# Succession Amendment Bill 2005

# Explanatory Notes

## General Outline

## Objectives of the Legislation

The Bill amends the *Succession Act 1981* to implement the recommendations of the National Committee for Uniform Succession Laws regarding the law of wills.

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

Succession laws were imported into the Australian colonies from English law. Over time, the succession laws applying in each jurisdiction have changed and diverged, with the result that there is little consistency between succession laws across the States and Territories.

The practical impact of this is that costs may be higher and administration of deceased estates more complex where a person dies in one jurisdiction but has assets in another.

In 1991, the Standing Committee of Attorneys-General (SCAG) initiated the Uniform Succession Laws Project. In 1992, the Queensland Law Reform Commission (QLRC) was asked to coordinate the Project. In 1995, the National Committee for Uniform Succession Laws, chaired by the Queensland Law Reform Commission, was established to examine four discrete areas of succession law - the law of wills, family provision, intestacy and estate administration.

In December 1997, the National Committee presented a final report to SCAG on the law of wills (QLRC MP29). The Report contained a model Wills Bill for introduction in each jurisdiction. The report and model Bill were based on the draft Victorian *Wills Act 1994* which drew on Queensland's Succession Act. Consequently, many of the amendments contained in the model legislation were either identical to, or substantially the same as, corresponding provisions of the Succession Act. However, the model legislation modernised the language used and introduced some significant changes to the law of wills, such as the concept of court authorised wills for minors and people who lack testamentary capacity.

In December 1997, QLRC released Report 52 on the law of wills. The QLRC Report assessed the extent to which the model legislation represented a change in existing law under the Succession Act and recommended several departures from the model legislation. The Bill implements the model legislation with several modifications recommended by the QLRC Report. The Bill does this by replacing Part 2 and other miscellaneous provisions (sections 49(3), 62, 63, 64 & 67) of the Succession Act which deal with the making, revocation, formal validity and interpretation of wills and powers of personal representatives.

Significant changes effected by the Bill include:

- the introduction of court authorised wills for minors and people who lack testamentary capacity;
- replacing the substantial compliance requirement for the execution of wills with a testamentary intention test;
- removing the requirement that a will must be signed at its foot or end;
- introducing provisions to allow the admission of limited evidence to aid in the interpretation of wills;
- new rules about the effect of marriage on wills;
- new rules about beneficiaries and interpreters who witness wills; and
- new provisions about who is entitled to see a will on the death of the testator.

### Administrative cost to Government of implementation

The implementation of the Bill is not expected to result in any additional administrative costs to Government.

### Consistency with Fundamental Legislative Principles

The Bill is consistent with fundamental legislative principles.

## Consultation

### Community

In the context of the Uniform Succession Laws Project, QLRC conducted public consultation on the law of wills by releasing an initial issues paper in

1994 and a subsequent working paper in 1996 to individuals and organisations with an interest or expertise in the law of wills.

In 2004, the Department of Justice and Attorney-General sought comment from the Chief Justice, Queensland Law Society and the Bar Association of Queensland on the National Committee's 1997 Report and model legislation. These stakeholders were subsequently consulted on exposure drafts of the Bill in April and July 2005.

### Government

In 2004, the Department of Justice and Attorney-General sought comment on the National Committee's 1997 Report and model legislation from the following:

- Public Trustee
- QLRC
- Adult Guardian
- Public Advocate
- the former Department of Families
- Disability Services Queensland.

These stakeholders were subsequently consulted on an exposure draft of the Bill in April and July 2005.

## Notes on Provisions

Clause 1 sets out the short title of the Act.

Clause 2 provides that the Act commences on a day to fixed by proclamation.

Clause 3 states that the Act amends the *Succession Act 1981* ('the Act').

Clause 4 amends section 5 of the Act by:

- omitting the definition of '*property*'. The exhaustive definition of '*property*' under s.36 of the *Acts Interpretation Act 1954* is to be relied for the purposes of the Act.

- updating the definitions of '*disposition*', '*internal law'* and '*will*'; and
- inserting new definitions of '*annulment*', '*divorce*', '*document*' and '*registrar*'.

Clause 5 inserts new section 5C which clarifies that a note in the text forms part of the Act.

Clause 6 replaces Part 2 of the Act with a new Part 2 containing provisions about the making, revocation, alteration, revival and interpretation of wills.

*New section 7* applies new Part 2 only to a will of a person who dies on or after the day new section 7 commences operation. This is subject to the transitional arrangements under new section 76, which applies new sections 14 and 15 to wills made before the commencement of new section 7, in certain circumstances.

*New division 2* deals with who may make a will and what property may be disposed of by will. It sets out the requirements for executing a valid will. It also sets out the circumstances in which an attesting witness or an interpreter may take a benefit under a will.

*New section 8* replaces and essentially restates section 7 of the Act. It sets out what property a person may dispose of by will, namely any property to which:

- the person is entitled at the time of his or her death (regardless of whether or not the entitlement existed when the will was made); and
- the person's personal representative becomes entitled, in their capacity as personal representative, after the person's death (regardless of whether or not the entitlement existed when the person died).

It expressly excludes property of which the person is trustee when he or she died.

*New section 9* replaces section 8 of the Act. It states the minimum age of capacity to make a will. Having regard to the definition of '*minor*' under s.36 of the Acts Interpretation Act, this remains at 18 years of age. However, subsection 9(2) enables a minor to validly make, alter or revoke a will in limited circumstances:

- in contemplation of a particular marriage (however, the will takes effect only if the contemplated marriage is solemnised).

Subparagraph 9(2)(a) represents an extension of the current law regarding a minor's will-making capacity. It is consistent with the law in relation to the capacity of minors to marry. Under the *Marriage Act 1961* (Cth), a person is of marriageable age if the person has attained the age of 18 years. However, a minor who is 16 or 17 years of age may apply to a judge or magistrate for an order authorising him or her to marry a particular person, despite the fact that the applicant has not attained the age of 18 years. Where a minor has been authorised to marry a particular person, it is understandable the minor may wish to make a will in contemplation of that marriage. New section 9(2)(a) enables a minor to have a will that is effective as soon as he or she has married.

- while married.

Subsection 9(2)(c) enables a minor who was, but is no longer, married to revoke a will already made in the circumstances outlined above, but does not enable the minor to make a new will. This is because a minor's will-making capacity is seen as an incident of marriage. The minor would require court authorisation under new section 19 to make another will (discussed below).

The minimum age requirement does not apply to a court-authorised will for a minor made under a section 19 order or under the law of a place outside Queensland.

*New section 10* replaces ss.9, 10, 11, 13 and 14 of the Act. It sets out the requirements for executing a valid will, namely:

- the will must be in writing;
- the will must be signed by the testator (or another person in the testator's presence and at the testator's direction). It is no longer necessary for the signature to be made at the 'foot' or end of the will;
- the testator (or other person in his or her presence and at his or her direction) must sign with the intention that the document constitutes the testator's will;
- the testator must make or acknowledge his or her signature in the presence of two or more witnesses who are present together. A person disqualified under subsection 10(10) can not witness a will (discussed below); and

- at least two of the witnesses must attest and sign the will in the testator's presence (though it is not necessary for them to so in the presence of each other). It is no longer necessary for the will to have an attestation clause.

Subsection 10(5) replaces and essentially restates section 13 of the Act. It states that it is not necessary for a witness to a will to know that the document he or she was witnessing was a will. This reflects the purpose of the witnessing requirement, namely to verify the authenticity of the testator's signature and to ensure the testator is signing voluntarily.

Subsection 10(10) replaces section 14 of the Act. It operates to disqualify a person who can not see and attest that a testator has signed a document, from acting as a witness to a will.

Subsection 10(11) provides that these execution requirements must be met in order to validate an appointment, made by will, in the exercise of a power of appointment by will. However, subsection 10(12) provides that where a power of appointment is exercised by will, the will has to comply only with the execution requirements under this section, without also having to comply with any additional requirements for the execution of the power by the instrument creating it.

Subsection 10(13) clarifies that these execution requirements do not apply to a court-authorised will for a person lacking testamentary capacity. This is because new section 26 specifies the execution requirements for a will made under a section 21 order (discussed below).

*New section 11* replaces section 15 of the Act and expands the exceptions to the rule under it. Subsection 11(2) voids a disposition to an attesting witness (or a person claiming under them). However, the operation of subsection (2) is not absolute - subsection 11(3) specifies circumstances in which a disposition to an interested witness is not void, namely if:

- there is a sufficiency of disinterested witnesses i.e. at least two of the attesting witnesses are not beneficiaries under the will – subparagraph (3)(a)
- all of the other beneficiaries consent in writing to the interested witness taking his or her share under the will – subparagraph (3)(b). Having regard to the operation of section 124 of the *Duties Act 2001*, the consent is not liable to stamp duty; or
- the court is satisfied the testator knew and approved of the disposition to the interested witness and was not unduly influenced in making it – subparagraph (3)(c).

The section does not void a charge or direction for the payment of a debt or appropriate remuneration to a person for acting in the administration of the testator's estate.

It should be noted that new section 11, unlike section 15 of the Act (which it replaces), does not void a disposition to the spouse of a witness or to a person claiming under the spouse of a witness.

*New section 12* replaces section 15A of the Act and creates new exceptions to the rule under it. Subsection 12(2) voids a disposition to an interpreter (or a person claiming under them) whose services were used in the making of the will. However, the operation of subsection (2) is not absolute – subsection 12(3) specifies circumstances in which a disposition to the interpreter is not void, namely if:

- all the other beneficiaries consent in writing to the interpreter taking his or her share under the will – subparagraph (3)(a). Having regard to the operation of section 124 of the *Duties Act 2001*, the consent is not liable to stamp duty; or
- the court is satisfied the testator knew and approved of the disposition to the interpreter and was not unduly influenced in making it – subparagraph (3)(b).

This section does not void a charge or direction for payment of appropriate remuneration to a person for providing interpreter services to the testator in relation to the will.

It should be noted that new section 12, unlike section 15A of the Act (which it replaces), does not void a disposition to the spouse of the interpreter or to a person claiming under the spouse of the interpreter.

*New division 3* sets out the ways in which a will can be validly revoked, altered or revived.

*New section 13* replaces section 20 of the Act. It sets out an exhaustive (and expanded) list of the means by which a will or part of a will may be revoked, namely by:

- the testator's marriage, to the extent specified in new section 14 (discussed below);
- the testator's divorce or annulment of the testator's marriage, to the extent specified in new section 15 (discussed below);
- a will or other instrument made under an order of the court under new sections 19 or 21 (discussed below);
- a later will;

- a document declaring an intention to revoke the will or part, executed as required under new Part 2;
- the testator (or another person in the testator's presence and at the testator's direction) burning, tearing or otherwise destroying the will, with the intention of revoking it; or
- the testator (or another person in the testator's presence and at the testator's direction), writing on the will or dealing with it in such a way that, having regard to the state of the will, the court is satisfied the testator intended to revoke it.

*New section 14* replaces section 17 of the Act. It states the effect of a testator's marriage on the testator's will. Generally, a will is revoked by the marriage of the testator – subsection 14(1). However, a will is not revoked by the testator's marriage in the following circumstances:

- a will made in contemplation of a particular marriage is not revoked by the solemnisation of the contemplated marriage. In this regard, there is no need for the contemplation of marriage to be expressed in the will – subparagraph (3)(a); or
- a will that is expressed to be made in contemplation of marriage generally is not revoked if the testator subsequently marries – subparagraph (3)(b).

The effect of subsection 14(2) is to preserve the following, despite the testator's marriage:

- a disposition to, or an appointment as executor, trustee, advisory trustee or guardian of, the person to whom the testator was married when the testator died; and
- the will, to the extent it exercises a power of appointment in circumstances where the property appointed would not pass to an executor under any other will of the testator or to an administrator of any estate of the testator, if the power was not exercised.

New section 7 operates to apply this section to the will of a person who dies on or after the commencement of new section 7. However, new section 76(3) applies new section 14 to wills made before the commencement of new section 7, where the testator's marriage is solemnised on or after this time. New section 76(2) continues the application of section 17 of the current Act to wills made before the commencement of new section 7, where the testator's marriage was solemnised before this time. This is

because what has already been revoked by section 17 of the current Act must remain revoked.

*New section 15* replaces section 18 of the Act. It states the effect of a testator's divorce or annulment of the testator's marriage on the testator's will. Subsection 15(1) provides that, subject to a contrary intention expressed in the will, the divorce or annulment automatically revokes the following in respect of a person to whom the testator was married immediately before the marriage ended ('the former spouse'):

- a disposition to the person made by a will in existence at the time of the divorce or annulment;
- an appointment, made by will, of the person as executor, trustee, advisory trustee or guardian;
- any grant, made by will, of a power of appointment exercisable by, or in favour of, the person.

In circumstances where subsection 15(1) applies, the testator's will takes effect as if the former spouse predeceased the testator.

Subsection 15(2) provides that divorce or annulment of marriage does not revoke the following in respect of the testator's former spouse:

- the appointment of the person as trustee of property left by will on trust for beneficiaries including that person's children; or
- the grant of a power of appointment exercisable by the person exclusively in favour of children who are children of both the testator and that person.

New section 7 operates to apply this section to the will of a person who dies on after the commencement of new section 7. However, new section 76(5) applies this section to wills made before the commencement of new section 7, where the divorce or annulment happens at or after this time. New section 76(4) continues the application of section 18 of the current Act to wills made before the commencement of new section 7, where the divorce or annulment happened before this time. This is because what has already been revoked by section 18 of the current Act must remain revoked.

*New section 16* replaces section 12 of the Act. It sets out the requirements for making a valid alteration to a will, after the will has been executed. To be effective, the alteration must be:

- authorised by an order of the court under new sections 19 or 21 and executed in accordance with new sections 20 or 26, respectively (discussed below); or

- executed according to the requirements for executing a will under new Part 2. In this respect, subsection 16(3) provides that it is sufficient compliance with these requirements for the signatures of the testator and the attesting witnesses to be made on the will beside, near or otherwise relating to the alteration or as authentification of a memorandum, written on the will, that refers to the alteration. It is noted that the courts have construed the term 'signature' quite widely: *Re Male* [1934] VLR 318 at 320. The reference in subsection (3) to 'signature' will include the initialling of an alteration.

Subsection 16(2) is concerned with the effect of a complete obliteration made by, or at the direction of, the testator i.e. an alteration that has the effect that the original words in the will are no longer apparent. It provides that a complete obliteration is not subject to the execution requirements specified under subsection 16(1). An alteration after execution that has the effect of making any part of the will 'not apparent' revokes 'that part if the testator has an intention to revoke it': (*Theobold on Wills*, 16th ed, 2001 at 7-07).

*New section 17* replaces and essentially restates section 21 of the Act. It states how a revoked will or part of a will can be revived, namely by re-execution or by executing a will evidencing an intention to revive the revoked will or part thereof. Subject to a contrary intention in the reviving document, the revival of a will that was initially partially revoked and subsequently wholly revoked, operates only to revive the balance of the will remaining after the initial partial revocation. Subsection 17(4) deems a revived will to have been made when it was revived.

*New division 4* deals with the court's powers in relation to wills, including new powers to authorise wills for minors and other persons lacking testamentary capacity.

*New section 18* replaces section 9(a) & (b) of the Act. Under this provision, the court will be able to admit a document to probate if satisfied the document embodies the testamentary intentions of a deceased person, even though it does not comply with the formal requirements for executing, altering or revoking a will. The court can only exercise this broad dispensing power if satisfied the person intended the document to constitute the person's will or an alteration to, or full or partial revocation of, it. The very broad definition of 'document' contained in section 36 of the Acts Interpretation Act is to be relied on for the purpose of this provision. (The more specific definition of 'document' that is inserted in

section 5 of the Act is expressed not to apply for purpose of new section 18).

In exercising this power, the court may have regard to extrinsic evidence including any evidence relating to the manner in which the document was executed and any evidence of the person's testamentary intentions (though the court is not limited to these matters when making a decision under this section). The exercise of this power is not limited to documents created within Queensland. The testamentary intention test under new section 18 represents a significant shift from the substantial compliance requirement under section 9(a) of the current Act.

It should be noted that references in the Act to an expression of contrary intention that appears in a will, will extend to a contrary intention found in a document admitted to probate in the exercise of the court's dispensing power under new section 18.

*New section 19* enables a minor, or his or her representative, to apply to the court for authorisation to make or alter a will in terms stated by the court or to revoke part or all of a will. Subsection 19(3) sets out the matters about which the court must be satisfied before it can make an order under this section. These include being satisfied the minor understands the nature and effect of his or her testamentary proposal and the extent of any property disposed of by it, as well as being satisfied the proposal accurately reflects the minor's testamentary intentions. The court may make an order on appropriate conditions.

Subsection 19(5) clarifies that the order per se has no dispositive effect and does not of itself make, alter or revoke a will. Consequently, if the court makes an order authorising a minor to make a will in specific terms, but the minor dies before executing the will, the minor will have died intestate. Similarly, if the court makes an order authorising a minor to revoke a previously authorised will, but the minor dies before revoking the will, the previous will will not have been revoked.

*New section 20* sets out the requirements for a will or other instrument made under a section 19 order to be valid, namely:

- it is executed according to the requirements specified in new Part 2; and
- the registrar is one of the attesting witnesses; and
- any conditions attaching to the order are complied with.

*New section 21* gives the court power to make an order authorising a will to be made or altered, in terms stated by the court, or partially or fully revoked

on behalf of a person lacking testamentary capacity. Subsection 21(2) sets out the matters about which the court must be satisfied before it can make an order under this section. These include being satisfied the person lacks testamentary capacity and is alive at the time the order is made. To the extent that subsection 21(7) applies this jurisdiction to a minor, it is intended to complement the jurisdiction conferred under new section 19 in respect of a competent minor. By extension, this section enables the court to make a statutory will for a minor for whom the court could not make a section 19 order, because the minor lacked the requisite degree of understanding eg because of immaturity or because of a particular incapacity.

The court has the power to make or give any necessary related orders or directions and may make the order on appropriate conditions. Subsection 21(5) expands the court's power under the Uniform Civil Procedure Rules to order costs, by enabling the court, at its discretion, to order the payment of costs from the assets of the person in relation to whom the order is sought. Having regard to case law on this issue, an order to this effect will not be appropriate in every case and the potential impact of such an order on the person's long-term security and welfare will always be an important consideration[1].

Subsection 21(6) clarifies that the order per se has no dispositive effect and does not of itself make, alter or revoke a will. Consequently, if the court makes a section 21 order authorising the making of a will for a person who does not already have a will, and the person dies before the will is executed in accordance with new section 26 (discussed below), the person will die intestate. Similarly, if the court makes an order authorising the revocation of a previous will, but the person dies before the instrument revoking the will is executed in accordance with new section 26, the previous will will not have been revoked. It should also be noted that new subsection 26(2) does not permit the registrar to sign a will or other instrument made under a section 21 order, if the person to whom the order relates is no longer alive.

*New section 22* establishes a two-stage process – the seeking of leave to make an application for a section 21 order and the making of an application once leave has been obtained. The court may give leave on appropriate conditions. Subsection 22(3) enables the two applications to be merged. It should be noted there are no restrictions on who may apply for leave for a section 21 order. This is further clarified by new section 28, discussed below.

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1 *Boulton v Sanders & Ors* [2004] VSCA 112

*New section 23* sets out the extensive range of information the applicant must provide to the court on the hearing of a leave application, including a draft testamentary proposal and evidence of:

- the person's lack of testamentary capacity and the likelihood of him or her acquiring or regaining it;
- the size and nature of the person's estate;
- the person's testamentary wishes;
- the terms of any previous will made by the person;
- the likelihood of a family provision application being brought in respect of the person's estate;
- the circumstances of any other person for whom the person lacking testamentary capacity might reasonably be expected to make provision for under a will;
- any other persons who might be entitled to claim on intestacy.

*New section 24* sets out the matters about which the court must be satisfied before it can give leave under new section 22. These include being satisfied that:

- the applicant is an appropriate person to make the application;
- adequate steps have been taken to allow all persons with a proper interest in the application to be represented. This includes persons who have a reason to expect a gift or benefit from the estate of the person in relation to whom the order is sought;
- there are reasonable grounds for believing the person does not have testamentary capacity. (In this regard, it should be noted that new section 21 requires the court to be satisfied the person does in fact lack testamentary capacity before it makes an order under that section);
- the testamentary proposal submitted under new section 23 is or may be what the person would have done if he or she had testamentary capacity; and
- it is or may be appropriate for a section 21 order to be made in relation to the person.

*New section 25* sets out how the court may conduct the hearing of an application under new sections 22 and 21. The court is not bound by the rules of evidence. It may consider any information provided to it under

new section 23 and may inform itself of any other relevant matter in any way it considers appropriate.

*New section 26* requires a will or other instrument made under a section 21 order to be in writing, signed by the registrar and sealed with the court seal. It is important to note that the registrar may not sign a will or other instrument unless the person to whom the section 21 order relates, is alive.

*New section 27* clarifies the validity of a will or other instrument made under a section 21 order.

*New section 28* clarifies that nothing in the *Guardianship and Administration Act 2000* or the *Powers of Attorney Act 1998* (eg the prescription of making or revoking a will as a 'special personal matter') prevents a guardian or an attorney for personal matters from bringing an application for leave under new section 22 or an application for a section 21 order.

*New section 29* requires the registrar to hold a will or other instrument made under a section 19 order until any of the events specified in subsection 29(2) occur. It should be noted that if a previously authorised will is only altered or revoked in part, the registrar will continue to hold the will (because it is still operative) until any of the events specified in subsection 29(2) occur. The document's validity is not affected by failure to comply with the requirements under this section.

*New section 30* requires the registrar to hold a will or other instrument made under a section 21 order until any of the events specified in subsection 30(2) occur. It should be noted that if a previously authorised will is only altered or revoked in part, the registrar will continue to hold the will (because it is still operative) until any of the events specified in subsection 30(2) occur. The document's validity is not affected by failure to comply with the requirements under this section.

*New section 31* requires a will or other instrument held by the registrar under new sections 29 or 30 to be placed in a sealed envelope that has prescribed identifying information on it.

*New section 32* sets out what happens upon the death of the testator of a will or other instrument held by the registrar under new sections 29 or 30. Subsection 32(2) enables an executor named in the will, an executor by representation or a person entitled to apply for letters of administration with the will to make a written application to the registrar for the release of the document. Subsection 32(3) requires the registrar, on receipt of an application under subsection (2), to give the document to the applicant or the Public Trustee, legal practitioner or trustee company nominated by the

applicant. The registrar may seek directions from court under subsection 32(4) in the event there is doubt about the person to whom the document should be given. Subsection 32(5) requires the registrar to make and keep a copy of a document released under this section.

*New section 33* replaces section 31 of the Act with a broader rectification power. It confers power on the court to rectify a will in order to give effect to the testator's intentions. The court may only exercise this power if satisfied the testator's intentions are not carried out because the will contains a clerical error or it does not give effect to the testator's intentions. A rectification application must be brought within a period of six months after the testator's death (although there is capacity for the court to grant an extension of time to apply, even after the six month period has expired, in appropriate circumstances and provided the final distribution of the estate has not been made). Subsections 33(4) & (5) set out actions to be taken following the making of a rectification order.

*New section 33A* protects a personal representative from liability in respect of certain distributions made to a beneficiary as if the will had not been rectified under section 33. The protection afforded by this section applies only in respect of a maintenance distribution made under new section 49A (discussed below) or a distribution made within the prescribed periods from the testator's death and without notice of an intended or pending rectification or family provision application. The notice requirements and timeframes are intended to mirror those under section 44 of the Act.

For example, a personal representative receives notice of an intended application under new section 33. This means that subsection 33A(3) will not protect the personal representative from liability in relation to distributions made not earlier than six months after the testator's death. However, unless the personal representative is given written notice that the application has been started or the personal representative has been served with a copy of the application, subsection 33A(4) will operate to protect the personal representative from liability in relation to a distribution made not earlier than nine months after the testator's death. This assumes there are no applications under sections 41(1) or 42 of the Act and no other applications to rectify the will under new section 33.

*New division 5* contains rules regarding the interpretation of wills.

*New section 33B* replaces and essentially restates section 32 of the Act. It operates, subject to a contrary intention expressed in the will, so that where a beneficiary under a will fails to survive the testator for a period of 30 days, his or her benefit fails. Subsection 33B(3) provides that a general

requirement or condition that a beneficiary survive the testator is not sufficient to displace the operation of this section.

The effect of new section 33B is such that a beneficiary can not take their entitlement under the will until they have survived the testator by 30 days. Complementary to this section is new section 49A, which enables a personal representative to make a maintenance distribution to certain beneficiaries during the 30 day period (discussed below). It should also be noted that new section 33N (discussed below) operates as an exception to new section 33B.

*New section 33C* permits the court to admit extrinsic evidence of the testator's actual intention for the purpose of interpreting a will, where the language used in it is meaningless or ambiguous (either on the face of the will or in light of surrounding circumstances). However, evidence of the testator's intention may not be admitted to establish any surrounding circumstances. The effect of subsection 33C(4) is to preserve the admissibility of extrinsic evidence otherwise admissible by law, for example, evidence of the testator's intention to fortify or rebut equitable presumptions of intention or where the wording of the will is found to be equivocal. There has previously been no statutory provision in Queensland allowing the admission of extrinsic evidence in the interpretation of a will.

*New section 33D* replaces and essentially restates section 26 of the Act. It provides that if, after executing a will, a testator changes domicile, this does not affect the interpretation of the will.

*New section 33E* replaces and essentially restates section 28(a) of the Act. It provides that, subject to a contrary intention expressed in the will, a will takes effect, with respect to the property disposed of by it, as if it had been executed immediately before the testator's death. It is designed to ensure that property acquired by the testator after he or she made the will, can be disposed of by it.

*New section 33F* replaces and essentially restates section 27 of the Act. It is concerned with the effect of the changed nature of the testator's interest in property that is the subject of a disposition. It provides that the will operates to dispose of a remaining interest in property, where subsequent to the making of the will, the testator disposes of a part interest in the property. It is designed to prevent the failure of the disposition, which otherwise would cause the remaining interest to fall into the testator's residuary estate under new section 33G (discussed below).

*New section 33G* replaces and essentially restates section 28(b) of the Act. It operates to avoid a partial intestacy by ensuring that, subject to a contrary

intention expressed in the will, property not effectively disposed of by the will, passes to the testator's residuary estate. Property that is the subject of an exercise of a power of appointment is excluded because if the power of appointment fails, the property passes according to the provisions of any gift over contained in the instrument creating the power.

*New section 33H* replaces and essentially restates section 62 of the Act. It operates to avoid a partial intestacy by giving income, accrued on a contingent, future or deferred disposition from the time of the testator's death, to the beneficiary of the capital. This rule does not displace a disposition of the income elsewhere by the will.

*New section 33I* replaces and essentially restates section 28(c) of the Act. It clarifies that, subject to a contrary intention expressed in the will, a general disposition of land includes a leasehold interest in the land.

*New section 33J* replaces and essentially restates section 28(d) of the Act. It provides that, subject to a contrary intention expressed in the will, a general disposition of all or the residue of the testator's property, or of all or the residue of the testator's property of a particular description, includes all the property of the relevant description over which the testator has a power of appointment exercisable by will, and operates as an exercise of the power.

*New section 33K* replaces and essentially restates section 28(e) of the Act, which abolished the common law rule that correct words of limitation must be used in devises of land in order to pass the fee simple. It provides that, subject to a contrary intention expressed in the will, a disposition of real property without words of limitation operates to pass the testator's whole estate or interest in the property.

*New section 33L* replaces section 30(2) of the Act. It provides that, subject to a contrary intention expressed in the will, a disposition of property to a person's issue, without limitation as to remoteness, must be distributed to those issue according to the intestacy rules that apply when a person is survived only by issue (which are set out in section 36A and Schedule 2, Part 2 (Item 1) of the Act). New section 33L represents a change from section 30(2) of the Act, under which the nearest issue of the person currently take in equal shares and more remote issue take by representation. Very often the relevant 'person' will be the testator. However, the provision is not limited to dispositions made to issue of the testator, as a testator may make a disposition in favour of the issue of another person eg to 'my nephew's issue'.

*New section 33M* replaces and essentially restates section 30(1) of the Act. The section provides that words in a will that would, but for the operation of this provision, be interpreted to mean that a disposition to a person is to fail for an indefinite failure of the person's issue, are to be interpreted to mean a want or failure of issue in the person's lifetime or at the person's death – not an indefinite failure of issue. It is designed to prevent a gift from failing because it breaches the rule against perpetuities. This section operates subject to a contrary intention expressed in the will, but only if the disposition doesn't breach the rule against perpetuities.

*New section 33N* replaces section 33 of the Act. It operates as an exception to the lapse rule contained in new section 33B (discussed above), in circumstances where a beneficiary, who is issue of the testator, fails to survive the testator for 30 days but leaves issue who do survive the testator for this period. In this case, the original beneficiary's share passes to his or her surviving issue, who take the share according to the intestacy rules that apply when a person is survived only by issue (which are set out in section 36A and Schedule 2, (Item 1) of the Act). New section 33N represents a change from section 33(1) of the Act, under which the nearest issue of the deceased beneficiary currently take in equal shares and more remote issue take by representation.

It should be noted that new section 33N does not apply if:

- the original beneficiary's interest in the property disposed of is determinable at or before his or her death – subparagraph (1)(b);
- the disposition is one to which new section 33L applies (discussed above) – subparagraph (1)(c);
- the original beneficiary fails to fulfil a condition imposed on him or her by the will – subsection (3)(a). For example, if the testator leaves a benefit to "my daughter X provided she has completed her degree at the University of Queensland" and the daughter dies before completing the degree leaving issue who survive the testator, then the daughter's issue can not take the benefit intended for the daughter in that event. This is to be read subject to subsection (4), which prevents certain types of conditions from displacing the operation of new section 33N;
- there is a contrary intention expressed in the will – subsection (3)(b). In this regard, subsection (4) states that a general requirement or condition that issue survive the testator or attain a specified age is not a sufficient indication of contrary intention to displace the operation of new section 33N. In addition,

subsection (5) states that a disposition of property to issue as joint tenants is not, of itself, a sufficient indication of contrary intention to displace the operation of new section 33N.

*New section 33O* replaces and essentially restates section 29(1)(a) of the Act. Subsection 33O(1) operates, subject to a contrary intention expressed in the will, to prevent a partial intestacy occurring in circumstances where a disposition of all, or of the residue, of the testator's estate refers only to the testator's realty or only to the testator's personal property. It does this by deeming the reference to include both.

*New section 33P* replaces and essentially restates section 29(1)(b) of the Act. It is concerned with how property passes if a disposition of the whole or the residue of the testator's estate fails as to a fractional part. It operates, subject to a contrary intention expressed in the will, to ensure that the part that fails is added to the other fractional parts proportionately.

*New section 33Q* replaces section 63 of the Act. It operates to save a disposition to an unincorporated association of persons, that would otherwise be invalid either on the grounds that it could be construed as a trust for non-charitable purposes or that it breached the rule against perpetuities. Subsection 33Q(1) deems certain dispositions of property to be a disposition in augmentation of the general funds of the beneficiary association. It expressly excludes dispositions to associations that are charities. This is because the grounds of invalidity this provision seeks to cure do not apply to charities. If an unincorporated association has aims, objects or purposes which are exclusively charitable or which can be considered to be exclusively for charitable purposes, then both the validity and the administration of the gift to the association are governed by the law relating to charities.

Subsections 33Q(2)-(5) set out the requirements for administering a disposition of property to an unincorporated association. It should be noted that the discharge requirements under subsections 33Q(3)&(4) are displaced by a contrary intention expressed in the will and for this reason, they do not limit the way in which an absolute discharge may otherwise be obtained under the terms of the will.

The effect of subsection 33Q(6) is to save a disposition to an unincorporated association even though:

- a list of the association's members at the time of the testator's death can not be compiled; or
- the association is unable, because of a specific provision in its constitution, to divide assets among members in the event the

association is wound up (eg where the association has been in receipt of fiscal benefits and the Australian Tax Office requires that any surplus monies, in the event of a winding up, be transferred to a similar association enjoying similar fiscal benefits).

*New section 33R* replaces and essentially restates section 64 of the Act. It clarifies that the creation of a power of appointment by will does not constitute an unacceptable delegation of the testator's will-making power.

*New section 33S* replaces section 67 of the Act. It operates, subject to a contrary intention expressed in the will, to provide a default method of valuation, namely a valuation of the property as at the testator's death, made by a competent valuer.

*New division 6* deals with the recognition of wills with a foreign connection. It replaces ss.22-25 of the Act, which were intended to conform to the 1961 *Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions*. New division 6 is not intended to change the operation of current law in Queensland as to the applicability of foreign law to the execution of wills.

*New section 33T* replaces and essentially restates sections 23 & 24 of the Act. It identifies which jurisdiction's domestic law is to be applied to the determination of whether a will has been validly executed. The new definition of '*internal law'* inserted in section 5 of the Act operates to exclude a jurisdiction's rules of private international law (which might have the effect of applying the domestic law of another jurisdiction).

*New section 33U* replaces and essentially restates subsection 25(1) of the Act. It provides a method for determining the system of law to be applied under new section 33T, in circumstances where there is more than one system of domestic law governing the formal validity of wills in force in the place concerned.

*New sections 33V and 33W* replace and essentially restate subsections 25(2) & (3) of the Act. They provide guidance as to the way in which the requirements of a foreign law are to be applied to the determination of whether a will has been validly executed in that jurisdiction.

*New section 33V* requires consideration of the formal requirements of the particular law identified by application of new section 33T (discussed above) at the time the will was executed. However, it permits consideration of a later change in that law, affecting wills executed when the will in question was executed, if the change means the will can be treated as properly executed.

*New section 33W* draws a distinction between the requirements for formal and essential validity and operates to re-characterise the two specified requirements as formal requirements only. This section applies when a law in force in a place outside Queensland is to be applied in relation to a will, whether by virtue of the operation of new section 33T (discussed above) or under the conflicts of laws principles that apply in relation to the validity of wills. In this regard, it is important to note that the provisions contained in new division 6 supplement the conflicts of laws principles that apply in relation to the validity of wills. Reliance on these principles will be important if a will is not taken to be properly executed according to any of the options under new section 33T.

*New section 33X* recognises a court-authorised will for a minor made in another jurisdiction.

*New section 33Y* recognises a court-authorised will for a person lacking testamentary capacity made in another jurisdiction.

*New division 7* contains a miscellaneous provision.

*New section 33Z* entitles prescribed categories of persons to inspect and obtain a certified copy of an original will or a copy thereof. It is intended to ensure that persons with a proper interest can see the contents of a will prior to the will's admission to probate (upon which, it becomes a public document) or in the event that probate is not sought and the estate is administered informally.

By virtue of the definition of '*will*' in subsection 33Z(4), the entitlement extends to a part of a will and to purported wills and revoked wills and to parts thereof. These testamentary instruments can be significant to the determination of questions concerning, for example, the testator's capacity, undue influence or interpretation.

The categories of persons entitled to access a will under this section are specified in the definition of '*entitled person'* in subsection 33Z(4). They represent persons considered to have a proper interest in the will eg possible beneficiaries or other claimants against the deceased's estate (such as a person entitled to make a family provision application under Part 4 of the Act).

The section operates by requiring a person who has possession or control of an original will, on request by an eligible person, to allow the eligible person to inspect and/or obtain a certified copy of the original. The obligation to permit inspection and/or provide a certified copy of a copy of a will applies only where the original document no longer exists (because it has been destroyed) or can not be located (because it has been lost or

stolen). This is designed to relieve the burden on the potentially wide range of persons who might hold a copy of the original document, when the original is readily available.

New section 76(8) operates to apply this section to a will regardless of when the testator died.

Clause 7 omits subsection 49(3) and renumbers the section accordingly. Subsection 49(3) is replaced by section 49A (discussed below).

Clause 8 inserts section 49A, which replaces subsection 49(3) of the Act. This section is complementary to the operation of new section 33B, under which a disposition lapses if the beneficiary does not survive the testator for 30 days. New section 49A enables a personal representative to make a maintenance distribution from the estate during or after the 30 day period following the deceased person's death to a person who:

- was wholly or substantially dependent on the deceased, when the deceased died; and
- would be, provided he or she survives the deceased person for 30 days, entitled to a share in the deceased's estate.

The distribution can only be made for the recipient's maintenance, support or education.

The fact that the personal representative is aware of a pending or intended family provision application is not an impediment to the making of a maintenance distribution under this section. A personal representative is protected from liability for a maintenance distribution made in good faith.

The effect of subsection 49A(5) is to treat a maintenance distribution as an advance distribution of the person's share of the estate and accordingly, the amount is to be deducted from the person's final entitlement. However, in the event the recipient of a maintenance distribution under this section fails to survive the deceased person by 30 days, subsection 49A(6) operates to treat the distribution as an administration expense.

Clause 9 omits sections 62, 63, 64 and 67 from the Act. These provisions are replaced by new sections 33H, 33Q, 33R and 33S respectively.

Clause 10 inserts a new division 4 in Part 7 of the Act, containing transitional provisions for this Act. New section 76 operates in conjunction with new section 7 (discussed above).

Subsection 76(1) preserves the validity of wills made prior to commencement under section 16 of the current Act. Under the privileged wills provision, people in the armed services, mariners or sailors at sea and

prisoners of war could make a valid will without having to comply with the requirements as to form and execution under the Act. The provision dated from the eighteenth century when the classes of people it covered had no access to legal assistance. With the advent of readily accessible legal advice in the armed services and the services provided by the Public Trustee, there is no need for this relaxation to continue and for this reason, section 16 has been omitted from the Act and is not replaced by the Bill. However, it is conceivable that there will be privileged wills in existence at the time of commencement and subsection 76(1) clarifies that the validity of a privileged will is not affected by the repeal of section 16 of the current Act.

The operation of subsections 76(2)-(5) & (8), in respect of the relevant new sections inserted by this Act, is detailed in the discussion of the relevant section in these Notes. Subsection 76(6) operates to preserve the definitions in section 5 of the Act for the purpose of those sections of the Act that continue to apply to wills made before commencement by virtue of the operation of subsections 76(2) & (4). Conversely, subsection 76(7) clarifies that the definitions in section 5, as amended by this Act, apply for the purpose of the new sections that are to apply by virtue of the operation of subsections 76(3) & (5).