defacto.

s. 36(1)(b) a distribution order made by a court on the basis of what the court considers just and equitable

s. 36 (1)(c) in equal shares if a number of conditions are met.

Transfers of property under either a will or intestacy currently

attract only a nominal stamp duty. Advice has been received from the Office of State Revenue confirming that a distribution of the entitlement under section 36 will also attract only a nominal stamp duty. Consideration is being given to having a revenue ruling confirming this advice in place on proclamation of this Bill.

*Section 36A* sets out the way to distribute the entitlement of issue. The traditional *per stirpes* rule is reinstated. The effect of the change is that where all the children of the intestate predecease the intestate leaving issue, the issue will now take *per stirpes* (or by representation) instead of *per capita* (in equal shares). In summary, the entitlement of issue is to be distributed in the following way:

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| s. 36E (3) | If the intestate had one child and the child survives, the child takes. |
| s. 36E (4) | If the intestate had 2 or more children, all of whom survived, the children take in equal shares. |
| s. 36E (5) | If the intestate had 2 or more children, of whom some survived and the remainder did not survive and did not leave surviving issue, the surviving children take in equal shares. |
| s. 36E (6) & (7) | In all other instances the entitlement is divided into as many shares as the intestate had children who survived or who did not survive but left surviving issues. The intestate's surviving children take 1 share each. The other shares are taken by representation. |

*Clause 10* Amends the section heading to section 37.

*Clause 11* Omits sections 38(2) and (3). On a partial intestacy (that is, when there is a will but it does not cover all the property) beneficiaries will no longer be required to account for the value of the interest received under the will. This means, for example, that if the intestate is survived by a spouse and no issue, the spouse will no longer be required to deduct from the $100,000 statutory legacy any benefit received under the will.

Clause 12 Inserts Division 3—Provisions about matrimonial home.

*Sections 39 A-D* give a spouse or de facto spouse an election to acquire the matrimonial home effectively at market value, if that person ordinarily resided in it at the time of the intestate's death.

*Clause 13* Amends the definition of dependant in section 40 by replacing the definition of de facto spouse in paragraph (d) with the words "de facto spouse." The amendment is necessary because defacto spouse is now defined in section 5, by *clause 4* of the Bill.

*Clause 14* Inserts a new section 73. It declares that, to avoid any doubt, the provisions of this Bill do not apply to the estate of a person who died before the commencement of the Bill.

*Clause 15* Amends Schedule 2.

# SCHEDULE 2

## 'DISTRIBUTION OF RESIDUARY ESTATE ON INTESTACY'

## 'PART 1—INTESTATE SURVIVED BY SPOUSE OR DE FACTO SPOUSE'

**1.** If the intestate is not survived by issue, the surviving spouse or de facto spouse will take the entire estate. The residue no longer has to be shared with the parents, brothers and sisters, and nieces and nephews of the intestate. If there is both a surviving spouse and de facto spouse, the entire estate is to be divided in accordance with section 36. See *Clause 9.*

**2.** If the intestate is survived by issue, and there is a surviving spouse or de facto spouse, the spouse or de facto spouse takes the household chattels, $100,000 and $^1/_2$ the residue if one child, ($^1/_3$ residue if more than 1 child) and the issue take the balance. The entitlement to the balance of the residuary estate by the issue is set out in *Clause 7*, section 36A. If there is both a surviving spouse

and de facto spouse, the spouse's share is to be divided in accordance with *Clause 7,* section 36.

## 'PART 2—INTESTATE NOT SURVIVED BY SPOUSE OR DE FACTO SPOUSE'

When the intestate is not survived by a spouse or de facto spouse, there are no changes to the persons entitled to take an interest in the residual estate. The issue continue to be entitled to the whole of the residuary estate. The entitlement to the residuary estate by the issue is set out in *Clause 7*, section 36A.

When the intestate is not survived by a spouse or de facto spouse or issue, there are no changes to the persons entitled to take an interest in the residual estate. The parents, followed by the next of kin and the Crown continue to be entitled to the residuary estate.

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