Victorian Law Reform Commission

Succession Laws

CONSULTATION PAPER | **INTESTACY**

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Victorian Law Reform Commission

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GPO Box 4637
Melbourne Victoria 3001 Australia
DX 144, Melbourne

Level 3, 333 Queen Street
Melbourne Victoria 3000 Australia

Telephone: +61 3 8608 7800
Freecall: 1300 666 555 (within Victoria)
Fax: +61 3 8608 7888

Email: law.reform@lawreform.vic.gov.au
Internet: www.lawreform.vic.gov.au

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Call for submissions

The Victorian Law Reform Commission invites your comments on this consultation paper.

What is a submission?

Submissions are your ideas or opinions about the law under review and how to improve it. This consultation paper contains a number of questions on page 43 that seek to guide submissions.

Submissions can be anything from a personal story about how the law has affected you to a research paper complete with footnotes and bibliography. We want to hear from anyone who has experience with the law under review. It does not matter if you only have one or two points to make—we still want to hear from you. Please note, however, that the Commission does not provide legal advice.

What is my submission used for?

Submissions help us understand different views and experiences about the law we are researching. We use the information we receive in submissions, and from consultations, along with other research, to write our reports and develop recommendations.

How do I make a submission?

You can make a submission in writing, or in the case of those requiring assistance, verbally, to one of the Commission staff. There is no required format. However, we encourage you to consider the questions listed on page 43.

Submissions can be made by:
Online form: www.lawreform.vic.gov.au
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- if you need assistance to have your views heard
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Publication of submissions

The Commission is committed to providing open access to information. We publish submissions on our website to encourage discussion and to keep the community informed about our projects.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments or which are outside the scope of the reference. Before publication, we may remove personally identifying information from submissions that discuss specific cases or the personal circumstances and experiences of people other than the author. Personal addresses and contact details are removed from all submissions before they are published.

The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, these views by the Commission.

We keep submissions on the website for 12 months following the completion of a reference. A reference is complete on the date the final report is tabled in Parliament or, in the case of a community law reform project, when the report is presented to the Attorney-General. Hard copies of submissions will be archived and sent to the Public Records Office Victoria.

The Commission also accepts submissions made in confidence. These submissions will not be published on the website or elsewhere. Submissions may be confidential because they include personal experiences or other sensitive information. The Commission does not allow external access to confidential submissions. If, however, the Commission receives a request under the *Freedom of Information Act 1982* (Vic), the request will be determined in accordance with the Act. The Act has provisions designed to protect personal information and information given in confidence. Further information can be found at www.foi.vic.gov.au.

Please note that submissions that do not have an author or organisation's name attached will not be published on the Commission's website or made publicly available and will be treated as confidential submissions.

Confidentiality

When you make a submission, you must decide how you want your submission to be treated. Submissions are either public or confidential.

- **Public submissions** can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the final report. Private addresses and contact details will be removed from submissions before they are made public.
- **Confidential submissions** are not made available to the public. Confidential submissions are considered by the Commission but they are not referred to in our final reports as a source of information or opinion other than in exceptional circumstances.

Please let us know your preference when you make your submission. If you do not tell us that you want your submission treated as confidential, we will treat it as public.

Anonymous submissions

If you do not put your name or an organisation's name on your submission, it will be difficult for us to make use of the information you have provided. If you have concerns about your identity being made public, please consider making your submission confidential rather than submitting it anonymously.

More information about the submission process and this reference is available on our website: www.lawreform.vic.gov.au.

Submission deadline 28 March 2013

Terms of reference

The Victorian Law Reform Commission is asked to review and report on the desirability of legislative or other reform in relation to the succession law matters set out in these terms of reference. The purpose of this reference is to:

(a) ensure that Victorian law operates justly, fairly and in accordance with community expectations in relation to the way property is dealt with after a person dies

(b) ensure that the processes to resolve disputes about the distribution of such property are efficient, effective and accessible

(c) identify practical solutions to problems that may still be outstanding in Victorian law and practice following the recommendations of the National Committee for Uniform Succession Laws established by the Standing Committee of Attorneys-General (SCAG).

In particular, the Commission is asked to review and report on the following matters:

Wills

1. whether the current requirements for witnessing wills should be revised to better protect older and vulnerable will-makers from undue influence by potential beneficiaries or others
2. whether the current provisions that allow the Supreme Court to authorise wills for persons who do not have testamentary capacity should be revised
3. the need to clarify when testamentary property disposed of during the will-maker's lifetime will be adeemed and when it will be protected from ademption

Family provision

4. whether Part IV of the *Administration and Probate Act 1958* concerning family provision applications is operating justly and effectively, having regard to its objective of providing for the proper maintenance and support of persons for whom a deceased had a responsibility to make provision

Intestacy

5. whether Division 6 of Part I of the *Administration and Probate Act 1958* concerning the distribution of an estate on an intestacy is operating effectively to achieve just and equitable outcomes

Legal practitioner executors

6. whether there should be special rules for legal practitioners who act as executors and also carry out legal work on behalf of the estate, including rules for the charging of costs and commission

Administration of estates

7. how assets are designated to pay the debts of an estate and the effect that this has on the estate available for distribution to beneficiaries or to meet a successful family provision claim
8. whether a court should have the power to review and vary costs and commission charged by executors

Operation of the jurisdiction

9. whether there are more efficient ways of dealing with small estates
10. the costs rules and principles applied in succession proceedings, taking into account any developments in rules or practice notes made or proposed by the Supreme Court
11. any other means of improving efficiency and reducing costs in succession law matters.

In undertaking this reference, the Commission should have regard to, and conduct specific consultation on, any relevant recommendations made by the National Committee for Uniform Succession Laws established by SCAG. The National Committee has released reports and model legislation on wills (1997 and 2006), family provision (1997 and 2004), intestacy (2007) and the administration of deceased estates (2009). State and Territory Ministers have agreed to adopt the National Committee's recommendations as the basis for reforming succession laws in their respective jurisdictions with the aim of maximising national consistency.

The reference does not include consideration of the remaining recommendations of the National Committee, unless relevant to the above referred matters.

The Commission should also consider any legislative developments in both Victoria and other Australian jurisdictions since the National Committee released its reports.

The Commission is to report by 1 September 2013.

Glossary

Ademption	The rule of ademption specifies that, when the subject matter of a specific gift to someone is no longer in the will-maker's estate at the date of death (because it has been sold or given away, for example), the beneficiary will receive nothing. In this case, the gift is said to have been adeemed.
Administrator	A person appointed by the court under letters of administration to administer a deceased estate which has no **executor**. This may be because there is no will, the will does not appoint an executor, or a named executor is unwilling or unable to act.
Bona vacantia	Property that has no owner. If a person dies intestate (leaving property that is not disposed of by a will) and is not survived by any next of kin, the intestate estate belongs to the Crown as *bona vacantia.* See also **intestacy**.
Collateral relatives	Blood relatives who are related by common ancestry but not through a direct line of descent. For example, the relationship between siblings is collateral. See also **lineal relatives**.
Disbursement	An expense paid by a solicitor on behalf of a client, for which reimbursement will be sought. Disbursements are distinct from solicitors' professional fees and court costs, and might include, for example, the cost of medical reports or a barrister's fees.
Executor	The person appointed by the will to administer the estate.
Grant of letters of administration	A grant of letters of administration is made where there is no will, or where there is a will but no **executor** is available for some reason. It confers upon a court-appointed **administrator** the authority to administer the estate.
Grant of probate	A grant of probate certifies that the will is the last and valid will of the deceased person and confirms the authority of the **executor** named in the will to administer the estate.

Grant of representation	A grant, by the Supreme Court, of probate or of letters of administration.
Hotchpot	The requirement for certain benefits received by a deceased person's child during the deceased person's lifetime to be taken into account when determining that child's share on **intestacy**.
Informal administration	Administration of estate assets without a **grant of representation**.
Inter vivos	Refers to something that occurs during life. In the succession law context, it is most often used to distinguish between gifts or transactions during a person's life and those that occur in accordance with their will.
Intestacy	Occurs when a person dies without having made a valid will, or where their will fails to effectively dispose of all of their property. Intestacy can be partial, where only some of the deceased person's property is effectively disposed of by will, or total, where none of the deceased person's property is effectively disposed of by will.
Issue	A person's children, grandchildren, great-grandchildren and other direct descendants down this line.
Joint tenancy	Common ownership of property when all co-owners (or co-tenants) together own the whole piece of property, each having an undivided share. Property that is owned jointly passes to the surviving co-owner or co-owners on the death of one of the co-owners and does not become part of the deceased person's estate. See also **survivorship** and **tenancy in common.**
Lineal relatives	Blood relatives who are related by a direct line of ancestry, either ancestors or descendants. For example, the parent to child relationship is lineal. See also **collateral relatives**.
Marshalling	The process of adjusting beneficiaries' benefits, after the payment of the estate's debts, to ensure the distribution accords with the order established under the will or by statute.
Next of kin	A person's closest blood relatives. A deceased person's estate is distributed to their surviving next of kin on **intestacy.**
Party and party costs	All costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party. The amount includes the necessary legal costs of prosecuting or defending a case, as calculated by using a standard scale of fees (rather than the fees that were actually charged). A party awarded party and party costs recovers less from the other side than they would if awarded **solicitor and client costs.**

Real property	Land and interests in land, otherwise known as real estate.
Registrar of Probates	An officer of the Supreme Court with both judicial and administrative functions. The Registrar of Probates is appointed under the *Supreme Court Act 1986* (Vic) and may exercise the power of the Court in making grants of representation.
Residuary estate	The remainder of the estate after debts and liabilities are paid, and specific gifts and legacies are distributed.
Solicitor and client costs	All costs reasonably incurred and of reasonable amount. They are likely to cover almost all the legal fees that the party was actually charged. A party awarded solicitor and client costs recovers more from the other side than they would if awarded **party and party costs.**
Statutory will	A will authorised by the court for a person who is alive but lacks the **testamentary capacity** required to make a valid will for themselves.
Survivorship	A right in relation to property held by two or more people as joint tenants. Where a co-owner (or co-tenant) dies, their share in the property passes to the surviving co-owner(s). It cannot be given by will. See also **joint tenancy.**
Tenancy in common	A type of co-ownership where multiple parties own distinct interests in the same piece of property. The share owned by a tenant in common forms part of their estate. See also **joint tenancy.**
Testamentary capacity	The mental capacity required to make a valid will. To have testamentary capacity, a person must be of sound mind, memory and understanding, and must understand the nature and effect of making a will.

1. Background

Background to the review

Terms of reference

1.1 On 1 March 2012, the Attorney-General asked the Victorian Law Reform Commission to report by 1 September 2013 on a number of succession law matters. The terms of reference are on page 6.

1.2 The purpose of the review, as set out in the terms of reference, is to:

(a) ensure that Victorian law operates justly, fairly and in accordance with community expectations in relation to the way property is dealt with after a person dies

(b) ensure that the processes to resolve disputes about the distribution of such property are efficient, effective and accessible

(c) identify practical solutions to problems that may still be outstanding in Victorian law and practice following the recommendations of the National Committee for Uniform Succession Laws established by the Standing Committee of Attorneys-General.

1.3 The terms of reference then specify 11 topics that the Commission should examine in particular.

The Uniform Succession Laws project

1.4 In conducting the review, the Commission is to take account of recommendations made by the National Committee for Uniform Succession Laws. The National Committee guided the National Uniform Succession Laws project, which was an initiative of the former Standing Committee of Attorneys-General (SCAG).[1]

1.5 In 1991, SCAG agreed to develop uniform succession law and practice across Australia. The following year, it asked the Queensland Law Reform Commission to coordinate the project. The project was guided by the National Committee, comprising representatives from all jurisdictions.

1.6 The National Committee conducted extensive research in conjunction with a number of law reform bodies over a period of 14 years and published reports on the law of wills (1997), family provision (1997 and 2004), intestacy (2007) and the administration of deceased estates (2009).

1 Now known, since September 2011, as the Standing Council on Law and Justice. It comprises Commonwealth, state and territory attorneys-general and the New Zealand Minister for Justice.

Succession laws in Victoria

1.7 Succession laws regulate how property is administered and distributed on the owner's death. In 2011, 36,733 deaths were registered in Victoria.[2] Many of those who died left a valid will setting out how they wanted their property to be distributed. Property that is not disposed of by a valid will can be distributed under a statutory intestacy scheme.

1.8 Victoria's succession laws are found in:

- the *Wills Act 1997* (Vic) and associated case law on the construction and validity of wills, and
- the *Administration and Probate Act 1958* (Vic) and associated case law dealing with the administration and distribution of assets.

1.9 Other legislation specifies the powers of executors, administrators and others involved in finalising the deceased person's financial affairs and the procedures they should follow.[3] Succession laws also interact with property and taxation laws and laws that determine the legal status of relationships.

1.10 Nevertheless, not all of a deceased person's assets are necessarily managed and administered under succession laws. Succession laws concern the administration and distribution of the deceased person's estate. The estate includes property that the person held or was entitled to at the time of their death. It may be real property (ownership or interest in land, a house or another type of building or immovable object attached to the land) or personal property (other assets such as money, shares, vehicles and other movable personal possessions).[4]

1.11 The following property interests are not normally included in the estate, and therefore are not dealt with by succession laws:

- Death benefits payable by a superannuation fund, as they may be disposed of only by a trustee of the fund. However, fund members often make a binding death benefit nomination asking the trustee to pay their superannuation death benefit to the person they appoint as executor under their will. When this happens, the executor can then distribute the money as directed by the fund member's will.[5]
- Payment under a life insurance policy to someone nominated by the insured person. The payment is made in accordance with the agreement between the insurance firm and the insured person.
- Jointly owned property, such as a house or a bank account, because this passes directly to the other owners.

1.12 As the Commission's terms of reference concern succession laws, they extend only to reviewing the rules that regulate the administration and distribution of property interests that comprise a deceased person's estate.[6]

2 Victorian Registry of Births Deaths and Marriages, *Fast Facts* (3 January 2012) <http://www.bdm.vic.gov.au/utility/about+us/fast+facts/>.
3 For example, trustee companies that act as administrators or executors of estates are regulated by the *State Trustees (State Owned Company) Act 1994* (Vic) and the *Corporations Act 2001* (Cth); and the Supreme Court's procedures for administration and probate are set out in the *Supreme Court (Administration and Probate) Rules 2004* (Vic).
4 For a full description of the types of property that may be disposed of by will, see the *Wills Act 1997* (Vic) s 4.
5 *Superannuation Industry Supervision Act 1993* (Cth) s 59(1A).
6 For a full discussion of the boundaries of succession law, see Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death: Text and Cases* (LexisNexis Butterworths, 3rd ed, 2009) 91–137.

The Wills Act

1.13 When Victoria separated from New South Wales and became an independent colony in 1850, the laws then in force in New South Wales continued to apply here. They included the *Wills Act 1837* (UK).[7]

1.14 An organising principle of the 1837 Act was the doctrine of 'testamentary freedom'. According to this doctrine, a person (the 'testator') should be free to determine how their property is distributed on their death by making a will (or 'testament') that sets out their intentions. The Act regulated who could make a will, the type of property that a will could dispose of, procedural formalities that must be followed in order for the will to be valid, and how to interpret it.

1.15 As a colony, and later as a state, Victoria's wills legislation developed and changed slowly, but sometimes significantly.[8] Although consolidated a number of times,[9] the legislation was not comprehensively reviewed until 1984. In that year the Attorney-General established a working party to review the *Wills Act 1958* (Vic).[10]

1.16 Two years later, in 1986, the working party presented the Attorney-General with a report recommending changes that would bring Victoria's legislation into line with legislation in the other Australian jurisdictions.[11] Work began on drafting a new Wills Act, reflecting the Working Party's recommendations. The eighth draft was referred to the Victorian Parliamentary Law Reform Committee in 1991.

1.17 By that time, moves were being made nationally to establish the Uniform Succession Laws project. The Parliamentary Law Reform Committee sought to assist the national project by 'avoiding unnecessary departures from formulations most likely to be generally adopted'.[12] For its part, the Queensland Law Reform Commission focused the national project on the law of wills in order to accommodate the work of the Parliamentary Law Reform Committee.[13] The Parliamentary Law Reform Committee presented its report in 1994, and its recommendations included a proposed Wills Act.[14]

1.18 The National Committee presented its report on wills in 1996, which took account of the proposed Victorian Wills Act and recommended national model legislation.[15]

1.19 The outcome in Victoria was the passage of the *Wills Act 1997* (Vic). It is a 'reasonably faithful' replica of the model national legislation.[16] The Commission is examining only three specific issues in relation to the law of wills.

7 7 Wm 4 & 1 Vict, c 26.
8 For example, the lowering of the age of majority from 21 to 18 by the *Wills (Minors) Act 1965* (Vic); and the amendment of the witness-beneficiary rule by the *Wills (Interested Witnesses) Act 1977* (Vic).
9 *Wills Statute 1864* (Vic); *Wills Act 1890* (Vic); *Wills Act 1915* (Vic); *Wills Act 1928* (Vic); *Wills Act 1958* (Vic).
10 The Attorney-General's Working Party in 1984 comprised representatives of the Law Department, the Probate Office, the Law Faculty of the University of Melbourne, the Law Institute of Victoria and the Victorian Bar.
11 The report was not published.
12 Law Reform Committee, Parliament of Victoria, *Reforming the Law of Wills* (1994) xiii.
13 National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills,* Queensland Law Reform Commission Miscellaneous Paper 29 (1997) i.
14 Law Reform Committee, above n 12.
15 National Committee for Uniform Succession Laws, above n 13.
16 Rosalind Croucher, 'Towards Uniform Succession in Australia' (2009) 83 *Australian Law Journal* 728, 730.

The Administration and Probate Act

1.20 Like the Wills Act, the origins of the Administration and Probate Act can be traced back to colonial times. It sets out the procedures for administering the estate until the assets are distributed to family, friends and other beneficiaries under a will or in accordance with the rules of intestacy.

1.21 Early versions of this legislation established: the jurisdiction of the Supreme Court in this area; the powers and responsibilities of executors and administrators; rules for distributing the property of people who die intestate; and court procedures, including special arrangements for small estates. Later, it incorporated 'family provision' legislation, empowering the Court to alter the distribution of property under a will or the intestacy scheme to provide for the maintenance and support of someone for whom the deceased person had responsibility to provide.

1.22 Family provision legislation provides a counterpoint to the doctrine of testamentary freedom. It places limits on the freedom of a will-maker to dispose of their property as they wish. Although testamentary freedom was favoured during Victoria's colonial period, it had previously been restricted in a variety of ways, to greater and lesser degrees, under English law.[17]

1.23 With the passage of the *Widows and Young Children Maintenance Act 1906* (Vic), the new State of Victoria was the first jurisdiction to introduce family provision legislation in Australia. It was based on the *Testator's Family Maintenance Act 1900* (NZ), the first law of its kind in a common law country.[18] Between 1912 and 1929, all Australian states and territories enacted family provision laws,[19] followed by England and Wales in 1938.[20]

1.24 Unlike the Wills Act, the Administration and Probate Act has never been comprehensively reviewed. While not requiring the whole Act to be examined, the Commission's terms of reference extend to many of the key provisions, including those that address the following issues:

- executors' commission for their time and trouble
- applying assets to the payment of debts
- the intestacy scheme for distributing the assets of someone who has died without making a will
- special procedures for administering small estates, and
- family provision.

17 See John K de Groot and Bruce W Nickel, *Family Provision in Australia* (LexisNexis Butterworths, 4th ed, 2012) 2–3.

18 Myles McGregor-Lowndes and Frances Hannah, 'Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?'(2009) 17 *Australian Property Law Journal* 62, 64; National Committee for Uniform Succession Laws, *Uniform Succession Laws: Family Provision,* Queensland Law Reform Commission Working Paper 47 (1995) 1. Dainow notes that the successful New Zealand bill followed several unsuccessful attempts at passing family provision legislation: Joseph Dainow, 'Restricted Testation in New Zealand, Australia and Canada' (1937) 37 *Michigan Law Review* 1107, 1108.

19 National Committee for Uniform Succession Laws, *Uniform Succession Laws: Family Provision,* Queensland Law Reform Commission Working Paper 47 (1995) 1; *Testator's Family Maintenance Act 1912* (Tas); *Testator's Family Maintenance Act 1914* (Qld); *Testator's Maintenance and Guardianship of Infants Act 1916* (NSW); *Testator's Family Maintenance Act 1918* (SA); *Guardianship of Infants Act 1920* (WA) s 11; *Administration and Probate Ordinance* (ACT) pt VII; *Testator's Family Maintenance Order 1929* (NT).

20 *Inheritance (Family Provision) Act 1938* (UK).

The Commission's process

1.25 Dr Ian Hardingham QC has been appointed to the Commission to lead the review. Dr Hardingham has extensive experience in teaching, advising and writing about the law, as well as practising in the area as a barrister.

1.26 Since receiving the terms of reference, the Commission has been studying the legislation, cases and academic materials and holding preliminary discussions with the courts and legal practitioners. To help it identify issues and possible areas in need of reform, the Commission formed an advisory committee of experts who have been able to provide insights into how the law works in practice.

1.27 These preliminary discussions were only the beginning of the Commission's consultations. The release of a series of consultation papers, including this one, is an opportunity for people who would like to comment on the topics covered by the terms of reference to contribute to the review.

1.28 It is the Commission's usual practice to publish a single consultation paper addressing all of the terms of reference of a review. In this case, because it is examining a range of disparate subjects, it is releasing six short consultation papers, each focusing on different topics:

- wills
- family provision
- intestacy
- executors
- small estates
- payment of debts.

1.29 The papers describe the law, identify issues, and suggest options for reform.

1.30 Submissions in response to the papers are invited by 28 March 2013. They will guide the Commission's deliberations and further consultations, in accordance with the Commission's community engagement principles.

This consultation paper

1.31 This consultation paper discusses the policy and principles that underpin intestacy law, and the information available about the number and characteristics of intestate estates in Victoria.

1.32 It raises possible areas for reform of intestacy law in Victoria, with a view to improving the efficiency and fairness of the scheme, and in light of recommendations made by the National Committee for Uniform Succession Laws. The areas for reform include:

- defining and setting a limit on next of kin
- survivorship
- entitlements of the deceased person's partner or partners
- entitlements of the deceased person's children
- *per stirpes* or *per capita* distribution
- taking other benefits into account
- Indigenous intestate estates.

1.33 Possible options for reform are suggested, which will continue to evolve as the Commission continues to explore the issues.

1.34 The policy framework of this paper is based on the terms of reference and gives priority to:

- the desirability of national consistency
- minimising cost and complexity in administration of intestate estates
- ensuring that the law operates fairly to produce just and equitable outcomes.

2. Intestacy

Introduction

2.1 If a person dies without a will, the law of intestacy determines how their property is disposed of. It establishes a hierarchy of relationships, in accordance with which the deceased person's property is distributed. The deceased person's partner and children are prioritised in this hierarchy, followed by their closest surviving blood relatives.

2.2 A person is said to have died intestate when they die:

- without a will
- without a valid will because, for example, the will does not comply with the necessary formalities or the will-maker was subject to the undue influence of another person
- with a valid will, but all of the beneficiaries under the will have died, so that the beneficial dispositions lapse, or
- with a valid will that only disposes of part of their estate (a partial intestacy).

2.3 Division 6 of part I of the *Administration and Probate Act 1958* (Vic) establishes a statutory scheme for the distribution of property on intestacy in Victoria. The Commission's terms of reference direct it to review and report on whether Victorian intestacy laws are operating effectively to achieve just and equitable outcomes.

2.4 The National Committee for Uniform Succession Laws, which comprised representatives from all states and territories except South Australia, reviewed the laws of intestacy in all Australian states and territories. Its 2007 report on intestacy made 79 recommendations, which, if implemented, would involve significant reform to Victoria's intestacy laws.[1] The recommendations have been substantially implemented in New South Wales and Tasmania.[2]

2.5 In preliminary discussions, the Commission has heard views that, unless there are strong reasons to depart from the National Committee's intestacy recommendations, they should be preferred over the current law or other alternatives. In many areas, the National Committee's recommendations would update and improve the law, and greatly simplify the administration of intestate estates, in Victoria.

1 National Committee for Uniform Succession Laws, *Uniform Succession Laws: Intestacy,* New South Wales Law Reform Commission Report 116 (2007).

2 *Succession Amendment (Intestacy) Act 2009* (NSW); *Intestacy Act 2010* (Tas).

Overview of the intestacy scheme in Victoria

2.6 It is useful to consider some of the foundational concepts of intestacy law, and some statistics about Victoria's intestacy laws in operation, before turning to particular areas for reform.

Residuary estate

2.7 In Victoria, the property to be distributed on intestacy is referred to as the 'residuary estate'. The residuary estate is money that remains, and is not disposed of by will, after the deceased person's real and personal estate[3] has been sold and converted into money, and the funeral, testamentary and administration expenses, debts and other liabilities have been paid. It also includes any part of the estate that may be retained unsold and is not required for administration purposes.[4]

2.8 The residuary estate of a person who dies intestate vests in State Trustees[5] until there is a grant of letters of administration.[6]

Grant of letters of administration

2.9 When a person dies wholly intestate, it is usually necessary for the person seeking to act as administrator to apply for a grant of letters of administration.[7]

2.10 The Supreme Court has sole jurisdiction to make both grants of letters of administration and grants of probate.[8] If the intestacy is partial, only a grant of probate is required and the executor administers the residuary estate—that is, the intestate estate—according to the laws of intestacy.[9]

2.11 In cases where a grant of letters of administration is necessary, the person seeking to be appointed administrator makes an application, supported by affidavit evidence, to the Registrar of Probates of the Supreme Court.[10]

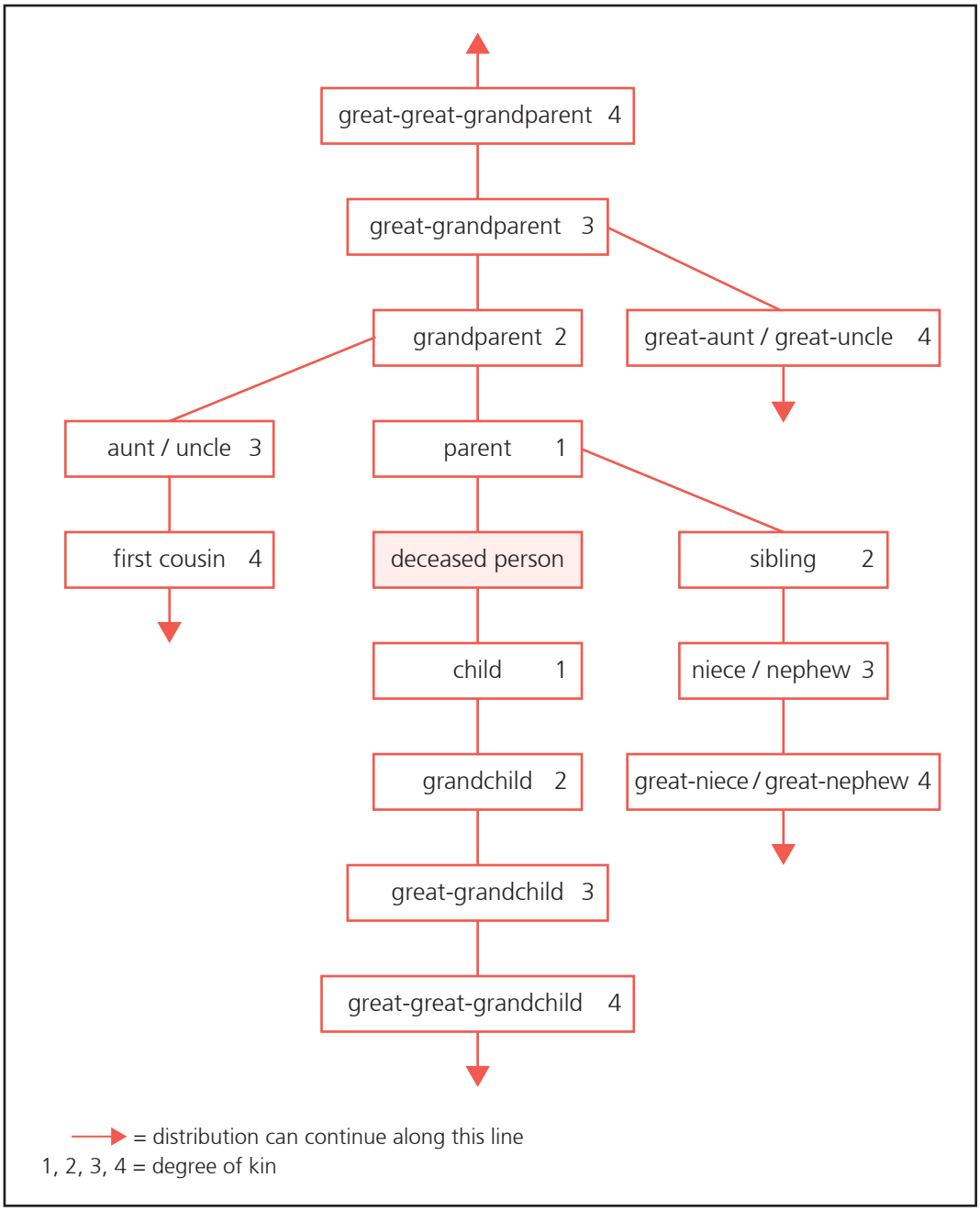
Distribution hierarchy

2.12 Intestacy law establishes a hierarchy of those who are entitled to a share of the residuary estate. In Victoria, next of kin are determined by the civil law rules of distribution,[11] subject to the rules of distribution set out in the Administration and Probate Act.[12]

2.13 Distribution according to the civil law involves counting the number of 'steps' between the deceased and the particular relative. Steps are counted directly, by generation, in the case of those related lineally (for example, deceased person to the deceased person's grandchild), and indirectly, up through the common ancestor, in the case of those related collaterally (for example, the deceased person to the deceased person's cousin). The relative, or relatives, with the fewest steps between them and the deceased person will be the deceased's next of kin for the purposes of intestacy. Distribution under the civil law is set out in Figure 1, below.

3 Real estate is typically land, and personal estate is non-land assets. Under the Administration and Probate Act, 'personal chattels' are separate from 'personal property', and they are not to be sold on intestacy unless required for administration or for special reason: *Administration and Probate Act 1958* (Vic) s 38(1).
4 *Administration and Probate Act 1958* (Vic) s 38(4).
5 State Trustees Limited, a company owned by the State of Victoria and operating under the *State Trustees (State Owned Company) Act 1994* (Vic).
6 *Administration and Probate Act 1958* (Vic) s 19.
7 Rather than a grant of probate, which would be sought if there were a will.
8 *Administration and Probate Act 1958* (Vic) ss 6, 3 (definition of 'Court'). Such grants may be made by the Registrar of Probates: s 12.
9 If the intestacy is partial, all of the deceased person's 'hereditaments'—that is, all of the estate that they could have disposed of by will—vest in the executor: *Administration and Probate Act 1958* (Vic) s 13. If the person died wholly intestate, the estate vests in the administrator: at s 13.
10 *Administration and Probate Act 1958* (Vic) s 12; *Supreme Court (Administration and Probate) Rules 2004* (Vic) O 4A.
11 Ian Hardingham, Marcia Neave and Harold Ford, *Wills and Intestacy in Australia and New Zealand* (Law Book Company, 2nd ed, 1989) 365. Next of kin were ascertained according to the civil law under the English Statute of Distributions of 1670, on which Victoria's intestacy laws are based: at 352, 357–8.
12 *Administration and Probate Act 1958* (Vic) ss 51–2.

Figure 1—Civil law rules of distribution to the fourth degree



2.14 The deceased person's children, grandchildren, great-grandchildren, and so on down that line, are sometimes called the deceased person's 'issue'. This consultation paper uses the term 'children or other issue' to indicate when the deceased person's children, grandchildren, great-grandchildren and so on are entitled to take a benefit on intestacy.

2.15 The Administration and Probate Act alters the civil law rules of distribution in the following ways:

- The deceased person's partner and children, or other issue, take in priority to all others.[13]
- Although they are of the same degree of kin, the deceased person's siblings (and siblings' children when taking as representatives of their deceased parent) take in priority to the deceased person's grandparents.[14]

13 Ibid ss 51, 52(1). This means, for example, that the deceased person's grandchild would take in priority to the deceased person's sibling, although they are of the same degree of remoteness from the deceased person, and the deceased person's great-grandchild would take in priority to the deceased person's sibling, although more remote than the sibling.

14 Ibid s 52(1)(f)(v).

2.16 Together, the Administration and Probate Act and the civil law rules of distribution establish the following hierarchy of those entitled to take on intestacy:

1 partner(s) and children or other issue

2 parents

3 siblings, or nieces and nephews when they take as representatives of their deceased parent[15]

4 grandparents

5 nieces and nephews when they take in their own capacity, rather than as representatives of their deceased parent; aunts and uncles; great-grandparents

6 first cousins; great-nieces and great-nephews; great-aunts and great-uncles

7 more remote kin.

Bona vacantia

2.17 If a person dies intestate in Victoria and is not survived by any next of kin, their residuary estate belongs to the Crown as *bona vacantia*.[16] *Bona vacantia* is Latin for 'unclaimed goods' or 'property that has no owner'.[17] *Bona vacantia* is considered 'unclaimed property' under the *Financial Management Act 1994* (Vic).[18]

2.18 The Minister for Finance may grant, convey, transfer, assign or deliver unclaimed property on such terms as the Minister thinks fit.[19] If the Crown became entitled to the property as a result of the death of any person, the Minister for Finance may grant, convey, transfer, assign or deliver the property to:

- any person, whether related to the deceased or not, who was dependent on the deceased, or
- any person for whom the deceased might reasonably have been expected to make provision (in the opinion of the Minister).[20]

Statistical information about intestacy in Victoria

2.19 The total number of intestacies in Victoria each year can only be estimated from the number of deaths each year and the number of grants of representation[21] made by the Supreme Court. The statistics available are unable to account for estates that are administered informally, where a grant of representation is not obtained. This may occur when property that is owned jointly passes by survivorship, or estates are 'administered informally by members of the family or friends'.[22]

2.20 In Victoria in 2010, there were 35,764 registered deaths.[23] For the financial year 2010–11, the Supreme Court made 17,979 grants.[24] This indicates that, for this period, there were 17,785 deaths for which there was no grant of representation and the Supreme Court only made grants in relation to approximately 50 per cent of all registered deaths.

15 For discussion of when nieces and nephews take as representatives and when they take in their own capacity, see [2.86]–[2.89] of this chapter dealing with distribution *per stirpes* and distribution *per capita*.
16 *Administration and Probate Act 1958* (Vic) s 55.
17 Peter Butt and Peter Nygh (eds), *Encyclopaedic Australian Legal Dictionary (online)* (LexisNexis Butterworths, at 20 March 2012).
18 *Financial Management Act 1994* (Vic) s 58. According to information provided by State Trustees, there have been 115 instances of *bona vacantia* estates passing to the Crown as unclaimed property from financial year 2006–07 to 2011–12.
19 *Financial Management Act 1994* (Vic) s 58(1); Ted Baillieu MLA, Premier of Victoria, *General Order: Administration of Acts* (22 February 2011).
20 *Financial Management Act 1994* (Vic) s 58(3)(a).
21 'Grant of representation' is used in this consultation paper to include both grants of probate and grants of letters of administration.
22 National Committee for Uniform Succession Laws, above n 1, 5–6.
23 Registry of Births, Deaths and Marriages, *Fast Facts* (3 January 2012) <www.bdm.vic.gov.au/utility/about+us/fast+facts>.
24 As shown at Table 1, below, the grants data available to the Commission is sorted by financial year, and the data on deaths is only available by calendar year. However, the numbers of deaths and grants in Victoria did not vary greatly from 2007–11. Note also that elections to administer small estates by State Trustees and other trustee companies were included in the number of grants, although they are not strictly grants. The provisions governing elections to administer are found in the *Administration and Probate Act 1958* (Vic) s 79 ('deemed grants' for State Trustees only) or the *Trustee Companies Act 1984* (Vic) s 11A (for State Trustees and other trustee companies).

2.21 Of the grants of representation made in the 2010–11 financial year, approximately 7.35 per cent were grants of letters of administration—that is, the grant of representation obtained where there is a total intestacy. The actual intestacy figure would be higher than this, because where there is a partial intestacy the grant obtained is a grant of probate. It was not possible to separate this figure out from the probate grants data.

2.22 According to the grants data provided by the Supreme Court and set out in Table 1, below, the average proportion of formal grants involving total intestacies in Victoria from 2002–03 to 2010–11 was 7.29 per cent.

2.23 The Supreme Court has provided the Commission with the number of grants made per financial year from 2002–03 to 2010–11.[25] The data is summarised in Table 1.

Table 1—Total grants made by the Supreme Court from 2002–11

Financial year	Grants of letters of administration[a]	Grants of probate[b]	Total grants	Percentage of grants that involved total intestacies[c]
2002–03	1185	14,929	16,114	7.35%
2003–04	1102	14,603	15,705	7.02%
2004–05	1028	14,373	15,401	6.67%
2005–06	1087	14,554	15,641	6.95%
2006–07	1168	14,998	16,166	7.23%
2007–08	1204	15,855	17,059	7.06%
2008–09	1299	16,591	16,654	7.80%
2009–10	1323	15,942	17,265	7.66%
2010–11	1394	16,585	17,979	7.75%
Mean	1198.89	15,381.11	16,442.67	7.29%

a The figures for 'grants of letters of administration' include small numbers of applications for other types of grants, such as: *ad colligenda bona*, *ad litem*, administration of the unadministered estate, administration reseal, letters of administration (estate), *pendente lite*, and State Trustees small estate applications (no will).

b The figures for 'grants of probate' include small numbers of applications for other types of grants, such as: administration of the unadministered estate with will, administration reseal with the will annexed, informal will (*cum testamento annexo*), informal will (probate), probate with codicils, probate pursuant to leave reserved, probate pursuant to rights saved, probate reseal, State Trustees small estate applications (*cum testamento annexo*), State Trustees small estate applications (will). *Cum testamento annexo* means 'with the will annexed'. Note that the distinction between *cum testamento annexo* (with the will annexed) and 'with will' is that where the will is annexed, no executor has been appointed or appointment of the executor has failed.

c From the data available, the Commission has not been able to ascertain the number of cases that involved partial intestacies.

25 The Supreme Court has also provided the Commission with statistics from 1 June 2011 to 10 May 2012, but we have not included that data here, as it was not for a complete financial year.

Defining and setting a limit on next of kin

2.24 As noted above at [2.12]–[2.16], next of kin in Victoria are determined according to the civil law rules of distribution, subject to the modifications set out in the Administration and Probate Act. There is no limit placed on next of kin.

2.25 Victoria is currently the only state that does not place a limit on next of kin who take on intestacy.[26] All other states and territories place a limit on next of kin at:

- the first cousins of the deceased person—that is, a child of the deceased person's parent's brother or sister[27] or
- issue of first cousins of the deceased person—that is, first cousins once removed, first cousins twice removed, and so on.[28]

2.26 The National Committee for Uniform Succession Laws recommended that, in order to 'avoid complexity, delay and expense in the administration of intestate estates', a limit should be set on next of kin for the purposes of intestacy.[29] It recommended that the limit should be set at children of aunts and uncles of the deceased—that is, the first cousins of the deceased person.[30]

2.27 The National Committee's recommendation excludes the deceased person's great-nieces and great-nephews (children of the deceased person's nieces and nephews) and great-aunts and great-uncles (siblings of the deceased person's grandparents), who are currently in the same class as first cousins under the civil law.

2.28 Limiting next of kin in this way may result in more *bona vacantia* passing to the state as consolidated revenue. However, statistics provided by State Trustees indicate that next of kin are more remote than first cousins in only five per cent of cases.

2.29 If a more remote relative of the deceased person was excluded from distribution on intestacy, and the estate went to the state as *bona vacantia*, that relative would be able to apply to the Minister for Finance for provision to be made out of the estate or, if the deceased person had a responsibility to provide for them, to the court for a family provision order.[31]

2.30 The Commission has heard views from legal practitioners in support of setting a limit on next of kin. If Victoria placed a limit on next of kin for the purposes of intestacy, according to these views it would have the effect of:

- reducing costs and delay involved in locating more remote kin
- enabling the hierarchy of next of kin to be clearly set out in legislation, resulting in greater clarity and certainty
- maximising national consistency, which would result in greater certainty when a person who owns property in multiple jurisdictions dies intestate.

Question

I1 Should Victoria set a limit on next of kin at children of the deceased person's aunts and uncles (the deceased person's first cousins), as recommended by the National Committee?

26 *Administration and Probate Act 1958* (Vic) s 52(1)(f).
27 *Administration Act 1903* (WA) s 14(1) table item 8; *Succession Act 1981* (Qld) s 35(1A); *Succession Act 2006* (NSW) s 131(3); *Intestacy Act 2010* (Tas) s 32(3).
28 *Administration and Probate Act 1919* (SA) ss 72G(1)(e), 72J(d); *Administration and Probate Act 1929* (ACT) ss 49(5), 49C; *Administration and Probate Act 1969* (NT) s 69(1)(c).
29 National Committee for Uniform Succession Laws, above n 1, 173.
30 Ibid 173 recommendation 37, Draft Intestacy Bill 2006 cl 32(3).
31 Family provision law is discussed in a separate consultation paper, available on the Commission's website: <www.lawreform.vic.gov.au>.

Survivorship

2.31 In Victoria, there is currently no requirement for a person who would be entitled to a share on intestacy to survive the deceased person by any particular length of time—it is sufficient that they survive the deceased person.

2.32 However, the *Wills Act 1997* (Vic) creates a 30-day survivorship requirement for beneficiaries under a will, where no contrary intention is expressed in the will.[32] This creates inconsistency in relation to partial intestacies, where a person is a beneficiary under the will and is also the deceased person's next of kin for the purposes of the partial intestacy. If that person dies within 30 days of the deceased person, they (or their estate) would not be entitled to their share under the will, in the absence of a contrary intention in the will, but would be entitled to a share on intestacy.

2.33 The National Committee for Uniform Succession Laws noted that, although the survivorship requirement in relation to wills was developed 'to avoid an accumulation of death duties in the case of simultaneous or near simultaneous deaths', it 'can now be justified on the grounds that they may prevent part or all of the intestate's estate going to the heirs of the deceased beneficiary'.[33]

2.34 Both New South Wales and Tasmania have adopted the approach proposed by the National Committee: that those entitled to a share on intestacy should be required to survive the deceased person by 30 days, unless the survivorship requirement would result in *bona vacantia*.[34] Queensland already had a 30-day survivorship requirement prior to the National Committee's recommendations,[35] and South Australia has a 28-day survivorship requirement that applies only to the deceased person's spouse and domestic partner.[36]

2.35 Views have been expressed to the Commission that survivorship on intestacy should be brought into line with survivorship under a will and that introducing a survivorship requirement would resolve the inconsistency that currently operates in relation to partial intestacies.

Question

I2 Should Victoria introduce a survivorship requirement of 30 days, for consistency with the National Committee's recommended approach, the law in New South Wales and Tasmania and the position under the *Wills Act 1997* (Vic)?

32 *Wills Act 1997* (Vic) s 39.
33 National Committee for Uniform Succession Laws, above n 1, 192.
34 *Succession Act 2006* (NSW) s 107(2); *Intestacy Act 2010* (Tas) s 8(2).
35 *Succession Act 1981* (Qld) s 35(2).
36 *Administration and Probate Act 1919* (SA) s 72E.

Entitlements of the deceased person's partner or partners

Current law in Victoria

The partner's share

2.36 In Victoria, a deceased person's 'partner' is entitled to a share on intestacy.[37] The Administration and Probate Act defines partner as the deceased person's spouse or domestic partner.[38] 'Spouse' means someone who was married to the deceased person at the time of the deceased person's death.[39] 'Domestic partner' means the deceased person's registered domestic partner,[40] registered caring partner[41] or unregistered domestic partner.[42]

2.37 The size of the partner's share depends on whether the deceased person was also survived by:

- any children or other issue
- any other partners.

2.38 If the deceased person is survived by one partner, and no children or other issue, the deceased person's partner takes the entire residuary estate.[43] If the deceased person is survived by both a partner and children or other issue, the partner is entitled to:

- the deceased person's personal chattels, and
- if the residuary estate is worth less than $100,000, the entire residuary estate, or
- if the residuary estate is worth more than $100,000, a legacy of $100,000 and one-third of the remaining residuary estate.[44]

The deceased person's children, or other issue, share the remaining two-thirds of the residuary estate.[45]

Multiple partners

2.39 It is possible for a deceased person to be survived by both:

- a spouse or registered domestic partner, and
- an unregistered domestic partner.[46]

37 *Administration and Probate Act 1958* (Vic) ss 51–51A.
38 Ibid s 3(1) (definition of 'partner').
39 Ibid s 3(1) (definition of 'spouse').
40 Ibid s 3(1) (definition of 'domestic partner'). 'Registered domestic partner' is defined as someone who was in a registered domestic relationship with the deceased person at the time of the deceased person's death: *Administration and Probate Act 1958* (Vic) s 3(1) (definition of 'registered domestic partner'). 'Registered domestic relationship' is defined as a relationship, registered in the Relationships Register, involving two people, who are not married or in another registered relationship, where one or both of the parties provide personal or financial commitment and support of a domestic nature for the material benefit of the other, not for fee or reward and irrespective of their genders and whether or not they are living under the same roof: *Relationships Act 2008* (Vic) ss 6(b)–(c), 10(3)(a), 5 (definition of 'registrable domestic relationship').
41 *Administration and Probate Act 1958* (Vic) s 3(1) (definition of 'domestic partner'). 'Registered caring partner' is defined as someone who was in a registered caring relationship with the deceased person at the time of the deceased person's death: *Administration and Probate Act 1958* (Vic) s 3(1) (definition of 'registered caring partner'). 'Registered caring relationship' is defined as a relationship, registered in the Relationships Register, involving two adults, who are not a couple or married to each other, and who may or may not otherwise be related by family, where one or both of the parties provide personal or financial commitment and support of a domestic nature for the material benefit of the other, not for fee or reward and irrespective of their genders and whether or not they are living under the same roof: *Relationships Act 2008* (Vic) ss 6(b)–(c), 10(3)(ab), 5 (definition of 'registrable caring relationship').
42 *Administration and Probate Act 1958* (Vic) s 3(1) (definition of 'domestic partner'). An unregistered domestic partner is a person other than a registered domestic partner of the deceased person who, although not married to the deceased person, was living with the deceased person at the time of their death as a couple and on a genuine domestic basis, and had either lived with the deceased person in that manner continuously for the previous two years or is a parent of a child of the deceased person who was under the age of 18 at the time of the deceased person's death: *Administration and Probate Act 1958* (Vic) s 3(1) (definition of 'unregistered domestic partner').
43 *Administration and Probate Act 1958* (Vic) s 51(1).
44 Ibid s 51(2). The partner also receives interest on the $100,000 legacy: s 51(3).
45 The share of the deceased person's children, or other issue, is discussed from [2.73] of this chapter.
46 A person can never have a spouse and registered domestic partner or registered caring partner at the same time. This is because in order to register a domestic or caring relationship, a person must not be married or in another registered relationship: *Relationships Act 2008* (Vic) s 6(b)–(c).

2.40 In these circumstances, there is a sliding scale to determine how the 'partner's share' is distributed.[47] The partner's share may comprise the entire residuary estate, if there are no children or other issue who are entitled to a share on intestacy, or it may comprise a part thereof, in accordance with the rules for distribution when the deceased person is survived by both partner(s) and children or other issue.

2.41 The portion of the partner's share that each partner receives will depend on the length of the relationship between the deceased person and their unregistered domestic partner.[48] For a relationship to be recognised as an unregistered domestic relationship for the purposes of intestacy, there is the minimum requirement that the partners have been living together on a genuine domestic basis for two years (or that they have a child together),[49] after which point:

- if the unregistered domestic relationship is less than four years in length, the unregistered domestic partner receives one-third of the partner's share
- if the unregistered domestic relationship is longer than four years, but shorter than five years, the unregistered domestic partner receives half of the partner's share
- if the unregistered domestic relationship is longer than five years, but shorter than six years, the unregistered domestic partner receives two-thirds of the partner's share
- if the unregistered domestic relationship is longer than six years, the unregistered domestic partner receives the entire partner's share, to the exclusion of the spouse or registered domestic partner.[50]

National Committee's recommendations

The partner's share

2.42 The National Committee for Uniform Succession Laws recommended an overall approach similar to that in Victoria:

- where the deceased person is survived by a partner, but no children or other issue, the deceased person's partner should be entitled to the whole of the intestate estate,[51] and
- where the deceased person is survived by a partner and children or other issue who are also entitled to a share,[52] the deceased person's partner should be entitled to: the deceased person's personal effects,[53] a statutory legacy[54] and a share in the remainder of the residuary estate.[55]

2.43 However, the National Committee recommended that, where the deceased person is survived by both a partner and children or other issue who are also entitled to a share, the partner's statutory legacy and share of the remainder should be larger.

2.44 It recommended that the partner's statutory legacy be $350,000, adjusted to reflect changes in the Consumer Price Index between 1 January 2006 and the date of the deceased person's death.[56] It was the National Committee's view that the statutory legacy should permit the deceased person's partner to continue living in the manner to which they had become accustomed, and permit the partner to buy essential estate items.[57]

47 *Administration and Probate Act 1958* (Vic) s 51A(1).
48 Ibid.
49 Ibid s 3(1) (definition of 'unregistered domestic partner').
50 Ibid s 51A(1).
51 National Committee for Uniform Succession Laws, above n 1, 34 recommendation 3, Draft Intestacy Bill 2006 cl 12.
52 The National Committee's recommendations in relation to when the deceased person's children, or other issue, should be entitled to a share are discussed at [2.75]–[2.77] of this chapter.
53 National Committee for Uniform Succession Laws, above n 1, 61–2 recommendation 5, Draft Intestacy Bill 2006 cls 4(1) (definition of 'personal effects'), 14(a).
54 Ibid 70–1 recommendation 6, Draft Intestacy Bill 2006 cls 8(1), (4), 14(b).
55 Ibid 75–6 recommendation 8, Draft Intestacy Bill 2006 cls 14(c), 28(2).
56 Ibid 70–1 recommendation 6, Draft Intestacy Bill 2006 cls 8(1), (4), 14(b). From March 2006 to June 2012, the sum of $350,000 has been adjusted to approximately $415,000: Reserve Bank of Australia, *Inflation Calculator* <www.rba.gov.au/calculator/>.
57 National Committee for Uniform Succession Laws, above n 1, 63–4.

2.45 Where the deceased person is survived by a partner and children or other issue who are also entitled to a share, the National Committee recommended that the deceased person's partner should be entitled to one half of the remainder, in addition to their statutory legacy.[58] The National Committee considered that a one-third share of the remainder, which the deceased person's partner currently receives in Victoria, was too small.[59]

2.46 Both New South Wales and Tasmania have implemented the National Committee's recommendations in relation to the partner's share.[60]

Multiple partners

2.47 When a deceased person is survived by multiple partners, the National Committee for Uniform Succession Laws recommended that there should be two sets of rules:

- one set of rules for when the deceased person was survived by multiple partners, but no children or other issue who were entitled to a share, and
- another set of rules for when the deceased person was survived by multiple partners *and* children or other issue who were entitled to a share.

2.48 The National Committee's recommendations were based on provisions that were already in operation in Queensland,[61] and New South Wales and Tasmania have since implemented these recommendations.[62]

Where no children or other issue are entitled to a share

2.49 The National Committee recommended that where the deceased person is survived by multiple partners, but no children or other issue who are also entitled to a share, each partner should be entitled to share in the estate, as in Victoria.[63] However, the National Committee recommended that in these circumstances, there should be no rights to personal effects or statutory legacies.[64]

2.50 It recommended adoption of the Queensland provisions for distribution of the estate by:

- a written distribution agreement made between the partners, or
- a partner or the personal representative applying to the court for a distribution order, or
- the personal representative dividing the estate between the partners in equal shares.[65]

2.51 The National Committee considered that, under these provisions, distribution of particular items from the estate could be subject to negotiation between the parties.[66]

Where children or other issue are also entitled to a share

2.52 Where the deceased person is survived by multiple partners and children or other issue who are also entitled to a share, the National Committee recommended that the partners should each be entitled to their own statutory legacy—rateably if there are insufficient funds—and a share of half the residue of the estate.[67] The National Committee did not specify how personal effects should be distributed in these circumstances.

58 Ibid 75–6 recommendation 8, Draft Intestacy Bill 2006 cls 14(c), 28(2).
59 Ibid 75.
60 *Succession Act 2006* (NSW) ss 106, 112–13; *Intestacy Act 2010* (Tas) ss 7, 11–14.
61 *Succession Act 1981* (Qld) ss 35(1), 36, sch 2 pt 1 cls 1–2; National Committee for Uniform Succession Laws, above n 1, 116.
62 *Succession Act 2006* (NSW) ss 122, 125; *Intestacy Act 2010* (Tas) ss 23–7.
63 National Committee for Uniform Succession Laws, above n 1, 117–18 recommendation 23, Draft Intestacy Bill 2006 pt 2 div 3, cl 8(3).
64 Ibid.
65 Ibid 110, 117–18 recommendation 23, Draft Intestacy Bill 2006 pt 2 div 3, cl 8(3).
66 Ibid 117.
67 Ibid 117–18 recommendation 23, Draft Intestacy Bill 2006 pt 2 div 3 cl 25.

Issues and options for reform

The partner's share

2.53 Where the deceased person is survived by a partner and children or other issue who are also entitled to a share, the approach taken in Victoria is consistent with that in other states and territories—the deceased person's partner receives:

- the deceased person's personal chattels
- a statutory legacy
- one third or one half of the residuary estate.[68]

2.54 The question is not whether this overarching structure should be altered, but whether the statutory legacy and share of the remainder received by the deceased person's partner in these circumstances is adequate, in light of cost of living and property prices.

2.55 The National Committee for Uniform Succession Laws noted that, where the deceased person was survived by children or other issue who were also entitled to a share, the purpose of the statutory legacy was to enable the surviving partner to purchase the deceased person's interest in the shared home.[69] The current partner's legacy of $100,000 in Victoria is insufficient to allow for this. The Commission has heard views that the current partner's statutory legacy is insufficient.

2.56 The Commission has also heard views that an increased statutory legacy would better reflect the needs of the deceased person's partner today, and that linking it to the Consumer Price Index would ensure it remained up to date without the need for legislative amendment.

Question

I3 **Should Victoria increase the partner's statutory legacy to $350,000, adjusted to reflect changes in the Consumer Price Index, as proposed by the National Committee?**

2.57 The National Committee also expressed the view that one third of the remainder was insufficient where the deceased person is survived by a partner and children (or other issue) who are also entitled to a share on intestacy.

Question

I4 **Should Victoria increase the partner's share of the remainder of the estate from one third to one half, as proposed by the National Committee?**

68 *Administration and Probate Act 1919* (SA) ss 72H(2)–(3); *Administration and Probate Act 1929* (ACT) s 45A(1); *Succession Act 1981* (Qld) s 35(1), sch 2 pt 1 cl 2. In the Northern Territory, where the deceased person is survived by both a spouse and a de facto partner, either the spouse or the de facto partner takes the entire partner's share depending on certain prescribed circumstances: *Administration and Probate Act 1969* (NT) sch 6 pt 3 cls 1–2. In Western Australia, where the deceased person is survived by both a spouse and a de facto partner, whether the de facto partner is entitled to nothing, one half of the partner's share or the whole partner's share depends on certain prescribed circumstances: *Administration Act 1903* (WA) ss 15(2)–(3).

69 Citing the Law Commission of England and Wales: National Committee for Uniform Succession Laws, above n 1, 68.

Multiple partners

2.58 The National Committee for Uniform Succession Laws proposed specific provisions for distribution of the intestate estate where the deceased person is survived by multiple partners.

Where there are no children or other issue who are entitled to a share

2.59 As discussed at [2.36]–[2.41], above, in Victoria where there are no children or other issue who are entitled to a share on intestacy, the partners take the deceased person's entire residuary estate between them. The Administration and Probate Act determines the share of the estate that each partner will receive by reference to a sliding scale. The Commission has heard mixed views about the way in which Victorian law deals with multiple partners on intestacy. Some considered that this approach operates effectively and justly, although it is invoked only rarely.

2.60 Others expressed concerns that the current approach is not sufficiently nuanced and too readily favours the deceased person's unregistered domestic partner, to the exclusion of their spouse or domestic partner. It was suggested that entitling both partners to a statutory legacy and a share of the remainder may provide an unfair windfall to relatively short-term unregistered domestic partners.

2.61 The National Committee's recommendations would replace Victoria's sliding scale approach where there are no children or other issue who are also entitled to a share. Instead, the partners' shares would be determined by a distribution agreement, distribution order or equal distribution.

Question

I5 Where the deceased person is survived by multiple partners, but no children (or other issue) who are entitled to a share on intestacy, should Victoria adopt provisions, recommended by the National Committee, which allow the estate to be distributed:

(a) by a distribution agreement, or

(b) by a distribution order, or

(c) equally between the parties?

Where there are children or other issue who are entitled to a share

2.62 Victoria's current approach where the deceased person is survived by multiple partners and children or other issue who are also entitled to a share, is for the partners to share between them: the deceased person's personal chattels; a single statutory legacy; and one third of the remainder.[70] This is the approach taken in several other states and territories.[71] As noted at [2.40] to [2.41] of this chapter, a sliding scale approach determines the portion of the 'partner's share' that each partner will receive.

70 *Administration and Probate Act 1958* (Vic) s 51A.

71 *Administration and Probate Act 1919* (SA) ss 72H(2)–(3); *Administration and Probate Act 1929* (ACT) s 45A(1); *Succession Act 1981* (Qld) s 35(1), sch 2 pt 1 cl 2. In the Northern Territory, where the deceased person is survived by both a spouse and a de facto partner, either the spouse or the de facto partner takes the entire partner's share depending on certain prescribed circumstances: *Administration and Probate Act 1969* (NT) sch 6 pt 3 cls 1–2. In Western Australia, where the deceased person is survived by both a spouse and a de facto partner, whether the de facto partner is entitled to nothing, one half of the partner's share or the whole partner's share depends on certain prescribed circumstances: *Administration Act 1903* (WA) ss 15(2)–(3).

2.63 The National Committee's recommendation would replace Victoria's current approach with an approach under which each partner would receive *their own* statutory legacy and a share of the remainder (to the extent that the estate could afford it). The interests of each partner, and presumably any of the deceased person's children (or other issue) who were also entitled to a share, would be reduced to the necessary extent.

Question

I6 **Where the deceased person is survived by multiple partners and children (or other issue) who are entitled to a share on intestacy, should both partners be entitled to their own statutory legacy, as well as a share of the remainder?**

The partner's right to elect to acquire an interest in certain property

Current law in Victoria

2.64 It is possible to own real property solely, jointly with another person or as tenant in common with another person. When a person dies intestate, any place of residence owned by them (or part of a place of residence) becomes part of the residuary estate that is distributed under the laws of intestacy.

2.65 As discussed at [2.38] above, if the deceased person is survived by both a partner and children or other issue, the residuary estate is shared between the deceased person's partner and children or issue. This means that it is possible that the deceased person's partner will not receive the deceased person's interest in the home they shared with the deceased person. Where the deceased person is survived by multiple partners who are entitled to a share on intestacy, the partner who lived with the deceased person may wish to elect to acquire the deceased person's interest in the shared home, if any.

2.66 However, the Administration and Probate Act includes a provision to remedy this. It provides that if a person dies intestate as to a share in the shared home—that is, the principal place of residence that the intestate shared with their partner at the time of their death—the deceased person's partner may elect to acquire the interest at its value at the date of the deceased person's death.[72] This right exists despite anything to the contrary in the Administration and Probate Act.[73]

2.67 If the partner elects to acquire the interest in the shared home, their share of the residuary estate is reduced by the value of the interest.[74] If the value of the interest in the shared home is greater than the partner's share of the residuary estate, then the partner must pay the difference into the estate, either before distribution of the estate or within twelve months of making the election, whichever occurs first.[75]

2.68 If the shared home is part of a larger property and cannot be severed from that property without subdividing the property, then a reference to the 'shared home' in these provisions is deemed to be a reference to that entire property.[76] If a shared home is part of a farm, then a reference to the 'shared home' in these provisions is deemed to be a reference to the entire farm.[77]

72 *Administration and Probate Act 1958* (Vic) ss 37A(2), (6).
73 Ibid s 37A(2).
74 Ibid s 37A(7)(a).
75 Ibid s 37A(7)(b).
76 Ibid s 37A(10).
77 Ibid s 37A(11).

National Committee's recommendation

2.69 The National Committee for Uniform Succession Laws recommended that the deceased person's partner should be permitted to elect to acquire an interest in any estate asset, not just the shared home.[78]

2.70 It was the National Committee's view that limiting the partner's right of election to the shared home created unnecessary complexity in the administration of intestate estates, and that there may be other property interests that the deceased person's partner may wish to acquire, such as a holiday home or copyright over a business venture.[79]

Issues and option for reform

2.71 Some Victorian legal practitioners have expressed the view that the deceased person's partner should be entitled to elect to acquire an interest in any of the property in the estate, up to the value of the estate, provided that, where the value of what they elect to acquire exceeds the value of the share to which they are entitled, they pay the difference into the estate. Several practitioners agreed with the National Committee for Uniform Succession Laws that there might be property other than the shared home which the deceased person's partner might wish to purchase, for example, the deceased person's interest in a family business.

2.72 However, others raised concerns about partners being entitled to acquire all property in the estate to the exclusion of the children of an earlier relationship. For example, the partner would be able to purchase property that was of sentimental value to the deceased person's children from another relationship.

Question

I7 Should the right of the deceased person's partner to elect to acquire an interest in the shared home be extended to other property in the estate, as proposed by the National Committee?

Entitlements of the deceased person's children or issue

Current law in Victoria

2.73 If the deceased person is not survived by a partner, the deceased person's children share the entire residuary estate between them.[80] If any of the deceased person's children have predeceased the deceased person, their child or children take as their representative.[81]

2.74 As discussed above, when the deceased person is survived by a partner and children or other issue, the residuary estate is shared between them.[82] All of the deceased person's children, regardless of whether they are also the children of the deceased person's surviving partner, are entitled to take the remainder of the residuary estate in equal shares.[83]

78 National Committee for Uniform Succession Laws, above n 1, 82–6 recommendation 9, Draft Intestacy Bill 2006 cl 16(1).
79 Ibid 82–3.
80 *Administration and Probate Act 1958* (Vic) s 52(1)(f).
81 Ibid.
82 Ibid s 51(2).
83 Ibid s 52(1)(f).

National Committee's recommendations

2.75 In the view of the National Committee for Uniform Succession Laws, allowing the deceased person's children to take on intestacy even where their surviving parent is also entitled to a share creates unnecessary complexity, given that those children could expect to inherit from their surviving parent later on.[84] The National Committee noted that the entitlement of the children to a share in these circumstances may, for example, necessitate sale of the family home.[85]

2.76 The National Committee recommended that the children of the deceased person should not be entitled to a share on intestacy if:

- their parent survives the deceased person and is entitled to a share on intestacy, and
- all surviving children of the deceased person are also children of that surviving parent or another partner of the deceased person who is entitled to a share on intestacy.[86]

2.77 However, the National Committee expressed concern about the position of children of other relationships, where the child's other parent is not also a partner of the deceased person who is entitled to a share on intestacy.[87] For fairness, the National Committee recommended that where any such children exist, all children of the deceased person should be entitled to a share.[88]

Issues and option for reform

2.78 If Victoria were to adopt the approach recommended by the National Committee, this would involve a substantial change to the current scheme of distribution to partners and children on intestacy in Victoria.

2.79 Both New South Wales and Tasmania have adopted the recommendations of the National Committee.[89] In preliminary discussions, the Commission has heard views in support of the National Committee's proposals.

Question

I8 Should Victoria adopt the approach to entitlements of the deceased person's children on intestacy recommended by the National Committee?

84 National Committee for Uniform Succession Laws, above n 1, 35–6.
85 Ibid.
86 Ibid 52 recommendation 4, Draft Intestacy Bill 2006 cl 13.
87 Ibid 50.
88 Ibid 52 recommendation 4, Draft Intestacy Bill 2006 cl 28(2).
89 *Succession Act 2006* (NSW) ss 112, 127; *Intestacy Act 2010* (Tas) s 28(2). The position in all other states and territories remains similar to that in Victoria: *Administration Act 1903* (WA) ss 14(1) table Item 2(b), 14(3); *Administration and Probate Act 1919* (SA) s 72G(1)(b)(ii); *Administration and Probate Act 1929* (ACT) sch 6 pt 6.1 items 2–3, s 49B(2); *Administration and Probate Act 1969* (NT) s 67(2), sch 6 pt 1 cl 2; *Succession Act 1981* (Qld) ss 35(1), 36A, sch 2 pt 1 cl 2.

Per stirpes or *per capita* distribution

2.80 Where a person would have been entitled to a share on intestacy, but did not survive the deceased person, their children or issue can take their share in some circumstances. The manner in which that person's children or issue take is either *per stirpes* (by stock) or *per capita* (by head).[90]

2.81 The National Committee for Uniform Succession Laws recommended an approach to this that, if adopted, would result in substantial change to Victoria's law.

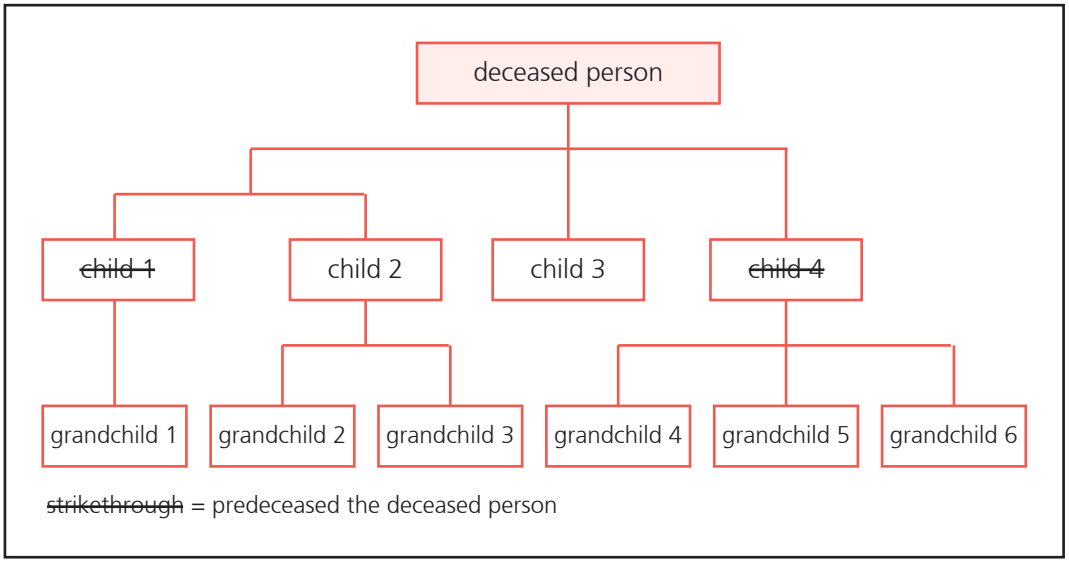
Current law in Victoria

2.82 If the deceased person's children would have been entitled to a share on intestacy, but did not survive the deceased person, their children or issue take their share.[91]

Distribution *per stirpes* to children and other issue

2.83 As discussed earlier in this consultation paper, children and other issue take in precedence to almost all others on intestacy. In Victoria, if a child of the deceased person predeceases the deceased person, that child's children or other issue (if any) take their deceased parent's share as representatives—they are not equal recipients with the deceased person's surviving children.[92] Even if all of the deceased person's children predecease the deceased person, leaving only grandchildren or their issue, those grandchildren or issue still only take as representatives.[93] This is referred to as distribution *per stirpes*, and is explained further by reference to Figures 2 and 3, below.

Figure 2—One or some children of the deceased person are deceased: distribution to grandchildren *per stirpes*



90 *Per capita* means 'individually in equal shares, according to the number of beneficiaries' and *per stirpes* means 'by root, stock, or branch … the method of division and distribution of a deceased estate based on the stocks of the family or branches of descent': Butt and Nygh (eds), above n 17.

91 *Administration and Probate Act 1958* (Vic) s 52(1)(f).

92 Ibid s 52(1)(f)(ii). Distribution can continue indefinitely down this line.

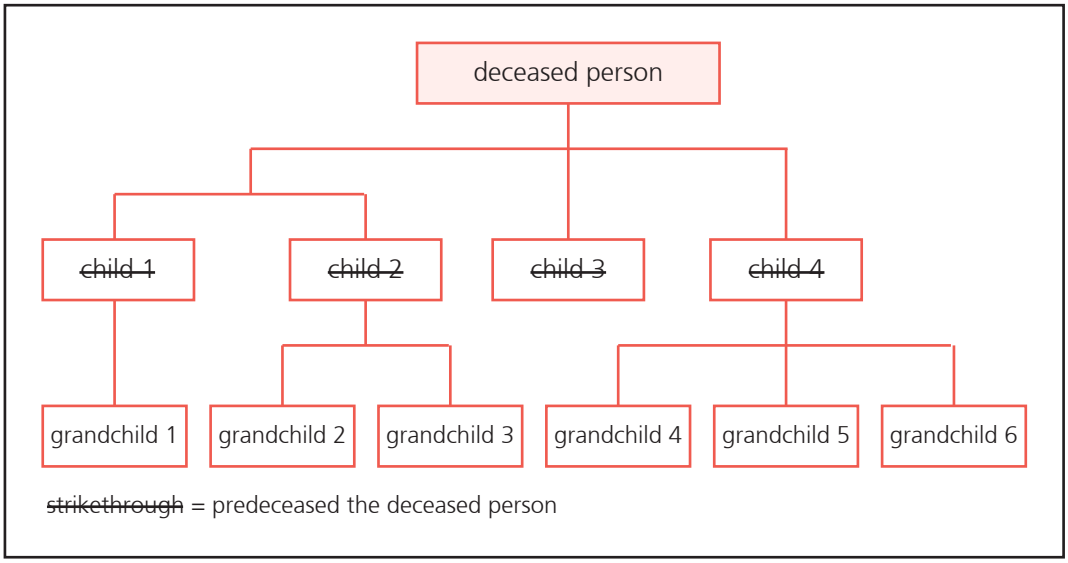
93 Ibid.

2.84 In Figure 2:

- grandchild 1 takes child 1's entire share, as child 1 has predeceased the deceased person
- child 2 takes their own share, because they are still living at the time of the deceased person's death
- child 3 takes their own share, because they are still living at the time of the deceased person's death
- grandchildren 4, 5 and 6 take child 4's share in equal shares.

Grandchildren 1, 4, 5 and 6 only take as their deceased parents' representatives, and the size of their share is determined by how many siblings they must share with. They do not become equal recipients with child 2 and child 3.

Figure 3—All children of the deceased person are deceased: distribution to grandchildren *per stirpes*



2.85 In Figure 3:

- grandchild 1 takes child 1's entire share, as child 1 has predeceased the deceased person
- grandchildren 2 and 3 take child 2's share in equal shares, as child 2 has predeceased the deceased
- child 3's share goes back into the residuary estate to be distributed among the others who are entitled to a share, as child 3 has predeceased the deceased person and is not survived by children or issue
- grandchildren 4, 5 and 6 divide child 4's share equally between them, as child 4 has predeceased the deceased person.

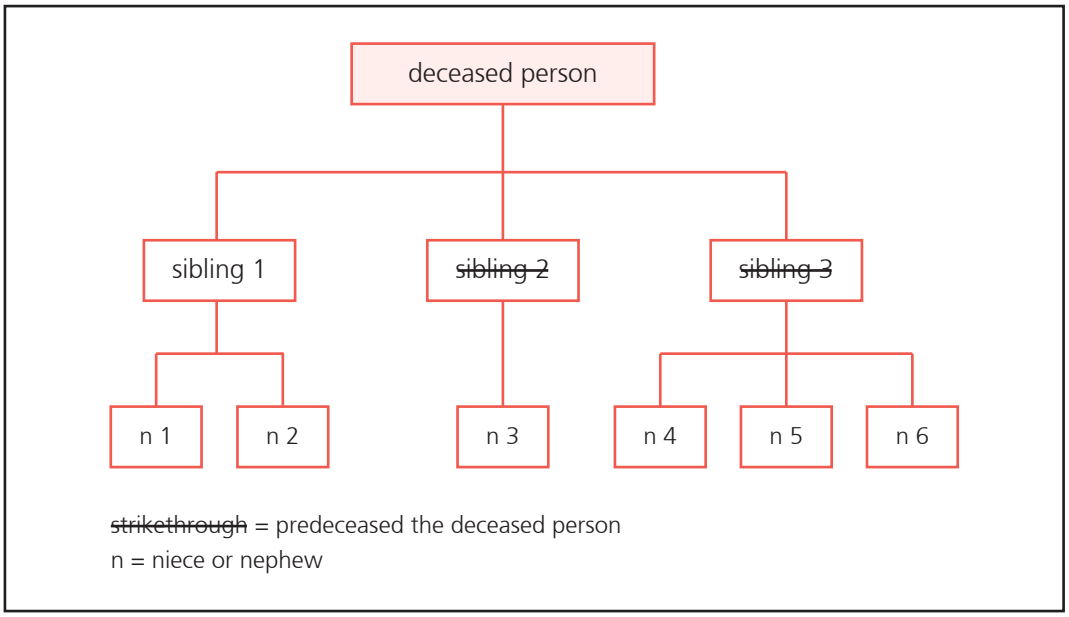
Because they take *per stirpes*, grandchildren 1, 2, 3, 4, 5 and 6 do not take in six equal shares, even though all members of the preceding generation are deceased.

Distribution *per stirpes* and *per capita* to the deceased person's nieces and nephews

2.86 If the deceased person's siblings would have been entitled to a share on intestacy, but have predeceased the deceased person, the deceased person's nieces and nephews are entitled to take their deceased parent's share.[94]

2.87 If one or some, but not all, of the deceased person's brothers or sisters predecease the deceased person, then their children (if any) take their deceased parent's share as representatives.[95] This is distribution *per stirpes*. However, if all the deceased person's siblings predecease the deceased person, all siblings' children take in equal shares, not as representatives.[96] This is distribution *per capita*. Contrast this with the situation for grandchildren in Figure 3, above.

Figure 4—One or some brothers and sisters of the deceased person are deceased: distribution to nieces and nephews *per stirpes*



2.88 In Figure 4:

- sibling 1, being alive at the time of the deceased person's death, takes their own share
- niece/nephew 3 takes sibling 2's entire share, as sibling 2 has predeceased the deceased person
- nieces/nephews 4, 5 and 6 divide sibling 3's share equally between them.

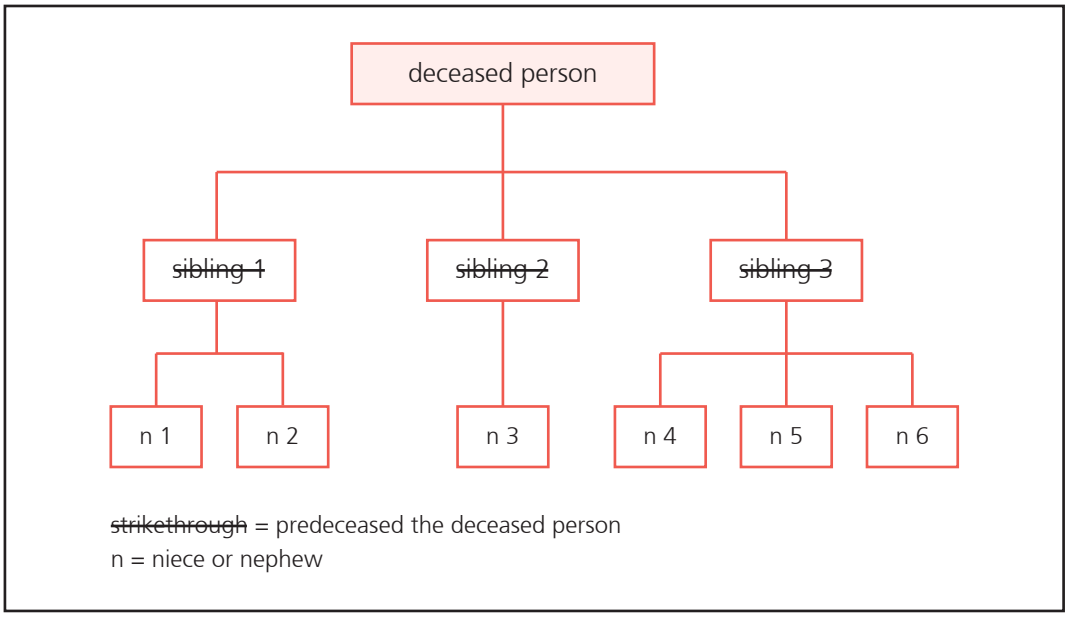
The deceased person's nieces/nephews 3, 4, 5 and 6 only take as their deceased parents' representatives. They do not become equal recipients with sibling 1 or as between themselves.

94 The deceased person's nieces and nephews can take either as representatives of their deceased parent, or in their own right: see Figure 1.

95 *Administration and Probate Act 1958* (Vic) s 52(1)(f)(ii). Note also that there is no representation admitted among collaterals after brothers' and sisters' children: s 52(1)(f)(iii). This means that although nieces' and nephews' children (the deceased person's great-nieces and great-nephews), and other collaterals down this line, can take on intestacy, they only take if they are the deceased person's next of kin; they do not take as their deceased parent's representatives.

96 *Administration and Probate Act 1958* (Vic) s 52(1)(f)(vi).

Figure 5—All brothers and sisters of the deceased person are deceased: distribution to nieces and nephews *per capita*



2.89 In Figure 5, the residuary estate is distributed equally between nieces/nephews 1, 2, 3, 4, 5 and 6 because all of the deceased person's siblings are deceased.

National Committee's recommendation

2.90 The National Committee for Uniform Succession Laws concluded that the Victorian and South Australian provisions are illogical, in that they only allow for *per capita* distribution in relation to collateral descendants and not lineal descendants.[97] It recommended that distribution be *per stirpes* in all circumstances, even where all members of the preceding generation are deceased.[98]

2.91 Despite acknowledging that 'a majority of people would probably prefer the equality achieved by a system of *per capita* distribution at each generation', the National Committee expressed the view that:

- the rule would still be arbitrary if amended in this way
- the need for the *per capita* rule would arise only rarely, when all members of the preceding generation were deceased
- it would involve complexity and delay.[99]

97 That is, to nieces and nephews in Victoria and to nieces, nephews and cousins in South Australia: National Committee for Uniform Succession Laws, above n 1, 147.
98 National Committee for Uniform Succession Laws, above n 1, 147–8 recommendation 28.
99 Ibid 147–8.

Issues and options for reform

2.92 The Commission notes the National Committee's conclusion that, in Victoria, there is currently an inconsistency between distribution to nieces and nephews of the deceased person and distribution to issue of the deceased person, where all members of the preceding generation are deceased.

2.93 Further, if Victoria were to abolish *per capita* distribution, it could be seen as a step towards national consistency. Distribution is *per stirpes* in all circumstances in most other Australian states and territories. South Australia is the only other state that allows for *per capita* distribution, and then only:

- to the deceased person's nephews and nieces if all of the deceased person's siblings are deceased, and
- to the deceased person's first cousins if all of the deceased person's aunts and uncles are deceased.[100]

2.94 Arguably, however, administering *per capita* distribution in certain circumstances would not necessarily lead to any greater complexity and delay than instituting a system of *per stirpes* distribution in all instances. Additionally, as noted by the National Committee, many people may consider *per capita* distribution to be fairer in instances where all members of the preceding generation are deceased.

2.95 Therefore, two options present themselves for consideration:

- Retain both *per stirpes* and *per capita* distribution, but apply *per capita* distribution at each generation, so that relatives take *per capita* when all members of the preceding generation are deceased, and apply this rule equally to collateral and lineal descendants.
- Abolish *per capita* distribution and apply *per stirpes* distribution in all cases, as recommended by the National Committee.

Question

I9 Should Victoria:

(a) retain *per capita* distribution and extend its operation so that it applies at each generation to both lineal and collateral relatives when all members of the preceding generation are deceased, or

(b) abolish *per capita* distribution and apply *per stirpes* distribution in all cases?

100 National Committee for Uniform Succession Laws, above n 1, 140; *Administration and Probate Act 1919* (SA) s 72J(b)(iv).

Taking benefits into account

'Hotchpot': Benefits received during the deceased person's lifetime

Current law in Victoria

2.96 Currently in Victoria, benefits received by the deceased person's children by settlement or advancement during the deceased person's lifetime[101] must be taken into account when calculating their share on intestacy.[102] 'Settlement' means a gift of property by way of permanent provision or continuing provision for the future,[103] and 'advancement' means 'something given by the parent to establish the child in life or to make provision for him or her, as opposed to a mere casual payment'.[104]

2.97 The rule requiring these benefits, received by the deceased person's children, to be taken into account when determining their share on intestacy is sometimes referred to as the 'hotchpot' rule. It originates from the Statute of Distributions, enacted in England in 1670.[105]

National Committee's recommendation

2.98 The National Committee for Uniform Succession Laws recommended that benefits given during the deceased person's lifetime should not be taken into account when determining a person's share on intestacy, finding that any advantages of such a rule were 'at best, equivocal'.[106]

Issues and options for reform

2.99 There are a number of problems with Victoria's hotchpot rule in its current form. Those raised with the Commission include that:

- The concepts of settlement and advancement are outdated. Legal practitioners have expressed the view that these concepts are archaic, and do not necessarily represent the way in which parents benefit their children today.
- The rule unduly complicates distribution on intestacy.
- The rule only applies to children of the deceased person, not others who are entitled to a share on intestacy. The benefits received by other relatives should arguably be taken into account when determining their share on intestacy.
- The intention of the deceased person may not have been to treat all children equally.[107]

101 Testamentary gifts in the case of partial intestacy are discussed below at [2.105]–[2.110].
102 *Administration and Probate Act 1958* (Vic) s 52(1)(f)(i).
103 Hardingham, Neave and Ford, above n 11, 442.
104 Butt and Nygh (eds), above n 17.
105 For a discussion of the origins and operation of the hotchpot doctrine, see Hardingham, Neave and Ford, above n 11, ch 29; National Committee for Uniform Succession Laws, above n 1, 212–19.
106 National Committee for Uniform Succession Laws, above n 1, 219 recommendation 43, Draft Intestacy Bill 2006 cl 41(a).
107 Some of these points, and other problems with the rule, are discussed in National Committee for Uniform Succession Laws, above n 1, 214–16.

2.100 There are several options in relation to hotchpot in Victoria:

- Abolish the rule entirely, as recommended by the National Committee for Uniform Succession Laws.[108] This would make Victorian law consistent with the law in New South Wales, Queensland, Western Australia and Tasmania.[109]
- Retain the current rule with no amendment.
- Retain the rule, but replace the references to settlement and advancement with modern terms. This would address concerns that concepts like settlement and advancement are outdated.
- Retain the rule, but extend its operation beyond children of the deceased person and their representatives. This would address concerns that only applying the rule to children of the deceased person is inequitable.

2.101 In deciding whether the hotchpot rule should be retained and extended beyond the deceased person's children, the question of whether any benefits received by the deceased person's partner should also be taken into account arises.

2.102 Of the remaining states and territories that still have a version of the hotchpot rule:

- In the Northern Territory, it applies only to the deceased person's children.[110]
- In South Australia and the Australian Capital Territory, it applies to all those entitled to take on intestacy other than the deceased person's partner.[111]

2.103 The rule in the Northern Territory, like the rule in Victoria, treats certain types of gifts to the deceased person's children differently from all other lifetime dispositions, and suggests that children should not be provided for twice—once during life and again after death. Additionally, the rules in South Australia and the Australian Capital Territory suggest that the deceased person's partner should be given special status on intestacy. This is consistent with the priority given to the deceased person's partner in the intestacy hierarchy, and the statutory legacy and share of the remainder that they receive.

2.104 In preliminary discussions, the Commission has heard mixed views about whether to retain, abolish or amend the hotchpot rule.

Questions

I10 Should Victoria abolish the hotchpot rule, as recommended by the National Committee?

I11 Alternatively, should Victoria retain and amend its hotchpot provision:

(a) to replace references to advancement and settlement with more modern, simplified terminology?

(b) to extend it beyond the deceased person's children and their representatives? If hotchpot were extended beyond children of the deceased person, should it apply to the deceased person's partner and/or all next of kin?

108 National Committee for Uniform Succession Laws, above n 1, recommendation 43, Draft Intestacy Bill 2006 cl 41.

109 *Succession Acts Amendment Act 1968* (Qld); *Administration Act Amendment Act 1976* (WA) s 3; *Wills, Probate and Administration (Amendment) Act 1977* (NSW); *Intestacy Act 2010* (Tas) s 41(a).

110 *Administration and Probate Act 1969* (NT) s 68(3). Benefits received by the deceased person's child in the last five years of the deceased person's life, by way of advancement or on marriage, must be taken into account unless a contrary intention was expressed or appears from the circumstances, or the benefit does not exceed $1000: s 68(3).

111 *Administration and Probate Act 1919* (SA) s 72K(1); *Administration and Probate Act 1929* (ACT) ss 49BA(1), (3). In South Australia, 'gifts' and 'settlements' received within the last five years of the deceased person's life are covered if their value does not exceed $1000. In the Australian Capital Territory, money or property given within the last five years of the deceased person's life is covered if its value does not exceed $10,000.

Benefits received under the deceased person's will in the case of partial intestacy

Current law in Victoria

2.105 Where there is a partial intestacy in Victoria, testamentary benefits received by the deceased person's children or other issue must also be taken into account when determining their share.[112]

National Committee's recommendation

2.106 The National Committee for Uniform Succession Laws recommended that gifts received by a person under the deceased person's will, in the case of partial intestacy, should not be taken into account when determining that person's share on intestacy.[113]

2.107 The National Committee concluded that the primary purpose for taking testamentary benefits into account was to achieve consistency between those who received benefits under the deceased person's will and those who had received benefits during the deceased person's lifetime.[114] Having proposed that hotchpot be abolished, the National Committee considered that there was no need for a rule taking into account benefits received under a will on partial intestacy.[115]

Issues and options for reform

2.108 A number of problems have been drawn to the Commission's attention in relation to Victoria's requirement to take testamentary benefits into account:

- The rule unduly complicates distribution on intestacy.
- The rule only applies to children of the deceased person, not others who are entitled to a share on intestacy. In some other states and territories, testamentary benefits received by the deceased person's partner or child, or, in South Australia, by any person entitled to take on intestacy, must be taken into account when determining their share on partial intestacy.[116]
- If hotchpot is abolished, as proposed by the National Committee, there would be no need to ensure consistency between benefits received before and after the deceased person's death.[117]
- Victoria is out of step with four states: in Queensland, New South Wales, Western Australia and Tasmania, testamentary benefits are not taken into account on partial intestacy.[118]

2.109 However, if hotchpot is retained in relation to gifts received during the deceased person's life, it may make sense to continue to take testamentary benefits into account. If hotchpot is extended beyond children of the deceased person, it may make sense to also extend the rule taking into account testamentary benefits received on partial intestacy.

2.110 If hotchpot were abolished, there is arguably still a need to take into account testamentary benefits received by beneficiaries on partial intestacy when determining their share on intestacy. The Commission seeks views on this.

112 *Administration and Probate Act 1958* (Vic) s 53(a).
113 National Committee for Uniform Succession Laws, above n 1, 225 recommendation 44, Draft Intestacy Bill 2006 cl 41(b).
114 Ibid 224.
115 Ibid.
116 *Administration and Probate Act 1919* (SA) s 72K(1)(b); *Administration and Probate Act 1929* (ACT) s 49D; *Administration and Probate Act 1969* (NT) s 70. In South Australia, only benefits that exceed $1000 in value are taken into account.
117 These and other problems with the rule are discussed in National Committee for Uniform Succession Laws, above n 1, 222–3.
118 New South Wales and Tasmania have provisions specifically stating this, as proposed by the National Committee: *Succession Act 2006* (NSW) s 140; *Intestacy Act 2010* (Tas) s 41(b).

Questions

I12 If Victoria were to abolish the requirement to take benefits received during the deceased person's life into account (hotchpot), should it also abolish the requirement to take into account benefits received under a will on partial intestacy?

I13 If hotchpot is retained and extended beyond children of the deceased person, should the current requirement to take into account benefits received under the deceased person's will on partial intestacy also be extended beyond children of the deceased person?

Indigenous intestate estates

Introduction

2.111 Intestacy laws often provide an inadequate framework for the administration of Indigenous[119] intestate estates. The National Committee for Uniform Succession Laws addressed this issue, finding that it is 'questionable whether it is appropriate, or always appropriate, for the general law to apply without qualification in cases where an Indigenous person dies intestate'.[120] The National Committee noted that distribution on intestacy in Australia is reflective of English law and society and may, therefore, be inappropriate for the distribution of intestate estates in some Indigenous communities.[121]

2.112 Academic research accords with the National Committee's view, and provides the following insights into the problematic application of intestacy law to some Indigenous intestate estates in Australia:

- Different understandings of property, and ownership of property, exist under Aboriginal customary law from those embodied in intestacy law.[122] It is noted, for example, that 'for Indigenous Australians, the land is not an inanimate thing, which can be bought and sold; it is alive and sacred'.[123]
- The definition of next of kin in intestacy law, with its emphasis on blood relations, 'is frequently inappropriate for Indigenous people'.[124] Although not all Indigenous kinship patterns are the same, kinship generally 'reflects customary law obligations and dependencies which are woven into the social fabric',[125] and is not determined by blood ties.[126]

2.113 The National Committee considered Indigenous intestacy to be an important issue, because it is 'quite common' for Indigenous people to die intestate.[127] This is consistent with the finding by academic commentators that 'most Indigenous Australians or Aboriginals die "intestate" … primarily because will-making is not part of the cultural or spiritual constitution of Indigenous communities'.[128]

119 In this consultation paper, 'Indigenous' refers to Aboriginal people of Australia and Torres Strait Islanders.
120 National Committee for Uniform Succession Laws, above n 1, 228.
121 Ibid.
122 Lidia Xynas, 'Succession and Indigenous Australians: Addressing Indigenous Customary Law Notions of "Property" and "Kinship" in a Succession Law Context' (2011) 19 *Australian Property Law Journal* 199, 207–12; Prue Vines, 'Consequences of Intestacy for Indigenous People in Australia: The Passing of Property and Burial Rights' (2004) 8 *Australian Indigenous Law Review* 1, 1–2.
123 Lidia Xynas, 'Succession and Indigenous Australians: Addressing Indigenous Customary Law Notions of "Property" and "Kinship" in a Succession Law Context' (2011) 19 *Australian Property Law Journal* 199, 209.
124 Prue Vines, 'Consequences of Intestacy for Indigenous People in Australia: The Passing of Property and Burial Rights' (2004) 8 *Australian Indigenous Law Review* 1, 1.
125 Ibid, 1–2.
126 Xynas, above n 123, 213.
127 National Committee for Uniform Succession Laws, above n 1, 229.
128 Xynas, above n 123, 215. See also Vines, above n 124, 1.

National Committee's recommendations

2.114 In light of the problems with intestacy law for Indigenous Australians, and the prevalence of Indigenous intestacy, the National Committee for Uniform Succession Laws recommended provisions based on those in operation in the Northern Territory.[129] The Northern Territory provisions establish a parallel scheme for distributing the intestate estate of an Indigenous person, if an application is made to the court for this parallel scheme to operate.[130]

2.115 The National Committee proposed that a person who claims to be entitled to take an interest in an Indigenous person's intestate estate, under the customs or traditions of the community or group to which the deceased person belonged, should be able to make an application to the court for an order for distribution within 12 months of the grant of administration.[131] The National Committee recommended that the application should be accompanied by a plan for distribution of the estate, prepared in accordance with the traditions of the deceased person's group or community.[132]

2.116 The provisions recommended by the National Committee have been adopted in New South Wales and Tasmania.[133]

Evaluation of the recommended provisions

Northern Territory provisions in operation

2.117 The Commission is aware of only one reported case in which an application was made under the Northern Territory provisions for distribution according to a distribution plan.[134] In this case, the Public Trustee had filed an election to administer the estate, which comprised $28,700 in cash.[135] Three senior members of clans of the Jawoyn people gave affidavit evidence that they were 'qualified and authorised by Jawoyn tradition to say who is entitled to take an interest in the estate under the customs and traditions of the Jawoyn'.[136]

2.118 According to their evidence, the three surviving children of the man who raised the deceased person, but predeceased him, were entitled to the intestate estate in equal shares.[137] These three people did not appear to be related to the deceased person by blood. The affidavit evidence was supported by a letter to the Public Trustee from the executive director of the Jawoyn Association.[138] The Court ordered that the estate be distributed in accordance with the plan.[139]

2.119 In this case, the Court noted that the interaction between division 4A of the Administration and Probate Act—dealing with Indigenous distribution plans—and the standard intestacy provisions of the Act was unclear, but found that, because there were no next of kin entitled under the general provisions, this question did not arise.[140]

129 National Committee for Uniform Succession Laws, above n 1, 237–46, recommendation 45.
130 *Administration and Probate Act 1969* (NT) pt III div 4A.
131 National Committee for Uniform Succession Laws, above n 1, 246, recommendation 45.
132 Ibid.
133 *Succession Act 2006* (NSW) ss 133–5; *Intestacy Act 2010* (Tas) ss 34–6.
134 *Application by the Public Trustee for the Northern Territory* [2000] NTSC 52 (30 June 2000).
135 Ibid [1]–[3].
136 Ibid [4].
137 Ibid.
138 Ibid.
139 Ibid [7].
140 Ibid [2]; *Administration and Probate Act 1969* (NT) divs 4, 4A.

Academic critique of the Northern Territory model

2.120 Although academic commentators have noted that provisions like those in the Northern Territory represent 'important initiatives',[141] and that the Northern Territory model is the best existing scheme for dealing with Indigenous intestate estates,[142] they argue that it suffers from several flaws.

2.121 Of the Northern Territory provisions, Professor Prue Vines writes:

> This legislation represents a real attempt to address the fact that Aboriginal customary law cannot be dealt with as a monolith. However … [it] only applies if an intestate Aboriginal has not entered into a marriage that is a valid marriage under the Marriage Act … this is based on the invalid assumption that persons married under the Marriage Act are not living traditional lifestyles.[143]

2.122 Lidia Xynas echoes this concern, writing that:

> Full legal and moral credence must be given to the distributional rights of Indigenous communities following intestacy and the implicit notion that these rights become irrelevant where an Indigenous intestate has engaged in non-traditional practices should be discarded.[144]

2.123 Further, Xynas argues that even the Northern Territory provisions fail to address 'which bundle of property rights (as recognised under customary law) are encapsulated' within the operation of the provisions for distribution of an Indigenous intestate estate.[145]

Questions

I14 Are any statistics available about intestacy of Indigenous people in Victoria?

I15 Are more flexible provisions needed in Victoria for the distribution of Indigenous intestate estates? If so, what form should those provisions take?

141 Xynas, above n 123, 220.
142 Vines, above n 124, 5.
143 Ibid 4–5.
144 Xynas, above n 123, 220–1.
145 Ibid 220.

Questions

Defining and setting a limit on next of kin

I1 Should Victoria set a limit on next of kin at children of the deceased person's aunts and uncles (the deceased person's first cousins), as recommended by the National Committee?

Survivorship

I2 Should Victoria introduce a survivorship requirement of 30 days, for consistency with the National Committee's recommended approach, the law in New South Wales and Tasmania and the position under the *Wills Act 1997* (Vic)?

Entitlements of the deceased person's partner or partners

I3 Should Victoria increase the partner's statutory legacy to $350,000, adjusted to reflect changes in the Consumer Price Index, as proposed by the National Committee?

I4 Should Victoria increase the partner's share of the remainder of the estate from one third to one half, as proposed by the National Committee?

I5 Where the deceased person is survived by multiple partners, but no children (or other issue) who are entitled to a share on intestacy, should Victoria adopt provisions, recommended by the National Committee, which allow the estate to be distributed:

(a) by a distribution agreement, or

(b) by a distribution order, or

(c) equally between the parties?

I6 Where the deceased person is survived by multiple partners and children (or other issue) who are entitled to a share on intestacy, should both partners be entitled to their own statutory legacy, as well as a share of the remainder?

The partner's right to elect to acquire an interest in certain property

I7 Should the right of the deceased person's partner to elect to acquire an interest in the shared home be extended to other property in the estate, as proposed by the National Committee?

Entitlements of the deceased person's children or issue

I8 Should Victoria adopt the approach to entitlements of the deceased person's children on intestacy recommended by the National Committee?

Per stirpes or *per capita* distribution

I9 Should Victoria:

(a) retain *per capita* distribution and extend its operation so that it applies at each generation to both lineal and collateral relatives when all members of the preceding generation are deceased, or

(b) abolish *per capita* distribution and apply *per stirpes* distribution in all cases?

Taking benefits into account

I10 Should Victoria abolish the hotchpot rule, as recommended by the National Committee?

I11 Alternatively, should Victoria retain and amend its hotchpot provision:

(a) to replace references to advancement and settlement with more modern, simplified terminology?

(b) to extend it beyond the deceased person's children and their representatives? If hotchpot were extended beyond children of the deceased person, should it apply to the deceased person's partner and/or all next of kin?

I12 If Victoria were to abolish the requirement to take benefits received during the deceased person's life into account (hotchpot), should it also abolish the requirement to take into account benefits received under a will on partial intestacy?

I13 If hotchpot is retained and extended beyond children of the deceased person, should the current requirement to take into account benefits received under the deceased person's will on partial intestacy also be extended beyond children of the deceased person?

Indigenous intestate estates

I14 Are any statistics available about intestacy of Indigenous people in Victoria?

I15 Are more flexible provisions needed in Victoria for the distribution of Indigenous intestate estates? If so, what form should those provisions take?

Victorian
Law Reform
Commission

Succession Laws
CONSULTATION PAPER

GPO Box 4637
Melbourne
Victoria 3001
Australia

Level 3
333 Queen Street
Melbourne
Victoria 3000
Australia

Telephone
+61 3 8608 7800

Freecall
1300 666 555 *(within Victoria)*

Fax
+61 3 8608 7888

Email
law.reform@lawreform.vic.gov.au

www.lawreform.vic.gov.au

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