INHERITANCE (FAMILY AND DEPENDANTS PROVISION) AMENDMENT BILL 2011

First Reading

Bill read a first time, on motion by **Mr C.C. Porter (Attorney General)**.

Explanatory memorandum presented by the Attorney General.

Second Reading

MR C.C. PORTER (Bateman — Attorney General) [12.20 pm]: I move —

That the bill be now read a second time.

The Inheritance (Family and Dependants Provision) Amendment Bill 2011 will modernise the law in relation to family provision. This law overrides the effect of a deceased person's testamentary intentions on the rules of intestacy in favour of categories of eligible people on certain grounds. A person's testamentary intention is given effect to by way of a will, and the rules of intestacy apply when a person dies not having left either a will or an entirely effective will. Family provision legislation enables a court to override testamentary freedom, with a judicial discretion. It is thought necessary, as a matter of policy, in circumstances when some testators fail to have regard to commonly acknowledged responsibilities when organising the distribution of their estate upon their death or that the applicable intestacy rules may, in the circumstances, fail to provide adequately for someone to whom the testator owed such a responsibility. There is clearly a need to balance testamentary freedom against what is considered by a court to be just in the circumstances. This bill achieves that balance.

A review of family provision legislation was commenced in 1991 by the Standing Committee of Attorneys-General of Australia, which approved the development of uniform succession law for all Australian states and territories. At the time, there was little consistency between succession laws across the states and territories. The Queensland Law Reform Commission coordinated the project and a model Family Provision Bill for introduction in each jurisdiction was presented to SCAG in July 2004. To date, the model Family Provision Bill has been partially adopted in New South Wales and is under consideration in other states and territories.

In this state, a working group comprising experts in the area drawn from the Supreme Court of Western Australia, academia, the Public Trustee's office, the independent bar and the legal profession has reviewed the model Family Provision Bill. The working group did not support much of the model Family Provision Bill, as it regarded that the benefits contained in the present family provision legislation should not be forgone for the purposes of uniformity alone. It did not recommend eligibility to make a claim on the estate of a deceased person on the basis of the establishment of a responsibility on the part of the deceased person towards the applicant, and recommended that the present system be retained, whereby automatic eligibility to apply for family provision is granted to the class of persons as set out in the Inheritance (Family and Dependants Provision) Act 1972; for example, spouses, de facto partners and children. It did not recommend provisions allowing for notional estates; that is, property that can be notionally added back to the estate of the deceased so that the court can use the property for distribution to an eligible person under the family provision legislation.

A significant amendment in the bill allows for limited claims by stepchildren. Western Australia is the only state or territory that presently does not provide for stepchildren claims at all. The bill allows for a claim for the stepchild of the deceased who has been maintained wholly or partly, or was entitled to be maintained wholly or partly, by the deceased immediately before the deceased's death. This is the position in South Australia and the Northern Territory. Legislation elsewhere allows for claims by stepchildren in broader circumstances. Victoria has dispensed with claimants altogether and liability is based on the establishment of responsibility on the part of the deceased person towards the applicant. Recent amendments to the family provision in New South Wales do not follow this aspect of the Victorian legislation and the model Family Provision Bill.

The bill also allows a stepchild of the deceased to claim if the deceased had received or was entitled to receive property with a value greater than the prescribed amount from the estate of a parent of the stepchild. I draw attention to the relevant clause note of the bill, which reads —

> Also, a stepchild of the deceased if the deceased had received or was entitled to receive property above an amount (which will be prescribed by regulation) from the estate of a parent of the stepchild can make a claim for family provision. An example of a stepchild's claim is where a child's parent re-partners and, as is common, the partners leave all of their estate to each other. In these situations there may be an understanding that on the death of the survivor of the partners, the survivor's stepchild can expect to receive all, or a substantial part of the estate which came from the surviving partner from the child's parent. However, for various reasons these understandings may not be adhered to.

It must be acknowledged that stepchildren claims, along with other claimants, are subject to the legislative requirements in section 6 of the Inheritance (Family and Dependants Provision) Act 1972 that requires that a

claimant has to establish that adequate provision has not been made out of the estate of the deceased person for the proper maintenance, support, education or advancement in life of any persons listed in section 7 of the act, which under the bill include limited claims by stepchildren. The definition of "stepchild" is included in clause 5 of the bill.

The bill allows the Supreme Court to vary a previous court order for family provision in the event that previously undisclosed property is discovered and the undisclosed property would have materially affected the result. It also enables the court to make interim orders for maintenance pending the final determination of the family provision application.

Finally, the bill allows for oral evidence of a person to be considered by the Supreme Court in an application for family provision; for example, a statement by the now deceased to another about the potentially disqualifying conduct of an applicant.

The bill largely reflects the recommendations of the working group and modernises the law of family provision in Western Australia. A bill dealing with this topic was introduced by the former Attorney General, Hon Jim McGinty, in September 2007 but was not proceeded with because of the state election. I commend the bill to the house.

Debate adjourned, on motion by **Mr D.A. Templeman**.