Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, Minister for Justice, and Acting Minister for Education and Training [2.21 p.m.]: I move:

That this bill be now read a second time.

This bill 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 or lowering the costs of administering the estates of people who have moved between, or held assets in, different jurisdictions. The National Committee for 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 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 three 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 the Standing Committee of Attorneys-General 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 of 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 the Standing Committee of Attorneys-General. 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 established to provide advice on the reforms to succession law. The committee comprised: Justice Young, Chief Judge in Equity; Justice Windeyer; the Probate Registrar of the Supreme Court; the Public Trustee; representatives for the Law Society and Bar Association; Ross Ellis, representing the Trustee Corporations Association of Australia; Les Handler, the co-author of the loose-leaf service on succession law; and a representative from the Guardianship Tribunal. I thank the committee members for the valuable advice and assistance that 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 report on family provision law, and its comments on the model bill, are comprehensive. I will, however, outline the aspects of the New South Wales bill, which depart from the model bill. First, the model bill did not adopt the eligibility requirements for an application for family provision that are currently in place in New South Wales. 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 dependents, including grandchildren, are also entitled to apply, but the Act requires the court to determine whether there are factors that 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 contains a "catch-all" category of claimant permitting anyone to whom the deceased 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, 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 living in a domestic relationship with the deceased are automatically entitled to eligibility. The model bills restriction of this entitlement to de facto partners is sensible and thus the 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 has to meet the same requirements imposed on former spouses and other dependents before being entitled to have the application considered by the court.

The bill addresses widely held concerns about the increasing and disproportionate costs of family provision proceedings. The 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 cost blowouts in family provision proceedings in New South Wales. For instance, a case in which the 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". Another was a case in which costs approached $100,000 for an estate valued at less than $400,000. In that case, the applicant tried to appeal after failure in the first instance. The applicant's appeal was dismissed both because it was without merit and because further litigation might have left a beneficiary of the estate without her home. Another was a case regarding an estate of $412,000, which occupied a half-day hearing, where the costs were $90,000. The judge quite rightly described the costs as "excessive".

The majority of lawyers work hard to achieve a fair outcome for their clients. There is, however, a minority of practitioners who exploit the highly emotionally charged nature of these cases to their own benefit, on the assumption that all costs are 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 bill gives the court specific rule-making 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; 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 make rules relating to applications that can be dealt with on the papers, which will allow the court to cut costs by determining simple cases without a hearing.

The bill gives the Government the potential to build on these strategies. The bill contains a regulation-making power that enables regulations to be made with to respect costs in family provision proceedings, including the fixing of maximum costs that can be paid out of the estate or notional estate. The bill also contains the 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.

As to mediation, new section 98 makes it clear that the Government's objective 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 why 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. In relation to additional provision, new section 59 (3) reflects the model bill by providing that the court may order an additional provision for a previously successful applicant for a family provision order when it can be demonstrated either that there has been a substantial detrimental change in that eligible persons circumstances since a family provision order was last made in that eligible person's favour—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—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 his or her 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 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 a provision would not be successful simply because there is not enough estate for provision to be made to all deserving applicants.

As to evidence of statements made by the deceased, the model bill does not include a provision based on section 32 of the current Act. New 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 child was being left less in the deceased's will because the child had already been given his or her 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. The 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. It is also another step towards enhanced consistency in succession law across Australia. I commend the bill to the House.