REFORMING QUEENSLAND’S INTESTACY LAWS:
THE SUCCESSION AMENDMENT BILL 1997

LEGISLATION BULLETIN NO 9/97

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1. PURPOSE

The Succession Amendment Bill 1997 (Qld) amends Part 3 of the Succession Act 1981 (Qld) and Schedule 2 to the Act. These provisions deal with the way in which an intestate estate is to be distributed. The major objectives of the amending Bill are to:

- increase the legacy given to a spouse under the intestacy rules, and
- recognise opposite sex de facto relationships of at least five years duration.¹

¹Succession Amendment Bill 1997 (Qld), Second Reading Speech, Hon D E Beanland MLA, Daily Hansard, 20 August 1997, p 3017.
2. BACKGROUND

2.1 THE PURPOSE OF INTESTACY RULES

Intestacy rules describe how a deceased person’s estate is to be distributed when, or to the extent that, the deceased fails to make a will. The intestacy rules will apply if, for example:

- the deceased never made a will at all;
- the deceased made a will, but it was later revoked (eg marriage revokes a will, unless the will was made in contemplation of marriage: s 17 of the Succession Act 1981 (Qld); divorce also revokes a will: s 18 Succession Act)
- a will was made, but it did not dispose of all of the deceased’s property (ie there is a partial intestacy): Succession Act, s 34
- a will was made, but it proved to be invalid (eg because the maker did not have the legal capacity to make a will: s 8 Succession Act, or because the will was not made in the proper form: s 9 Succession Act).

In Queensland, Part 3 of the Succession Act 1981, together with Schedule 2, provides for the distribution of the residuary estate of an intestate person. For the purpose of Part 3 of the Succession Act 1981, “residuary estate” is defined as the property of the intestate that is not effectively disposed of by will or, if there is no will, “... the property of the intestate, which is available for distribution after payment thereout of all such debts as are properly payable thereout”: s 34(1).

2.2 THE HISTORY OF INTESTACY RULES

Intestacy rules have their origin in English common law rules, dating as far back as the 13th century. Different principles applied to the disposition of real property and personal property. Real property could not be disposed of by will. Rather, real property (ie land) descended to the deceased’s heir at law - usually the eldest son, under the doctrine of primogeniture. Although personal property (eg cattle, furniture) could be disposed of by will, a testator did not have total freedom to dispose of his personal property as he wished. Instead, the usual custom was that, on a man’s death, one-third of a man’s personal property passed to his wife, one-third passed to his children, and the deceased was entitled to dispose of the
remaining one-third part as he wished. If there were no children living at the time of a man’s death, one-half of the deceased’s personal property passed to his widow.²

The rule that land should descend to the eldest son according to the doctrine of primogeniture was abolished in Queensland by the Intestacy Act 1877. However, as the Queensland Law Reform Commission explains in its June 1993 Report on Intestacy Rules:

... the old rules applicable to personal property still affect the present Queensland intestacy rules and the distribution of both land and personal property: a spouse still has to share the intestate’s estate with the intestate’s issue.³

2.3 STATISTICS ON INTESTACY

In his Second Reading Speech to introduce the Succession Amendment Bill 1997, the Attorney-General and Minister for Justice, Hon D E Beanland MLA estimated that possibly 20% of Queenslanders die intestate.⁴

3. BACKGROUND TO QUEENSLAND’S SUCCESSION AMENDMENT BILL 1997

As part of a reference received to bring Queensland’s succession laws up-to-date, the Queensland Law Reform Commission (QLRC) prepared a Working Paper on Queensland’s intestacy rules in July 1992 (Working Paper No 37). Comments and submissions on the proposals were invited to be submitted by September 1992. A Report on the subject of Queensland’s intestacy rules was subsequently issued in June 1993 (Report No 42). A consultation draft Succession Amendment Bill 1997 was released in June 1997, and interested persons were given until 11 July 1997 to comment. Sixteen responses were received and, as result of this consultation, the Succession Amendment Bill introduced to Parliament on 20 August 1997 now also proposes to insert a new Division 3 into Part 3 of the Succession Act.⁵ Proposed new Part 3, Division 3 will allow a spouse or de facto spouse to elect to acquire


⁴ Succession Amendment Bill 1997 (Qld), Second Reading Speech, Hon D E Beanland MLA, Daily Hansard, 20 August 1997, p 3017.

⁵ Succession Amendment Bill 1997 (Qld), Explanatory Notes, p 4.
the intestate’s matrimonial home, if the spouse or de facto spouse ordinarily resided
in the home at the time of the intestate’s death.

The remainder of this Bulletin looks at the key provisions of the Succession Amendment Bill 1997, and compares them with the existing legislation, and the recommendations of the QLRC in its June 1993 report. Key provisions of the Bill are also compared with the intestacy rules in force in other Australian jurisdictions.

4. MAIN PROVISIONS OF THE BILL

4.1 THE POSITION OF A SURVIVING SPOUSE

4.1.1 The Current Legislation

Where there is a Surviving Spouse and Issue of the Intestate

The term issue refers to a person’s lineal descendants (ie children, grandchildren, great-grandchildren and so on).6

The existing Succession Act provides that, where there is a surviving spouse and surviving issue of an intestate, then:

- the surviving spouse takes one-half of the estate if there is only one child, and the issue of the intestate take the other half: Succession Act, Second Schedule, Part 1, Item 2.
- the spouse receives one-third of the estate if there is more than one child, and the issue of the intestate take the remaining two-thirds: Second Schedule, Part 1, Item 2.

Preece has referred to the vagueness of drafting of this provision:

... which distinguishes the one child and two or more child cases where there is a surviving spouse. It should be spelt out clearly there that what is meant by there being one child is the survival by one child or the issue of only one child if all children are predeceased, and what is meant by the two or more child case is the survival by two or more children, or by one child and the issue of at least one other, or by the issue of at least two children.7

Commenting on Schedule 2, Part 1, Item 2, Lee, author of the Manual of Queensland Succession Law, has said:

This provision for the surviving spouse - statistically a widow in her late sixties or seventies - has not been changed since medieval times and enshrines an antediluvian view of the status of elderly women in society. In every case where issue survive an intestate the surviving spouse can be forced to liquidate one half or two thirds of the estate for distribution amongst the issue. If the major asset of the estate is a family home vested in the deceased, the surviving spouse can be forced to leave it and left with insufficient means to maintain independence. No other Australian jurisdiction treats its elderly mothers so badly.

**Surviving Spouse, No Issue, but a Parent, Brother, Sister, Nephew or Niece Survives**

Where a person who dies intestate is not survived by issue, but is survived by a parent, a brother or sister, or a child or children of a brother or sister, the surviving spouse is entitled to:

- $50,000 or the whole of the residuary estate, whichever is the lesser, and
- if the value of the residuary estate is greater than $50,000, one-half of the balance of the residuary estate: Second Schedule, Part 1, Item 3.

** Surviving Spouse, No Issue, or Parent, Brother, Sister, Niece or Nephew Survives**

Where the intestate is not survived by issue, nor by a parent, brother, sister, nephew or niece, a surviving spouse is entitled to the whole of the residuary estate: Second Schedule, Part 1, Item 1.

**4.1.2 A Comparative Survey**

In six Australian jurisdictions, a surviving spouse is given a paramount interest in all personal or household chattels in relation to which a deceased dies intestate.

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8 Lee, p 197.
9 The exceptions are Queensland and Tasmania.
10 Wills, Probate and Administration Act 1898 (NSW), s 61B(3); Administration and Probate Act 1958 (Vic), s 51(2); Administration and Probate Act 1919 (SA), s 72H(1); Administration Act 1903 (WA), s 14, Table Item 1; Administration and Probate Act 1969 (NT), s 67; Administration and Probate Act 1929 (ACT), s 49A.
Hardingham, Neave and Ford suggest:

>This concession appears to be a humane one worthy of inclusion in all codes. The continued possession and use of personal chattels by a surviving spouse will minimise the disruption brought about by the death of the deceased and will produce some continuity of lifestyle for the spouse and any surviving children.\(^{11}\)

In all jurisdictions other than Queensland, a surviving spouse is entitled to a statutory legacy before any division of the intestate estate between the spouse and issue.\(^{12}\) The amount varies from $10,000 in South Australia to $150,000 in New South Wales and the Australian Capital Territory.

Hardingham, Neave and Ford describe the availability of such a legacy as:

>... desirable. The surviving spouse will be put in a good position to reduce substantially any mortgage over the matrimonial home. If an estate is small and a proportional division is envisaged between spouse and issue without the concession of any legacy to the spouse, the spouse may very well be placed in a position of severe economic hardship. The only recourse then will be by way of application under testator’s family maintenance legislation with the attendant expense and domestic unpleasantness.\(^{13}\)

In New South Wales\(^{14}\), Victoria\(^{15}\), South Australia\(^{16}\), Western Australia\(^{17}\), the Australian Capital Territory\(^{18}\) and the Northern Territory\(^{19}\), a surviving spouse may elect to take an interest in the matrimonial home, where this is part of the intestate estate, in satisfaction, either total or partial, of an entitlement upon intestacy.

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\(^{11}\) Hardingham, Neave and Ford, p 362.

\(^{12}\) Wills, Probate and Administration Act 1898 (NSW), s 61B, and see also the definition of “prescribed amount” in s 61A and the Wills, Probate and Administration Regulation 1993, s 4; Administration and Probate Act 1958 (Vic), s 51(2); Administration and Probate Act 1919 (SA), s 72G; Administration Act 1903 (WA), s 14 and Table, Item 2; Administration and Probate Act 1935 (Tas), s 44; Administration and Probate Act 1980 (NT), Sixth Schedule, Part 1 Item 2; Administration and Probate Act 1929 (ACT), s 49 and Sixth Schedule.

\(^{13}\) Hardingham, Neave and Ford, pp 362-363.

\(^{14}\) Wills, Probate and Administration Act 1898 (NSW), s 61D, Fourth Schedule.

\(^{15}\) Administration and Probate Act 1958 (Vic), s 37A.

\(^{16}\) Administration and Probate Act 1919 (SA), s 72L.

\(^{17}\) Administration Act 1903 (WA), s 14, Fourth Schedule.

\(^{18}\) Administration and Probate Act 1929 (ACT), s 49G.

\(^{19}\) Administration and Probate Act (NT), s 73, s 81.
In three jurisdictions (Queensland\textsuperscript{20}, Western Australia\textsuperscript{21} and the Northern Territory\textsuperscript{22}), a surviving spouse must share intestate property not only with issue but also with other relations of the intestate, if there are no issue. Of these provisions, Hardingham, Neave and Ford have commented:

\textit{One may query the wisdom and generosity of requiring a spouse to share intestate property with relatives of the intestate spouse other than issue. In the absence of issue, it is the writers’ view that the surviving spouse should be absolutely entitled to intestate estate.}\textsuperscript{23}

\subsection*{4.1.3 The QLRC’s Recommendations}

In its Report No 42, the QLRC recommended that, where the intestate is survived by a spouse and by issue, the spouse should receive from the estate, where it is large enough:

\begin{itemize}
  \item the personal property of the intestate; and
  \item a legacy of $100,000; and
  \item the matrimonial home; and
  \item a sum of money, not greater than $150,000, sufficient to discharge the capital and interest owing at the date of death on any mortgage of the matrimonial home; and
  \item if there is no matrimonial home forming part of the estate, or vested in the estate and the spouse as joint tenants which passed on the intestate’s death beneficially to the spouse, a further statutory legacy of $150,000;
  \item if the intestate’s interest in the matrimonial home is not held in fee simple, the surviving spouse is entitled to either that interest or the statutory legacy referred to immediately above;
  \item if there is more than one matrimonial home which is part of the intestate’s estate, then the surviving spouse must elect which home he or she will take, and
  \item 50\% of the balance.\textsuperscript{24}
\end{itemize}

Under the QLRC’s recommendations, the issue of the intestate are entitled to receive the other 50\% of the balance.\textsuperscript{25}

\textsuperscript{20} Succession Act 1981 (Qld), s 35, Schedule 2, Part 1, Item 3.
\textsuperscript{21} Administration Act 1903 (WA), s 14, Table Item 3(b) (where the net value of the intestate property, other than the household chattels, exceeds $75,000).
\textsuperscript{22} Administration and Probate Act 1969 (NT), s 66, Schedule 6, Part 1, Item 3 (where the value of the intestate estate exceeds $60,000).
\textsuperscript{23} Hardingham, Neave and Ford, p 362.
\textsuperscript{24} QLRC, R 42, pp 10-11.
Where a person who dies intestate is survived by a spouse but no issue, the QLRC recommended that the spouse should receive the whole of the intestate’s residuary estate.26

**Entitlement of kin where there is a spouse**

In both its Working Paper27 and its Report28, the QLRC recommended that the surviving spouse should not have to share in the distribution of the intestate’s estate with anybody other than issue of the intestate (ie the spouse should not have to share with the intestate’s parents, brothers, sisters, nephews or nieces, as is currently the case - see Section 4.1.1 of this Bulletin). In its Report, the QLRC commented:

> If relatives more remote than issue were permitted to share with the spouse it would be appropriate to increase the spouse’s benefits in such circumstances. This would mean that relatives other than issue would take only in the case of very large estates. It would be an unnecessarily complicating factor. The Commission recommends that this course should not be taken and that a surviving spouse should have to share only with issue of the intestate.29

**4.1.4 The Proposed Legislation**

**Surviving spouse or de facto spouse and issue**

Section 35 of the existing Succession Act provides that the distribution of an intestate’s residuary estate is to be ascertained by reference to Schedule 2 to the Act, subject to s 35(2). (Section 35(2) provides that a person entitled to take a part of an intestate’s residuary estate must survive the intestate for a period of 30 days, or their entitlement lapses.)

Under the changes proposed to Schedule 2 of the Succession Act by the Succession Amendment Bill 1997, if an intestate is survived by a spouse or de facto spouse and

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25 QLRC, R 42, p 11.
26 QLRC, R 42, p 10.
28 QLRC, R 42, p 11.
29 QLRC, R 42, p 63.
issue, the spouse or de facto spouse will take:

- a statutory legacy of $100,000 and the household chattels, and
- one-half of the residue if there is only one child of the intestate who survived, or did not survive but left issue who survived, or
- one-third of the residue if there is more than one child who either survived the intestate or left issue who survived the intestate: proposed new Schedule 2, Part 1, Item 2.

The issue of the intestate take the balance of the residuary estate in accordance with proposed new s 36A of the Succession Act: proposed new Schedule 2, Part 1, Item 4.

The way in which any entitlement of issue is to be distributed is discussed further in Section 4.3 of this Bulletin.

The position where both a married partner and a de facto partner survive the intestate is discussed in Section 4.2 of the Bulletin.

Clause 8 of the Succession Amendment Bill 1997 amends s 35 so that the distribution of the residuary estate is subject to s 35(2) (as discussed above), and proposed new Part 3, Division 3 of the Succession Act.

Under proposed new Part 3, Division 3 of the Succession Act, inserted by Clause 12 of the Succession Amendment Bill 1997, a surviving spouse or de facto spouse will be given a right to elect to acquire the intestate’s interest in a matrimonial home, if the intestate’s spouse or de facto spouse ordinarily resided in that home.

This right of election was not available under the draft consultation Bill released in June 1997, but was included in the Bill introduced into Parliament on 20 August 1997, after taking into account responses received to the draft Bill.30

The changes proposed to be introduced by the Succession Amendment Bill 1997 increase the provision currently made for a surviving spouse by entitling the spouse to the intestate’s household chattels and a statutory legacy of $100,000, and giving the spouse the right to elect to acquire the matrimonial home. However, they are less generous than the QLRC’s recommendations in the following respects:

Entitlement to the matrimonial home

The Succession Amendment Bill 1997 does not propose that the spouse should be entitled to the matrimonial home, although it does now give a surviving spouse a right to elect to acquire a matrimonial home in which the intestate has an interest.

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30 Succession Amendment Bill 1997 (Qld), Explanatory Notes, p 4.
In its Report, the Queensland Law Reform Commission stated its views on the entitlement of a surviving spouse to the matrimonial home in the following terms:

Those framing intestacy rules have found difficult the question of what should be done about the matrimonial home. One of the difficulties is that in Australia the matrimonial home is very often vested in the spouses as joint tenants so that the title passes automatically to the surviving spouse on the death of the first spouse to die. That may have contributed to the omission of the matrimonial home from intestacy schemes. But most intestacy schemes provide that the surviving spouse is given the right to purchase the matrimonial home.

There is some suggestion that the amount of the statutory legacy reflects the cost of a modest home in the jurisdiction. These provisions appear to be based on the assumption that the matrimonial home has not passed by survivorship to the surviving spouse, which ignores the fact that the matrimonial home is often held in joint tenancy.

In any case if the purpose of the statutory legacy is merely to enable the surviving spouse to acquire the existing family home, and that legacy will be exhausted by the purchase, the spouse is left with the home but without the means to remain living in it. The Commission shares the view taken by the Public Trustee of Queensland and the Trustee Companies Association of Australia (Queensland Council) that the spouse should receive both the matrimonial home and a sum of money sufficient to enable him or her to remain living it. At present-day interest rates even if the estate is sufficient to give the surviving spouse the home and $100,000, interest on $100,000 would be very modest (between $4,000 and $6,000 a year).

... The recommendation of the Commission that the surviving spouse should be entitled to the matrimonial home or, if there is no matrimonial home, an additional legacy of $150,000 is based on the assumption that the legal title to the matrimonial home which passes to the residuary estate of the intestate is a secure title which will ensure that the surviving spouse can have a roof over his or her head, so far as is possible, for the rest of his or her life. Where the title to the home is absolute, that is, in fee simple, the spouse who inherits it will have as secure a legal title as the law permits.

... In the case of titles of a different sort, however, the Commission recommends that the spouse should be allowed to choose whether to remain in the matrimonial home or to receive the legacy of $150,000. The choice of the spouse may well be governed by such factors as the duration of the title, and obligations imposed by law on the title holder, as well as by personal factors such as the age of the surviving spouse and the kind of life the spouse wishes to lead. \(^{31}\)

\(^{31}\) QLRC, R 42, pp 41-42, 44-45.
Distribution of Residue

While the QLRC recommends that a surviving spouse should be entitled to the intestate’s personal effects, $100,000, the matrimonial home, and one-half of the residue, under the 1997 Bill, a surviving spouse will take one-half of the residue only if the intestate is survived by only one child or the issue of one child. A surviving spouse will be entitled to only one-third of the residue if the intestate is survived by more than one child, or by one child and the issue of another child or children, or by the issue of more than one child ie the distribution of the residue with issue follows the formula presently laid down in the Succession Act of one half to the spouse if there is only one child or the issue of only one child and one third otherwise.

Household chattels versus personal property

As previously stated, the QLRC recommended that a surviving spouse should receive the intestate’s “personal property”, defined as:

... all of the intestate’s property excluding the following -

a) any interest in land
b) money (other than a coin collection), cheques and securities for money (including accounts with a financial institution and bonds);
c) stocks, shares and debentures;
d) property that was used exclusively for business purposes at the time of the intestate’s death.\(^\text{32}\)

The Commission argued for an open definition of “personal property” on the basis that:

\(\text{In the vast majority of cases of smaller estates it would be unfortunate if a narrow, or possibly narrow, interpretation of “personal property” were imposed upon the surviving spouse. A spouse should not have to suffer the anxiety of wondering whether a brooch or a neckchain given to the deceased spouse as a wedding anniversary present is or is not ‘jewellery’. Even if a person has established an extremely valuable collection of articles, such as paintings, then the Commission considers that if its owner fails to make a will it is reasonable to assume that he or she intended his or her spouse to have it. For this reason, the Commission has decided that it would be more appropriate to adopt an open definition of ‘personal property’ which excludes 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.}

\(\text{... The Commission’s exclusive definition of ‘personal property’ will resolve doubts about whether certain items are in fact personal property. Items such as}\)

\(^{32}\) QLRC, R 42, p 40.
motor vehicles, works of art, collections, and other valuable items would be included.\textsuperscript{33}

By contrast with the QLRC, which recommended that the surviving spouse should receive the “personal property” of the intestate, the 1997 Bill gives the spouse the “household chattels”. Under proposed new s 34A of the Succession Act, inserted by Clause 7 of the Succession Amendment Bill 1997, “household chattels” excludes motor vehicles, boats, aircraft, racing animals, original paintings, trophies, jewellery, or other chattels of a personal nature: proposed new s 34A(2). Under proposed new s 34A(1), the phrase “household chattels” is defined to mean:

... all furniture, curtains, drapes, carpets, linen, china, glassware, ornaments, domestic appliances and utensils, garden appliances, utensils and effects and other chattels of ordinary household use or decoration, liquors, wines, consumable stores and domestic animals owned by the intestate immediately before the intestate’s death.

**Surviving spouse or de facto spouse but no issue**

Under the Succession Amendment Bill, where the intestate is not survived by issue, but is survived by a spouse or de facto spouse, the surviving spouse or de facto spouse is entitled to the whole of the intestate’s residuary estate (as recommended by the Queensland Law Reform Commission): proposed new Schedule 2, Part 1, Item 1.

This is similar to the position in the majority of other Australia jurisdictions. In New South Wales\textsuperscript{34}, Victoria\textsuperscript{35}, South Australia\textsuperscript{36}, Tasmania\textsuperscript{37}, and the Australian Capital Territory\textsuperscript{38}, a surviving spouse is entitled to the whole of an intestate’s residuary estate where there is no issue. In Western Australia, however, where the net value of the intestate’s property (other than household chattels) exceeds $75,000, a surviving spouse must still share the intestate’s residuary estate equally with any surviving parents or brothers and sisters and their children after an increased statutory legacy of $75,000.\textsuperscript{39} In the Northern Territory, even though the intestate leaves no issue, a surviving spouse must still share an intestate’s estate worth more

\textsuperscript{33} QLRC, R 42, pp 39-40.
\textsuperscript{34} Wills, Probate and Administration Act 1898 (NSW), s 61B(2).
\textsuperscript{35} Administration and Probate Act 1958 (Vic), s 51(1).
\textsuperscript{36} Administration and Probate Act 1919 (SA), s 72(G)(a).
\textsuperscript{37} Administration and Probate Act 1935 (Tas), s 44(2)(b).
\textsuperscript{38} Administration and Probate Act 1929 (ACT), s 49, Schedule 6, Part 1, Item 1.
\textsuperscript{39} Administration Act 1903 (WA), s 14, Table Item 3(b).
than $60,000 with the intestate’s parents, brothers and sisters and their issue (after first being paid a legacy of $60,000 from the estate).

Announcing the proposed Queensland changes, the Attorney-General and Minister for Justice, Hon D E Beanland MLA, emphasised that:

*Queensland is one of the few states in Australia where a surviving spouse with no children of an intestate has to share the estate with the deceased’s other relatives. Those relatives are entitled to insist that the estate be sold or valued so they can receive their entitlement.*

*Considering the surviving spouse is usually a woman between 72 and 78 years of age, the prospect of a forced sale of the family home and/or the family car, can come as a harsh insult after the injury of losing a life long soul mate.*

*For those reasons, alone, the current law is unfair and must be changed.*

### 4.2 THE POSITION OF DE FACTO SPOUSES

#### 4.2.1 The Current Legislation

At common law, a de facto spouse is not regarded as a spouse for the purpose of intestate succession. In the context of intestacy laws, de facto spouses have been accorded legislative recognition in other Australian jurisdictions (eg New South Wales, South Australia and the Northern Territory). However, in Queensland at present, de facto spouses are given no rights upon intestacy, although they may make application, as a dependant, for family provision under Part IV of the Succession Act.

40 Administration and Probate Act 1969 (NT), s 66, Schedule 6, Part 1, Item 3.
42 Hardingham, Neave and Ford, p 414.
43 *Wills, Probate and Administration Act 1898* (NSW), s 61B, s 61D.
44 *Administration and Probate Act 1919* (SA), s 4 and 72H, and *Family Relationships Act 1975* (SA), s 11(1).
45 Administration and Probate Act 1969 (NT), s 66, Schedule 6, Parts 2 and 3.
46 QLRC R 42, p 19.
4.2.2 The QLRC’s Recommendations

In its Report, the QLRC proposed that de facto partners be given similar rights upon intestacy to those of married partners. The QLRC argued, for example, that:

*If the de facto partner has had children to the intestate, the children will be entitled to share the estate; if the intestate has no other children (and no surviving married spouse) they will be entitled to the entire estate. Further, if the children are infants, the estate may well fall to be administered by the Public Trustee. The Public Trustee might also be a participant in any family provision application made by the parent, with inevitable administrative costs. It is hardly fair that intestacy rules should make provision from the intestate’s estate for a child of the intestate but not the surviving parent of the child who lived with the intestate at the time of death.*\(^{47}\)

The QLRC also argued that:

*To deny intestacy rights to de facto partners may in some cases mean that the survivor is left dependent on social security and family charity for the remainder of his or her life.*\(^{48}\)

**Same sex de facto relationships**

The QLRC supported homosexual couples being given the same rights upon the death intestate of a partner as parties to a de facto heterosexual relationship, on the following grounds:

*Participating in a homosexual sexual relationship is no longer a criminal activity. Discrimination in work, education and accommodation on the ground of “lawful sexual activity”, which would now include sexual activity within a homosexual relationship, is prohibited in Queensland. ... Australia has declared ‘sexual preference’ as a ground of discrimination for the purposes of the Discrimination (Employment and Occupation) Convention. Equitable principles applied in the area of constructive trusts, which have long been invoked in the settlement of property disputes between married and heterosexual de facto couples, have been applied in the case of homosexual couples. The needs of a surviving partner of a homosexual couple are the same as those of a married or de facto spouse. The arguments in support of granting partners in de facto heterosexual couples rights upon intestacy apply with equal force to the granting of such rights to partners in homosexual couples.*\(^{49}\)

\(^{47}\) QLRC R 42, p 20.  
\(^{48}\) QLRC R 42, p 20.
Duration of de facto partnership

Under the QLRC’s proposals, to qualify as a de facto partner for the purpose of the intestacy rules, a person must have lived with the intestate as a member of a couple on a genuine domestic basis for a period of, or periods totalling, at least 5 of the 6 years before the intestate’s death. However, no qualifying period of this kind applied in the case of a person who lived with the intestate as a member of a couple on a genuine domestic basis where that person was the parent of a child of the intestate who was less than 18 years old. However, in either of the above cases, the de facto partner must have actually been living with the intestate on a genuine domestic basis at the time of the intestate’s death. 50

Married partner and de facto partner

The Commission also considered what rules should apply if an intestate was survived by a married partner and a de facto partner. In its Report, it recommended that:

- Rights on intestacy should be given to only one surviving partner.
- A de facto partner should be recognised in preference to the married partner only if:
  - there is a qualified de facto partner, and
  - the intestate and the married partner had not lived together at any time during the five years before the intestate’s death. 51

4.2.3 The Proposed Legislation

The Succession Amendment 1997 Bill recognises de facto relationships where the relationship had existed for at least five of the six years immediately preceding the intestate’s death, and the relationship was in existence at the time of the intestate’s death. By contrast with the QLRC’s proposals, the qualifying period is not reduced if there is a child of the relationship under 18. While the QLRC proposed that homosexual de facto relationships should be recognised for the purpose of the intestacy laws, only opposite sex de facto relationships are recognised under the proposed legislation. 52 The definition of de facto spouse inserted into the definition section (s 5) of the Succession Act by Clause 4 of the Bill is the same as part (d) of

49 QLRC R 42, pp 18-19.
50 QLRC R 42, p 21.
51 QLRC, R 42, pp 24-27.
52 Succession Amendment Bill 1997 (Qld), Explanatory Notes, p 1.
the existing definition in s 40 of “dependant” for the purpose of that part of the Succession Act (Part 4) which deals with family provision.

By contrast with the QLRC proposal that rights upon intestacy should be given to only one surviving partner, the Succession Amendment Bill provides a mechanism for distributing the entitlement to the whole or a part of an intestate’s residuary estate between a married partner and a qualified de facto partner. Under **proposed new s 36** of the Succession Act, where there is both a spouse and a de facto spouse with an entitlement to a whole or a part of an intestate’s estate, the intestate’s residuary estate may be distributed between them in one of three ways:

- in accordance with a distribution agreement ie a written agreement between the spouse and the de facto: **proposed new s 36(1)(a)**;
- in accordance with a distribution order made by a court on the basis of what the court considers is just and equitable: **proposed new s 36(1)(b)** and **proposed new s 36(7)**, or
- in equal shares, if certain conditions set out in **proposed new s 36(1)(c)** are met.

In a Ministerial Media Statement of 14 March 1997, Hon D E Beanland MLA described this provision as a “unique innovation”, as a result of which:

> ... Queensland will become the only State where both a married and de facto spouse with legitimate yet competing interests will have the ability to have their claims resolved by the courts, with the courts given the power to ensure the split is just and equitable.  

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### 4.3 DISTRIBUTION OF ENTITLEMENT OF ISSUE

#### 4.3.1 The Current Legislation

The existing s 36 of the Succession Act sets out the way in which the entitlement of surviving issue to any part of an intestate’s residuary estate is to be distributed.

It provides that:

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53 Under **proposed new s 36(8)**, where a court decides what is just and equitable, no assumption is to be made in favour of a equal distribution as a starting point or otherwise. **Proposed new s 36(9)** allows a court to order an entitlement to be distributed solely to a spouse or solely to a de facto spouse if that is what the court considers is just and equitable.

Where an intestate is survived by issue who are entitled to the whole or a part of the residuary estate of the intestate the nearest issue of the intestate shall take that whole or part and if there be more than 1 such nearest issue among them in equal shares and the more remote issue of the intestate shall take that whole or part by representation.

The effect of existing s 36 is, as Lee explains, that:

... nearest issue take in equal shares, even if the nearest issue of the intestate happen all to be grandchildren or great grandchildren - so they do not take per stirpes [ie by representation]. But issue more remote take by representation, that is, they take, in equal shares if more than one, any share their deceased parent would have taken had he or she survived the intestate.55

4.3.2 The Proposed Legislation

Clause 9 of the Succession Amendment Bill 1997 inserts a proposed new s 36A into the Succession Act. This section sets out how the entitlement of issue to an intestate’s residuary estate is to be distributed. The Explanatory Notes explain that:

The traditional per stirpes rule is reinstated. The effect of the change is that where all the children of an intestate predecease the intestate leaving issue, the issue will now take per stirpes (or by representation) instead of per capita (in equal shares).56

In summary, where the issue of an intestate are entitled to the whole or a part of an intestate’s residuary estate, their entitlement is to be distributed in the following way:

- If the intestate had only one child and the child survived, the child takes: proposed new s 36A(3)
- If the intestate had two or more children, all of whom survived, the children take in equal shares: proposed new s 36A(4)
- If the intestate had two or more children, of whom some survived, and the others did not survive and did not leave surviving issue, the surviving children take in equal shares: proposed new s 36A(5).
- In any other case, the entitlement is divided into as many equal shares as the intestate had children who survived or who did not survive but left surviving issue: proposed new s 36A(6).
  - Any surviving children of the intestate take one share each: proposed new s 36A(7)(a).

55 Lee, p 198.
56 Succession Amendment Bill 1997 (Qld), Explanatory Notes, p 5.
• For each child of the intestate who did not survive but left surviving issue, one share is taken by representation by the child’s surviving issue (ie the issue take per stirpes): proposed new s 36A(7)(b).

4.4 ENTITLEMENT OF KIN WHERE THERE IS NO SPOUSE OR ISSUE

4.4.1 The Current Legislation

Under Schedule 2, Part 2, Item 2 of the Succession Act 1981, where the intestate is not survived by a spouse or by issue, but is survived by a parent, then the surviving parent is entitled to the whole of the intestate’s residuary estate. If both parents survive the intestate, they take the residuary estate in equal shares. Where either or both parents survive, they take the estate to the exclusion of all other kin.

Where the intestate is survived by neither a spouse, issue or a parent, but is survived by next of kin, they are entitled to share in the residuary estate, as follows:

• Surviving brothers and sisters of the intestate, and surviving children of any brothers and sisters who predeceased the intestate, are entitled to share the entire residuary estate to the exclusion of any other kin: s 37(1)(a).

• If the intestate is not survived by a parent, brother, sister, nephew or niece, but is survived by either or both grandparents, they take, if more than one, in equal shares, to the exclusion of any other kin: s 37(1)(b).

• If the intestate is not survived by a parent, brother, sister, nephew, niece or grandparent, then the uncles and aunts (if any) of the intestate and the surviving children (if any) of any uncles and aunts who predeceased the intestate are entitled to share the entire residuary estate: s 37(1)(c).

4.4.2 The QLRC’s Recommendations

In relation to the question of the entitlement of kin where there is no surviving spouse or issue, the QLRC recommended in its Report as follows:

It is proposed that the law should remain as it is. This means that parents take first; if there are no parents, then brothers, sisters, nieces and nephews; then grandparents; then uncles, aunts and cousins. No-one more remote can take.57

In considering the question of what limits should be placed on the entitlement of kin to share in an intestate’s residuary estate, the Queensland Law Reform Commission expressed the following view in both its Working Paper58 and its Report59:

57 QLRC, R 42, p 64.
58 QLRC, WP 37, p 21.
The next of kin entitled to share the estate of an intestate are confined by statute in Queensland to the parents, brothers, sisters, nephews and nieces, grandparents, uncles and aunts and cousins of the intestate. One reason for this is the difficulty of discovering remoter kin in a country a large proportion of whose population are immigrants, or children or grandchildren of immigrants. 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.

Commenting on this view as originally expressed in the QLRC’s Working Paper, Preece has argued:

It is a cause for regret that the opportunity has not been taken in the working paper to address in detail the general question of whether the definition of next of kin is wide enough. There is little more than an assertion that the extent of entitlement should remain as it is. The only argument advanced in support is the alleged difficulty of discovering remoter kin in a country a large proportion of whose population are immigrants or the children of immigrants. This proposition may be questioned. Most people of Queensland domicile or owning immovable property in Queensland, these being the people on whose death Queensland succession law will be applicable, are either from families sufficiently long settled in Australia or from countries of origin with sufficiently settled legal systems and administrations for tracing some more remote relatives not to present undue difficulty, for example, great nephews or great nieces or children of first cousins.

A particular issue is whether the restriction to benefit of children only to the exclusion of remoter issue of siblings or uncles or aunts of the intestate (Succession Act 1981, s 37, proviso at the end of the section) is appropriate, particularly the former. While children of first cousins of the intestate will rarely share a close relationship with the intestate, the same cannot be said in general of great nephews or great nieces. A childless and/or unmarried person will often have a close relationship with great nephews or great nieces, particularly if they have only one sibling. In some cases, the closeness of the relationship will approach that of grandparents and grandchildren. As the Commission recognises, the rate of marriage is decreasing, so the number of persons with no children or grandchildren of their own, but possibly great nephews or great nieces, is likely to increase.

More generally, the decrease in marriage, decrease in fertility and increased longevity all tend to reduce the number of surviving close relatives, so that the frequency of the Crown being able to claim the estate is likely to increase in future. 60

59 QLRC, R 42, p 63.
60 Preece, p 97.
4.4.3 The Proposed Legislation

The Succession Amendment Bill 1997 does not propose any changes to the entitlement of parents and next of kin, where the intestate is not survived by a spouse (or de facto spouse) or issue.

4.5 Entitlement Of The Crown

Under Schedule 2, Part 2, Item 4 of the current Succession Act 1981, where an intestate is not survived by a spouse, issue, a parent, or by next of kin, the entire residuary estate goes to the Crown.

The Queensland Law Reform Commission did not recommend that any change be made to the Crown’s entitlement where an intestate is not survived by a spouse (or de facto spouse), issue, parent(s) or next of kin. Nor is any change proposed under the Succession Amendment Bill.

4.6 Requirement Of Statutory Beneficiaries To Account

4.6.1 The Current Legislation

Section 38(2) of the current Succession Act 1981 provides that:

Where the spouse of an intestate acquires a beneficial interest under the will of an intestate in the property of the intestate, schedule 2, part 1, item 3 applies as if -

(a) in a case where the value of the beneficial interest so acquired by the spouse under the will does not exceed $50,000 - the references to the sum of $50,000 were references to that sum less the value of that beneficial interest; or

(b) in any other case - the references to the sum of $50,000 or the whole of the residuary estate, whichever is the less, were omitted.

As explained previously in Section 4.1.1 of this Bulletin, under Part 1, Item 3 of the Second Schedule, a surviving spouse is entitled to receive $50,000 and, if the value of the intestate’s residuary estate is greater than $50,000, one half of the balance of the residuary estate where the intestate is not survived by issue but is survived by a parent, brother, sister, nephew or niece. The effect of s 38(2) is that a surviving spouse has to bring into account, to a maximum of $50,000, any benefits received under the deceased’s will.
4.6.2 The QLRC’s Recommendations

In its Report, the Queensland Law Reform Commission considered whether a surviving spouse should bring into account, before receiving the benefits the QLRC recommended, especially the proposed statutory legacy of $100,000, benefits otherwise received upon or before the intestate’s death. Referring to submissions made in response to its Working Paper, the QLRC stated:

Some respondents to the Working Paper suggested that the surviving spouse should bring benefits otherwise received from the intestate into account against the statutory legacy of $100,000. One suggestion was that lump sum benefits received by virtue of a superannuation scheme or Approved Deposit Fund should be brought into account. Another respondent suggested that where the spouses have separated, any sum paid to the spouse in or towards a settlement should be brought into account. If it is justifiable to bring such sums into account it must further be considered whether legacies left by the will should still be required to be brought into account and whether other forms of benefit, for instance, gifts made to the spouse within a certain time before death, or even money placed in a joint account for the benefit of a surviving spouse, should be brought into account.\(^{61}\)

The QLRC took the view that there were:

... substantial arguments against requiring the spouse to bring benefits otherwise acquired from the deceased into account, both practical and theoretical.

At the practical level it would be difficult to ensure that every type of benefit could be traced to ensure that the spouse would bring them into account. Separation settlements are sometimes made in confidence, perhaps with the desire of both parties that children, or some children, should never become aware of them. Gifts, even if of a considerable amount, might have been made some years before and perhaps spent. Some superannuation lump sums are paid to the estate of the deceased rather than to the spouse. Any general requirement to account would be difficult to police and would produce anomalies.

But the more fundamental issue of what intestacy rules are really about is raised. ...

It is hard to see what justification there can be for using intestacy rules to reduce or even deprive the spouse of benefits which the deceased intended the surviving spouse to receive. If a testator makes provision for a spouse that reflects the wishes of the testator. If a spouse enters into a superannuation scheme under which the surviving spouse will benefit in the event of death before retirement, the deceased intends to benefit the spouse. A settlement made upon separation should be similarly regarded. These propositions are all the more tenable if the deceased did not make a will so as to indicate any intention to benefit others.

\(^{61}\) QLRC, R 42, p 52.
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.\textsuperscript{62}

4.6.3 The Proposed Legislation

Clause 11 of the Succession Amendment Bill 1997 omits ss 38(2) and(3) of the existing Succession Act. Accordingly, where an intestate person made a will but it did not dispose of all of his or her property, statutory beneficiaries will no longer be required to account for any interest received under the will.

\textsuperscript{62} QLRC, R 42, pp 52-53.
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Attorney-General and Minister for Justice

14 March 1997

STATE GOVERNMENT WILL IMPROVE WILLS

Almost 20% of the population dies intestate, which is reason enough to make a will. But according to Attorney-General and Minister for Justice, Denver Beanland, it’s also reason enough to make Queensland’s intestacy legislation fairer by changing the Succession Act 1981.

“Queensland is one of the few States in Australia where a surviving spouse with no children of an intestate has to share the estate with the deceased’s other relatives. Those relatives are entitled to insist that the estate be sold or valued so they can receive their entitlement,” Mr Beanland said.

“Considering the surviving spouse is usually a woman between 72 and 78 years of age, the prospect of a forced sale of the family home and/or the family car, can come as a harsh insult after the injury of losing a life long soul mate.”

“For those reasons alone, the current law is unfair and must be changed,” he said.

Under the changes, approved in principle by State Cabinet, the surviving spouse will be entitled to the household chattels, $100,000 (currently $50,000), and half the residue if there is one child and one third of the residue if there is more than one child.

Opposite sex de facto relationships of more than five years duration will also be recognised under the new law. And, in a unique innovation, Queensland will become the only State where both a married and de facto spouse with legitimate yet competing interests will have the ability to have their claims resolved by the courts, with the courts given the power to ensure the split is just and equitable.

“What is clear is that regardless of these changes people should keep up to date wills. The Public Trustee offers a free will making service which may be why Queensland’s intestacy rate is lower than in many other parts of the world,” Mr Beanland said.

The proposed new changes will also reinstate the traditional per stirpes rule which will enable the speedier distribution of some intestate estates where some of the beneficiaries cannot be located.

Further information: Paul Edwards, Senior Media Adviser (07) 3239 3815 office, 041 2161 202 mobile.
Attorney-General and Minister for Justice

14 March 1997

NEW SUCCESSION LEGISLATION

Almost 20% of the population dies intestate, which is reason enough to make a will. But according to Attorney-General and Minister for Justice, Denver Beanland, it’s also reason enough to make Queensland’s intestacy legislation fairer by changing the Succession Act 1981.

“At the moment, surviving spouses are often faced with the prospect of selling the family home to settle the estate,” Mr Beanland said.

“That is a harsh and crippling blow for someone who has just lost a loved one.”

Mr Beanland launched an exposure draft of the bill today for three weeks public consultation. He said proposed changes would ease the blow for surviving family members and for the first time recognise opposite sex de facto relationships of more than five years standing.

“Despite these proposals people should keep their wills up to date. The Public Trustee offers a free will making service with very low estate charges,” Mr Beanland said.

The three week public consultation period will end on 11 July. Any interested persons should send their submissions in writing to:
The Attorney General and Minister for Justice
The Hon Denver Beanland MLA
GPO Box 149
Brisbane Q 4000

Further information: Paul Edwards (07) 3239 3815 or 041 2161 202