Agreement in Principle

Mr BARRY COLLIER (Miranda—Parliamentary Secretary) [4.43 p.m.]: I move:

That this bill be now agreed to in principle.

The Succession Amendment (Intestacy) Bill 2009 marks the next step for New South Wales in implementing the recommendations of the National Committee on Uniform Succession Laws. The committee was established by the Standing Committee of Attorneys General [SCAG] to develop model laws to be used as the basis for the reform of succession laws across Australian States and Territories. The National Committee on Uniform Succession Laws was charged with examining four separate areas of succession law: the law of wills, family provision, intestacy and the administration of estates. Reports have been released on wills, intestacy and family provision. The administration of estates report will be released shortly. Each report contains a model bill for implementation by States and Territories.

The national committee's first two reports have been implemented in New South Wales. The Succession Act 2006 implemented the model wills bill. The Succession Amendment (Family Provision) Act 2008 added a new Chapter 3 to the Succession Act, implementing the model Family Provision Bill, and repealed the Family Provision Act 1982. The bill before the House today implements the national committee's report on intestacy. It will become chapter 4 of the Succession Act 2006. The Succession Amendment (Intestacy) Bill 2009 repeals part 2, division 2A of the Wills Probate and Administration Act 1898 and implements the model bill endorsed by the Standing Committee of Attorneys General. The application of the model to existing New South Wales laws is highly technical. The Attorney General's Department has been greatly assisted in this task by the expert committee that the Government has established to provide advice on the reforms to succession law.

The Attorney General's Advisory Committee on Succession Law Reform comprises Justice Young of the New South Wales Court of Appeal; Justice Palmer of the Supreme Court of New South Wales; representatives of the Supreme Court; the Public Trustee; representatives from the Law Society and the Bar Association; Ross Ellis representing the Trustee Associations of Australia; Les Handler and Richard Neal, co-authors of the loose leaf service on succession law; and a representative from the Guardianship Tribunal. The national committee's recommendations were informed by the New South Wales Law Reform Commission's research about the characteristics of both testate and intestate estates.

This research was useful in determining how people who do not write wills might have intended to distribute their property upon death. The Law Reform Commission research involved a survey of 650 matters filed in the Probate Registry of the Supreme Court of New South Wales in September 2004. I do not propose to go through every clause in the bill, as the national committee report and its comments on the model bill are comprehensive. I will, however, outline the significant changes the bill will make to the law of intestacy in New South Wales. The first significant changes relate to the distribution of the estate between a spouse or partner and any children of an intestate. Currently, when an intestate dies leaving children and a spouse or partner, the spouse or partner is entitled to a statutory legacy, the deceased's personal effects and half the residue of the estate. The intestate's child or children are entitled to the remainder unless it is required to secure an interest in the shared home for the spouse or partner.

The new bill provides that where an intestate dies leaving a spouse or partner and children of that relationship, the entire estate goes to the spouse or partner. This recommendation was based on the Law Reform Commission's research. The Law Reform Commission found that in 75 per cent of testate estates surveyed where a testator had a spouse and children of the relationship, the testator left the whole estate to the spouse. Spouses and children shared in the estate in only 2.3 per cent of estates surveyed. The new provisions make the administration of an estate much simpler in the case of an intestate who dies leaving a spouse or partner and children of the relationship, and reflect community standards on this issue. It can be assumed that the intestate's children will inherit from the spouse or partner in due course.

The bill provides for different arrangements where the intestate dies leaving a spouse or partner and children from another relationship. This recognises the fact that such children may not stand to inherit from the intestate's spouse or partner. In these circumstances the estate is shared between the spouse or partner and the intestate's children. The spouse or partner will receive a legacy, the intestate's personal effects and half the residue of the estate. All of the intestate's children share in what remains. The second significant changes relates to the rights of the spouse when the intestate dies leaving children from another relationship. When the intestate dies leaving a spouse or partner and children of another relationship, the surviving spouse will not, as is currently the case, be automatically entitled to the house at the expense of the intestate's children. Instead, the spouse or partner will have a special right to elect to take any part of the estate in satisfaction of their entitlement.

If the selected part of the estate is worth more than the entitlement, the surviving spouse or partner will be required to make up the difference from their own resources. This will protect the interests of the intestate's children in such a situation. The third significant change relates to statutory legacy. The new bill increases the

statutory legacy entitlement for a spouse or partner, where they are not entitled to the whole estate, from $200,000 to $350,000. There is an automatic indexing mechanism in the bill for increasing the legacy in accordance with changes in the consumer price index from 2006—when the committee settled on the figure of $350,000—until the date of death of the intestate.

The national committee considers that this increase addresses general community expectations that a surviving spouse or partner should be provided for and that the intestate's children should inherit where the estate can bear it. The suggested amount will be uniform across jurisdictions when other States and Territories adopt the model bill. It will reduce the potential for forum shopping where real property is held in more than one jurisdiction and it will also help ensure that the surviving spouse or partner will have some social mobility. For example, a surviving spouse or partner may wish to relocate to another, more expensive, city in another jurisdiction to be closer to surviving family.

The intestacy rules provide for an order of distribution among the family of a person who dies intestate. Currently, in New South Wales, the basic order of distribution is: first, spouse and children; second, parents; third, siblings; fourth, grandparents; and fifth, aunts and uncles of the intestate. If those categories are exhausted, the estate is bona vacentia—vacant property—and is paid to the Crown. On the recommendation of the national committee, the bill extends the categories to take in the cousins of the intestate. This is a compromise position across all Australian jurisdictions, and will mean a broadening of entitlements in New South Wales. The current law in New South Wales makes no specific provision for the operation of the intestacy rules for Aboriginal people. The distribution of property on intestacy is based on a relatively narrow range of family relationships. It may at times be inappropriate to apply the general intestacy rules to members of Aboriginal communities, who may have a broader concept of family relationships.

The bill, in line with the national committee's recommendation, adopts similar provisions relating to the estates of Aboriginal people who die intestate to those that operate in the Northern Territory. The new provisions provide that the personal representative of an indigenous estate, or a person claiming to be entitled to share in the intestate estate under the laws, customs, traditions and practices of the community or group to which the intestate belonged, can apply to the court for a distribution order that takes into account entitlement under those laws, customs, traditions and practices. If no such application is made, the estate will be distributed according to the general rules. This bill marks a further step in the direction of harmonisation of the law of succession across Australia. New South Wales is the first State to implement this model bill and I hope other jurisdictions will follow our lead. The bill modernises the distribution of intestate estates in New South Wales. I commend the bill to the House.