Agreement in Principle

Mr BARRY COLLIER (Miranda—Parliamentary Secretary) [5.36 p.m.], on behalf of Mr David Campbell: I move:

That this bill be now agreed to in principle.

The Succession Amendment (Family Provision) Bill 2008 is the next step for New South Wales in implementing the recommendations of the uniform succession laws project—a project initiated by the Standing Committee of Attorneys General [SCAG] aimed at developing model laws to be used as the basis for reform of succession law in all Australian States and Territories. Consistent succession laws across jurisdictions will have a number of benefits, including simplifying and lowering the cost of administering the estates of people who have moved between or held assets in different jurisdictions. A national committee for the uniform succession laws project was established to examine four discrete areas of succession law—the law of wills, family provision, intestacy and the administration of estates—and to prepare model bills. The first of the national committee's reports on the law of wills was implemented in New South Wales in 2006, with the enactment of the Succession Act 2006.

This bill will become chapter 3 of the Succession Act. As the rest of the national committee's reports are implemented they will be included in the Succession Act. The national committee produced two reports on family provision, which were considered and endorsed by SCAG in 1997 and 2004. The 2004 report included model legislation prepared by the New South Wales Parliamentary Counsel's Office. The national committee chose to make the existing New South Wales Family Provision Act 1982 the basis for the model family provision bill as the New South Wales Act was considered "the most comprehensive and recent legislation" in the area of family provision.

The Succession Amendment (Family Provision) Bill 2008 repeals the Family Provision Act and implements the model bill endorsed by SCAG. Some changes have been made to take into account the specific policy concerns of the New South Wales Government, and suggestions made by an expert committee which the Government has established to provide advice on the reforms to the succession law. This committee comprises Justice Young, Chief Judge in Equity; Justice Windeyer; the Supreme Court Probate Registrar; the Public Trustee; representatives from the Law Society and the Bar Association; Mr Ross Ellis, representing the Trustee Associations of Australia; Mr Les Handler, the co-author of the loose leaf service on succession law; and a representative from the Guardianship Tribunal. On behalf of the Government I thank the members of the committee for the valuable assistance and advice they have provided in relation to the bill.

I do not propose to go through each clause of the bill as the national committee's reports on family law and its comments on the model bill are comprehensive. However, I will outline the aspects of the New South Wales bill that depart from the model bill. The model bill did not adopt the eligibility requirements for an application for family provision that are currently in place in the New South Wales Family Provision Act. Currently the Family Provision Act provides that the following people are automatically entitled to apply for provision: the spouse of the deceased, a person with whom the deceased was living in a domestic relationship and the adult or non-adult child of the deceased. Former spouses of the deceased and other dependants, including grandchildren, are also entitled to apply, but the Act requires the court to determine whether there are factors which warrant the making of the application before going on to consider an application.

The model bill restricts the list of those who are automatically entitled to make an application for provision to spouses, de facto partners and non adult children of the deceased. It then contains a catch-all category of claimant permitting anyone "to whom the deceased person owed a responsibility to provide maintenance, education or advancement in life" to apply to the court for a family provision order. Such a change may lead to a flood of new claims being made on estates from people who are not currently entitled to apply in New South Wales. Adult children would also be forced to demonstrate the requirement of the deceased's responsibility to them. This may lead to more lengthy and expensive litigation, as adult children seek to prove they meet this requirement.

The bill before the House therefore does not adopt the model bill eligibility provisions. It retains the approach taken in the current Act with one modification: the current Act provides that those who were living in a "domestic relationship" with the deceased are automatically entitled to eligibility. The model bill's restriction of this entitlement to de facto partners is sensible and thus the new bill replaces "domestic relationship" with "de facto relationship" and creates a new category of applicant—a person in a "close personal relationship" with the deceased. This applicant will have to meet the same requirements imposed on former spouses and other dependents before being entitled to have their application considered by the court. The new bill addresses widely held concerns about the increasing and disproportionate costs of family provision proceedings. The new bill seeks to prevent people from making unmeritorious claims and accessing money from the deceased's estate to fund their legal costs without any restriction.

There are numerous instances of costs blow-outs in family provision proceedings in New South Wales. For

instance, I refer to a case in which legal costs reached $605,000 for a relatively modest estate. The judge commented that the legal costs were far greater than the amount that any of the claimants could have hoped to receive in a family provision order and called the case "a dark stain on the administration of justice". That case was *Sherborne Estate (No. 2): Vanvalen and Anor v Neaves and Anor;. Gilroy v Neaves and Anor,* 2005 New South Wales Supreme Court page 103. I refer to a case where costs approached $100,000 for an estate valued at less than $400,000. In that case, the applicant tried to appeal after they failed at first instance. The application for appeal was dismissed both because it was without merit and because further litigation might leave a beneficiary of the estate without her home. That case was *Hooper v Rowley and One Other*, 2004 New South Wales Court of Appeal, page 398. I refer to a case regarding an estate of $412,000, which occupied a half-day hearing, where costs were $90,000. The judge quite rightly described the costs as "excessive". That case was *Bladwell and Davis v. Davis and Bladwell*, 2003 New South Wales Supreme Court at page 882.

The majority of lawyers work hard to achieve a fair outcome for their clients. However, a minority of practitioners exploit the highly emotionally charged nature of these cases to their own benefit, on the assumption that all costs will be paid out of the estate. The Supreme Court has recognised this problem and is currently implementing its own strategies, including intensive case management, the introduction of a new practice note for family provision and a more restrictive approach to the recovery of costs. The new bill gives the court specific powers to make rules in relation to costs, including the costs payable out of the estate and specifically the costs in relation to estates worth less than $750,000; to make rules relating to the use of expert witnesses and other means of proof of medical reports, valuations, et cetera—these items are sometimes the most expensive component of the costs of a case; and to make rules relating to applications that can be dealt with on the papers. This will allow the court to cut costs by determining simple cases without a hearing. The new bill gives the Government the potential to build on these strategies.

The bill contains a regulation-making power in respect of costs in family provision proceedings, including the fixing of maximum costs that can be paid out of the estate or notional estate. The new bill also contains a power to make regulations regarding advertising of legal services in connection with proceedings for family provision advertising that is often aggressive, unrealistic and seeks to exploit the vulnerable. Section 98 of the new bill makes it clear that the Government's object is to encourage settlement of family provision matters before they go to a hearing if possible. The court will be required to refer all matters to mediation before making an order unless there are special reasons that the matter should not be mediated. Mediation would not be advisable in circumstances where there is a threat of violence or a power imbalance between the parties.

New section 59 (3) of the bill reflects the model bill by providing that the court may order additional provision for a previously successful applicant for a family provision order where it can be demonstrated either that there has been a substantial detrimental change in the eligible person's circumstances since a family provision order was last made in the eligible person's favour new section 59 (3) (a)—or that when the family provision order was made the evidence about the nature and extent of the deceased person's estate did not reveal the existence of certain property and the court would have considered the estate to be substantially greater in value if the property's existence were known, new section 59 (3) (b).

The bill also provides the court with power to make a family provision order in favour of a person who was unsuccessful in their application for provision only if it can be demonstrated that the second condition I outlined has been satisfied—that is, that when the family provision order was made there was substantial property in the estate that was not disclosed to the court. This change recognises the fact that the bill requires the court to have regard to the nature and extent of the estate when determining the eligibility for an order, whether an order should be made and the nature of such an order. If substantial property is overlooked, it could mean that persons otherwise deserving of provision would not be successful simply because there is not enough estate for provision to be made to all deserving applicants.

The model bill does not include a provision based on section 32 of the current Act. Section 32 clarifies the circumstances in which evidence can be adduced about statements that were made by the deceased during his or her lifetime. For example, the deceased might have stated that a chid was being left less in the deceased's will because that child had already been given their share of the estate. This evidence could be extremely useful in ascertaining the testator's reasons for making the will in the way that it was made. The bill re-enacts section 32 in new section 101. The court will continue to be able to make interim family provision orders if, for example, there is a pressing need for financial support. This bill modernises the law of family provision in New South Wales and makes a number of changes to protect family estates from being whittled away by unmeritorious litigation and to encourage settlement.

The Government amended new section 66 in the Legislative Council, which clarifies the court's power to make additional orders in a family provision application. The amendment makes it clear that additional orders may be made to adjust the interests of eligible persons under the Act and those whose interests in the estate or notional estate are affected by a family provision order or consequential orders. The court will continue to be bound by the requirement that such orders are to be just and equitable to all affected. The amendment was necessary to clarify the operation of the section. The original wording of new section 66 could be read restrictively and the amendments more accurately reflect the Government's intention. The amendments corrected an inadvertent typographical error changing the word "immediate" to "intermediate" in lines 6 and 13 of schedule 2.1 so that

schedule 2.1 operates to restore the operation of section 33B of the Conveyancing Act 1919 in its original form. The bill is another step towards enhanced consistency in succession law across Australia. I commend the bill to the House.