LAW REFORM AS PERSONALITIES, POLITICS AND PRAGMATSICS – THE FAMILY PROVISION ACT 1982 (NSW) : A CASE STUDY

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Legislation which empowers a court to override a will is an expression of the balance between rights of individuals with respect to property and a checking mechanism in favour, broadly, of ‘family’. The process through which the Testator’s Family Maintenance Act 1916 (NSW) became the Family Provision Act 1982 (NSW) provides a fascinating case study of the process of institutional law reform; one in which the shifting philosophy of property concepts within families was expressed through the day-by-day exercise of getting law changed. Where the Testator’s Family Maintenance Act 1916 had been introduced entirely through the legislative processes of Parliament, the Family Provision Act 1982, which superseded it, was the product of the work of the New South Wales Law Reform Commission, and later, in the implementation of the Law Reform Commission’s Report, Parliamentary Counsel. This article considers the process that led to the passage of the 1982 Act and reveals how personal the pragmatic process of law reform can be.

I LAW REFORM AND FAMILY PROVISION

The Family Provision Act 1982 (NSW) was the product of institutional law reform, resulting from the work of the New South Wales Law Reform Commission in the 1960s and 1970s. It was a reasonably slow, sometimes painstaking, process. After the reference on the subject in 1966 it involved considerable research that led to a Working Paper in 1974, and then a Report in 1977. There was then an extended process of drafting that eventually led to the passage of the amending legislation in 1982. A process such as this poses many questions: what is the role of institutional law reform bodies; why was the particular subject chosen for the law reform agenda; how was the process of investigating it conducted; what consultation was involved; to what extent did individuals dominate or drive the process; to what extent did the broader political agendas interfere or interact with the particular law

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reform proposals; and, above all, how can the achievement of the reform outcome be measured?

A Institutional Law Reform

The institution of the New South Wales Law Reform Commission forms part of a history of law reform through established bodies that began in England in the 1830s. The interest in law reform was generated largely by the writings of Jeremy Bentham, evidenced for instance in the work of the great 19th century Law Commissions established to enquire into several aspects of the law. The English movement rippled in waves in the first half of the 20th century, culminating in 1965 in the establishment of the Law Commission for England and Wales. These Commissions had an extremely wide brief; they were also very influential. The New South Wales Law Reform Commission was the first of the Australian bodies established in their wake. The Hon Justice Michael Kirby considered that:

It would be impossible to overestimate the impact of the establishment of the law commissions upon the common law world. In little more than a decade, most of the jurisdictions of the Commonwealth of nations have established law reform bodies after the model of the independent law commissions of the United Kingdom. ... The work given to these bodies, the way they operate and their achievements vary from place to place. But the establishment of an institution with a statutory charter to review the body of the law, modernize and simplify it is now a common theme of almost of countries of the Commonwealth of Nations.

One area that caught the attention of law reformers was ‘Testator’s Family Maintenance’, as it was known then.

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1 The work of the Real Property Commissioners was a monumental contribution to law reform. The Commissioners were appointed in 1829 and produced four reports (1829, 1830, 1832 and 1833). The work of the Commissioners is summarised in Alfred W B Simpson, A History of the Land Law (2nd ed, 1986) ch xi, ‘The Nineteenth Century Movement for Reform’.

2 The history of the various bodies is outlined in Michael D Kirby, ‘Reforming the Law’ in Alice E-S Tay and Eugene Kamenka (eds), Law-making in Australia (1980) 39, 43-44.

3 Law Commissions Act 1965 (GB) s 3(1).


5 So great was the keenness to embark upon the exercise of reform that the New South Wales commission got underway at the beginning of 1966 by executive direction even before it was formally constituted by the Law Reform Commission Act 1967: NSWLRC, Annual Report 1976. A law reform body had also been constituted in New South Wales by Letters Patent in July 1870: (1870-71) 2 Votes and Proceedings (NSW) 117. The brief of this first ‘New South Wales Law Reform Commission’ was in wide terms, including the ‘revision, consolidation and amendment’ of the laws of the Colony, but it achieved little more than adaptation of English reforms. This Commission ‘quietly faded away and the initiative for an organized, institutional review of the law was lost’: Kirby, above n 2, 41. See further: John M Bennett, ‘Historical trends in Australian Law Reform’ (1969-70) 9 West Aust L Rev 1. Earlier examples of law reform exercises in New South Wales are described in Tilbury, above n 4, 5.

6 Kirby, above n 2, 44.
B Why Testator’s Family Maintenance?

Testator’s Family Maintenance legislation enables a court to override a will, or entitlements on intestacy, in favour of a defined group of family members. Introduced first in New Zealand in 1900, it set a limit on the exercise of will-making by creating an avenue of challenge, principally for wives and children who had been omitted from, or poorly considered, in the wills of their husbands and fathers. Where the pattern of preceding centuries had been to increase the domain of testamentary freedom, eliminating fixed shares and dower rights, this legislation sent a different message; but it was a limited one, intended as a modest inroad into the testamentary arena. All the Australian jurisdictions adopted it in the early years of the 20th century, followed, in time, by the United Kingdom in 1938. The legislation in New South Wales was the Testator’s Family Maintenance and Guardianship of Infants Act 1916. While there was some extension of the jurisdiction over the first three quarters of the century, to extend to intestate estates and to include illegitimate children, it remained much as it was when introduced in 1916.

The legislation included a two-stage process for evaluating applications from eligible persons: the ‘jurisdictional stage’ – an assessment of whether the applicant had been left without adequate provision for his or her proper maintenance, education and advancement in life; and the ‘discretionary stage’ – a determination of what provision ought to be made from the estate for the applicant, taking into account what provision community standards would require a person in the position of the testator to make for the applicant. The jurisdictional stage involved an assessment of what in all the circumstances was the proper level of maintenance etc appropriate for the applicant, having regard inter alia to the applicant’s financial position, the size

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10 See Rosalind Atherton and Prue Vines, Succession – Families, Property and Death – Text and Cases (2nd ed, 2003) [15.1].
12 Conveyancing, Trustee and Probate (Amendment) Act 1938 (NSW) introducing s 3(1A) to the 1916 Act.
14 Recent statements of this approach can be found in Singer v Berghouse (No 2) (1994) 181 CLR 201, 208; Vigolo v Bostin (2005) 213 ALR 692 [5], [74]-[75], [112].
and nature of the estate, the totality of the relationship between the applicant and the deceased (including any contributions made by the applicant to the deceased’s estate and/or welfare), and the relationship between the deceased and other persons who have a legitimate claim upon his or her bounty.\textsuperscript{15}

When it came to making an order the court was limited to property that was in the ‘estate’ of the deceased.

Orders under the Act were constrained by the discretion and interpreted within a fairly tight compass. The Court did not have power to re-write the will of the testator;\textsuperscript{16} nor to provide simply for equal division amongst children.\textsuperscript{17} It was to provide only for ‘proper maintenance, education and advancement in life; but the emphasis was, principally, upon ‘maintenance’.

In 1966 the attention of the New South Wales Law Reform Commission was turned towards testator’s family maintenance. It did not have an ‘at large’ jurisdiction, but rather operated on the basis of ‘references’.\textsuperscript{18} In June 1966 the Commission was given the reference on testator’s family maintenance, a decision that seems to have been made by the Minister of Justice, John Maddison, in consultation with the Attorney General, Kenneth McCaw.\textsuperscript{19}

The work on the reference got underway in the 1970s. While the initial trigger may have been concern among the Attorneys General as to the lack of uniformity among

\textsuperscript{15} McGowan v Waites; Estate of Ruth Patricia Watts [2006] NSWSC 465, Brereton J, [15].


\textsuperscript{17} See, eg, Cooper v Dungan (1976) 50 ALJR 539, 540 (Gibbs J).

\textsuperscript{18} Tilbury, above n 4, 10. The first group of references given on 11 March 1966 included habeas corpus, the Legal Practitioners Act, fusion of law and equity administration, review and modernisation of Imperial Acts in force in NSW, administrative appeals, Interpretation Act, infancy, and personal injury. The details of the references given to the Commission are contained in the Annual Reports of the Commission.

\textsuperscript{19} Questions concerning such legislation had been raised at the January 1966 meeting of the Standing Committee of Attorneys General in Hobart on 27-28 January 1966. The final item on the General Agenda for that meeting was ‘Testator’s Family Maintenance (Clth and WA)’: Attorney General, Special Bundles – Robey Papers (‘AG, Robey Papers’), ‘Agendas, Papers, Standing Committee Meetings’, General Agenda for Hobart Conference, Item 24. The Commonwealth had been considering amendments relating to the distribution on intestacy in the territories and had noticed the significant differences among the states in regard to testator’s family maintenance. Placing the item on the Agenda brought to the attention of the various Attorneys General the state of the legislation in their respective jurisdictions. Maddison and McCaw were both at the Conference. The raising of the issue at Standing Committee level seemed to provide the catalyst for whatever thoughts each had had in relation to the then operation of the Testator’s Family Maintenance Act. At the end of February, Maddison wrote to McCaw with a clear plan in mind: Maddison to McCaw, 23 February 1966, AG, Robey Papers, ‘Papers re Testator’s Family Maintenance’. McCaw responded enthusiastically to these suggestions: McCaw to Maddison, 1 March, 1966, ibid. On 29 June 1966, only four months later, the Law Reform Commission was assigned the task: ‘Statement of Matters Referred by the Attorney General to the Law Reform Commission for Consideration and Report’, 2, no 10, AG, Robey Papers, Papers, Correspondence and reports from and about the Law Reform Commission 1964-69'.


the states in regard to testator’s family maintenance, this was a time of attention to family issues more generally. It was, for example, the period when legislation giving equal rights to illegitimate children was introduced, in the form of Children (Equality of Status) Acts, and it was a highpoint of reform of family law, signified principally in the introduction of the Family Law Act 1975 (Cth). Testator’s Family Maintenance legislation was a natural extension of law reform work that was looking at laws that affected property within families. Where reform of the family law was very much in the front line of public opinion, and at the federal level, legislation that was in the succession arena operated in a less frenzied way, and at the state level. Precisely because it was outside the frontline of rhetoric, the process of reforming the law of testator’s family maintenance can provide insights into the nature of law reform in the 1970s.

II THE REFERENCE ON TESTATOR’S FAMILY MAINTENANCE

The brief for the Commission was to do two things: firstly, to review the Testator’s Family Maintenance and Guardianship of Infants Act 1916, ‘so far as it relates to assuring to the family of a deceased person adequate provision out of his estate’, and, secondly, to prepare a draft Bill ‘to modernise and improve the existing provisions of the law’. The process of review could have involved any or all of three broad directions: reviewing in depth the appropriateness of the maintenance model for dealing with distribution of property on death; correcting any anomalies in the legislation; expanding the application of the Act, but retaining its structure. Each time amendments to the Act had been considered prior to the reference to the Law Reform Commission, they had fallen within the second and third of these directions. The Law Reform Commission now had the chance to undertake a more substantial review.

In October 1974 the Law Reform Commission produced its ‘Working Paper on the Testator’s Family Maintenance and Guardianship of Infants Act 1916’. The principal work on the Act was given to Denis (later Master) Gressier, who was appointed as Commissioner in 1971, having had considerable experience as a country solicitor, particularly in the field of wills and probate.  

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20 Ibid.
21 Such as the Children (Equality of Status) Act 1976 (NSW).
22 This was to direct attention only to the ‘TFM’ parts of the legislation, not the guardianship provisions.
23 Comments were made in the context of consideration of formal amendments in 1938 and 1954 – see above nn 12, 13; and when plans for amending Bills were being proposed – in 1919, 1920 and 1922 (to include provisions eg in relation to illegitimate children and gifts made within one year of death).
24 Gressier’s authorship is not stated on the paper, but at par 7 the author refers to ‘my recent work on the TFM Act if I were back in private practice’. Gressier was the Commissioner in charge of the TFM Reference, he prepared the Report, was formerly a country solicitor, and his speaking to the Law Society is referred to in the Submission to the Law Reform Commission dated 18 December 1975, New South Wales Law Reform Commission, Testator’s Family Maintenance Papers (‘NSWLRC, TFM Papers’), 3, introduction and par 17.
The Working Paper was distributed to more than 300 persons and organisations in New South Wales and elsewhere. Nineteen written responses were received; and three experts were specifically approached for comment: Professor Roy A Woodman of the University of Sydney Faculty of Law, the Hon Mr Justice F C Hutley, and the barrister Roderick P Meagher (as he then was). There were discussions with various bodies, submissions from interested persons and groups leading up to the publication of the Report on the Testator's Family Maintenance and Guardianship of Infants Act, 1916 (LRC 28) in 1977. Unfortunately, few of the documented responses to the Commission's Working Paper remain in existence; and the views of many commentators have to be gleaned from the comments made by the Commission in its Report, or the scant references that can be found


26 Report – TFM, Appendix C. For example, the responses were received from the Bar Association of NSW, solicitors, community groups and public officials.

27 The responses are contained in Attorney General, Special Bundle of Papers – ‘Family Provision’, 83/8585 (‘AG, Family Provision Papers’): The Hon Mr Justice Hutley, Court of Appeal, New South Wales to F J Walker, Attorney General, 1 November 1978; Professor R A Woodman, University of Sydney, Faculty of Law, to F J Walker, Attorney General, 3 October 1978; R P Meagher to F J Walker, Attorney General, 8 December 1978. The Attorney General’s letters to Hutley, Woodman and Meagher were all in the same form and dated 20 September 1978: AG, Family Provision Papers. As Hutley’s and Woodman’s replies were strongly critical of the proposed reforms they were referred to the Law Reform Commission for detailed consideration. Meagher’s comments were generally supportive of the proposals and do not appear to have attracted further consideration.

28 Of the responses noted in Report – TFM only the following remain in the Law Reform Commission's files: (i) Law Society of New South Wales, General Legal Committee, ‘Submission to Law Reform Commission of New South Wales in Respect of Working Paper on Testator's Family Maintenance and Guardianship of Infants Act, 1916’, 18 December 1975 (‘Law Society Submission’); (ii) Deputy Probate Registrar, Mr L James, containing various tables, prepared at the Commission’s request, as to habits of will-making: L James, Deputy Registrar in Probates to R J Watt, Secretary of the NSW Law Reform Commission, 14 March, 1975, NSWLRC, TFM Papers (this seems to be the item listed as ‘Probate Registrar’ in Appendix C of the Report). Although the Report records a response as having been received by the Commission from Hutley, no additional response (apart from his reply to the letter of the Attorney General noted above) is retained in the TFM Papers at the Commission nor in the Attorney General’s Family Provision files, if indeed there was an additional response. Hutley’s letter to the Attorney General also contains no suggestion that an earlier comment on the proposals was made. Further attempts to track down surviving copies of the submissions also proved fruitless: for example the submissions made by WEL and the Women Lawyers’ Association have neither been retained amongst the papers of both bodies nor are they amongst the items deposited with the Mitchell Library (both groups), and the National Library, Canberra (Di Graham, Papers, MSS 7604). There are references to work on the TFM Reference being undertaken, but no further than this: eg Women Lawyers’ Association: Newsletter, February 1975, 2, reported the release of the Working Paper on TFM and that it was being examined by the Research Committee; 25th Annual Report, March 1976, ‘Research Committee Report’ 7, under the heading ‘TFM Amending Legislation’ noted ‘we are to make submissions to the TFM Working paper ... which paper has been closely examined by some of our members’; 26th Annual Report, March 1977, ‘Research Committee Report’ 5, under the heading ‘TFM Legislation’, noted ‘our study of this topic continues based on the New South Wales Law Reform Commission’s Working Paper’.
elsewhere. The comments of Woodman and Hutley have survived and provide an important counterpoint to the Commission's proposals.

The Report proposed some specific amendments to catch certain known problem areas in the 1916 Act, as well as making major proposals for the extension of the Act in relation to the class of eligible persons and the property that could be affected by orders under it. The proposals were approved by Cabinet on 8 May 1979 on the recommendation of the Attorney General. Bills were then prepared by Harry Rossiter QC, Parliamentary Counsel, and sent to the Commission for consideration.

Parliamentary Counsel and the Commissioner, Gressier, disagreed on several fundamental issues concerning the Bill, eventually narrowing down to two, but major, issues: the definition of 'eligible person' and the notional estate provisions, but it dragged the process of implementation out over several years. It was like a game of 'ping pong'. The disagreement was eventually resolved by a compromise, the Commission giving way on notional estate and Parliamentary Counsel giving way on eligibility, with the Under Secretary acting as mediator. Finally, the first reading of the Family Provision Bill was moved in the Legislative Assembly on 23 November 1982. The second and third readings took place in late November and December, and on Christmas Eve 1982 the Family Provision Act had completed its passage through Parliament.

A Time for Boldness?

‘What, in 1974, is the best way for the law to assure to the family of a deceased person adequate provision out of his estate?’ In opening its Working Paper in this way, the Law Reform Commission recognised that there was a broad choice to be made with respect to property among families on death: between discretionary powers (as under the existing Testator’s Family Maintenance legislation), and fixed rights (as existed in Scotland and parts of the United States), as a basis for dealing with family property. Considerable reference was made, in particular, to the work of the Law Commission for England and Wales on matrimonial property law. Its Working Paper in 1971 dealt thoroughly with, inter alia, family provision and the possibility of introducing a system of fixed inheritance rights. One of the Reports which followed the Working Paper was dedicated to the question of family

29 Cabinet Minute No 799, AG, Family Provision Papers; Cabinet Minute dated 15 September 1982, NSWLR, TFM Papers.
31 The Bills and the accompanying memoranda from 1979-1982 are contained in NSWLR, TFM Papers.
32 Seen for example in the Submissions by the Under Secretary to the Attorney General contained both in NSWLR, TFM Papers, and AG, Family Provision Papers.
provision on death.\textsuperscript{36} It was this work which led to the amendment of the English family provision legislation in 1975.\textsuperscript{37} Notwithstanding their work on fixed inheritance rights, the 1975 Act retained the discretionary framework of its predecessor. This was also, ultimately, the response in New South Wales.

In 1977 the Report of the New South Wales Law Reform Commission dropped the question altogether; the hope, or promise, of provoking public debate came to nothing. The Bill accompanying the Report was based on the old model, not a new one, its object, ‘to extend existing principles, not to supplant them’.\textsuperscript{38} The reason proffered was that: ‘we think that the time for proposing fundamental changes in [the laws of succession] has not yet come’.\textsuperscript{39} In the Report it was stated that ‘no person said that the policy of the old Act was wrong’.\textsuperscript{40} Some, it is clear, were clearly against the proposal for a different system, as for instance the General Legal Committee of the Law Society, who considered that ‘a number of innovations’ suggested ‘depart[ed] radically from the traditional view of minimal interference with testamentary freedom’.\textsuperscript{41} This view captured the mood of the day; the discretion was not touched.

The response to limit the extent of the review of the legislation in this way also reflected a particular approach to the role of law reform. It was an example of the ‘intellectual constraint’\textsuperscript{42} on law reform bodies like the New South Wales Law Reform Commission, described by Professor Michael Tilbury:

\begin{quote}
Governments and the committees themselves assumed that their business was only with ‘lawyer’s law’, the false corollary being that they could consider neither matters of ‘policy’ nor ‘political questions’.
\end{quote}

While, as Tilbury argues, there is no ‘bright line between “law”, “politics” and “policy”’,\textsuperscript{43} and the work of the commissions therefore did ‘consider issues that, by any standards, encompassed large policy elements’,\textsuperscript{44} the rejection of a major shift in direction in relation to testator’s family maintenance demonstrates a certain ‘raw nerve’ factor around things that might smack too much of ‘policy’.

\textsuperscript{38} Report – TFM, par 1.6, 9.
\textsuperscript{39} Report – TFM, par 1.6, 9.
\textsuperscript{40} Report – TFM, par 1.6, 9.
\textsuperscript{41} Law Society Submission, above n 28.
\textsuperscript{42} Ibid 10-11 (notes omitted).
\textsuperscript{43} Ibid 11. See also Anthony Mason, ‘Law Reform in Australia’ (1971) 4 Federal Law Review 197, 215: ‘There is no field of law-making which can remain the exclusive provide on the lawyer for there is no field of law which is without policy considerations, whether they be social, economic or political, which require to be taken into account.’
\textsuperscript{44} Ibid.
The definition of eligible persons and the property reach of the Act were to be the two areas of principal focus. They were intense points of engagement for the protagonists in the reform process on testator's family maintenance.

III POINTS OF ENGAGEMENT

A Eligible Applicants

1 The Law Reform Commission’s Proposals

The initial premise in the Working Paper had been that there was ‘no case for narrowing the class of eligible applicants’. The issue, then, was how far should the class be widened: ‘… who, on present day ideas, should be regarded as being amongst the family of a deceased person for the purposes of the Act’. The method of approach to the problem, however, was narrower than suggested by examining, simply, ‘who was a member of the family’. Only the spouse and children were considered eligible on the basis of status alone; others had to prove a relationship of dependency.

When the Commission was deliberating upon the width of the class of eligible persons, category after category of potential applicants was considered. In response, a broad three-limbed eligibility test was suggested, including dependency on the deceased at any time; membership at any time of the household of which the deceased person was a member; and being ‘a person whom the deceased ought not … to have left without provision …’. The object of such a test was ‘to avoid the inflexibility which would follow the prescription of a class of eligible applicants’. Such a test could encompass applications by a range of applicants. The Commission envisaged applications from a parent, a brother or sister, a stepchild, a foster child, a grandchild, a nephew, a niece, a spouse of a void marriage, a divorced spouse, a de facto spouse or a homosexual partner. Only children and lawful spouses were not required to pass the extra criteria as a pre-condition to eligibility.

But the proposal encountered considerable hostility in relation to the types of applicant which might therefore be able to apply. The possibility of applications by de facto spouses and former spouses, and, to a lesser extent, step-children, proved particularly problematic. This spoke very much of public opinion of the times and

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48 See the draft clause 6 included in the Report – TFM.
49 Clause 6(c) of the draft Bill.
50 Report – TFM, par 2.6.8.
51 Report – TFM, par 2.6.8. 22. The term ‘special friend’ was used, but was a well-known euphemism for a homosexual partner: see eg Under Secretary, ‘NSW Law Reform Commission Report No 28 on Testator’s Family Maintenance and Guardianship of Infants Act 1916 – Submission’ 29 August 1978, AG, Family Provision Papers, par 7.12, 5.
the hostility and opposition continued right through all stages in the process towards the introduction of the *Family Provision Act* in 1982.

As with the arguments which surrounded the introduction of no-fault divorce in the *Family Law Act 1975* (Cth), the arguments in relation to de facto spouses focused upon the issue of preserving the sanctity of marriage as against recognising the factual status of a marriage-like relationship. On the negative side were views such as those of Professor Woodman, of the University of Sydney Faculty of Law, who considered that ‘the law should not encourage alternatives to marriage’, and of the Hon Gerald Peacocke, then Member for Dubbo, in the New South Wales Legislative Assembly, when he commented in November 1982 in debate on the Family Provision Bill, that the inclusion of de facto spouses as applicants ‘... will further degenerate the family life of this country and will give the imprimatur of society, as expressed by this Parliament, to de facto relationships’.

The affirmative side of the argument was reflected in the Commission’s discussion of its proposals. While recognising that the question whether the Act should recognise de facto relationships was ‘a question which must turn on matters of public policy’, the Commission recommended their inclusion. Because of the ‘public policy’ aspects of the proposal, ‘to preserve the traditional concept of marriage’, the Commission had considered that de facto status alone should not be sufficient to satisfy eligibility, hence the inclusion of de facto spouses by way of application of the general category of eligibility rather than as specifically included by status. Even though the Law Reform Commission was working on a rough equation of lawful and de facto ‘marriages’, this was seen as striking a balance

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54 *NSWPD*, vol 173, 3rd Series, Legislative Assembly, 30 November, 1982, 3536. This view was firmly re-iterated by Rev the Hon F J Nile in the Legislative Council when he commented that many people and churches in New South Wales were most concerned about proposals ‘that regard marriage and de facto relationships as equal in the eyes of the law’, ibid 3606.


56 *Working Paper – TFM*, par 6.30, 51-52. This passage was repeated in the *Report – TFM*, at par 2.6.12, but the final sentence was stated emphatically rather than being posed rhetorically as in the passage quoted here.


58 The Commission also referred to the analogous criteria in Western Australia under s 7(1)(f) of the *Inheritance (Family and Dependants Provision) Act 1972*, where de factos were eligible on satisfying a multi-based test of eligibility: *Working Paper – TFM*, par 6.26.

59 This is seen for example in the discussion of the possible eligibility of former de facto spouses: ‘Just as parties to legal marriages are often deserted and left without support, so too are parties to de facto marriages. In this situation, the deserted party to the legal marriage is an eligible applicant. As we see it, in a like situation, the deserted party to the de facto marriage should also be an eligible applicant’, *Report – TFM*, par 2.6.10. The same logic of equating de facto
between the competing views that could be put. By the time of the final Family Provision Bill, however, the criteria for eligibility of de facto spouses had gone ‘far beyond any of [the Commission’s] proposals’. It was recognised that this was ‘a policy decision’ and the matter was left to the Chairman (Professor Ronald Sackville)60 to determine in conjunction with Parliamentary Counsel. The formula which was eventually agreed upon eliminated a need to show dependence and stipulated no minimum period. It was based on the definition of widow in the Social Services Act (Cth) and the Workers’ Compensation Act (NSW). It simply required proof of living with the deceased as his or her spouse on a ‘bona fide domestic basis’. What prompted the ‘policy decision’ in favour of de facto relationships was suggested by the Attorney General, the Hon Frank J Walker, in his Second Reading speech on the Family Provision Bill in the Legislative Assembly, that it was the ‘changes in thinking’ in the years between 1974, when the original Working Paper was submitted, and 1982, together with the work done by the Law Reform Commission on the reference concerning De Facto Relationships.64

The arguments in relation to former spouses focused on the effect of divorce in ending relationships. The view of the Law Society General Legal Committee reflected the divergence of opinion:

there was some considerable divergence of opinion concerning the question of whether a divorced spouse (whether remarried or not) should be entitled to apply, the first view being that the effect of the divorce was to terminate the relationship, to

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60 Gressier to Chairman, Law Reform Commission, 2 April 1982, NSWLRC, TFM Papers.
61 At the time Sackville was Professor of Law at the University of New South Wales and John Slee, writing in the Sydney Morning Herald at the time of Sackville’s appointment to the Commission, commented that the ‘pace was sharpened’ under its new leaders: ‘Law reform matures slowly, but new leaders sharpen the pace’, Sydney Morning Herald (Sydney), 13 March 1981, 6.
62 H Rossiter, Parliamentary Counsel, to Gressier, 8 June 1982, NSWLRC, TFM Papers, par 1; Gressier to Parliamentary Counsel, 28 June 1982, ibid, confirming that the de factos definition would be sorted out by Professor R Sackville, Chairman, and Parliamentary Counsel.
63 Professor R Sackville, Chairman Law Reform Commission to Parliamentary Counsel, 10 June 1982, NSWLRC, TFM Papers, commenting on drafting of de factos. Hutley J had argued that a five year minimum time period should be included if the ‘political decision’ was made to include de factos: Hutley to Attorney General, above n 27. The Women Lawyers’ Association’s view in relation to the De Facto Relationships reference was that although the WLA supported the overall recommendation for the inclusion of de facto spouses, a three year time period ought to be stipulated as a basis of eligibility under that legislation: ‘Submission to NSW Law Reform Commission from Women Lawyers’ Association of NSW – Topic: De Facto Relationships Enquiry’, 1982, 6 par 4.4, 9 par 8.6, Papers of the Women Lawyers’ Association held by the Secretary, Ms Kerrie Leotta (hereafter ‘WLA Papers’).
64 NSWPD, vol 172, 3rd Series, Legislative Assembly, 2778.
effect a final settlement between them, and that to permit a divorced spouse to recover against the estate of a deceased ex-spouse was to permit a re-opening of an already settled question. The opposing view put was that a divorced wife living on alimony payments which ceased on the death of her ex-husband should not be precluded from obtaining from his estate continuing support if she was able to bring herself within the class of person with reasonable expectation etc. This would undoubtedly involve the Court in consideration of the circumstances of the divorce and of the applicant and the deceased and their relationship in the ‘catch-all’ intervening period until the date of death.65

This is typical both of the divergence of view and the stereotyping of family relationships reflected in the submissions and in the debates at the time. A divorced spouse was considered as female (just as de factos were seen as women), so the arguments focused on when a husband’s (now ex-husband’s) responsibilities should end.66 Views in favour of including former spouses were held, for example, by others within the Law Society, namely in the Family Law Committee.67 There were also indications of identifiable support from the Women's Electoral Lobby.68

A particular problem seen in the commentators’ responses was the question of responsibility notwithstanding a property settlement on divorce. It was agreed that a former spouse who had not received a property settlement should have some legislative recourse on the death of the other spouse, both federally under the Family Law Act, as well as under the state legislation.69 That a former spouse who had obtained a property settlement should also be eligible to apply under the proposed amendments to the Testator’s Family Maintenance Act provoked considerable controversy, which continued to the final stages of debate in Parliament, when, for instance, the Hon Sir Adrian Solomons sought to move a specific amendment in Committee in the Legislative Council that a property settlement obtained on divorce would disqualify a former spouse from eligibility under the Act.70

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65 Law Society Submission, above n 28.
66 For example: F J Walker, NSWPD, vol 172, 3rd Series, 2770 (discussion of Sims v Sims, an unreported case); Peacocke, NSWPD, vol 173, 3rd Series, 3537; the Hon F J Nile, above n 54, 3608.
67 Judging from remarks made by the Secretary of the Committee, RA Kearsley to the Attorney General between 1979 and 1980: NSWLRC, TFM Papers.
68 D Graham, ‘Letter to the Editor’, Sydney Morning Herald (Sydney), 6 May 1975, 6c.
69 See for instance Family Law Council of Australia, Working Paper No 5, ‘Property and Maintenance after Death’, Sydney Morning Herald, August 1979, which recommended both amendments to the Family Law Act and uniformity of provisions amongst the jurisdictions in relation to the standing of former spouses to apply for family provision.
70 NSWPD, vol 173, 3rd Series, 3610-3611. The vote on the amendment was 22:19 that the words stand. See also Mr Peacocke, Legislative Assembly, 3537: ‘as it stands the provision is dangerous’. Hutley J considered that this ran counter to the spirit of the Family Law Act and that it would complicate family law settlements, which were made ‘upon the basis that all property relations are settled; the divorced parties, provided they satisfy these obligations, are then free to contract other obligations’. This attracted the Commissioner’s marginal comment: ‘The problem arises precisely where Family Law litigation is not settled’. Hutley thought this should be left to remedial action by the Commonwealth; or, if in the state legislation, should be confined to this ‘rare instance’; and that the proposed provision be altered to provide that a
The Law Reform Commission’s approach to eligibility of former spouses was similar to their approach to de facto spouses: a person should not be able to commence proceedings by virtue only of being the divorced spouse of a deceased person.\(^71\) \textit{[a]fter a marriage is dissolved the rights under the Act of the parties to the marriage should turn on circumstances peculiar to them, not on their former status’}.\(^72\) Hence, in the original proposal, both in the Working Paper and in the Report, former spouses were required to satisfy eligibility, if at all, under the general category of applicants: the same as for de facto spouses. Eligibility for both classes of applicant was to be based principally on dependency.

In its preparation of its proposals as to former spouses and in its response in the Report, the Law Reform Commission anticipated and accepted that no recommendation on this issue would gain general acceptance.\(^73\) In support of its recommendation, the Commission called in aid some comparative provisions.\(^74\) The recommendation differed from such precedents, however, by including the former spouse in a general category of applicants. The basis for doing so, it was argued, was that by its generality it would lead to a fairer result, even in cases where a spouse may be in receipt of maintenance.\(^75\)

The position of children was also considered on a category by category basis. Some categories were already included in the operation of the \textit{Testator’s Family Maintenance Act} by interpretation or by overriding statute: for example, posthumous children\(^76\) and adopted children.\(^77\) The case for the inclusion of illegitimate children was very strong and argued fully in the Working Paper.\(^78\) However, by the time of the Report in 1977, uniform legislation on the subject was in the process of being introduced around Australia and the \textit{Children (Equality of Status) Act} (NSW) was passed during the printing of the Report.\(^79\) The real debate therefore focused on eligibility of persons such as grandchildren, step-children and a broad category of dependants.

\(^{71}\) Report – TFM, par 6.13, 45.
\(^{73}\) Report – TFM, par 2.6.16.
\(^{74}\) Inheritance (Provision for Family and Dependants) Act 1975 (UK) ss 1, 25; Matrimonial Proceedings Act 1963 (NZ) ss 40 and 41 re continuing maintenance obligations after death; and Australian provisions on former spouse eligibility: Report – TFM, par 2.6.17.
\(^{75}\) Report – TFM par 2.6.20.
\(^{76}\) It was considered that no specific reference in the legislation was needed. The Draft Bill with the Working Paper did do so (pars 6.35-6.36, s 6(2)(b)(ii)); the Report dropped it (par 2.6.32).
\(^{77}\) Hence there was no need to include an express reference: Working Paper – TFM, paras 6.45-6.46; Report – TFM, par 2.6.27.
\(^{78}\) It also built upon the earlier proposals in the 1920s for the inclusion of illegitimate children as applicants under the Act: Testator’s Family Maintenance and Guardianship of Infants (Amendment) Bill 1920, NSWPD (1920) 2nd ser, vol 80, 472. A copy of the Bill is contained in AG, Special Bundles – TFM, Bundle 1.
\(^{79}\) Report – TFM, par 2.6.29.
There was no specific argument against the inclusion of grandchildren. But the Commission’s proposal that grandchildren should be considered, if at all, within the general category of applicants was modified expressly in the Report to reflect the comment in a submission that a grandchild may be dependent in some sense but not part of the same household as the deceased. In addition, grandchildren had been eligible in certain cases under the *Testator’s Family Maintenance Act* simply on the basis of their status as grandchildren (s 3(1A)) and therefore should be considered in a different position, not requiring the higher standard of eligibility contained in the general category. Clause 6(2) of the draft Bill included with the Report reflected this modification.

The case for the inclusion of step-children was more controversial, as it reflected arguments about the value of marriage and also, inherently, arguments about the responsibility of a step-father for ‘another man’s children’. The Commission proposed that step-children should be included, but with conditions: that they should be considered in the same general category with de facto and former spouses. Dependency alone was considered to be too broad a base:

> We do not believe that the principle of testamentary freedom should be encroached upon to the extent that would be possible if all dependants became eligible applicants under the Act. And, we do not believe that opportunities for speculative actions should be enlarged to the extent that they would be enlarged if any person claiming to be a dependant of a deceased person could commence proceedings under the Act.

The third limb of the dependants category was, therefore, specifically included to confine applications to particular sets of circumstances, rather than by simple status categories: ‘circumstances, not status, should control eligibility’. The Law Reform Commission recognised that a widening of the class of eligible applicants would increase the number of people who might benefit and that this would constitute a further encroachment on testamentary freedom and greater uncertainty in beneficiaries. The Commission therefore saw what it was doing as directly related to the question of testamentary freedom and were anxious to emphasise a desire ‘not to plunder’ it. Arguments pivoted around testamentary freedom and were justified because of it, or explained around it. The three conditions together represented the limits of moral duty formulated on the pretext of preserving the

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84 Working Paper – TFM, par 6.71. This was also reflected in relation to the argument to include a step-child on the basis of status alone. The Commission was ‘reluctant’ to do this, preferring instead the circumstances-based eligibility. This was also linked to the preservation of testamentary freedom: to equate step-children with children was thought too great an inroad upon it: Working Paper, par 6.48, 58. See also Report – TFM, par 2.6.25.
principle of testamentary freedom: to ‘aid the special deserving case and to deter the speculative case’.  

2 A Strident Defence of Testamentary Freedom

Professor R A Woodman and Justice F C Hutley expressed strongly negative views in relation to the proposed extension of the categories of eligible applicants. The basis of their objection was the same: the encroachment upon testamentary freedom. They were both leading exponents of succession law, and household names for their expertise in the field. They were approached by the Attorney General for specific comment on the proposals. Their responses were not included in the Report, as they were sought after its publication, but their negative viewpoints on the Commission’s proposals set an important context for the Attorney General in relation to the problem of implementing those proposals.

Woodman described his own comments as ‘a virtual rejection of the ideas put forward after a very exhaustive study’. He considered the expansion of the categories of eligible applicants such a threat to testamentary freedom that he remarked, despairingly, that ‘it would be much simpler to abolish altogether the right to make a will and leave all the estate to be distributed on intestacy’.  

Woodman wanted the eligible applicants confined: to spouse, children and grandchildren (including adopted and illegitimate), and those persons in regard to whom the deceased stood in loco parentis.

Both Woodman and Hutley J did not wish to see the class of applicants enlarged. Both saw the possibility of an increase in litigation. Hutley J was condemnatory: a viewpoint plainly evident, for example, in his preface to the third edition of his co-authored Cases and Materials on Succession, published after the passage of the Family Provision Act:

87 Hutley J had lectured at Sydney University Law School for many years prior to his appointment to the Supreme Court in 1972, specialising in Succession and Probate. He also published, together with Woodman, the first Australian Casebook on Succession in 1967, as well as writing many articles in the field and Australian Wills Precedents in 1970. Details are noted in brief in Who’s Who in Australia (1977). Woodman also wrote the text, Administration of Assets, first published by the Law Book Co in 1964.
88 See above n 27.
89 Woodman to Attorney General, above n 27.
90 Woodman to Attorney General, above n 27.
91 Hutley to Attorney General, above n 27. He commented, however, that the decision as to whether to include applicants outside the ‘legal family’ was ‘ultimately a political decision’, and he was prepared to concede a small enlargement to include: (i) a mother or father of the deceased’s ex-nuptial children; (ii) an applicant who had lived in a de facto relationship for at least five years, which relationship continued until death: 2. The basis for including these categories he stated was that: ‘in both these cases it could truly be said that the applicant could have a genuine expectation defeated by the failure of the deceased to provide for him or her in the will. They are also both cases in which those responsible for administering the deceased estate would have a real opportunity to check the relevant facts’: 3.
92 Ibid 1.
The most radical complications [in the law of succession by the extension of claims against the estate] have been introduced in New South Wales. George Orwell's Big Brother could not have done better than the reformers who entitled the Act which gave claims against the estate to mistresses and lovers, ‘The Family Provision Act 1982’. The Act might have been more properly entitled ‘The Act to Promote the Wasting of Estates by Litigation and Lawyers Provision Act 1982’.93

Hutley J’s overriding objection was that the proposals were dealing with questions of ‘abstract justice’, without real consideration as to the effect on the administration of the estate.94

The Commissioner in charge of the reference, Gressier, prepared a memorandum for the Attorney General examining the comments made by Hutley J and Woodman, dated 28 November 1978.95 It was defensive, candid, but well-considered, and committed to the proposals contained in the Working Paper and Report. The central point of divergence was as to the extent of interference with testamentary freedom. For example, Gressier noted that while Professor Woodman objected to inroads into testamentary freedom, he seems content to accept some encroachment on freedom of testation, presumably (although he does not explain why) on the grounds that wives, children, grandchildren and persons standing in filial relationships, have some kind of moral claim.96

Gressier pointed out:

The fallacy in Professor Woodman’s first statement is that it fails to recognise what the LRC have understood, namely that our society prizes both the power of the individual to dispose of what is his on his death, and a fair deal for those who were dependent on him. Neither is, nor is perceived to be absolute, so that it is absurd to suggest that if you widen the class you may as well abolish will-making. Widening the class would simply bring the law into greater (though never perfect) accord with social reality, which is messy in so far as people's relationships do not always coincide with the legal stamps put on them.97

The real argument was about the degree of interference in will-making. On the one hand, commentators like Professor Woodman and Hutley J were not prepared to accept further interference – they wanted the legislation defined to limited relationships; on the other hand, there were those, like Gressier and his fellow Commissioners, who were so prepared. Both groups, however, argued from the same starting point: that testamentary freedom should not be ‘plundered’. Both

94 Hutley to Attorney General, above n 27, 1.
95 ‘Memorandum: LRC’s draft Family Provision Bill’, NSWLRC, *TFM Papers*.
96 Ibid. The marginal note on Woodman’s letter to the Attorney General evidently grouped this last comment with Hutley’s and others of the same ilk, by saying ‘Here we go again!’.
therefore agreed that the basis of family provision was the discretion of the willmaker, subject to the discretion of the court on application by designated family members. Although to the protagonists their points of divergence seemed considerable, in fact they were fundamentally in agreement as to the philosophical approach to the ‘rights’ of family members in relation to property on death.

Gressier’s comments were reiterated in the subsequent discussions with the Attorney General. Notwithstanding the strident defence of testamentary freedom made by the two very prominent and respected succession scholars, the overall proposal to widen the class of applicants was adopted on the broad basis, suggested in the Report, that ‘the advantage of allowing the court to intervene in appropriate cases outweighs the disadvantages’.

3 The Drafting of the Bill

When it came to settling the terms of the Family Provision Bill with respect to eligible applicants, the exact definition produced considerable disagreement at another level, this time between the Commission and Parliamentary Counsel. Dispute focused on the third limb of the three-limbed test of eligibility proposed for the general category of applicants. In addition to satisfying the ‘dependency’ and ‘membership of a household’ limbs, an applicant in this category also had to be ‘a person whom the deceased person ought not, in the opinion of the Court, to have left without adequate provision for his proper maintenance, education or advancement in life’. In effect this third limb required applicants within this group to satisfy the ‘without proper maintenance’ test twice. Parliamentary Counsel objected to this and his 1979 draft altered the Commission's conditions of eligibility by deleting the third limb suggested by the Law Reform Commission. Gressier and the Deputy Chairman of the Commission, R D Conacher, saw Parliamentary Counsel as attempting ‘to change the policy which the LRC was attempting to express’. They deliberately wanted the question of moral obligation to be considered twice in the case of the general category of applicants, to make it harder for some than others:

In proposing an enlarged class of eligible persons, we are making further inroads into the doctrine of freedom of testation. We were prepared to do this on condition that a person could become an eligible person only if he could show that he was a person for whom the deceased person ought to have made adequate provision.

The disagreement can be seen as rather like two points on the same continuum of imagined testamentary responsibility. For the Commission, the category of dependants was somewhat of an outlier, and only to be satisfied in exceptionally

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98 Report – TFM, par 2.6.9.
99 ‘Comments of R D Conacher and D Gressier on draft bills sent with Parliamentary Counsel’s letter to D Gressier of 11 September 1979’ (undated), NSWLRC, TFM Papers. The document is 60 pages long.
100 Ibid 3.
deserving circumstances – hence the layers of definition imposed for eligibility. For Parliamentary Counsel, however, whatever the policy background, the solution was too ungainly. While the effect of the modification might be construed as a ‘policy’ response, it was, principally, one of simplification of drafting. The continuum, in this sense, was not one of policy, but of pragmatism in the legislative arena.

The Under Secretary intervened in early 1981 proposing that compromises in approach should be made on both sides, and a concerted effort should be made to try to find some middle ground.\textsuperscript{101} The Under Secretary recommended that the Law Reform Commission’s approach be preferred, as this was more ‘acceptable to the general public’.\textsuperscript{102} Here the Under Secretary can be seen to be sensitive, and responding, to the policy implications of the proposal for expansion of eligibility in the third limb. After another draft Bill in March 1982 and much discussion, the Draft Bill of June 1982 finally reflected the Commission’s view of a three-limbed test for the general category of applicants. The form was not that initially proposed, namely of a three-limbed definition of eligibility, but, notwithstanding some continued objection by Gressier,\textsuperscript{103} was one that embodied the spirit of it by having a two-limbed eligibility test and an additional matter to be satisfied as a pre-requisite to the exercise of jurisdiction in the case of such applicants. This eventually became the s 9(1) that was included in the final bill:

\begin{quote}
... the Court shall first determine whether, in its opinion, all the circumstances of the case [whether past or present,] warrant the making of the application, and shall refuse to proceed with the determination of the application and to make the order unless it is of that opinion.\textsuperscript{104}
\end{quote}

This reflected both the policy aspect – of extending the definition in a cautious manner – but also the pragmatic perspective of Parliamentary Counsel, that a definition, any definition, had to be ultimately workable in the interpretative, judicial, arena.

By this time, however, another matter had arisen which attracted criticism from Gressier, namely that the Bill of March 1982 included de factos in a separate category. They were no longer grouped in the general category and therefore their eligibility was defined by satisfying a particular status and not dependency. The question of eligibility of de factos had now really passed from Gressier’s hands, and the question of how best to include them within the Family Provision Bill was

\begin{footnotes}
\item[101] Under Secretary, ‘Submission to the Attorney General’, above n 30.
\item[102] ‘Comments of R D Conacher and D Gressier’, above n 99, 2.
\item[103] D Gressier to H E Rossiter, 28 June 1982, NSWLRC, \textit{TFM Papers}, Appendix ‘C’ 1(2): ‘I know that a policy decision has been made to exclude from the Bill any equivalent of section 6(1)(c)(iii) of the LRC Bill. I wish, however, to make it perfectly clear that this is a policy decision with which I disagree. Section 9(1) goes some way towards placating me but not all the way.’
\item[104] Gressier to Rossiter, ibid, Appendix ‘C’, 1-2, par 2.
\end{footnotes}
decided by the Chairman in conjunction with the Attorney General in light of the Commission’s other work on de facto relationships.\textsuperscript{105}

By the time the definition of eligible applicants reached the Parliamentary forum, it represented a considerable expansion of the class of applicants eligible to apply under the 1916 Act. As finally passed, its form was wider than that initially proposed by the Law Reform Commission and very much the result of confrontation, negotiation and reconciliation between Parliamentary Counsel, the Law Reform Commission and the Department of the Attorney General. This had not been the story of the earlier legislation in 1916, nor its amendments.\textsuperscript{106} Although the Parliamentary Draftsman (as the officer was formerly known) was involved before,\textsuperscript{107} the Law Reform Commission was not. The addition of the Commission brought a considerable additional dynamic into the background of the 1982 Act and to 20\textsuperscript{th} century law reform in general.

\section*{B Property}

\subsection*{1 The Law Reform Commission’s proposals}

There were several aspects of the recommendations regarding property. Some were adopted without problem: defining when property had ceased to be in the hands of the legal personal representative;\textsuperscript{108} when New South Wales law could affect property under the Act;\textsuperscript{109} defining whether the court could reach property that had

\textsuperscript{105} Gressier to Chairman, Law Reform Commission, 2 April 1982, NSWLRC, \textit{TFM Papers}, point 9, 3; Rossiter to Gressier, 8 June 1982, ibid; Gressier to Rossiter, 28 June 1982, ibid, point 1. When Cabinet considered the Family Provision Bill on 28 September 1982, the Attorney General indicated that he had ‘received representations’, many of which concerned de facto relationships which had subsisted for many years: ‘Notes for Members of the Attorney General’s Ministerial Policy Unit – Family Provision Bill, 1982’, prepared by J Brogan and M Connell, NSWLRC, \textit{TFM Papers}, 2-3; ‘Cabinet Consideration on 28th September, 1982’, NSWLRC, \textit{TFM Papers}. It is not indicated about what subject matter the Attorney received representations, but in the context in which the note was made and the fact that the Cabinet consideration was of the Bill, it is likely that the representations concerned de facto spouses who had been aggrieved in property matters on the death of the de facto spouse. The representations may in fact have been wider than this to include property matters generally as between de facto partners, particularly given the currency of the Law Reform Commission work on de facto relationships.

\textsuperscript{106} See Atherton, n 11 above.

\textsuperscript{107} For example in the Attorney General’s papers on the 1916 Act there is correspondence between Parliamentary Draftsman and the Minister of Justice over the drafting of the 1922 Amendment Bill: AG, \textit{Special Bundles – TFM}, Bundle 1.

\textsuperscript{108} Working Paper – TFM, pt 8; Report – TFM, third recommendation, par 1.7, 11. The recommendation was that the cut-off point should only come once property was indefeasibly vested in interest in beneficiaries. This recommendation actually preceded the High Court decision in \textit{Easterbrook v Young} (1977) 136 CLR 308 which was to similar effect. In the \textit{Family Provision Act} the recommendation was embodied in s 6(5).

\textsuperscript{109} Report – TFM, sixth recommendation, par 1.7, 11: that the court be given power to affect movables of a deceased person which are situated in New South Wales even though the deceased person was not domiciled in New South Wales. In the \textit{Family Provision Act} this was embodied in s 11.
been distributed by the legal personal representative. The contentious question, however, was defining when property which was not in the estate at all, because of some *inter vivos* action of the deceased (including a contract to dispose of property by will), could be clawed back for purposes of a family provision order. In deliberating upon the problem of *inter vivos* dispositions, the Commission had focused upon particular examples:

> We have in mind situations where a father seeks, in favour of the children of his first marriage, to defeat the claims of his second wife or, in favour of his second wife, to defeat the claims of children of the first marriage or, in favour of his mistress, to defeat the claims of both his wife and his children.\(^{110}\)

Such examples lay behind the second principal recommendation in the Report: to enlarge the class of property out of which provision may be made for an eligible person.\(^{111}\)

The Commission recognised that to implement such a proposal would require some power to override what would otherwise have been regarded as valid dispositions of property *inter vivos*; and that this posed a difficult theoretical issue:

> The rights involved are fundamental: on the one hand, the right of a person to arrange his affairs in his way and the right of a transferee of property to a secure title and, on the other hand, the right of a family not to be disinherited.\(^ {112}\)

In considering whether, and how, claw-back provisions should be introduced, the Commission again considered comparative examples: for instance the provisions in the *Inheritance (Provision for Family and Dependants) Act 1975* (UK); the *Family Law Act 1975* (Cth) provisions in relation to matrimonial assets; the draft *Family Relief Act* in Canada, the uniform legislation proposal which included the capital value of certain transactions in the net estate; the 1969 United States *Uniform Probate Code* and its ‘augmented estate’ provisions; and the forced share provisions in some American jurisdictions, which may be elected against the will.\(^ {113}\)

The Law Reform Commission’s model, in the Bill attached to the Working Paper, used a concept of ‘Statutory Trust’, which would have included in the estate available for distribution eight kinds of transaction. It was not the first time that this

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13. Working Paper – TFM, pars 11.10-11.16. English legal history was also considered for its example of transactions avoided on the basis of fraud upon the custom of London, under which a surviving wife received a Customary Share of one-third of her deceased husband’s goods: Working Paper – TFM, pars 11.17-11.25; Report – TFM, par 2.22.5. ‘This old law lost its importance, not because it was wrong in principle, but because it fell into desuetude when testamentary freedom became a tenet of English law. Now that family provision statutes have limited that freedom, the old law is again pertinent. North American experience shows that it provides guidelines for modern legislators.’ Report – TFM, par 2.22.5.
had been mooted. In 1922 it had been proposed, unsuccessfully, to attach gifts made within one year of the deceased’s death;\(^{114}\) in the 1930s the general issue of attaching gifts and settlements made before death was raised again, but also dropped;\(^{115}\) and in 1951 Charles H McLelland, QC, in a paper given at the Seventh Legal Convention of the Law Council of Australia, argued that the number of cases of *inter vivos* evasion of the legislation was large enough to merit consideration of a remedy.\(^{116}\) This time, however, it was tackled more thoroughly than had been done before and the Commission’s proposals led to the inclusion of ‘notional estate’ provisions in the *Family Provision Act 1982*. The formulation and drafting of these provisions, however, again reflected a compromise between the divergent approaches of the Commission and Parliamentary Counsel.

2 Another Nail in the Testator’s Coffin?

The Commission expressed surprise that the notional estate proposals ‘evoked little opposition’ from the commentators,\(^{117}\) hence the conclusion in the Report that ‘…the proposals were widely accepted as being right in principle’.\(^{118}\) ‘Little opposition’ is not, however, an accurate reflection of the opposition actually received before the production of the Report. Although the negative arguments were fewer in number, such arguments, when put, were expressed in strong terms: ‘little’ in volume, perhaps; but not ‘little’ in terms of degree. For example, the minority of the General Legal Committee of the Law Society had considered the negative argument an extremely strong one:

> this is simply to put another nail in the testator's coffin, that the concept of testamentary freedom becomes an absolute myth and that the free right of the testator to determine, on his own appreciation of his obligations to his family, the disposition of his property on death and to take what steps he thought proper to ensure that it was

\(^{114}\) *Testator’s Family Maintenance and Guardianship of Infants (Amendment) Bill 1920*. A copy of the Bill is contained in AG, Special Bundles – TFM, Bundle 1.

\(^{115}\) Ibid.

\(^{116}\) ‘Fifty Years of Equity in New South Wales – a Short Survey’, delivered 16 August 1951 and reprinted in (1951) 25 *ALJ* 344, 345. McLelland was appointed to the Supreme Court of New South Wales in 1952 and to the Court of Appeal in 1966. He suggested including gifts made *inter vivos* within the reach of the provisions of the Act, based upon an analogy of notional assets for death duty and estate duty. It was such a model that was eventually included in the Act. Although the context in which McLelland’s comments were made and his later position on the Court of Appeal gave his remarks added weight, and therefore could support an argument that he was influential in the adoption of the ‘notional estate’ model in the 1982 Act, this model was an obvious and readily-available precedent in New South Wales at the time and would have been considered whether McLelland suggested it or not.

\(^{117}\) Report – TFM, par 2.22.6.

\(^{118}\) Report – TFM, par 2.22.6. Nor did any commentator disagree that *Schaefer v Schuhmann* [1972] AC 572 should be reversed: par 2.11.3. This was a case in which a promise to leave a house by will was held to exclude the claim of the testator’s daughters under the *Testator’s Family Maintenance Act* to the estate assessed on the basis that the house was included. The daughters’ claims therefore were only in respect of any balance of the estate, notwithstanding that the house was the principal asset held by the deceased.
done in accordance with his wishes, would be totally over-ruled by these provisions of the Act.\textsuperscript{119}

Moreover, if the Commission had had Professor Woodman’s and Hutley J’s comments before it at the time of the Report, ‘little opposition’ would have been singularly inappropriate. Even on the responses received, it was a big jump from ‘little opposition’ to ‘wide acceptance’.

Professor Woodman considered the notional estate recommendations in two paragraphs, headed ‘Freedom of Contract’ and ‘Freedom of Settlements and Gifts’ respectively.\textsuperscript{120} Under the first heading he considered the housekeeper contract, in which a person (‘the housekeeper’) is promised property by will in return for agreed services (‘looking after the testator till his death’), represented by \textit{Schaeffer v Schuhmann} [1972] AC 572. ‘There is’, he said, ‘no reason whatever to upset a contract validly entered into by the deceased in his lifetime’. Under the second he considered that the legislation would introduce ‘new and far-reaching rules’ into succession law:

In my view, it represents a savage attack upon the rights of a person to create a settlement affecting his property, and to make gifts if he so desires and, at the same time, raises difficult questions as to the ‘intention of defeating an application for provision’. The periods selected are arbitrary and, in general terms, settlements and gifts are made with the intention of arranging affairs at that particular moment. True enough, property can be placed beyond the reach of an eligible person, but in my view the necessity of including this Part of the Act should be left in abeyance until statistics show whether or not this is being done on sufficient occasions. It is preferable to continue on the basis that there should be no interference with the established rights to create settlements and make gifts. I place joint tenancies in the same category.\textsuperscript{121}

In responding to the argument in favour of freedom of contract, Gressier sought to draw a connection between freedom of contract and a particular type of society:

Freedom and sanctity of contract were precepts which flourished in a certain kind of society which was not averse to visiting gross injustice on the mass of people in the interests of the commercially powerful fittest. ... There is no obvious reason, if society chooses to give legal recognition to values at odds with the sanctity of contract, why these values should not be given play even where a contract is the

\textsuperscript{119} Law Society Submission, above n 28, par 17, 3. There was ‘uniform agreement’, however, about including in the deceased’s estate the amount of any property given away by the deceased with the intention of evading the Act, if such gift was made within three years prior to the date of death, although it was recognised that subjective proof of intention would be difficult: ibid, par 13. Another view was that the provisions did not go far enough: ibid.

\textsuperscript{120} Woodman, above n 27, 2-3.

\textsuperscript{121} Woodman made one exception: he considered that a \textit{donatio mortis causa} could be the subject matter of an application. A marginal note was made to Woodman’s comments about property: ‘OK for duty but not for family provision.’
subject of litigation after one of the contractors has died. It surely depends on what social objectives one is trying to achieve.\textsuperscript{122}

To Gressier, Woodman’s perception of the notional estate provisions as a ‘savage attack upon the rights of a person to create a settlement’ reflected ‘a somewhat emotional commitment to individualistic rights of disposition, without any underlying analysis of objectives’:\textsuperscript{123}

Again, it begs the question of how to achieve fairness in the operation of an agreed (given we have had TFM legislation since 1916) legal rule that some interference with people’s discretionary rights is socially and morally justifiable.\textsuperscript{123}

Hutley J’s remarks as to the extensions to the class of property that could be affected under the Act focused, as with his objections in relation to the proposal to extend the class of applicants, on the effect on the administration of any estate:

My own view is that in the administration of estates the law should seek simplicity even at the cost of occasional apparent injustice and the overall value of simplicity outweighs the advantages to be derived from seeking to rectify all ills. The sooner an estate can be vested in beneficiaries the better for all concerned, except possibly lawyers and accountants. The proposed abolition both of Commonwealth Estate Duty and State Death Duty will have removed the greatest single factor complicating the administration of estates and it would be a pity if by the complication of the law of Family Provision the benefits of these changes are nullified.\textsuperscript{124}

3 The Drafting of the Bill

When the Report was referred to Parliamentary Counsel to prepare the Bills, the notional estate aspect of the Act was the second ‘fundamental issue’ of disagreement. They were not disagreeing about the object – to prevent persons dissipating their property in order to defeat the provisions of the Act – the argument was only about the means of implementing the objective, even though the argument was quite intense. Where the Under Secretary had favoured the Law Reform Commission’s approach to eligible applicants, the Parliamentary Counsel’s version of notional estate was the preferred one, the Law Reform Commission’s proposal being seen as cumbersome and ‘likely to complicate an already complex area of the law’.\textsuperscript{125} The Parliamentary Counsel’s model was based on the UK Act of 1975.\textsuperscript{126}

\textsuperscript{122} Gressier, above n 95, 7.
\textsuperscript{123} Ibid.
\textsuperscript{124} Hutley, above n 27, 3. His comment about lawyers benefiting from the Act was reflected in his Preface to his Casebook, quoted in the text at n 93 above.
\textsuperscript{125} Under Secretary, ‘Submission to Attorney General’, above n 30, 5.
\textsuperscript{126} Gressier was annoyed by the suggestion of the Under Secretary in his ‘Submission to the Attorney General’, ibid 5, that ‘it appears the Law Reform Commission had not investigated this scheme in any detail’. Gressier responded: ‘We considered the English scheme in great detail and decided that the statutory trust approach was the better approach. We did not think it right, for example, that a donee of property who dissipates the proceeds should be liable, in TFM proceedings, to pay an amount equal to those proceeds when the donor, the testator,
and was wider in its reach. It also had a number of additional questions attached to the question of designating property under the scheme.

It is arguable that the disagreement over the ‘claw-back’ mechanism was not as serious as it seemed to the protagonists. To them the gulf was wide: as any step they were taking towards retrospectivity in relation to inter vivos dealings of a person was seen as enormous, any small divergence can be seen to be perceived in an exaggerated light.

**V ASSESSMENT OF THE ACHIEVEMENT**

The *Family Provision Act 1982* was not to repeal its predecessor, but to supersede it.\(^{127}\) The principal changes in the legislation from its predecessor were an extension in the range of eligible applicants, including, in particular, de facto spouses, former spouses and a general category of applicants based on dependence;\(^ {128}\) and the inclusion of provisions which allowed the claw back of property disposed of inter vivos, through the ‘notional estate’ provisions.\(^ {129}\) Minor changes were also made to tidy up aspects of the earlier Act.\(^ {130}\)

In contrast to the evolution of the *Testator's Family Maintenance Act 1916*, which had seen nearly all the debate on the form of the Bills within the Parliament itself,\(^ {131}\) much of the agonising over the form of the *Family Provision Act* went on within the offices of the Parliamentary Counsel, the Attorney General and the Law Reform Commission. This is in contrast to the discussion of the *Inheritance (Provision for Family and Dependents) Act 1975* (UK) in the Parliamentary Session of 1974-5, which has been described as ‘the most lively and intelligent discussion of the principles of restricting freedom of testation since the original attempts at legislation in the 1930s’\(^ {132}\). The discussion of the *Family Provision Act (NSW)* in November and December 1982, could not be described in this way.

In many respects the Family Provision Bill was accepted largely as a *fait accompli* in Parliament, with only a relatively few questions raised during debate. The Government desired that the legislation be introduced urgently,\(^ {133}\) however neither

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\(^{127}\) The 1982 Act also did not affect the Guardianship of Infants provisions of the 1916 Act. These continue in force.

\(^{128}\) *Family Provision Act 1982* (NSW) s 6(1) definition of ‘eligible person’.

\(^{129}\) Ibid Division 2.

\(^{130}\) For example, the power of the court to have regard to the circumstances at the time the order is made (s 7), rather than only those things that were reasonably foreseeable to the testator, a consequence of the decision in *Coates v National Trustees Executors and Agency Co Ltd* (1956) CLR 494.

\(^{131}\) See Atherton, above n 11.


\(^{133}\) See Cover Sheet to Cabinet Minute dated 15 September 1982, NSWLRC, *TFM Papers*: ‘Priority: Urgent; introduction into Parliament at an early date’.
the Hon Frank J Walker, the then Attorney General, in the Legislative Assembly, nor the Hon David P Landa in the Legislative Council, rose to the occasion by giving the spirited and thoughtful analysis of the provisions, which perhaps such ‘urgency’ may have warranted. The legislation was useful politically: it would have fitted Premier Neville Wran’s ‘policy of pursuing reforms which were relatively inexpensive but welcome’.

Why were the experiences of the United Kingdom and New South Wales parliaments so different on the subject of amending family provision law? Was it a case of bad timing in the Parliamentary agenda? The debate did take place late in the year, with the Second Reading continuing from 23 November into 1 December, and the assent being given on Christmas Eve. Many of the provisions were very complex – particularly in relation to notional estate – and, it seems, the Bills were only given to Members a few days before the debate. There had been a considerable gap between the presentation of the Report in 1977 and the introduction of the Bills into Parliament and although, according to the Law Reform Commission, there had been wide consultation in relation to the proposals in the Working Paper of 1974, there was evidently little time for the participants in the parliamentary debate to absorb the issues raised in it. After all, it had taken the Law Reform Commission, Parliamentary Counsel and the Attorney General’s Department three years to sort their way through the various draft bills.

In some respects then, it can be said that the Bills ‘walked through’ the Parliamentary arena. With the weight of the Commission’s work behind them, it would have required a brave soul to speak against the Bills with any force. It would certainly at least have required one with a ready grasp of the intricacies of the provisions. Had Professor Woodman or Justice Hutley been Members of Parliament, the legislative history may have taken another path.

Another major question that must be asked is why there was no comment during the debate on the Family Provision Act about the discussion in relation to matrimonial property reform that was going on at the federal level. The fact that such issues were not raised during debate on the Family Provision Bill, nor even during the discussions leading up to it, reflects a narrow-sightedness endemic where jurisdiction is divided between a federal parliament and state legislatures. This is particularly the case where that division affects property distribution amongst families: property division on divorce being the province of the federal sphere, via the Family Law Act 1975, property division on death being the province of the state in the guise of family provision legislation. This creates a logistical problem in relation to the debates on family provision as they were disconnected from debates on federal issues. Hence although in the federal sphere the matter of matrimonial property was under review in the late 1970s, seen for example in the establishment

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135 Peacocke, *NSWPD*, vol 173, 3rd Series, 3541, stated that he had only had the bills for ‘one or two days’.
in 1978 of the Joint Select Committee on the Family Law Act (the Ruddock Committee) which led to the reference to the Australian Law Reform Commission in 1983, this did not spill over into the state sphere in the debates on the Family Provision Act.

Could it have been another question of bad timing? The thorough debate on property relationships between spouses that arose in the 1980s may have been just too late for it to have any effect on the discussion of the question of property relationships on death, the conclusions of the New South Wales Law Reform Commission and the proposals developed from their having been settled several years before. This was not to be the experience in the United Kingdom and Canada where the review of family provision legislation was integrated with a review of other aspects of family property.

If such debates on property division on divorce were to have an impact on the analysis of family provision on death involved in the Family Provision Act, it would have involved not only lateral thinking, because of the location of inheritance in the state sphere and divorce in the federal, it would have forced a re-opening of the question of fixed rights of inheritance, which, though raised in the Working Paper in the mid 1970s, was quickly dismissed. While it can be argued that to consider both family provision on death and family provision on divorce should not involve lateral thinking, because both involve fundamentally the same questions, the problem of bad timing and the division between state and federal spheres can be readily grasped on the practical level. If the question of family provision were to have arisen a decade later, after the Australian Law Reform Commission had completed its work on matrimonial property, the debate on family provision on death may well have taken a different course.

If the Family Provision Act is viewed in isolation, apart from the discussions at the federal level on matrimonial property, how then can it be assessed as a piece of law reforming legislation on its own? Was it, in the words of Justice Hutley, simply dealing with ‘abstract justice’? Can it survive the criticism made about law reform generally that it is often ‘ad hoc, impressionistic, casual’; that it is ‘hobby horsing’ and usually bears ‘the inevitable hallmark of tinkering with the superstructure’?

Perhaps to describe the Family Provision Act as dealing with questions of ‘abstract justice’ is to understand it completely. To Justice Hutley this presented a problem in

137 Report – TFM, 9, par 1.6.
138 Hutley to Attorney General, above n 27, 1.
141 ‘Games People Play’ (1976) 126 New LJ 1006.
the practical sphere in relation to the widening of the Act both in relation to the possible applicants and the property that could be affected under the Act. For him, therefore, to describe the Commission’s proposals in this way was to criticise them. But the discussion over the introduction of the Family Provision Act, like the Testator’s Family Maintenance Act, can be understood as being a debate about justice in the abstract, seen in terms largely of justice for de facto wives, former wives, and lawful wives; as another example of legislation ‘in favour of our women’, as the amendment in 1938 was described. If criticism is to be directed at the Act for dealing with questions of ‘abstract justice’, it should not be considered simply for the practical implications of the legislation, but rather whether a model which, in essence, deals with such questions by a discretionary mechanism related to family models of dependence is a valid mechanism for doing so.

Given the degree of effort made in the evolution of the Family Provision Act, at least before it reached the doors of Parliament House, it would be unfair to describe the Act as ‘ad hoc’, ‘impressionistic’, or ‘casual’. It would also be unfair to describe it as an example of ‘hobby horsing’ in view of the circulation given to the Working Paper, the fact that reform of family provision legislation was being undertaken in many other jurisdictions, and that it seemed to have gained reasonable support in the submissions to the Law Reform Commission referred to in the Report.

The more difficult criticism to answer is whether the Family Provision Act was another example of ‘tinkering with the superstructure’ of the law. If it is seen simply as a tidying up and adjustment of the 1916 Act, it could be said to be a ‘tinkering’ with the earlier Act. But the Attorney General stated in introducing the Second Reading of the Bill in Parliament, that it was ‘a complete re-shaping of the law with respect to what is now widely known as Testator’s Family Maintenance’. While this had the air of the rhetorical flourish, it cannot stand closer examination as a valid assessment of the 1982 Act. The Act did extend the reach of the 1916 Act substantially, but it did not re-shape it in substance. This was expressly rejected: ‘the time for proposing fundamental changes in [the laws of succession] has not yet come’, the Commission had concluded. The implementation of some fixed rights of inheritance would have re-shaped the law in this field; and would have produced the ‘sweeping changes’ claimed of the Family Provision Act by the Attorney General. So, too, would a re-casting of the jurisdictional formula, which was based on a concept of what was ‘proper’ provision.

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142 Hutley to Attorney General, above n 27.
143 NSWPD, vol 172, 3rd Series, Legislative Assembly, 2769.
144 Report – TFM, par 1.6.
145 NSWPD, vol 172, 3rd Series, Legislative Assembly, 2769.
146 This was described as ‘the primary condition of the Court’s jurisdiction’: Working Paper – TFM, Part 5. The formula was retained because, as reported by the General Legal Committee of the Law Society of New South Wales, it was ‘well understood by lawyers and the Court’: Ibid par 4. The formula is the origin of the ‘moral duty’ approach to the Act: see Atherton, above n 9.
From the point of view of the deceased whose will and *inter vivos* transactions could now be affected by the 1982 Act, where they could not have been similarly affected under the 1916 Act, the changes in the 1982 Act could be described as ‘sweeping’. But from the point of view of the family which was the apparent object of the ‘Family Provision Act’, while the membership of the family was somewhat wider, the position of the family members was, in fact, little different from that under the 1916 Act. Viewed in this light it might indeed be considered to be little more than a ‘tinkering with the superstructure’, despite all the hard fought efforts of the protagonists in the Act’s development.

Looking at whom to credit for the Act, credit must go to the New South Wales Law Reform Commission and Parliamentary Counsel. Where the *Testator’s Family Maintenance Act 1916* had been introduced entirely through the legislative processes of Parliament, the *Family Provision Act 1982* was the product of the work of the Commission, and later, in the implementation of the Law Reform Commission’s Report, Parliamentary Counsel. But it is sad in a way that the legislative history of the *Family Provision Act* involved an immense amount of effort for arguably little gain. It was an example of an opportunity missed, or bad timing, or both. The discussion on testator’s family maintenance happened, in the main, just before law reform in Australia really took off.

Michael Tilbury identified the period before the creation of the Australian Law Reform Commission in 1975 as one in which commissions ‘eschewed overt consideration of embedded policy issues’.147 The discussion on the *Testator’s Family Maintenance Act* – and particularly the comments of Hutley and Woodman – demonstrate how much the ideas were expressed as ‘lawyer’s law’,148 rather than a thorough consideration of the place of family provision legislation as an aspect of an overall notion of family property – ‘policy’. Tilbury identified the Chairmanship of the Australian Law Reform Commission by the Hon Justice Michael D Kirby as a driving force in the change of law reform work.149 He described the period 1975 to the late 1980s as ‘a “golden age” of law reform in Australia’.150 The New South Wales Law Reform Commission also shifted gear, with a change in methodology after 1976.151

In drawing up ‘the balance sheet’ on law reform in Australia, Tilbury summed up:

> Viewed through the lens of the present, the history of any subject is prone to yield a catalogue of pluses and minuses, of successes and failures. For the history of law reform in Australia, the overwhelming plus is an immense body of work that has

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147 Tilbury, above n 4, 13.
148 Tilbury, above n 4, 13.
149 Tilbury, above n 4, 13-15.
150 Tilbury, above n 4, 15.
151 Tilbury above n 14, referring to the Commission’s 25th Anniversary Annual Report (1991), [2.16]-[2.19].
either been translated, in whole or in part, into legislation, or stands as testimony to what could have been and still might be.\textsuperscript{152}

Measured in terms of volume, the work of the Law Reform Commission was immense. The Working Paper ran to 366 pages and was an extremely detailed review of the law, not only in New South Wales, but in other jurisdictions with similar legislation, as well as discussions of Law Reform bodies elsewhere on the subject.\textsuperscript{153} The Working Paper also contained a Draft Bill for an Act to amend the 1916 Act and a substantial extract from the work of the Law Commission for England and Wales on the same subject. The Report was 188 pages and included a further Draft Bill. Then, when the matter was in the hands of Parliamentary Counsel, several different versions of Bills went backward and forward in succession between Parliamentary Counsel and the Law Reform Commission, with detailed notes and comments each time, until finally it was brought to Parliament in 1982.\textsuperscript{154}

The Commission, and Denis Gressier in particular, one of the Commission’s ‘workhorses’,\textsuperscript{155} are to be applauded for the time and attention that was given to the task assigned under the testator’s family maintenance reference. Further, notwithstanding a change of Government between the preparation of the Working Paper and the Report,\textsuperscript{156} there was little change throughout the whole process from the Reference to the enactment of the legislation. This in itself is a reflection of the independence of the Law Reform Commission and the Government’s concern to be seen to be implementing Law Reform Commission proposals. The work of the Commission takes its rightful place in the ‘immense body of work’, acknowledged by Tilbury, but is rather an example of ‘what could have been and still might be’.\textsuperscript{157} It was very much ‘a product of its own time and place’,\textsuperscript{158} and an impressive example of individual effort, particularly by the Commissioner in charge of the reference, Denis Gressier. Perhaps the single biggest problem, or limiting factor, in the work of the New South Wales Law Reform Commission in relation to family provision, was that identified by Tilbury in general terms at the end of his chapter on the history of law reform in Australia, namely ‘the failure to pay systematic attention to the promotion of uniform law’.\textsuperscript{159} In the area of succession law, of which testator’s family maintenance or family provision can be considered to form part, it was only in the mid-1990s that the need for systematic law reform really got

\begin{itemize}
\item \textsuperscript{152} Tilbury, above n 4, 17.
\item \textsuperscript{153} Report – TFM, 9, n 5 details some of the material considered by the Commission.
\item \textsuperscript{154} The various versions of the Bills and the notes and comments upon them are contained in NSWLRC, TFM Papers.
\item \textsuperscript{155} Gressier was one of two commissioners (the other being Julian H P Disney) described as the ‘Commission's workhorses’ since 1977 until 1981 when the comment was made: Slee, above n 61, 6.
\item \textsuperscript{156} The Labor Government under Neville Wran was elected on 1 May 1976. It remained in power during the passage of the Family Provision Act in 1982.
\item \textsuperscript{157} Tilbury, above n 4, 17.
\item \textsuperscript{158} Tilbury, above n 4, 17.
\item \textsuperscript{159} Tilbury, above n 4, 17.
\end{itemize}
off the ground, with the establishment of the National Committee for Uniform Succession Laws. Working in a co-ordinated cross-jurisdictional manner in this fashion cannot be considered ‘ad hoc’, ‘impressionistic’, or ‘casual’, and provides the opportunity for truly measured and consistent reform.

Family provision reform in New South Wales leading to the introduction of the 1982 Act was limited by its time and place; by the shackles of ‘lawyer’s law’; by a mindset that was resistant to ‘policy’ and the continuing interaction of law and society; and by the limitations of law reform in a federal system. Because of all such limiting factors the ‘reform’ remains as testimony ‘to what could have been and still might be’.

160 The project is being co-ordinated by the Queensland Law Reform Commission and details are found on the Commission’s website at http://www.qlrc.qld.gov.au/projects.htm#2. As noted there, the National Committee recommended that four categories of persons should be able to apply for provision: the husband or wife of the deceased person; a person who was, at the time of the deceased person’s death, the de facto partner (or equivalent, as may be applicable in the enacting jurisdiction) of the deceased person; a non-adult child of the deceased person; and a person for whom the deceased person, having regard to certain specified criteria, had a responsibility to make provision. The last of these categories was based on the eligibility provision of the Administration and Probate Act 1958 (Vic), where this is the sole basis on which a person’s eligibility may be established. The National Committee also recommended the adoption of provisions, based on the Family Provision Act 1982 (NSW) to enable the court to designate certain property as part of the ‘notional estate’ of the deceased and to order that provision be made out of the property so designated.

161 Woodman, above n 139.