



**SCRUTINY OF ACTS AND
REGULATIONS COMMITTEE**

55th Parliament

**Review of
Redundant and Unclear Legislation**

**Report concerning the
Maintenance Act 1965, Marriage Act 1958 and
Perpetuities and Accumulations Act 1968**

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Review of Redundant and Unclear Legislation
Report concerning the Maintenance Act 1965,
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Accumulation Act 1968
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Functions of the Committee

The statutory functions of the Scrutiny of Acts and Regulations Committee as set out in section 17 of the *Parliamentary Committees Act 2003* are —

17. Scrutiny of Acts and Regulations Committee

The functions of the Scrutiny of Acts and Regulations Committee are –

- (a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly—
 - (i) trespasses unduly upon rights or freedoms;
 - (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
 - (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
 - (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;
 - (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
 - (vi) inappropriately delegates legislative power;
 - (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
- (b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –
 - (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;
 - (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;
 - (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but where an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;
- (c) to consider any Act that was not considered under paragraph (a) or (b) within 30 days immediately after the first appointment of members of the current Committee and to report to the Parliament with respect to that Act on any matter referred to in those paragraphs;
- (d) the functions conferred on the Committee by the *Subordinate Legislation Act 1994*;
- (e) the functions conferred on the Committee by the *Environment Protection Act 1970*;
- (f) the functions conferred on the Committee by the *Co-operative Schemes (Administrative Actions) Act 2001*;
- (g) to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under this Act.

Redundant Legislation Subcommittee and Terms of Reference

Scrutiny of Acts and Regulations Committee

The Scrutiny of Acts and Regulations Committee (“the Committee”) is a joint investigatory Committee of the Parliament of Victoria with members drawn from both houses and from the Government and Opposition. The role of the Committee is primarily to scrutinise bills and regulations and to review redundant, unclear or ambiguous legislation. The Committee also examines matters specifically referred to it by reference from Parliament or by the Governor-in-Council.

Redundant Legislation Subcommittee

While all members of the Committee are involved in the scrutiny of bills, other Committee functions are carried out by subcommittees consisting of members of the Full Committee. All Parliamentary Committees have the power to appoint subcommittees of no fewer than four members. Accordingly, the Committee has appointed a subcommittee of five members to review redundant, unclear or ambiguous legislation – the Redundant Legislation Subcommittee, who are responsible for this review.

Terms of reference

In 1994, the Governor-in-Council referred to the Committee the additional scrutiny responsibility of reviewing redundant, unclear and ambiguous legislation. At the expiration of each Parliament the responsibility for reviewing redundant legislation ceases and these terms of reference must be renewed with the commencement of each new Parliament. On 3 June 2003, the Lieutenant-Governor as the Governor’s deputy referred the following terms of reference to the Committee:

A review of redundant legislation.

- 1) The Committee is requested, in conjunction with Chief Parliamentary Counsel, to inquire into and consider and make recommendations as to:
 - Acts of Parliament and provisions of Acts of Parliament which are unnecessary or redundant; and

- legislative instruments made under an Act of Parliament and provisions of legislative instruments made under an Act of Parliament, which are unnecessary or redundant.
- 2) The Committee is requested, in conjunction with Chief Parliamentary Counsel, to inquire into and consider and make recommendations as to:
- Acts of Parliament and provisions of Acts of Parliament which are unclear, ambiguous or should be re-drafted; and
 - legislative instruments made under an Act of Parliament and provisions of legislative instruments made under an Act of Parliament which are unclear, ambiguous or should be re-drafted.
- 3) In the conduct of this inquiry, the Committee is requested to pursue the primary objects of reducing the number and complexity of Victorian Acts and legislative instruments, and ensuring that Acts and instruments are clearly expressed in accordance with modern drafting practices.
- 4) Acts that the Committee may initially wish to consider under this reference are:
- ***Maintenance Act 1965***;
 - ***Marriage Act 1958***; and
 - ***Perpetuities and Accumulations Act 1968***.

The Committee is required to report to Parliament on an ongoing basis as each review is completed.

Dated 3 June 2003

Responsible Minister:
STEVE BRACKS
Premier

Chair's Foreword

The Scrutiny of Acts and Regulations Committee is pleased to present its Report on Redundant and Unclear Legislation concerning the *Maintenance Act 1965*, *Marriage Act 1958* and the *Perpetuities and Accumulations Act 1968*. The Committee reviewed these Acts pursuant to a Governor in Council reference dated 3 June 2003.

The Committee formed a subcommittee, the Redundant Legislation Subcommittee, to review these Acts as part of its inquiry to review redundant or unclear legislation. We wish to thank the other Members of the Subcommittee being the Hon. Lidia Argondizzo MLC, Mr Michael Leighton MP and Mr Andrew McIntosh MP, for their participation in the preparation of this report.

The Committee would like to take this opportunity to thank those individuals and organisations that contributed advice or made submissions to the inquiry.

The Committee is grateful to Mr Michael Magazanik (*Maintenance Act 1965* and *Marriage Act 1958*) and Dr David Blumenthal (*Perpetuities and Accumulations Act 1968*) who carried out the research, corresponded with interested parties, and drafted the report. Thanks are due also to the staff of the Scrutiny of Acts and Regulations Committee, namely Andrew Homer, Senior Legal Adviser; Simon Dinsbergs, Assistant Executive Officer and Ms Sonya Caruana, Office Manager, for their commitment and assistance.

Mr Murray Thompson MP
Chairperson
Redundant Legislation Subcommittee

Ms Lily D'Ambrosio MP
Chairperson
Scrutiny of Acts and Regulations Committee

November 2004

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Recommendations

The recommendations of the Report are set out below.

The Maintenance Act 1965 (Vic)

Recommendation 1 [page 6]

The Committee recommends that the *Maintenance Act 1965* is redundant and should be repealed.

Recommendation 2 [page 6]

The Committee recommends that a saving clause preserving any orders made under the *Maintenance Act 1965* (and assuring the enforceability of such orders) be included in the repealing Act.

The Marriage Act 1958 (Vic)

Recommendation 3 [page 8]

The Committee recommends that sections 132 (2), 134, 148 and 155 (2) in Part VII (which deal with guardianship issues) of the *Marriage Act 1958* be repealed.

Recommendation 4 [page 8]

The Committee recommends that sections 133, 135, 138, 139 and 153 of the *Marriage Act 1958* be retained and transferred to the *Children and Young Persons Act 1989*.

Recommendation 5 [page 10]

The Committee recommends that sections 156, 157, 158 and 159 (1) in Part VIII of the *Marriage Act 1958* (regarding the rights of married women) be repealed.

Recommendation 6 [page 10]

The Committee recommends that sections 160 and 161 of the *Marriage Act 1958* be repealed.

Recommendation 7 [page 11]

The Committee recommends that s.159 (3) of the *Marriage Act 1958* be retained. However this section is inconsistent with section 14 of the *Wills Act 1997* (Vic). The Committee recommends

that, subject to this inconsistency being resolved, section 159(3) of the *Marriage Act 1958* be transferred to the intestacy provisions of the *Administration and Probate Act 1958* (Vic).

The Perpetuities and Accumulations Act 1968 (Vic)

Recommendation 1 [page 29]

The Committee recommends that the rule against perpetuities be retained.

Recommendation 2 [page 29]

The Committee recommends that Parliamentary Counsel be requested to re-draft the *Perpetuities and Accumulations Act 1968* for the purpose of making the Act clearer and more understood, without altering its substantive legal effect. In this regard, the Committee recommends placing examples in the Act to clarify the effect of certain provisions.

Recommendation 3 [page 29]

The Committee recommends that consideration be given to the conduct of a comprehensive review of the *Perpetuities and Accumulations Act 1968* for law reform purposes.

Recommendation 4 [page 29]

The Committee recommends that if a comprehensive review of the *Perpetuities and Accumulations Act 1968* is conducted for law reform purposes, the reviewing body consider the following proposals:

- a) The introduction of an exclusive statutory perpetuity period;
- b) What the appropriate length of any exclusive statutory perpetuity period should be, and specifically, whether the current period of 80 years should be extended to 125 years;
- c) Whether the Act should be modified so as to create an inclusionary regime that will confine the operation of the rule against perpetuities to family settlements, and to exclude it from operation with respect to commercial transactions;
- d) Whether the ambit of the exclusions in relation to options under section 15 of the Act be expanded to effectively exclude all options;
- e) Whether any amendments to the Act are required to respond to issues raised by new reproductive technologies.

**THE MAINTENANCE ACT 1965
AND THE
MARRIAGE ACT 1958**

Introduction

The *Maintenance Act 1965* and the *Marriage Act 1958* were, at the time of their enactment, key pieces of the Australian family law rubric.

That they are now largely redundant is testament to the rapid and all but complete shift of power in this area from state legislatures to the Commonwealth Parliament.

To put these Acts in their proper perspective – and thus to understand their greatly diminished relevance today – it is important to give some historical context to the development in Australia of what we now know as family law.

Background to the development of Family Law in Australia

The First Fleet arrived in Australia in 1788, bringing not just white settlement, but British law. The legal position in the new colony was that as an outpost of the Empire, British laws and customs applied.

The first local (Australian) step in regulating the area we now see as family law came in February 1810. Governor Macquarie, concerned at the increasing frequency of de facto relationships, issued a proclamation against cohabitation without marriage.

Thus began almost a century of Australian legislative initiative in the area of marriage and related issues – a period often marked by Australian attempts at reform and frequent English attempts to pull the distant colonies into line.

At the time of white settlement in Australia, the English approach ensured divorce was available to just a privileged few. In fact, divorce was essentially unheard of among all classes except for the exceptionally rich landed gentry. Divorce was only available by petitioning Parliament to pass an Act dissolving a marriage on the basis that one party (inevitably the husband) had been “wronged” by the adultery of the other party (inevitably the wife).

According to John Macqueen, (a 19th century legal expert and the author of the 1958 guide “A Practical Treatise on Divorce and Matrimonial Jurisdiction under the Act of 1857 and New Orders”) Parliamentary divorce was available only to the “extremely rich”. Mr Macqueen wrote that not even the “moderately opulent” would be able to afford this “luxury”.

When England finally introduced a divorce law with widespread application (the English *Divorce and Matrimonial Causes Act 1857*) copies were sent to the governor of each Australian colony with invitations to pass similar Acts. (Victoria, incidentally, distinguished itself by trying to pass a reformed divorce law that introduced desertion as a ground for divorce and also abolished the

double standard – under the English model, men had to prove only a single case of adultery, while women had to prove repeated or aggravated adultery plus an exacerbating factor such as incest or cruelty. This Victorian attempt was disallowed by the English authorities.)

Inevitably, given the colonies' different social conditions and a growing sense of nationhood, the young Australian jurisdictions did strike out in different directions, generally liberalising the English divorce laws.

Meanwhile, maintenance obligations were legislated for by the states during the 1840s. The legislation was, in part, a response to the gold rush and mineral boom period when many men left home, deserting wives and children.

Federation and the division of powers

At Federation in 1901, powers were divided between the new Commonwealth Government and the states. Naturally who got what was a key bone of contention and during the Constitutional Conventions of the 1890s much debate centred on which powers should be given to the Commonwealth.

In the end, the division of powers between the Commonwealth and the states was settled and enshrined in section 51 of the Australian Constitution. It includes 39 specified subject areas where the Commonwealth is given power to legislate. In other areas – or if the Commonwealth chooses not to exercise its power in one of the 39 specified areas – the states may legislate. Of course if there is any conflict between state laws and valid Commonwealth legislation, the state law is struck out.

It is this section that – in essence – handed the Commonwealth power in relation to marriages and matrimonial causes (divorce, children of marriages and other issues flowing from a marriage).

The relevant section reads as follows:

s 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

(xxi) Marriage:

(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:

Marriage was, of course, seen as the voluntary life-long union of a man and a woman to the exclusion of all others. At the time, marriage was not taken to include de facto relationships. The definition of “divorce and matrimonial causes” is a little more difficult – but according to one definition it was intended to mean “divorce and its consequences for the children, property and finances of the former spouses”. (Constitutional Commission, *Advisory Committee on the Distribution of Powers Report*, Canberra, 1987)

The Commonwealth Government opts out

But while the new Commonwealth Government had won power to legislate in the family law area, (and could have enacted a uniform nation-wide Marriage Act) it chose not to. In fact, the area quickly came to be regarded as politically controversial and best left to the states. So for almost 60 years after Federation the states regulated marriage, divorce and the custody of children.

That naturally gave rise to a complex, confusing set of laws which varied from state to state. One author – in 1910 – thought the laws so different that he argued it would be possible to be considered married in one state but not in another. “There is a good deal of diversity in the divorce law of the states, and it is quite possible, so long as the states remain separate law districts, that parties may be married person in the view of one state and single persons according to the law of another,” he wrote. (Harrison Moore, *The Constitution of the Commonwealth of Australia*, second edition, 1910)

The only time the Commonwealth made any foray into the family law arena was to make brief and temporary laws to deal with wartime conditions.

The Commonwealth steps in

But by the 1950s there was a growing demand for a uniform, national approach to marriage and divorce law. These demands culminated in the enactment of a uniform divorce law, the *Matrimonial Causes Act 1959*, and two years later, a uniform marriage law, the *Marriage Act 1961*.

These new Commonwealth Acts superceded and replaced the state laws in the same areas. State courts were invested with federal judicial power so that state courts could exercise power under a mixture of state and Commonwealth laws.

Over the next years the Commonwealth increasingly legislated in the family law area, this intervention reaching its high point with the introduction of the *Family Law Act 1975*. This massive step forward towards a uniform national family law effectively ended any large-scale state involvement in the area. Since then complementary legislation, such as the Child Support legislation, has driven Australia down the road towards one national family law regime.

It is in this context – one of Commonwealth supremacy in the family law arena – that we now turn to the individual acts under consideration.

The Victorian Maintenance Act 1965

The Victorian *Maintenance Act 1965* covered the maintenance paid, by one spouse to another, for the care and upkeep of children of a marriage.

But the introduction of the *Family Law Act 1975* (Cth) radically altered the marriage and divorce landscape in Australia.

The *Family Law Act* provided no-fault divorce but also governed the issue of maintenance paid for the children of a marriage. This had the effect of rendering redundant the Victorian *Maintenance Act 1965* so far as it related to the children of a marriage.

But the maintenance provisions of the Commonwealth legislation (*Family Law Act 1975*) only related to the children of a marriage and not to children of other (de facto) relationships.

So ex-nuptial children remained covered by the Victorian *Maintenance Act 1965*. This was progressively seen as less and less satisfactory, especially as less traditional relationships became increasingly common. Australia was becoming increasingly familiar with serial marriages, blended and mixed families and a rapid increase in the number de facto partners having children.

The dual maintenance system (one for children of a marriage, another for children of de facto relationships) was widely criticised. Everyone eventually agreed that having disputes about some children heard under the *Family Law Act* and disputes about others heard under state legislation was an unsatisfactory arrangement.

In 1988, four states Victoria, New South Wales, Tasmania, South Australia referred their powers over ex-nuptial children to the Commonwealth and the *Family Law Act* was amended to give the Family Court jurisdiction over children of de facto relationships. (Queensland later referred powers and Western Australia has had its own Family Court since 1976 and did not need to refer powers).

The result of this was that all disputes pertaining to the children of all relationships fell under the Commonwealth legislation. Since then the Commonwealth has also passed complementary legislation, including Child Support legislation.

Taken together this had had the effect of rendering the Victorian *Maintenance Act 1965* wholly redundant.

The Victorian *Maintenance Act* can therefore be repealed with the proviso that any existing orders made under the Act must remain in force. Some orders – made for the very young children of de facto relationships in the mid-1980s – may still be in force. Similarly, orders relating to handicapped children may have to remain in force past the age of 18. In the same vein, any orders made for the maintenance of wives (or husbands) prior to the *Family Law Act* should be preserved.

It is probable that these orders would remain in force without a specific provision to that effect. The *Interpretation of Legislation Act 1984* is relevant.

14. Provision as to effect of repeal etc. of Acts

(2) Where an Act or a provision of an Act-

- (a) is repealed or amended; or
- (b) expires, lapses or otherwise ceases to have effect-

the repeal, amendment, expiry, lapsing or ceasing to have effect of that Act or provision shall not, unless the contrary intention expressly appears-

- (c) revive anything not in force or existing at the time at which the repeal, amendment, expiry, lapsing or ceasing to have effect becomes operative;
- (d) affect the previous operation of that Act or provision or anything duly done or suffered under that Act or provision;
- (e) affect any right, privilege, obligation or liability acquired, accrued or incurred under that Act or provision;
- (f) affect any penalty, forfeiture or punishment incurred in respect of an offence committed against that Act or provision; or
- (g) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as is mentioned in paragraphs (e) and (f)-

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if that Act or provision had not been repealed or amended or had not expired, lapsed or otherwise ceased to have effect.

The effect of these provisions would likely protect any ongoing orders made under the *Maintenance Act 1965* (and their enforcement) even if the *Maintenance Act* were abolished without a specific saving clause.

But for the sake of certainty a general clause should be included in the repealing Act making clear that any orders made under the previous legislation remain in force and enforceable.

Recommendations

1. The Committee recommends that the *Maintenance Act 1965* is redundant and should be repealed.

2. The Committee recommends that a saving clause preserving any orders made under the *Maintenance Act 1965* (and assuring the enforceability of such orders) should be included in the repealing Act.

The Victorian Marriage Act 1958

When the Commonwealth Government passed the *Marriage Act 1961* it rendered the pre-existing Victorian legislation (the Victorian *Marriage Act 1958*) largely redundant.

In the years since, the Victorian *Marriage Act* has been eviscerated and heavily amended to the point that the few remaining sections now bear no relation to the legality, registration or status of marriages. The Act now includes just two parts.

They are: Part VII – Guardianship and Custody of Minors; and
Part VIII – Provisions Relating to Property of Married Women.

Guardianship and Custody of Minors

These provisions deal essentially with the appointment and removal of guardians (by a will or a court) and continue to be relevant. (This was the strong view of the Law Institute of Victoria)

However, three of the sections are no longer necessary and should be repealed.

They are section 134 (which grants mothers equal rights to fathers to apply to the court in respect of matters affecting their children), section 148 (which denies fathers the rights to the wages of children in the mother's custody) and section 155 (2) (the *forma pauperis* provision).

The sections to be retained specify:

- when a court is considering property held on trust for a minor, the interests of the child shall be paramount (section 133)
- the mother or father shall be guardian of the minor on the death of the other, either alone or with a guardian appointed by the dead spouse (section 135).
- parents may appoint guardians by deed or will (section 135).
- courts may remove or appoint testamentary guardians (section 138)
- guardians are also guardians of the minor's estate (section 139)
- the court can appoint guardians of a minor's estate (section 139)
- the court always has the right to consult the child (section 153)

These sections should be preserved via transfer to another Act.

The question of the best home for the guardianship provisions is difficult. The Law Institute submission suggests the *Community Services Act 1970*. Another possibility is the *Children and Young Persons Act 1989*. Both of these acts have as their focus children in trouble or needing protection. Neither would be a perfect fit with the routine guardianship provisions of the *Marriage Act 1958*. Alternatively, the *Guardianship and Administration Act 1986* (which deals with the appointment of guardians or administrators for persons with disabilities) could provide a new home for the sections.

On balance the best home for the guardianship provisions would be the *Children and Young Persons Act 1989*.

Recommendations

3. The Committee recommends that sections 132 (2), 134, 148 and 155(2) in Part VII (which deal with guardianship issues) of the *Marriage Act 1958* be repealed.

4. The Committee recommends that sections 133, 135, 138, 139 and 153 of the *Marriage Act 1958* be retained and transferred to the *Children and Young Persons Act 1989*.

Provisions Relating to Property of Married Women

These sections are an echo of the 19th Century legislation - the *Married Women's Property Act 1882* (UK) and *Married Women's Property Act 1884* (Vic) - which repealed the "unity of property" principle. This principle was the (now) archaic notion that married women could not own property and that all of their property transferred to the husband upon marriage.

For example: s 156 of the *Marriage Act 1958* (Vic):

156. Capacity of married women

(1) Subject to this Part a married woman shall –

(a) be capable of acquiring holding and disposing of any property whatsoever.

This sort of position is obviously dated. But whether these sections should be abolished was the subject of some dispute among those consulted. One point of view was that sections - 156, 157, 158, 159(1) – could be abolished because the world has moved on and nobody would interpret repealing the provisions as a reversion to the principle that the property of a single woman transfers to her husband upon her marriage. The other point of view was that risks should not be taken and that the safest course would be to preserve the old sections and make no assumptions about what the common law would be.

These competing points of view were enunciated by (among others) the Law Institute of Victoria in its submission.

"In theory these provisions remain in force and should be transferred to Part 2 Division 8 of the *Property Law Act 1958*. That division deals with other aspects of married women's property.

“However there is a question whether the common law position would be that in the light of current community standards the provisions are redundant because the common law has evolved to recognise married women’s property rights in any event.

“The Institute’s view is that the provisions should be retained, as legislation should not be repealed on the basis of speculation as to what the common law is likely to be.”

The dilemma was also discussed in a submission from Suryan Chandrasegaran, a solicitor.

“These provisions were originally enacted to override established common law rules which had the effect of making married women a sub-set of their husbands so far as property matters were concerned. The social conditioning and thinking which gave rise to these common law rules has now all but disappeared. There may not therefore be much harm in repealing these remaining provisions on the basis that current social conditions and views would not permit a resurrection of the old common law rules.

“On the other hand, if the remaining provisions of the Act were repealed, it would allow some mischievous litigant to attempt to use the old common law rules to unnecessarily prolong litigation (for example, by alleging that a married female plaintiff could only bring a court action in her husband’s name). It could also result in some difficult circumstances if a particular rule of common law has not been subsequently abrogated by court precedent. In that case, the repeal of the Act’s provisions would effectively re-instate the old common law rule.

“On balance, therefore, I submit that it would be easier and safer to leave the current provisions in the *Marriage Act*.”

When deciding between these two points of view (to repeal or retain) it is important to again consider the provisions of the *Interpretation of Legislation Act 1984* (Vic).

14. Provision as to effect of repeal etc. of Acts

- (2) Where an Act or a provision of an Act-
 - (a) is repealed or amended; or
 - (b) expires, lapses or otherwise ceases to have effect-
 - the repeal, amendment, expiry, lapsing or ceasing to have effect of that Act or provision shall not, unless the contrary intention expressly appears-
 - (c) revive anything not in force or existing at the time at which the repeal, amendment, expiry, lapsing or ceasing to have effect becomes operative;

As can be seen 14(c) would indicate that the repeal would not revive lapsed common law principles.

The original principle - that married women were lesser legal entities than single women, and that women had lesser property rights than men - was repealed during the 1880s. A century and quarter later it is – arguably – extremely unlikely that the repeal of the Act would revive the old common law principles.

While the merits of the case for retention are appreciated, it could be considered overly and unnecessarily cautious to retain the provisions. It would be safe to repeal the sections under discussion.

(If the conservative position were adopted, and the sections retained, they should be transferred to Part 2 Division 8 of the *Property Law Act 1958* (Vic). That section of the Act deals with aspects of married women's property).

Recommendation

5. The Committee recommends that sections 156, 157, 158 and 159(1) in Part VIII of the *Marriage Act 1958* (regarding the rights of married women) be repealed.

Sections 160 and 161

Sections 160 and 161 of the *Marriage Act 1958* have equivalents in the *Family Law Act* (s 119 and s 78) and should be repealed.

Recommendation

6. The Committee recommends that sections 160 and 161 of the *Marriage Act 1958* be repealed.

Intestacy and Divorce

S. 159(3) of the *Marriage Act* poses a different problem.

The section deals with the case of a spouse who dies intestate (without a will) in the midst of finalising a divorce. That is, the spouse dies between the time a decree for judicial separation (or decree nisi) is granted (after the spouses have been apart for at least 12 months) and the time the decree becomes absolute one month later.

Under this section, if the spouse dies during this period, the property shall be disposed of as if the surviving spouse had already died. That is, the divorce is effectively regarded as final with the surviving spouse having no special rights to the property of the dead intestate spouse. (The surviving spouse can apply to the Supreme Court for a share of the estate).

This attitude to a spouse's death during the period between a divorce being granted and becoming absolute is inconsistent with the approach in the *Wills Act 1997* (Vic).

S. 14 of the *Wills Act* specifies that a divorce revokes a disposition (in a will) to a spouse but only when the decree becomes absolute.

The effect of these provisions is that in the case of an intestate spouse, the divorce is considered effective from the time the decree nisi is granted. However, in the case of a spouse with a will, the divorce is considered effective only if the decree absolute has been granted.

The inconsistency between these two approaches is undesirable.

The question is which is the better approach? This is a matter of policy and one to be considered by Government and the Parliament. The *Wills Act 1997* is the more recent legislation. It drew in part on the work of the Law Reform Committee's investigation of wills law in Victoria.

Reforming the Law of Wills, Final Report, May 1994

S.14 – What is the effect of divorce on a will?

Recommendation 31

The Committee recommends that divorce should effect a partial revocation of a will, with dispositions to the former spouse treated as if he or she had predeceased the testator, the rest of the will to remain on foot.

It is not the role of this review to decide which approach is better – but it is strongly recommended that consistency is preferable.

Once the policy issue is decided, s.159(3) should be simplified and transferred to the *Administration and Probate Act 1958* (Division 6 deals with intestacy).

Recommendation

7. The Committee recommends that s.159(3) of the *Marriage Act 1958* be retained. However this section is inconsistent with section 14 of the *Wills Act 1997*. The Committee recommends that, subject to this inconsistency being resolved, section 159(3) of the *Marriage Act 1958* be transferred to the intestacy provisions of the *Administration and Probate Act 1958* (Vic).

PERPETUITIES AND ACCUMULATIONS ACT 1968

The Perpetuities and Accumulations Act 1968

Inquiry

The Scrutiny of Acts and Regulations Committee (“the Committee”) has been requested to review the *Perpetuities and Accumulations Act 1968*. This inquiry was referred to the Committee under section 4F of the *Parliamentary Committees Act 1968* by Order in Council dated 3 June 2003. The purpose of the inquiry is to consider the content and relevance of the Act, and to determine whether it contains provisions that are unclear, redundant or ambiguous that require repeal, amendment or revision.

Introduction

Trusts, frequently created by wills, are a common means by which families leave their property to future generations. A trust may be rendered void if it contravenes an express statutory provision, or if it is considered by the common law to be in some way contrary to public policy. The rule against perpetuities is a common law rule that renders void a trust that postpones the vesting of an interest in property to what the law deems to be an excessively remote period in the future. The rule arose because the courts considered that it was contrary to public policy to allow a current generation to tie up land for an indefinite period into the future (i.e. in perpetuity). The basis for this policy is discussed in detail below. The related common law rule against accumulations prohibits trusts that mandate the accumulation of income, without that income becoming available to spend or otherwise invest, for excessive periods of time.

The rule against perpetuities was developed centuries ago by the English courts, and was then effectively transferred to Australia as a part of our common law heritage. The rule persists in Victorian law as a legal doctrine of broad and potentially significant effect. The rule against accumulations was primarily a creature of English statute, and was most recently operative in Victoria as sections 164-168 of the *Property Law Act 1958*.

The *Perpetuities and Accumulations Act 1968* (“the Act”) was enacted to modify the operation of the rule against perpetuities in a number of significant ways, and to abolish the rule against accumulations. Thus the Act has a significant impact on trusts, and particularly on the making of wills, throughout Victoria. The Act also has an effect on certain property and other commercial transactions that do not involve trusts or wills. The substantive legal functions of the Act will be outlined in this Report.

The Purpose of this Inquiry

As noted above, the purpose of this Inquiry is to consider the content and relevance of the Act, and to determine whether it contains provisions that are unclear, redundant or ambiguous and that therefore require repeal, amendment or revision.

For reasons that will be explained, the Committee wishes to make it clear at the outset that the Act continues to serve important legal functions in Victoria, and that it is certainly not redundant as a whole.

However, despite the ongoing legal relevance of the Act and the breadth of its operation, it is a highly specialised piece of legislation of which few lay people, and in reality, few legal practitioners, have a clear understanding. Concerns have been raised that in its present form, the Act is difficult for all but the most experienced or specialised legal practitioners to readily understand. This is not a desirable situation, as it creates difficulties for non-specialist legal practitioners who have to deal with the Act, and potentially for their clients in the event that the provisions of the Act are not complied with.

Moreover, a recent inquiry by the English Law Commission into the equivalent UK *Perpetuities and Accumulations Act 1964* (on which the Victorian Act is largely based), identified a number of problems with the way in which that legislation operates in practice.¹

The approach of the Committee in conducting this Inquiry has therefore been to:

- Examine the substantive operation of each provision in the Act with a view to determining whether that provision is redundant, unclear or ambiguous;
- Assess whether substantive reforms to the operation of the Act are desirable or appropriate, whether by repeal or amendment of existing provisions;
- Assess whether revisions can be made to the wording and structure of the Act to make its provisions clearer, without altering the substantive legal effect of the Act.

The Conduct of the Inquiry

The highly specialised nature of the Act led the Committee to conclude that there would be little purpose – and most probably even less interest – in conducting public hearings in relation to this Inquiry. Instead, the Committee called for submissions from the legal profession through direct contacts.

In response to this call for submissions, a very detailed and considered submission was received from the Victorian Bar, prepared by Dr Ian Hardingham QC and Mr Richard Waddell, with assistance from Mr Ross Nankerville. The Committee thanks them for their input.

In addition, the Committee engaged consultant, Dr David Blumenthal to examine the operation of the Act, undertake research into the history and purpose of the Act, and to conduct a cross-

¹ English Law Commission report on *The Rules Against Perpetuities and Excessive Accumulations* (Law Com No. 251) (London: Stationary Office, 1998)

jurisdictional analysis for the purpose of examining how this area of law has been dealt with in other Australian states and in comparable overseas common law jurisdictions. Reports produced by law reform bodies in other common law jurisdictions were also considered in some detail, particularly the comprehensive review of the UK *Perpetuities and Accumulations Act 1964*, released by the English Law Commission in 1998,² as mentioned above.

Professor Michael Bryan of the University of Melbourne also provided valuable input throughout the course of the Inquiry.

Background to the Act

The rule against perpetuities

The rule against perpetuities evolved from a number of cases in England during the sixteenth and seventeenth centuries. During this period, judges developed a range of strategies to disallow provisions in wills that were seen to unjustifiably prevent future generations from being able to sell or otherwise dispose of property that had been left to them. There were a number of specific rationales expressed for these decisions, but the common general principle accepted by judges was that the current generation should not be able to tie up land within their family for excessive periods of time - 'in perpetuity'.

The rule against perpetuities was first formulated by Lord Nottingham in 1682 in the *Duke of Norfolk's Case*,³ and the rule was subsequently refined into its 'modern' form by the House of Lords in 1833 in *Cadell v Palmer*.⁴ These cases rationalised into a single rule the complex and at times inconsistent rules and principles that had been developed by individual judges in a plethora of previous cases.

In essence, the 'modern' rule against perpetuities states that a disposition creating a future interest in property will be void from the outset unless the interest created by that disposition must vest (if at all) not later than 21 years after the death of a life in being at the creation of the interest (i.e. not later than 21 years after the death of a person who was alive at the time of the disposition, plus any relevant period of gestation).⁵ If it is possible that the interest may vest outside the perpetuity period, then that part of the trust creating the interest will be rendered void *ab initio* by the rule,⁶ as

² English Law Commission report on *The Rules Against Perpetuities and Excessive Accumulations* (Law Com No. 251) (London: Stationary Office, 1998)

³ (1682) 3 Ch Cas 1 at 31; 22 EDR 931

⁴ (1833) 1 Cl & Fin 372; 6 ER 956

⁵ The classic statement of the rule is: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."
- John Gray, *Gray on Perpetuities*, 4th Ed. (Boston: Little & Brown, 1942)

There is a considerable body of law regarding several aspects to the rule, including matters such as the commencement of a perpetuity period, the definition of when an interest can be said to have 'vested', the meaning and identification of a 'life in being' and the extent to which a 'class' of lives in being – such as members of a royal family – may be used to define a particular perpetuity period. This extensive and technical body of law will not be described in any detail in this Report.

⁶ The term 'void *ab initio*' means that the instrument will be treated as having no legal effect from the outset (rather than merely losing effect prospectively from the time it is identified as being in some way defective.)

will any subsequent dispositions dependent on the first interest, and that part of the disposition will fail.

For example, T creates a trust that will confer property on the first of his grandchildren to reach the age of 21. If at the time T created the trust he is a bachelor with no children, the trust will be rendered void because there is no certainty that any grandchild T might have will turn 21 during T's life plus a further period of 21 years.⁷

It is important to emphasise that the rule against perpetuities applies only to prevent the creation of interests that will not vest until some remote or unknowable time in the future, as defined by the rule, and that the rule has no application once an interest has actually vested. For this reason, the rule against perpetuities is sometimes described as the 'rule against remoteness of vesting' because it is concerned primarily with the period within which interests must *commence*, rather than the *duration* of interests once they have been created.⁸

Policy basis for the rule against perpetuities

The original policy justifications for and function of the rule against perpetuities was to place some restriction on the freedom of a given generation to control the devolution of their property by future generations. The first policy basis for the rule is the principle that living persons should not have their freedom to deal with their own property unduly constrained by the wishes of persons long dead. The rule thus represents a compromise, broadly formulated to permit a property owner to control the disposition of his or her property for the lifetime of a person whom they know (the 'life in being'), and thereafter until the (traditional) age of legal consent of any progeny of that person, but not beyond that time.

In the second reading speech to introducing the Act, the then Attorney-General Mr Reid said:

The rule represents an attempt to balance two competing interests – on the one hand, the reasonable desire of a man to leave his property to his descendants in the way he feels it would do most good; and, on the other hand, the evident undesirability of having property, particularly land, controlled for centuries by the desires of men long since dead.⁹

The second primary rationale for the rule against perpetuities is what is sometimes referred to as the 'Dead Hand' rationale. In England prior to the Industrial Revolution, wealth was measured largely in property holdings, and family dynasties were built on land ownership. It was partly for this reason that an existing generation might seek to prevent any selling of that critical asset by a future generation. However, with the changes brought about by industrialisation and economic modernisation, land became only one of a number of possible bases of wealth, and indeed, inflexible land holdings could become an economic liability rather than an asset as a consequence

⁷ B Marks and R Baxt, *Law of Trusts* (Sydney: CCH, 1981) 504.

⁸ An often-cited rationale for the rule is to strike a balance between the freedom of present versus future generations to dispose of property in which they have an interest. However, historically the rule did not ensure that property was freely alienable by future generations, because the rule applied only to interests that had not yet vested, and because once an interest did vest a number of legal devices were still available to prevent the disposal of land held in trust or in a settlement.

- English Law Commission report on *The Rules Against Perpetuities and Excessive Accumulations* (Law Com No. 251) (London: Stationary Office, 1998) paragraph 1.10.

⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 10 April 1968, 4218 (Mr G.O. Reid, Attorney-General)

of changes to economic, legal (especially taxation) and social circumstances that the original testator could not have anticipated. There was therefore a strong economic rationale to restrict the ability of a long dead generation to prevent future generations from disposing of their property as they saw fit in light of changing circumstances.

A third possible rationale for the rule is purely economic: That the rule prevents property from being withdrawn from commerce for excessive periods of time, which would have the undesirable effect of reducing the amount of accessible capital in the economy. The validity of this third rationale is uncertain, and the Committee is not in a position to undertake the detailed economic analysis necessary to assess what, if any, weight should be given to this argument with respect to the Victorian economy.¹⁰

Application of the rule against perpetuities by the courts

Since its establishment, the rule against perpetuities has been rigidly applied by the courts, at times operating to defeat the wishes of testators in an unnecessarily harsh, and at times absurd, manner.

One of the harshest aspects of the common law rule against perpetuities is that an interest will be void from the outset if there is any *possibility* that the interest *may* vest outside of the perpetuity period, no matter how remote that possibility is. The rule makes no allowance for dispositions that will almost certainly vest within the perpetuity period, or for dispositions that would certainly vest within the period based on the facts as they existed, or could reasonably have been expected to unfold at the time the disposition, if it is merely possible that circumstances might change in a way that would lead to the rule being contravened. Most significantly, the common law rule does not permit interested parties to 'wait and see' how events turned out, and hence, whether an interest created by a disposition does *in fact* vest within the perpetuity period.

For example: A leaves a gift in his will to the first of B's children to attain the age of 21, in circumstances where B was alive at the time of A's death and B did not yet have any children. This gift would be valid at common law, because B's life will be the relevant life in being, and if B has any children who reach the age of 21 they *must* do so within 21 years of B's death. However, if in similar circumstances A willed a gift to the first of B's children to marry, then the entire gift would fail because of the possibility that none of B's children would marry within 21 years of B's death. The common law did not allow the parties to wait and see whether in fact any of B's children would marry within the perpetuity period, even where this was highly likely.

The potentially unjust consequences of the rigid application of the rule were compounded by an overly technical judicial approach, which held that the possibility that an interest might vest outside the perpetuity period did not have to be a practical possibility, but merely a 'theoretical' or 'legal' possibility. Two infamous examples of this approach led to a will being struck down on the basis that a woman in her eighties might subsequently have more children, and on the basis that a child

¹⁰ The UK Law Commission also noted that it was not able to reach any definitive conclusion on the weight to be given to this rationale for the rule, despite the provision of expert evidence in this regard, and the considerable time and resources committed to that inquiry.

- English Law Commission report on *The Rules Against Perpetuities and Excessive Accumulations* (Law Com No. 251) (London: Stationary Office, 1998) paragraphs 2.30 - 2.32.

might have children of his or her own while still under the age of five.¹¹ Rather than being overruled in subsequent decisions, these cases have been upheld, with the effect that they remain binding common law authorities.

To illustrate the first example: T leaves in his will a gift 'to the first child of Aunt Agatha to get married'. Aunt Agatha is 80 years old at the time of T's death and has three children. Common sense would dictate that T's gift does not offend the rule against perpetuities, because clearly the gift must vest, if at all, within 21 years of the death of the relevant lives in being – the three children of Aunt Agatha, who, being 80, is not going to have any more children. The courts, however, took a different approach. A long line of authority, commencing in the English courts in the eighteenth century, but extending into the twentieth century,¹² establishes that because it is theoretically possible (in law) that Agatha might somehow have another child, and that this hypothetical child might be the only one of Agatha's children that marries, and that she might get married more than 21 years after the death of her three siblings, the entire gift fails. Clearly, such a common law presumption of fertility regardless of age is capable of creating absurd and unjust results.

The rule against accumulations

The rule against accumulations is related to rule against perpetuities, and states that a trust with a direction to accumulate income (and to thereby prevent its distribution to beneficiaries) will be void if the period of accumulation could exceed the perpetuity period. This rule, based on the UK *Thelluson Act*, was enacted in Victoria as sections 164-168 of the *Property Law Act 1958*.

The Perpetuities and Accumulations Act 1968

The operation of the rule against perpetuities has been significantly modified by legislation in most common law jurisdictions, both within Australia and overseas.

In Victoria, the rule against perpetuities has been substantially modified by the Act, which was prepared in the late 1960s by a sub-committee of the Chief Justice's Law Reform Committee.¹³ The Bill prepared by that Committee was based substantially on recent equivalent legislation in the United Kingdom, New Zealand and Western Australia,¹⁴ and was passed in 1968 without significant amendment.

¹¹ For a discussion of the rule against perpetuities in this context, see John Dee, "Return of the Fertile Octogenarians" (1992) 14 *Dublin University Law Journal* 69, and Walter Barton Leach, "Perpetuities: Staying the Slaughter of the Innocents" (1952) 58 *Law Quarterly Review* 85

¹² In *Jee v Audley* (1787) 1 Cox 324, Sir Lloyd Kenyon MR said in relation to a gift of similar kind to the children of a couple aged in their seventies that "I am desired... to suppose it impossible for persons in so advanced an age... to have children; but if this can be done in one case it may in another and it is a very dangerous experiment, and introductive of the greatest inconvenience to give a latitude to such sort of conjecture." The decision in *Jee v Audley* was followed in several subsequent cases, including *Dugannon v Smith* (1846) 12 Cl. & F. 546; *Re Dawson* (1888) 39 Ch. D 155; *Ward v Van der Loeff* [1924] AC 653.

¹³ The sub-committee was comprised of Hon Mr Justice Adam, HR Newton, QC, L Voumard, QC, Professor D C Jackson and J A Richards.

¹⁴ *Perpetuities and Accumulations Act 1964* (U.K.); *Law Reform (Property, Perpetuities and Succession) Act 1962* (W.A.); *Perpetuities Act 1964* (N.Z.)

The major changes to the operation of the rule against perpetuities made by the Act can be broadly summarised as follows, and are set out briefly below:

- Section 5 defines a statutory perpetuity period that may be used as an alternative to the common law period;
- Sections 6 to 12 set out a number of ‘trust saving devices’ that operate to mitigate some of the harsher aspects of the common law rule;
- Sections 13 to 18 limit the scope of operation of the common law rule;
- Section 19 abolishes the rule against accumulations (in conjunction with section 20);

The Act also contains a number of more technical and mechanical provisions that will not be discussed in this Report.

Statutory Perpetuity Period

Section 5: The perpetuity period

Section 5 provides that the perpetuity period is the common law period of ‘a life in being plus 21 years’ unless the parties elect to specify a period in the instrument creating the interest, this period not exceeding 80 years.

The common law period applies in default if no other period is specified.

Trust Saving Devices

Section 6: The ‘wait and see’ regime

As discussed above, the common law rule against perpetuities will operate to invalidate a disposition from the outset where it is merely possible that an interest will vest outside the perpetuity period, no matter how remote that possibility is in fact. It is irrelevant that events may in fact transpire that will cause the interest to vest within the perpetuity period, even where this is extremely likely, as the rule does not allow the parties to ‘wait and see’ how events unfold. As discussed above, the rigid application of the rule in this manner has led to extremely harsh, and at times absurd, results. The striking down of gifts and other interests on the basis of possibilities only, no matter how remote, and regardless of the actual circumstances that unfold, does not serve the purposes underlying the rule, but has the unjust effect of defeating both the intention of the person conferring the property in question and the interest of the intended recipient(s).

To avoid injustices that might otherwise arise from the common law’s rigid application of the rule against perpetuities, section 6 of the Act creates a regime that allows the parties to ‘wait and see’ how events unfold in fact. In this way, section 6 ensures that a disposition is invalidated only if it becomes *certain* (rather than possible) that the interest will vest outside the perpetuity period.

This ‘wait and see’ modification is perhaps the most significant modification to the rule against perpetuities made by the Act.

Section 6(4) clarifies the common law requirement in relation to ‘lives in being’ for the purposes of applying the ‘wait and see’ rule.

Section 8: Presumptions regarding fertility

Section 8 of the Act cures certain anomalies created by the rigidly technical application of the rule by the courts discussed above,¹⁵ by establishing certain presumptions regarding future parenthood. These presumptions apply where a question arises as to the capacity of a person to have a child at some future time, in which case it is presumed that:

- A male can have a child at the age of 12 years or over; and
- A female can have a child at the age of 12 years or over but not over the age of 55.

These presumptions of fertility are rebuttable. For example, a person of child-bearing age may provide medical evidence to show that they were, in fact, incapable of procreating or bearing children, and hence that in relation to this presumed source of uncertainty it may not be necessary to 'wait and see' how events transpire.

Sections 9(1) and (2): Age reduction

Where a disposition provides that an interest will vest only when the intended beneficiary reaches a specified age, the common law rule will generally cause the disposition to fail if that specified age is over 21. Section 9 of the Act provides that in such circumstances, and provided that the disposition would have been valid if the specified age had been 21 years, the specified age is to be reduced to whatever age is required so as to validate the disposition.

Sections 9(3) and (4): Class exclusion

At common law, an 'all of nothing' principle operates in relation to gifts to a *class* of recipients. According to this principle, the rule against perpetuities will be breached if the exact share of each member of a class of beneficiaries will not vest within the perpetuity period, and the entire gift will therefore fail. For example, a gift on trust by A to her nephews and nieces, where A has living siblings, would fail at common law because the class of beneficiaries might continue to grow (if A's siblings continue to have children) with the effect that not all interests must vest within the perpetuity period of A's life plus 21 years.¹⁶

Sections 9(3) and (4) abolishes the 'all or nothing' principle in relation to gifts to a class, by operating to exclude any members or potential members of a class of beneficiaries whose interest has not vested or cannot be ascertained within the perpetuity period. The gift will be valid for those members of the class whose interest has in fact vested within the perpetuity period. This saving provision will operate if the gift has not otherwise been saved by the 'wait and see' and 'reduction of age' provisions.

¹⁵ As noted above, there are cases in which the courts have refused to make presumptions with respect to fertility, and have therefore struck down gifts in wills based on the possibility that a couple of seventy (and older) might have another child. In another case, a judge wrestled with the possibility that a child under the age of five might itself have another child, a case referred to by one commentator as the case of 'the precocious toddler'.
- John Mee, "Return of the Fertile Octogenarians" (1992) 14 *DULU* 69, and Leach, "Perpetuities: Staying the Slaughter of the Innocents" (1952) 58 *Law Quarterly Review* 35

¹⁶ This situation was partially - but not wholly - ameliorated at common law by rules of construction called 'class closing rules'.

Section 10: Unborn partners

Section 10 redresses another difficulty with the common law rule created by the possibility of the 'unborn widow or widower'. This section provides for situations in which a gift is made to a person that will vest only on the deaths of a then unmarried person (the relevant life in being) and that person's unidentified future spouse. For example, where a gift is made by T to his son, X, for life, then to X's future and as yet unidentified wife for life, with the remainder to their children then living, there is a possibility that X may marry and have children with a woman born after the death of T, and who therefore cannot be deemed a life in being at the time of the disposition. Their children may then survive X (the only relevant life in being at the time the will came into effect) by more than 21 years. At common law, the rule against perpetuities would therefore operate to render the entire gift to the children void.

In circumstances such as this, section 10 makes the future spouse a relevant life in being for the purposes of such a disposition, notwithstanding that he or she may not have been born at the time of the will, thereby ensuring the validity of the gift to the children of that couple.

Section 11: Saving of interests following a void previous interest

At common law, if a later interest is dependant upon a prior interest that is void for contravening the rule against perpetuities, that later interest would automatically fail. Section 11 saves that later interest, although that later interest must itself comply with the rule against perpetuities, as modified by the Act. In such circumstances, section 11 allows the vesting of the valid interest to be 'accelerated' by effectively ignoring the invalid interest.

Transactions and Matters Excluded from the Operation of the Rule against Perpetuities

Section 13: General restrictions on the ambit of the rule

Section 13 lists a number of interests to which the rule does not apply (and is deemed never to have applied), including various easements over land.

Section 14: Administrative powers of trustees

At common law, the rule against perpetuities has been applied to invalidate the administrative powers of trustees exercised outside the perpetuity period, including for the purpose of providing remuneration for the trustee, notwithstanding that the trust itself is valid. Section 14 of the Act addresses these problems by excluding the operation of the rule with respect to the administrative powers of trustees, including with respect to exercising powers for the purpose of obtaining reasonable remuneration for their services.

Section 15: Options to purchase property

Section 15 excludes from the operation of the rule against perpetuities from certain options to purchase property. Specifically, the rule does not apply to an option to acquire the reversionary interests in a lease (s.15(1)) and to renew leases (s.15(2)(b)). However, section 15(2) provides that a right of pre-emption, unless conferred by will or contained in a lease, is void after 21 years from the date of the grant.

The Committee notes that Section 15 is narrower than its counterpart section in the NSW *Perpetuities Act 1984*, which effectively provides that the rule does not apply to any option given for valuable consideration or by will to acquire an interest.¹⁷

Section 16(1): Determinable and conditional dispositions of property

Section 16 resolves an uncertainty in the common law with respect to the application of the rule against perpetuities to determinable interests in property.

Section 16(2): Gifts to charities

Section 16(2) expressly confirms a common law exception to the rule against perpetuities which provides that where there is a gift from one charity to another charity subject to a contingency that would otherwise offend the rule against perpetuities, that gift will nevertheless be valid.

Section 17: Superannuation funds

Section 17 of the Act provides that the rule against perpetuities does not apply to superannuation funds.

Section 18: Non-charitable purpose trusts

Section 18 provides that the Act does not affect the operation of the common law rule as it affects the validity of trusts created for non-charitable purposes or for the benefit of corporations, unless the property the subject of those trusts is to be applied within the common law perpetuity period and the trust would otherwise be valid.

The Rule against Accumulations

Section 19: Abolition of the rule against accumulations

The rule against accumulations, enacted in Victoria as sections 164-168 of the *Property Law Act 1958*, is repealed by sections 19 and 20 of the Act (in relation to instruments taking effect after 10 December 1968).

However, trusts for the accumulation of income must still comply with the rule against perpetuities, and in this regard section 19 provides that a direction to accumulate income generated from property is void if the disposition of the accumulated income offends the rule against perpetuities. If the income accumulated vests within the perpetuity period the direction will be valid, and the 'wait and see' principle applies in these circumstances.

Options for Repeal, Amendment, or Revision

As the above discussion makes clear, in modifying the rule against perpetuities and abolishing the rule against accumulations, the Act has an ongoing and substantial effect on the law in Victoria. Without the Act, those two rules would operate in rigid accordance with the common law jurisprudence that has developed around them, with harsh, unjust, and at times anomalous

¹⁷ Section 15, *Perpetuities Act 1984* (NSW).

consequences. Accordingly, the Committee has concluded that the Act is certainly not redundant, and should be retained.

However, in conducting this review, the Committee has also examined whether the Act contains individual provisions that are unclear, redundant or ambiguous, and that therefore require repeal, amendment or revision, as well as broader questions of reform. The Committee has identified the following three primary options for amendment and revision of the Act:

- (A) Introduce substantive amendments to the Act for the purpose of abolishing the rule against perpetuities entirely;
- (B) Retain the rule against perpetuities (and the statutory abolition of the rule against accumulations), but introduce substantive amendments to the Act for the purpose of improving its operation;
- (C) Revise the language and structure of the Act for the purpose of making the Act more understandable (regardless of whether or not substantive legal amendments are introduced).

Option A – Amend the Act to abolish the rule against perpetuities

As a starting point for its deliberations, the Committee undertook an assessment of whether the rule against perpetuities, which arose in England in the seventeenth century, is still relevant and appropriate to Victoria in the twenty-first century.

As discussed above, the primary policy underlying the rule against perpetuities is to place some restriction on the capacity of a current generation to control the devolution of their property by future generations. This policy is in part based on the premise that living persons should not have their freedom to deal with their own property unduly constrained by the wishes of persons long dead. There is also what is sometimes referred to as the ‘Dead Hand’ justification for the rule, in that the rule seeks to ensure that subsequent generations have the freedom to dispose of their property if this becomes desirable or necessary in as economic conditions, legal (especially taxation) rules, and socio-political environments change, often in ways that previous generations did not contemplate.

The Committee believes that these policy rationales are still relevant and valid in Victoria today.

As noted above, the Committee is unable to assess the weight, if any, that should be accorded to the purely economic rationale for the rule, and so the Committee has not considered this rationale in its deliberations.

The situation in other Australian jurisdictions

All Australian jurisdictions except for South Australia have retained the rule against perpetuities, as modified by the relevant state legislation. In Victoria, along with Queensland, Tasmania, Western Australia and the Northern Territory, individuals may select between the common law perpetuity period (‘a life in being plus 21 years’), or a statutory period defined by an upper limit of 80 years. In the ACT and NSW the common law perpetuity period has been abrogated entirely and replaced with a statutory period of 80 years. The following Table outlines the position in each Australian jurisdiction:

Jurisdiction	Statutory maximum period	Common law period?
ACT	80 years	No
NSW	80 years	No
NT	80 years	Yes
QLD	80 years	Yes
SA	The rule against perpetuities is abolished. (But see below.)	No
TAS	80 years	Yes
VIC	80 years	Yes
WA	80 years	Yes

Although South Australia has abolished the rule, section 62 of the *Law of Property Act 1936* (SA) provides that 80 years after the date of a disposition, parties may apply to the court for orders to vary the disposition so that any remaining unvested interests will immediately vest. Alternatively, if it is clear that interests under a disposition cannot vest or are unlikely to vest within 80 years, section 62 allows the parties to apply to the court to vary the terms of a disposition to ensure that those interest will vest within 80 years. Section 62 of the South Australian *Law of Property Act 1936* therefore serves a comparable function to the rule against perpetuities, and effects a similar final result, albeit through a different mechanism.

The situation in foreign jurisdictions

The vast majority of common law jurisdictions have retained the rule against perpetuities in one form or another.¹⁸ However, law reform bodies in both the UK and Ireland have recently re-examined the rule, and in each case considered whether the rule should be abolished.

United Kingdom

In 1989, the English Law Commission determined that as a part of its law reform program it would re-examine the rule against perpetuities and the rule against accumulations. The Commission proposed "...to examine the policy behind the rule, and also the policy on accumulations, to see whether in modern conditions they can any longer be justified, and if so, whether they could be simplified and brought up to date (particular account to be taken of any difficulties experienced with the operation of the 1964 Act)."¹⁹

The Law Commission released a Consultation Paper in 1993, outlining a number of defects in the present law and suggesting a range of options for reform. Over the following years the Commission received some 62 submissions, and in 1998 the Commission published a comprehensive final Report.

The possibility of abolishing the rule against perpetuities had been raised in the 1993 Consultation Paper, however the majority of 62 respondents to that Paper indicated that they believed the rule should be retained. The Law Commission agreed, concluding that the rule continued to fulfill an

¹⁸ John Mee, "From Here to Eternity? Perpetuities Reform in Ireland" (2000) 22 *Dublin University Law Journal* 91.

¹⁹ English Law Commission report on *The Rules Against Perpetuities and Excessive Accumulations* (Law Com No. 251) (London: Stationary Office, 1998) paragraph 2.16

important function, on sound policy grounds. The Commission noted that several of the law firms that made submissions to the Commission said that they in fact had clients who wanted to create dynastic trusts in perpetuity, and who would take advantage of any abolition of the rule to do so.²⁰

However, while the Law Commission recommended retention of the rule, it also recommended substantial statutory reform to improve the operation of the rule, as well as numerous changes to simplify the law. These recommendations are discussed below.

Ireland

In its December 2000 Report on the *Rule Against Perpetuities and Cognate Rules*,²¹ the Irish Law Reform Commission ('the Irish Commission') recommended the abolition of the rule against perpetuities. This has been described as a rather radical suggestion by at least one commentator,²² and the recommendation has not yet been acted on by the Irish parliament.

The Irish Commission reasoned that the original justifications for the rule were no longer persuasive, and that in practice the rule was of little effect. The Irish Commission argued that it was 'paternalistic' for the law to interfere in the right of property owners to control the devolution of their property, even if this right was to be exercised through a trust instrument long after their death.²³

The Irish Commission also argued that the 'Dead Hand' justification could better be dealt with by introducing legislation to allow for the variation of trusts where circumstances required it, suggesting the enactment of legislation comparable to existing UK legislation of this kind.

In this regard, this Committee notes that the English Commission considered that the Dead Hand rationale for the rule was still valid, notwithstanding the existence of variation of trusts legislation. This Committee believes that to rely on a mechanism for variation of trusts by the courts, as South Australia has sought to do, is to rely on a potentially cumbersome mechanism that may raise a host of other legal complexities, particularly where beneficiaries are not yet of legal age, or are not yet ascertainable (including unborn beneficiaries).

This Committee is not persuaded that the Irish Commission's arguments against the rule, particularly the argument that it is inappropriate for the law to constrain the capacity of a present generation to control the disposition of their property far into the future, even where this control significantly curtails the freedom of subsequent generations to dispose of their property. The Committee notes that the situation in Ireland is somewhat unusual, in that to date the rule against perpetuities has operated there in its common law form, unaltered by legislation.²⁴

²⁰ Ibid, paragraph 2.25

²¹ Irish Law Reform Commission *Report on the Rule Against Perpetuities and Cognate Rules* (Ireland: LRC 62 – 2000)

²² John Mee, "From Here to Eternity? Perpetuities Reform in Ireland" (2000) 22 *Dublin University Law Journal* 91.

²³ The Irish Commission also argued that in a modern economy such as Ireland's, the purely economic justification for the rule – that it prevents property from being withdrawn from commerce and thereby reducing the amount of accessible capital in the economy – is no longer valid.

²⁴ Mee describes the current Irish situation as an 'objectionable' regime, and suggests that while reform in Ireland is therefore essential, the Irish Commission went too far in recommending abolition of the rule. Mee argues that the Irish Commission should instead have recommended statutory reform of the rule, modelled on comparable legislation in most common law jurisdictions, but modified to take into account the recent reform proposals of the English Law Commission.

United States

The rule against perpetuities has been limited or abolished in several US jurisdictions in recent years. According to Professor Sterk, the two primary drivers of this change are competition between states to attract business by allowing people within their jurisdiction to create perpetual 'dynasty trusts' that can never be subject to estate taxation, and pressure from within the legal profession to abolish a complicated rule that leaves lawyers increasingly open to malpractice suits should they fail to adhere to it.²⁵

The Committee does not consider either of these factors to be relevant or persuasive arguments for abolition of the rule in the State of Victoria.

Conclusion

The Committee has concluded that although the rule against perpetuities is very old, very complicated, and cumbersome in some respects, the policy basis and purpose of the rule remain relevant today, and that the rule should therefore be retained.

The Committee also notes that if the rule was to be abolished, the likely impact of such a radical change to the law would first need to be examined by an appropriately resourced Victorian law reform body, and extensive public consultation would need to occur.

Option B – Retain the rule against perpetuities, but introduce substantive amendments to the Act to improve its operation

Having concluded that the rule against perpetuities should be retained, the Committee turned to examine whether there were problems with the way in which the Act currently operates, and if so, whether substantive reform of the Act is desirable to respond to any such problems.

The position of the Victorian Bar in this regard is as follows:

In our view there are no provisions of the Act that have become redundant.

...

We have consulted a number of practitioners at the Bar and have inquired about their experience with the operation of the Act. No-one has indicated substantive problems or indeed any problems at all.

This statement largely accords with the Committee's understanding that the current statutory regime works reasonably well. However, that is not to say that the regime could not be improved. Having examined the report of the English Commission, the Committee believes that Victoria could well benefit from reform in this area. Although this Committee is not the appropriate body to undertake a major law reform inquiry of this kind, it is the Committee's view that some of the key recommendations of the English Commission could form the useful basis of a future inquiry into this area or law by the appropriate law reform body.

- John Mee, "From Here to Eternity? Perpetuities Reform in Ireland" (2000) 22 *Dublin University Law Journal* 91.

²⁵ Stewart Sterk, "Jurisdictional Competition to Abolish the Rule Against Perpetuities: RIP for the RAP" (2003) 24 *Cardozo Law Review* 2097

Specifically, the Committee suggests that if substantive reform of the Act is to be considered at some later point in time, the following reform proposals should be considered:

Introduce an exclusive statutory perpetuity period

The Committee recommends investigation of reforms to simplify the law by abolishing the arcane common law perpetuity period of ‘a life in being plus 21 years’, and replacing it with a defined statutory period.

The Committee notes that this has been done in the ACT and in NSW, where the perpetuity period is 80 years in all cases. In contrast, the English Commission recommended an exclusive statutory period of 125 years, on the basis that this period would exceed almost any possible common law period, and would therefore simplify the law without effectively reducing the current maximum period.²⁶ Clearly, the appropriate duration of any exclusive statutory period would need to be the subject of public consultation. The Committee believes that an exclusive ‘long-stop’ perpetuity period of 125 years would simplify the Act by rendering unnecessary a number of the complex trust-saving devices that relate primarily to the common law perpetuity period under the current regime.

Exclude the rule against perpetuities from operating with respect to commercial transactions, by confining it to family trusts and wills

The Committee recommends investigation of reforms aimed at confining the rule against perpetuities to family settlements alone, and excluding it from operation with respect to commercial transactions. Since formulation the rule has been extended to rights over land such as easements and options, and has been applied to situations entirely unconnected with family arrangements, such as superannuation trusts and to certain commercial dealings by corporations. Frequently the extension of the rule has occurred without due consideration of its practical impact, or of the appropriateness of such an extension of effect in terms of the policy underlying the rule.

The English Commission argued that the rule serves no useful function in most commercial contexts, but rather, that it may inappropriately restrict or complicate activities and commercial enterprises. For example, the English Commission discusses the manner in which rights of pre-emption, options and future easements may be subject to the rule, while leases are not, with the effect that the rule can operate to extinguish an easement that is essential to the functionality of leased property at some point during the operation of that lease. The English Commission therefore recommended reforming the law to create an *inclusionary* regime, defining explicitly where the perpetuity period applies, rather than having a rule of general application with a number of complicated exclusions, as presently exists.²⁷ This Committee believes that any future investigation of reform to the operation of the Act in Victoria should consider a similar restriction on the ambit of the rule’s effect.

At the very least, the Committee recommends that consideration be given to broadening the exclusions in relation to options under section 15 of the Act, so that the provision more closely mirrors section 15 of the *Perpetuities Act 1984* (NSW).

²⁶ English Law Commission report on *The Rules Against Perpetuities and Excessive Accumulations* (Law Com No. 251) (London: Stationary Office, 1998) paragraphs 8.9 - 8.13.

²⁷ *Ibid.*, 7.20 - 7.28

