



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 3

Illegitimate Succession

WORKING PAPER

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SCHEME OF THE PAPER

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INTRODUCTION

The Law Reform Committee having completed its first consideration of the projects on the *Testator's Family Maintenance Act* (Project No.2) and *Illegitimate Succession* (Project No. 3), now issues its working papers on these matters.

The papers are being issued together because the two matters are somewhat related and the papers contain cross-references.

The papers do not represent; the final views of the Committee.

Comments and criticisms should reach the Committee by the 31 March 1968.

Copies of the papers are being forwarded to –

The Chief Justice and the Judges of the Supreme Court,

The Master of the Supreme Court,

The Law School,

The Law Society,

The Public Trustee,

The Perpetual Executors Trustee and Agency Co. (WA) Ltd.,

The West Australian Trustee Executor and Agency Co. Ltd.,

and

Other Law Reform Commissions and Committees with which this Committee is in correspondence.

The Committee may add to the above list.

The research material on which the papers are based is at the offices of the Committee and may be made available on request.

TERMS OF REFERENCE

1. "To consider whether any alterations are desirable in the law of succession in Western Australia in illegitimate persons".

2. The terms of reference would warrant our examining the position of illegitimates relative to the *Testators Family Maintenance Act, 1939-1962*. However, as this matter is dealt with in the working paper on Project No.2 – *Testator's Family Maintenance*, we will not consider the matter here.

THE MOVEMENT FOR REFORM

3. The present move for reform in this State began with a minute, dated the 12th July, 1966, and written by the Legal Officer of the Public Trust Office, to the Public Trustee. In this minute, it was pointed out how the law in this State was leading to hardship, and how this State had failed to follow reforms carried out in the United Kingdom and in other States of Australia. He proposed the enactment of a provision equivalent to that in s.9 of the *Legitimacy Act, 1926*, of the United Kingdom, which permits an illegitimate child to succeed to the estate of his mother, if there are no legitimate children, and permits a mother to succeed to the estate of her illegitimate child.

THE LAW IN WESTERN AUSTRALIA

4. Neither the illegitimate nor any issue of an illegitimate has any right to participate on the intestacy of either parent of the illegitimate; nor have either parent of the illegitimate any right to participate on the intestacy of the illegitimate. Nor can the illegitimate participate on the intestacy of lineal or collateral kindred, or vice versa.

5. So far as concerns the construction of terms such as "children" and "issue" in wills instruments, the present rule of construction is that terms apply only to those with a legitimate connection. In construing such documents the courts will regard these terms as extending to persons with an illegitimate connection only if the particular language or surrounding circumstances justify the conclusion that such was the intention of the testator or settlor.

6. These are rules of the common law. In Western Australia they have been considerably modified by statute, though not to the same extent as in England and in most other parts of Australia. The statutory provisions directly in point in this State are the *Adoption of Children Act, 1896-1964*, the *Legitimation Act, 1909-1940*, s.89 of the *Commonwealth Marriage Act, 1961*, and s.21 of the *Law Reform (Property, Perpetuities and Succession) Act, 1962*.

7. The *Legitimation Act* provides that any child who is thereby legitimated "shall be deemed ... legitimated from birth ... and shall be entitled to all the rights of a child born in wedlock" (s.3). Furthermore, it provides that the issue of any such legitimated child shall take, by operation of law, the same real and personal property which would have accrued to such issue if the parent had been born in wedlock (s.4).

8. Section 89 of the *Marriage Act* covers the same ground as our *Legitimation Act*. However, the latter is not rendered altogether inapplicable by this, for sub-s.(4) of the Commonwealth provision is as follows –

"Nothing in this section renders ineffective any legitimation that took place before the commencement of this Act by or under a law of a State or Territory or shall be taken to exclude the continued operation of such law in relation to such a legitimation."

9. Both statutes specify that legitimation does not qualify the legitimated person to share in any distribution or property coming about as the result of a disposition made or death occurring before the date of the legitimation, except, in so far as the State Act is concerned, to the extent that such property remains undistributed at the date of the legitimation (ss.3 and 5 of the *Legitimation Act* and s.89(5) of the *Marriage Act*).

10. By the *Adoption of Children Act* it is provided that where an order for adoption has been made, the adopted child shall for all purposes, and with regard to the rights of the adopting parents as well as those of the child, be deemed in law to be the child born in wedlock of the adopting parents (ss.7 and 8). However, this rule is subject to the following proviso -

“Provided always, that such adopted child or the issue of that child shall not by such adoption –

- (1) acquire any right, title, or interest whatsoever in any property which would devolve on any child or remoter issue of the adopting parent by virtue of any deed, will, or instrument whatsoever prior to the date of such order of adoption, unless it is expressly so stated in such deed, will or instrument; nor
- (2) be entitled to take property expressly limited to the heirs of the body of the adopting parent, nor property from the lineal or collateral kindred of such parent by right of representation; nor
- (3) acquire any property vested or to become vested in any child of lawful wedlock of the adopting parent in the case of the intestacy of such last mentioned child, or otherwise than directly through such adopting parent.”

11. Whilst it is stated that this new relationship terminates all the other rights, legal responsibilities and incidents existing between the child and his natural parents, the right of the child to take property as "heir or next of kin" or his natural parents, directly or by right of representation, is specifically preserved (s.8). Of course, where the adopted child is illegitimate, he would never have had any such right to succeed to the property of his natural parents.

12. Section 21 of the *Law Reform (Property, Perpetuities and Succession) Act* modifies the rule, as set down in the *Wills Act, 1837*, whereby a devise or bequest by will to a child or other issue of the testator does not lapse if the child or issue dies before the testator, but, unless a contrary intention appears in the will, takes effect as if the death of such person had happened immediately after the death of the testator (s.33 of the *Wills Act, 1837* - adopted in this State by 2 Vict. No. 1). Its effect may be summarised by saying that where any property is devised, bequeathed or appointed to a child or issue of the testator (whether as a named or designated person or as a member of a class) and such child or issue dies in the lifetime of the testator, the devise, bequest or appointment takes effect as if the will had contained a substitutional gift devising or bequeathing or appointing the property to such of the children of that person as are living at the time of the testator's death and if more than one, in equal

shares. It does not matter that the child or issue to whom the devise, bequest or appointment is made is illegitimate - subject to the proviso that an illegitimate relationship between a father and his child shall not be recognised unless there is proof that the paternity of the father was admitted by or established against the father while both the father and child were living - nor, where the person to whom the devise, bequest or appointment is made is a woman, does it matter that the children she leaves surviving her are illegitimate. This provision follows the *Wills Amendment Act, 1958*, of New Zealand.

THE LAW IN OTHER PLACES

13. The *Legitimacy Act, 1926*, of the United Kingdom provides that, in respect of deaths intestate after 31st December, 1926, an illegitimate may succeed on his mother's intestacy as if he had been born legitimate, is no legitimate issue of the mother survive her, and, in the same circumstances, the legitimate issue of the illegitimate stand in his place if he dies before his mother. A reciprocal right is given to the mother to succeed on her illegitimate intestacy if no legitimate; issue of the illegitimate survive and succeed him and, if the illegitimate be a woman, no illegitimate children survive. These rights are subject, respectively, to the prior rights on intestacy of any widower of the mother and of any widow or widower of the illegitimate.

14. In New South Wales (1954) and Victoria (1958) legislation has been passed which is substantially along the lines of the aforesaid provisions of the *Legitimation Act* of the United Kingdom.

15. South Australia has gone a good deal further than any of the abovementioned enactments with s.55 of its *Administration and Probate Act, 1919-1936*, which is as follows:-

- 55 (1) So far as regards succession to any estate under any will or under the total or partial intestacy of a woman her illegitimate child shall have the same right and title as if he were legitimate.
- (2) So far as regards succession to any estate under any will or under the total or partial intestacy of an illegitimate child his next of kin on his mother's side shall have the same right and title as if such child were

legitimate. (For the application of this section, see 10 A.L.J., 155; *In re Gardiner Deceased*, [1936] S.A.S.R. 84; *In the Estate of E.F. deceased*, [1948] S.A.S.R. 97; *In the Estate of Searle, deceased*, [1936] S.A.S.R. 303.)

16. Also going beyond the provisions of the legislation of the United Kingdom, New South Wales and Victoria, is s.49E of the *Administration and Probate Ordinance, 1929-1967*, of the Australian Capital Territory, which is as follows –

- 49E (1) Where an intestate is survived by an illegitimate child, the child is entitled to take the interest in the intestate estate that the child would be entitled to take if the child were the legitimate child of the intestate.
- (2) Where an illegitimate child of an intestate has died before the intestate leaving issue (being issue who are the legitimate issue of the child) who survive the intestate, the issue are entitled to take the interest in the intestate estate that they would have been entitled to take if the child had been the legitimate child of the intestate.
- (3) Where an intestate (being an illegitimate person) is survived by a parent or both parents, the parent is or parents are, as the case may be, entitled to take the interest in the intestate estate that the parent or parents would have been entitled to take if the intestate had been the legitimate child of the parent or parents.
- (4) For the purposes of this Division and the Sixth Schedule in their application to and in relation to an intestate, relationship may, to such extent only as is necessary to enable effect to be given to the preceding subsections of this section, be traced through or to an illegitimate person as if the person were the legitimate child of his mother and, subject to the next succeeding subsection, of his father.
- (5) For the purposes of this section, a person shall not be taken to be the father of an illegitimate child unless he has acknowledged, in writing, that he is the

father of the child or has been adjudged by a court to be the father of the child, and, in the case where the child died before that person, the person so acknowledged the child, or has been so adjudged, before the death of a child.

- (6) For the purposes of the last preceding sub-section, a person shall be taken to have been adjudged by a court to be the father of a child -
- (a) if the Court has made an order in such circumstances that it was not entitled to make the order unless it found as a fact that the person was the father of the child; or
 - (b) if, at any time within six months before the birth of a child, the court has made an order in such circumstances that it was not entitled to make the order unless it found as a fact that the child's mother at that time with child by that person.

17. Queensland does not give the illegitimate any right of succession, but it does, on s.89 of the *Succession Acts*, 1867 to 1968, give its Supreme Court power to make provision for an illegitimate child out of the estate of the intestate natural parent, whether the intestate be the child's father or mother. This is an extension of the Testator's Family Maintenance principle.

18. The law of New Zealand is that, for the purposes of intestate succession, the relationship of mother to illegitimate child and of the child to the mother is to be deemed, in all cases - except where the child has been legally adopted - a legitimate relationship (s.58 of the *Administration Act*, 1952).

19. Attention is also directed to the information as to the law in other countries which is given in Appendix IV of the Russell Report (see para. 22 below) and in the report of the Ontario Law Reform Commission (volume III, pages 471-473) (see para. 25 below).

20. It will be noticed that legislation of South Australia, the Australian Capital Territory and New Zealand, all confer rights on the illegitimate irrespective of whether or not the intestate is survived by legitimate children or their representatives.

21. Furthermore, it should be pointed out that recent Australian legislation - that of the Australian Capital Territory - gives the illegitimate a right of succession not only to the estate of the mother, but to that of the father as well, provided that the father has acknowledged the relationship in writing or has been adjudged by a court to be the father of the child.

PROPOSALS FOR REFORM THAT HAVE BEEN MADE IN OTHER PLACES

22. In the first place, notice should be taken of the United Kingdom's *Report of the Committee on the Law of Succession in Relation to Illegitimate Persons* (Cmnd 3051) (referred to throughout this paper as the Russell Report). This was published in July, 1966, and the Lord Chancellor subsequently gave an assurance that, at least as far as English law was concerned, the Government would promote legislation implementing its recommendations (*Parliamentary Debates, 1966-67*, Vol. 280, Col. 764). This has not yet been done, but a Law Reform (Miscellaneous Provisions) Scotland Bill has been introduced into the Parliament of the United Kingdom and this will have the effect (*inter alia*) of –

- (1) giving illegitimates the same rights of succession on intestacy as legitimates;
- (2) giving parents a right to succeed to the property of their illegitimate children who are intestate and without issue;
- (3) creating a presumption that an illegitimate is not survived by his father, unless the contrary is shown (see clause 4).

23. The Society of Public Teachers of Law in Kingdom has been asked by the Law Commission to review of the law relating to illegitimate' children and make recommendations with regard to it. It is anticipated that the Society will submit its report to the Law Commission before the end of this year. The indications are that the prevailing thought in the United Kingdom is that the recommendations of the Russell Report did not go far enough and it seems likely that no action will be taken to implement those recommendations until the Society's report has been considered.

24. The recommendations of the Russell Committee in so far as they are relevant to the present inquiry, were as follows:-

- (1) The extension of the rights of an illegitimate (and his legitimate issue in his place if he predeceases) to share on his mother's intestacy to cases where the mother leaves legitimate issue, and on the basis of equality (paras. 31, 32 and 33).
- (2) The rights of an illegitimate (and his legitimate issue in his place if he predeceases) to share on his father's intestacy to be the same as in the case of a mother as so extended (para. 46) (this recommendation subject to the dissent of one member of the Committee).
- (3) The rights of a father on the intestacy of his illegitimate to be equal to those of the mother i.e. that given by the *Legitimation Act* of 1926, namely a right to succeed on the illegitimate's intestacy if –
 - (i) no legitimate issue of the illegitimate survive and succeed him, and
 - (ii) if the illegitimate be a woman, no illegitimate children survive her.

Any such right would be subject, of course, to prior rights of any widow or widower of the illegitimate (para. 46).

The Committee considered that, because the father will often be unknown, there should be a "rule of convenience" that, for purposes of distribution, on an illegitimate's intestacy, the father of the illegitimate be deemed to have predeceased the illegitimate unless the contrary is established (para. 47).

- (4) The rule of construction of phrases such as "children", "issue", etc. in wills and other instruments as *prima facie* limited to legitimate relationship to be retained (paras. 57 and 58).
- (5) The courts to be left to decide in any disputed claim on all the evidence whether the particular paternity has on balance of probabilities been

established. No birth certificate, form of declaration, or affiliation order (or its refusal), to be conclusive proof (para. 44).

- (6) Special protection be provided for those (administrators, etc.) who distribute estates in ignorance of the existence of an illegitimate claimant. For these purposes of distribution evidence of the absence of illegitimates not to be required (para. 60).
- (7) No provision to be made for suits for declarations of illegitimate paternity or maternity (para. 40).
- (8) Legislation embodying any of these recommendations not to affect estates of people dying before that legislation comes into operation (para. 59).

25. Other recent proposals for reform in this branch of the law are those published by the Ontario Law Reform Commission in 1967 as part of its project on family law. The said proposals are as follows (see volume III of the report at pp. 537-538).

- (1) In so far as paternity has been proved or acknowledged before death (there is seldom any problem about the maternity of a child) illegitimacy should be no bar to succession.
- (2) "Child" and similar terms should include an illegitimate child, so that he can take under a will to "children" and inherit on an intestacy from both his mother (and his maternal relatives) and his father (and his paternal relatives). Similarly an illegitimate's parents and other natural relatives should be in no different position on the death illegitimate child, than if the child had not been illegitimate. The principle of equating the illegitimate with the legitimate should apply for the benefit of the natural relatives.
- (3) Natural relatives of an illegitimate to be entitled to succeed on the intestacy of an illegitimate as though the deceased had been their lawful relative.

- (4) Since the effect of adoption is now to make an adopted child the legitimate child of the adopting parent, an erstwhile illegitimate child ceases to be illegitimate upon adoption and is no longer in law the child of its natural parent. Thus, an adopted child ought not to succeed on an intestacy of, or under a will to "children" of, his natural parents. To allow an adopted child to succeed as the child of his adopting parent *and* as the child of his natural parent would give him an undue advantage and would unjustly reduce the share of other children of his natural parents.

It must be pointed out that these proposals are those of the special committee which the Ontario Law Reform Commission set up to study the matter; they have not yet been adopted - or rejected - by the full Commission.

26. A most interesting proposal is that set out in the recent New Zealand Bill for a *Status of Children Act, 1968*. This Bill seeks to give to illegitimates - "for all the purposes of the law" - the same status as legitimates. This basic principle, however, looks like being considerably qualified in its application by restrictions as to the mode of proof of paternity; Clause 7 of the Bill is as follows –

“Recognition of Paternity - (1) The relationship of *father* and child, and any other relationship traced in any degree through that relationship shall, for any purpose related to succession to property or to the construction of any will or other testamentary disposition or of any instrument creating a trust, or for the purpose of any claim under the *Family Protection Act* be recognised only if –

- (a) The father and the mother of the child were married to each other at the time of its conception or at some subsequent time; or
- (b) Paternity has been admitted by or established against the father in his lifetime (whether by one or more of the types of evidence specified by *section 8* of this Act or otherwise) and, if that purpose is for the benefit of the father, paternity has been so admitted or established while the child was living.

(2) ...”.

The Bill also seeks to abolish the rule of construction whereby in any instrument words of relationship signify only legitimate relationship (clause 3(2)).

THE CASE FOR REFORM

27. In several respects the law of this State already recognises that the legal rights which arise out of the blood relationship should not be denied to the illegitimate. Apart from s.21 of the *Law Reform (Property Perpetuities and Succession) Act, 1962* (para. 12 above), we refer particularly to those provisions of the Statute law which confer on the illegitimate child, to take action for and share in the damages payable where a parent is killed because of the wrongful act, neglect or default of some other person (*Fatal Accidents Act, 1959*, s.3(2), but see also s.6(3)), and to those provisions which confer a similar equality on the illegitimate child when it comes to claiming and sharing in the workers compensation which is payable in the event of a parent suffering death as the result of an accident arising out of or in the course of his employment (*Workers Compensation Act, 1912-1967*, s.5 - definition of "Dependants" and "Member of a family").

Illegitimates also have rights under the *Estate Duty Assessment Act, 1914-1957* (s.18A) and under the *Repatriation Act, 1920-1965*.

28. The common argument against according illegitimates equality with children born in marriage is that it will diminish the material value of the rights conferred by marriage and thus tend to undermine marriage as a social institution. In other words that while the State recognises and upholds marriage and the family as the basic social unit it should not do anything that might hasten the breakdown of these institutions.

It would be unreal to suggest that persons are persuaded to marry by the thought that, if they do not, it will be necessary for them to make wills in order to ensure that their property is inherited by their children.

29. The argument mentioned in the first part of paragraph 28 above fails to recognise the plight of the individual illegitimate and experience indicates that there have been many cases

of apparent injustice. The information from the Public Trustee, the private trustee companies, the legal profession and other sources, indicates, for instance, that there have been cases in recent years of brothers and sisters, and children of deceased brothers and sister's, taking the whole or a large part of the estate on intestacy, to the exclusion of the intestate's illegitimate infant children.

30. It is reasonable to assume that the cases that have come to our notice represent only a proportion of the cases of this sort. Furthermore, in view of the rising number of illegitimate births, there seems good reason to suppose that, in the future, the number of such cases will increase. In this last connection, the following figures should be noted:-

Total births compared with illegitimate births for the period, 1961 - 1966

	Total Births	Illegitimate Births
1961	17,078	959
1962	17,064	1,005
1963	17,290	1,229
1964	16,685	1,311
1965	16,186	1,439
1966	17,007	1,607

(Western Australian Year Book, 1968)

POSSIBLE REFORMS

31. A consideration of the existing law, the various involved and of the reforms which have been made elsewhere suggest the following possibilities –

- (1) the relationship of the illegitimate child to its parents to be deemed legitimate for all purposes relating to intestate succession, so as not only to give the illegitimate the right to succeed to the property of either parent, and vice versa, but also to establish the usual and corresponding rights of succession between the child and all other lineal and collateral kindred;

- (2) where the right to succession depends on the person being the child of a particular parent, that right not to be lost on account of the parent being illegitimate;
- (3) the terms "children", "issue" etc., where used in a will, to be deemed to include illegitimates, unless the words of the will indicate a contrary intention (consistency would require the application of a similar rule in respect of other instruments effecting disposition of property);
- (4) the legally adopted illegitimate child to have no right to succeed on the intestacy of either natural parent, or of any lineal or collateral kindred in the event of the parent or kindred dying after the making of the adoption order; nor to have any right under a testamentary gift to the "children", "issue", etc. of either natural parent (whether made by a parent or otherwise) where the particular will is executed after the making or the adoption order, unless there are indications in the will, or in the surrounding circumstances, that he is meant to take (consistency would require a similar rule in the case of other adopted children - see para. 11 above).

DISCUSSION OF THE POSSIBLE REFORMS

32. In considering these possibilities it should be borne in mind that amendments to the *Testator's Family Maintenance Act* are also under consideration (see Working Paper on Project No. 2) and that relief may become available to illegitimates out of both testate and intestate estates under that Act. Those who stress the importance of marriage and the family unit may find legislation which merely permits illegitimates to apply for relief out of their parents' estates more acceptable than legislation which grants them status.

Such a suggestion was put to the Russell Committee, though apparently coupled with the idea that the illegitimate could also have full rights of succession on intestacy if he had had some true "familial relationship" with the deceased. The Russell Committee did not accept these views (see paras. 31, 38 and 45 of the Russell Report). In particular, they stressed the difficulty of formulating any satisfactory test of "familial relationship" (but see para:3.10 and 11 of Sir Hugh Munro-Lucas-Tooth's note of dissent).

33. Basically, the rules set out in para. 31 above do not go beyond those recommended for adoption by the working committee of the Ontario Law Reform Commission, or the law as it already exists in various parts of the world (see Appendix IV to the Russell Report and volume 11, pages 471-473, of the report of the Ontario Law Reform Commission). However, they do go beyond any present Australian law and also beyond the recommendations of the Russell Committee.

34. The only argument for denying the illegitimate a right to succeed on the intestacy of lineal (i.e. other than parents) and collateral kindred would seem to be that which found favour with the Russell Committee and which appears in paragraph 32 of its report.

"We appreciate that there may well be cases in which it would be reasonable to suppose that an illegitimate would be intended by the deceased to share in the intestate estate of a grandparent, or of a brother or sister of a settled irregular establishment. But on the whole it seems to us that it would not be right to impose a system of intestate succession which could, for example, lead to participation of a daughter's illegitimate in the intestacy of the daughter's parent when such participation might be directly opposed to the wishes of the latter, who indeed, might know nothing of the illegitimate."

35. This argument is based on the assumption that generally intestates are likely to have had an antipathy to their illegitimate kindred. There is no evidence to warrant this assumption. In any event, legislative rules for distribution should not automatically exclude persons from benefit on any vague assumption as to the possible wishes of a deceased (see the criticism of this decision of the Russell Committee in 30 *Modern Law Review* pp. 554-555)

36. To give the illegitimate a right of to the estate of the father and his relatives raises squarely the problem of establishing paternity. The Russell Report points out the particular difficulty of this task –

"There is of course the distinction dictated by nature between the association between an illegitimate and his mother and that between an illegitimate and his father; and this distinction has both an evidential and a familial aspect. Nature permits that a man may produce more illegitimates more secretly. Facts dictate that it must be generally far more difficult to establish the paternity of an illegitimate than the maternity: blood tests can sometimes deny an alleged paternity but at present cannot to any significant extent establish it: the facts of birth normally establish maternity." (paragraph 22).

"These differences lead to the result that there is far more likely to be at least at some stage a familial relationship between mother and illegitimate than between father and illegitimate. While either parent may sever the familial connection with an illegitimate, the father, if he is not living with the mother as his "unmarried wife", will probably do so from the outset. The mother, on the other hand, will retain her connection with her child in virtually all those cases in which the father does so and also in a considerable proportion of those in which the father has "jettisoned" it. In many cases of jettison by a mother the child will be adopted by strangers and so will cease to be an illegitimate for the purpose of this report. Some cases occur, of course, in which the mother simply jettisons the child to an institution, a relation or a friend, but we cannot form any estimate of their number. " (paragraph 23).

37. In most jurisdictions where the illegitimate has any right of succession on the intestacy of the father or his relatives, that right is, made conditional on the relationship being acknowledged in some formal way by the father, or being adjudged to exist in the finding of a court (e.g. s.49E(5) of the *Administration and Probate Ordinance, 1929-1965*, of the ACT and s.38A of the Decedents Estates Law of New York, noted in 30 *Modern Law Review* p.559, fn. 37; see also clause 7 of the New Zealand Bill mentioned in para. 26 above). The Russell Report recommends that the illegitimate's right should not be limited in this way, but that the courts should be left to decide in any disputed claim, on all and any evidence available whether the particular paternity has on balance of probabilities been established. However, it is acknowledged that there are strong arguments for limiting the right to succession to cases in which the father has acknowledged his paternity in some way and we think that these arguments are fairly stated in the note of dissent to the Russell Report provided by Sir Hugh Munro-Lucas-Tooth, MP.

38. The Russell Report rejects the idea that there should be a system whereby applications might be made on behalf of an illegitimate, for purposes of prospective succession, for a declaration of paternity, at a time when the facts were recent and the mother and alleged father alive (paragraph 40).

39. It is appreciated that where there has been no acknowledgement by the father, either formal or informal, proof will often be impossible. However, this does not appear to be a reason for denying a right of succession to those illegitimates who can establish their relationship.

40. As to the matter of the meaning of "children", "issue" and similar words in wills; and other instruments, it is arguable that these words should be accorded their ordinary, literal

meaning. Arguments to the contrary appear in the Russell Report (para. 57). Criticism of this part of the Russell Report has been made by O.M. Stone in the *Modern Law Review* (30 *Modern Law Review*, pp. 556-557).

41. Another matter that should be mentioned is that giving illegitimate children a right to succeed on intestacy may serve to exclude a de facto wife --who could be the mother of the children concerned -from such largesse as might otherwise be bestowed on her as a "moral" claimant under section 9 of the *Escheat (Procedure) Act, 1940*. However, any bad effect that may accrue in this way could be alleviated by amendments to the *Testator's Family Maintenance Act*. Applications under this Act could be permitted in cases of intestacy and de facto wives could be added to the category of persons entitled to make such applications (see para. 66 of the working paper on Project No. 2 - *Testator's Family Maintenance Act*).

42. Implementation of the possible reforms set out in paragraph 31 above would certainly give Western Australia a law which would have no parallel in Australia. However, there is already great diversity between the laws of the States and Territories and this state of affairs seems likely to continue.

43. Uniformity may be desirable but is by no means essential.

POSSIBLE INCIDENTAL PROVISIONS

44. If the possible reforms mentioned in para. 31 above were to be implemented, it might be thought desirable to provide also –

- (1) that no new rule should affect - so far as intestacy is concerned - the estate of any person dying before the relevant legislation comes into effect, nor - so far as concerns the interpretation of the terms "children", "issue" etc. as appearing in wills - any will or other testamentary instrument made before that time;
- (2) for special protection for those (administrators etc.) who distribute estates in ignorance of the existence of an illegitimate claimant, and for a statement that, for the purposes of distribution, evidence of the absence of illegitimates is not required;

- (3) for the "rule of convenience" recommended in the Russell Report, to the effect that, for purposes of distribution on an illegitimate's intestacy, the father of the illegitimate shall be deemed to have predeceased the intestate unless the contrary is established.